DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

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Introduction

The 2022 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 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 legal work illustrated in this year's *Digest* was in many ways shaped by world events. On February 24, 2022, Russia launched a brutal full-scale further invasion of Ukraine. In response to Ukraine's entreaty to rally international support, the United States looked to international law, international institutions, and domestic law as tools in organizing and advancing international action. The United States' efforts to respond to Russian aggression and stand in support of Ukraine's sovereignty is evident in nearly every area of legal practice, and accordingly in most of the chapters of this volume. The United States participated in the development of five UN General Assembly resolutions in 2022 addressing the Russian further invasion of Ukraine. When Ukraine initiated proceedings against Russia under the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice ("ICJ"), the United States filed a Declaration of Intervention in support. The United States imposed sanctions, visa restrictions, and other measures on Russian and Belarusian officials believed to be involved in actions threatening the sovereignty of Ukraine. In addition to exercising existing authorities, the President issued new measures, including Executive Order (E.O.) 14065, "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine", in February, and E.O. 14071, "Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression", in April.

These robust efforts to respond to Russia's aggression were further bolstered by legal diplomacy. The Office of the Legal Adviser participated in multilateral meetings of foreign legal advisers on a variety of legal issues related to Russia's war against Ukraine, including at the Meetings of the Council of Europe Committee of Legal Advisers on Public International Law, U.S.-EU legal dialogues, the Annual Meeting of Allies' Legal Advisers at NATO, and frequent meetings with G7 legal counterparts.

Calendar year 2022 also saw a return to in-person and hybrid meetings as COVID-19 pandemic response measures eased. Whether virtual, written, or in-person, U.S. officials provided views and positions on critical topics. The United States expressed support for the negotiation of a UN treaty relating to cybercrime and participated in sessions of the Open-Ended Ad Hoc Intergovernmental Committee of Experts previously postponed from 2021 due to the pandemic. In August, a U.S.

delegation of more than 30 members, including participants from a dozen federal agencies and representatives from state and local government, attended a meeting of the Committee on the Elimination of Racial Discrimination (CERD) in Geneva, Switzerland. In a letter to the Uniform Law Commission (ULC), I expressed support for a renewed dialogue about developing a model state law on consular notification requirements. In September and October, the Office of the Legal Adviser delivered remarks in support of appointing a drafting committee for a uniform or model act on consular notification and access at meetings of the ULC. The United States participated in meetings of the World Health Organization's Intergovernmental Negotiating Body developing a new instrument on pandemic prevention, preparedness, and response. In November, the United States participated in the UN Climate Change Conference ("COP27") and announced initiatives to advance U.S. commitment to climate action. Also, in November, the United States endorsed the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas.

There were further developments in 2022 relating to U.S. international agreements, treaties, and other arrangements. The United States made swift progress towards supporting Finland and Sweden's bids to become NATO allies. In July, the United States signed the Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden (the "Protocols"). In August, the U.S. Senate passed resolutions providing advice and consent to ratification, President Biden signed the U.S. Instruments of Ratification to the Protocols, and the State Department deposited the Instruments. The U.S. Senate also considered and approved for ratification other agreements in 2022. It passed a resolution providing advice and consent to ratification on two law enforcement treaties with Croatia—an extradition instrument and a mutual legal assistance instrument—which were ratified by the United States in November. The U.S. Senate also gave advice and consent to U.S. ratification of the Kigali Agreement to the Montreal Protocol on Substances that Deplete the Ozone Layer.

In its relations with other nations, the United States supported significant diplomatic initiatives. The United States facilitated discussions between Israel and Lebanon on their maritime boundary, with the U.S. negotiating team helping to bring a maritime boundary agreement into force. In addition, the United States engaged in outreach and dialogue over maritime claims. The State Department released two Limits in the Sea studies—No. 150 on the People's Republic of China's maritime claims in the South China Sea, and No. 151 on Panama's maritime claims. Diplomatic efforts to address climate change also continued in 2022. The Biden-Harris Administration unveiled a new policy on sea-level rise and maritime zones. Other regional diplomatic efforts, such as the Negev Forum and the African Leaders Summit, similarly saw significant U.S. participation.

The United States responded to developments worldwide. In response to crackdowns on the right to freedom of expression and peaceful assembly following the death of Mahsa Amini in Iran, the United States imposed sanctions on Iranian officials under E.O. 13553, which authorizes the imposition of sanctions on certain persons with respect to serious human rights abuses by the Government of Iran, and E.O. 13846, which authorizes sanctions on persons who engage in censorship or other activities with respect to Iran. In addition, the United States participated in a UN Human Rights Council special

session addressing the human rights situation in Iran and co-signed joint statements on the human rights situation and internet shutdowns. To address the humanitarian and security situation in Haiti, Secretary Blinken announced a new visa restriction policy under section 212(a)(3)(C) of the Immigration and Nationality Act against Haitian officials and others involved in the operation of street gangs. Further, the United States co-drafted UN Security Council Resolution 2653 to impose travel bans, asset freezes, and arms embargo measures on those threatening the peace, security, or stability in Haiti. The resolution was unanimously adopted by the Security Council.

The Office of the Legal Adviser participated in developing and providing U.S. positions in a number of proceedings in U.S. courts in 2022. The United States filed briefs in several cases before the U.S. Supreme Court. In *Fitisemanu v. United States*, the United States filed a brief asserting that the court of appeals correctly held that individuals born in American Samoa were not birthright citizens under the Fourteenth Amendment's Citizenship Clause. In *Usoyan v. Turkey*, the United States filed an amicus brief asserting that the Foreign Sovereign Immunities Act's discretionary-function exception does not apply to claims based on a foreign president's security detail's use of force during an official visit to the United States. Consistent with the views of the United States, the Supreme Court denied *certiorari* in both cases and the courts of appeal opinions stand. The Supreme Court granted *certiorari* in *Halkbank v. United* States, a case concerning a question of sovereign immunity in criminal proceedings for U.S. sanctions violations. The United States also filed amicus briefs on questions of foreign sovereign immunity in U.S. courts of appeal. In *Levin v. Bank of New York*, the United States filed an amicus brief before the Second Circuit asserting that foreign sovereign property located abroad is not subject to execution to enforce a judgment against a foreign state. In *Broidy Capital Management LLC v. Muzin*, the United States, at the request of the D.C. Circuit, filed an amicus brief concerning the limited circumstances in which documents possessed by third parties may still be considered as part of a foreign mission's inviolable archives for purposes of the Vienna Convention on Diplomatic Relations.

The *Digest* discusses other forms of U.S. participation in international organizations, institutions, and initiatives. The United States participated in negotiations in the UN General Assembly Sixth Committee that resulted in the adoption of a resolution enabling debate on the International Law Commission's draft articles on the prevention and punishment of crimes against humanity. The United States co-drafted and negotiated a resolution establishing a humanitarian carveout across UN sanctions regimes, resulting in a successful adoption by the UN Security Council. In *Certain Iranian Assets*, relating to efforts by U.S. victims of terrorism to satisfy judgments against Iran, I led the United States' delegation team as we appeared in oral proceedings on the merits before the ICJ. In the fall, the United States delivered remarks at a UN General Assembly Fourth Committee meeting noting its position on the proposal of the UN General Assembly to request an advisory opinion from the ICJ relating to the "*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*." Also, as Chair of the U.S. National Group to the Permanent Court of Arbitration, I took pride nominating Professor Sarah Cleveland to be the U.S. candidate for election to the ICJ, continuing a legacy of excellent U.S. candidates to the Court.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2022 volume, attorneys whose contributions to the *Digest* were particularly significant include David Bigge, Jane Farrington, Kate Gorove, Peter Guthrie, Monica Jacobsen, Karin Kizer, Selene Ko, Nathan Nagy, Lorie Nierenberg, Bob Satrom, Lela Scott, and Jessica Thibodeau. 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 Anjali Kumar and Tyler Shappee 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 thanks this year to Tiffany Holloman, for taking on the role of editor of the *Digest* and her extraordinary work organizing this year's *Digest*.

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 2022 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 2022 volume follows the general organization and approach of past volumes. As with the 2021 volume, 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 August 2023) 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 2023 where they relate to the discussion of developments in 2022.

Updates on most other 2023 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://digitallibrary.un.org/. 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 https://www.supremecourt.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 https://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*.

Tiffany Holloman

CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. *Fitisemanu v. United States*

As discussed in *Digest 2021* at 1-3, the U.S. Court of Appeals for the Tenth Circuit in *Fitisemanu v. United States* held that the citizens of American Samoa are not birthright citizens of the United States under the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution. 1 F.4th 862. The decision reversed the district court's holding that American Samoa is "in the United States" for purposes of the of the Fourteenth Amendment. See *Digest 2020* 1-9 for a discussion of the U.S. brief on appeal in the Tenth Circuit. *Fitisemanu v. United States*, No. 21-1394. On April 27, 2022, Petitioners filed a petition for writ of certiorari to the U.S. Supreme Court. On October 17, 2022, the U.S. Supreme Court denied the petition. Excerpts follow from the August 29, 2022, U.S. brief in opposition to the petition for writ of certiorari.

* * * *

Petitioners contend (Pet. 13-34) that the Citizenship Clause of the Fourteenth Amendment confers birthright citizenship on individuals born in American Samoa and that 8 U.S.C. 1408(1) thus violates the Constitution. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' interpretation of the Citizenship Clause is consistent with the Constitution's test and with the long-established practice of the political Branches. It is also consistent with the wishes of the Samoan people, who have made clear through their elected representatives that they do not favor birthright citizenship. And to the extent that petitioners and other American Samoans who now reside in the United States would prefer to become citizens, they can avail themselves of the favorable terms for naturalization Congress has provided. This Court previously denied a petition for a writ of certiorari presenting the same question in *Tuaua v. United States*, 579 U.S. 902 (2016) (No. 15-981). The same result is warranted here.

1. The Citizenship Clause provides: "All persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. Const. Amend. XIV, § 1 (emphasis added). The term "the United States," as used in the Citizenship Clause, does not include the territories.

a. "The term 'United States' may be used in any one of several senses." *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671 (1945). In its narrowest sense, it refers only to "the states which are united by and under the Constitution"; in its broadest, it encompasses "the territory over which the sovereignty of the United States extends." Id. at 671-672.

In determining how the Citizenship Clause uses the term "United States," "there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 829 (2015) (Roberts, C.J, dissenting); see, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-405 (1819). The rest of the Constitution often uses the term "United States" in a way that does not encompass the territories. The Preamble, for example, declares that the Constitution was established by "We the People of the United States." U.S. Const. Pmbl. Yet only the States participated in proposing and ratifying the Constitution; the Northwest Territory did not. See U.S. Const. Art. VII. Similarly, Article II provides that Congress "may determine the Time of chusing the [presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same *throughout the United States*." U.S. Const. Art. II, § 1, Cl. 4 (emphasis added). That provision plainly uses the term "United States" in a sense that excludes the territories, which do not participate in presidential elections. See U.S. Const. Amend. XII (1804 amendment providing that "[t]he Electors shall meet in their respective states"); *id*. Amend. XXIII, § 1 (1961 amendment providing that electors from the District of Columbia "shall be considered * * * to be electors appointed by a State"). And Article IV provides that Congress may legislate with respect to the "Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Article IV thus describes the territories as "belonging to, but not a part of, the Union of states under the Constitution." *Hooven & Allison*, 324 U.S. at 673.

This Court, moreover, has held that territories do not automatically form part of the "United States" for purposes of other constitutional provisions. For example, the Tax Uniformity Clause provides that "all Duties, Imposts and Excises shall be uniform *throughout the United States*." U.S. Const. Art. I, § 8, Cl. 1 (emphasis added). Yet this Court has concluded that Congress may impose non-uniform taxes and duties in territories such as Puerto Rico. See, *e.g.*, *United States v. Ptasynski*, 462 U.S. 74, 83 n.12 (1983) (discussing *Downes v. Bidwell*, 182 U.S. 244 (1901)). In fact, as the Court recently noted, "Congress has long maintained federal tax * * * programs for residents of Puerto Rico * * * that differ in some respects from the federal tax * * * programs for residents of the 50 States." *United States v. Vaello Madero*, 142 S. Ct. 1539, 1542 (2022); see, *e.g.*, *ibid*. (observing that "residents of Puerto Rico are typically exempt from most federal * * * excise taxes").

Similarly, the Import-Export Clause restricts the authority of the States to tax "Imports," U.S. Const. Art. I, § 10, Cl. 2—i.e., articles that are brought into the United States from outside the United States, see *Hooven & Allison*, 324 U.S. at 669. In *Hooven & Allison*, the Court held that, although an article brought from another State did not qualify as an "Import" under the Clause, an article brought from the Philippines (then a U.S. territory) did. See *id*. at 674. That is so, the Court has explained, because the Philippines were "not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable." *Id*. at 679; see also *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (holding that territory occupied

during the Mexican-American War was not part of the United States for purposes of a federal customs statute).

When Congress meant to refer not only to the United States but also to the territories—whether in proposed constitutional amendments or in legislation—it often made that intention explicit. The Thirteenth Amendment, for example, which was proposed and ratified in 1865, provides that neither slavery nor involuntary servitude "shall exist within the United States, *or any place subject to their jurisdiction*." U.S. Const. Amend. XIII, § 1 (emphasis added). And the Eighteenth Amendment, while it was in effect between 1920 and 1933, prohibited intoxicating liquors in "the United States and all territory subject to the jurisdiction thereof." U.S. Const. Amend. XVIII, § 1 (emphasis added). Similarly, federal statutes enacted before Reconstruction referred separately to the United States and its territories. See, *e.g.*, Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426 (banning the importation of slaves "into the United States or the territories thereof"); Act of Mar. 1, 1809, ch. 24, § 1, 2 Stat. 528 (banning certain French and British vessels from "harbors and waters of the United States and of the territories thereof"); Act of June 30, 1864, ch. 173, § 94, 13 Stat. 264 (imposing duties on products made or sold "within the United States or territories thereof"); Act of July 4, 1864, ch. 246, § 5, 13 Stat. 386 (referring to the transportation of immigrants "to the United States and its territories").

In contrast, the Fourteenth Amendment's Citizenship Clause—which Congress proposed for ratification by state legislatures in 1866—refers only to the "United States"; it says nothing about territories or places (as opposed to persons) that are subject to the United States' jurisdiction. "From this difference of phraseology, * * * a difference in constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816); see *Russello v. United States*, 464 U.S. 16, 23 (1983).

b. Historical practice strongly supports that interpretation of the Fourteenth Amendment. As the court of appeals explained, practice between the Founding and the Fourteenth Amendment was consistent with the understanding that citizenship in the territories "was not extended by operation of the Constitution," because it was instead addressed by other instruments, such as specific provisions of treaties or statutes. Pet. App. 11a; see *id*. at 11a-13a & n.5 (discussing examples); Adams-Onis Treaty, U.S.-Spain, Art. 6, Feb. 22, 1819, 8 Stat. 256, 258 ("The inhabitants of [Florida] shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."). And since the adoption of the Fourteenth Amendment, "every extension of citizenship to inhabitants of an overseas territory has come by an act of Congress." Pet. App. 13a. Thus, as Chief Judge Tymkovich emphasized in his concurring opinion, "[t]he settled understanding and practice over the past century" is that Congress may determine the citizenship status of territorial inhabitants. *Id*. at 43a-44a.

* * * *

2. Petitioners' contrary arguments lack merit. a. Petitioners first cite (Pet. 14-19) dictionaries, maps, atlases, and other sources that use the term "United States" to encompass the territories. But those sources show only that one *can* use the term "United States" in a manner that includes the territories—a point that the government does not dispute. See p. 7, *supra*. Those sources do not suggest that the Constitution in general, or the Citizenship Clause in particular,

uses the term that way. To the contrary, sources of greater legal relevance than maps and atlases—including other provisions of the Constitution itself, congressional practice before and after the Fourteenth Amendment, and this Court's precedents—show that the Clause does not use the term "United States" in a sense that includes territories such as American Samoa.

* * * *

b. Petitioners next rely (Pet. 20-23) on this Court's decisions in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), *Elk v. Wilkins*, 112 U.S. 94 (1884), and *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). But none of those cases establishes that the Citizenship Clause confers birthright citizenship on persons born in American Samoa.

In the *Slaughter-House Cases*, this Court observed that, as a result of the Fourteenth Amendment, "persons may be citizens of the United States without regard to their citizenship of a particular State." 83 U.S. (16 Wall.) at 73. But the Court did not purport to set out the particular circumstances in which that may be the case. It did not determine how the Citizenship Clause applies to territories.

In *Elk*, this Court held that the Citizenship Clause does not confer citizenship on members of Indian tribes "born within the territorial limits of the United States," because they are not subject to the jurisdiction of the United States within the meaning of the clause. 112 U.S. at 102. But that statement says nothing about whether territories such as American Samoa fall within "the territorial limits of the United States." *Ibid*.

Finally, in *Wong Kim Ark*, this Court held that the Citizenship Clause conferred birthright citizenship upon a child born in California, even though the child's parents were not citizens of the United States. 169 U.S. at 705. Because the child had been born in a State, the Court had no occasion to consider the application of the Citizenship Clause to the territories. Petitioners cite *Wong Kim Ark*'s statements that the clause confers citizenship upon persons born in "the dominion" or "the territory of the United States," Pet. 21 (citations and emphases omitted), but those statements do not answer the question of how far "the United States" extends.

c. Petitioners also contend (Pet. 24-28, 34) that the decision below improperly applies the framework from the Insular Cases and that this case provides an appropriate vehicle for reexamining those decisions. That is incorrect.

In the Insular Cases, a series of decisions issued in the first decade of the 20th century, this Court concluded that the Constitution applies "in full" in incorporated territories but "only in part" in unincorporated territories. *Boumediene v. Bush*, 553 U.S. 723, 757 (2008). Specifically, the Court held that "guaranties of certain fundamental personal rights" apply in unincorporated territories. *Id*. at 758 (citation omitted). But it held that other constitutional guarantees do not apply in unincorporated territories, at least if "judicial enforcement of the provision[s] would be 'impracticable and anomalous.'" *Id*. at 759 (citation omitted).

The government's argument here does not rest on that framework. The government does not rely on the premise that citizenship is not "fundamental," or on the view that extending birthright citizenship to American Samoa would be "impracticable and anomalous." And the government in no way relies on the indefensible and discredited aspects of the Insular Cases' reasoning and rhetoric that petitioners highlight here (*e.g.*, Pet. 27).

The government's defense of Section 1408(1)'s constitutionality instead relies on the text of the Citizenship Clause, which confers citizenship only on persons born in "the United States," U.S. Const. Amend. XIV, § 1, and precedent that well predates the Insular Cases. As discussed

above, the ordinary tools of constitutional interpretation—including text, context, historical practice, and precedent—establish that the term "the United States," as used in that provision, does not include American Samoa. The multi-step framework from the Insular Cases is therefore beside the point. As a result, this case would be an unsuitable vehicle for reexamining those cases—cases which, petitioners emphasize (Pet. 26), did not apply the Citizenship Clause.

Petitioners argue (Pet. 34) that, "[b]ecause the court of appeals premised its holding on the Insular Cases, this case offers an appropriate vehicle for overruling those ill-founded decisions." But only one judge, Judge Lucero, relied on the Insular Cases' distinction between fundamental and non-fundamental rights. See Pet. App. 32a n.21. The other judge in the majority, Chief Judge Tymkovich, expressly declined to rely on the framework of the Insular Cases and instead rested his decision on historical practice. See *id*. at 41a-44a. The latter approach is akin to that of previous court of appeals decisions that found no need to "determine the application of the Citizenship Clause to inhabitants of the Philippines under the doctrine of territorial incorporation" because "[t]he phrase 'the United States' is an express territorial limitation on the scope of the Citizenship Clause." *Valmonte v. INS*, 136 F.3d 914, 918 n.7 (2d Cir.), cert. denied, 525 U.S. 1024 (1998); accord *Rabang v. INS*, 35 F.3d 1449, 1453 n.8 (9th Cir. 1994), cert. denied, 515 U.S. 1130 (1995).

In any event, this Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). For the reasons discussed above, the court of appeals' judgment was correct; the "fact that [one judge] reached [his] decision through analysis different than this Court might have used" does not warrant review. *Ibid*.

3. In 2016, this Court denied a petition for a writ of certiorari raising the same question that is presented here. See *Tuaua*, *supra* (No. 15-981). The Court should likewise deny the petition in this case.

a. Petitioners concede (Pet. 33) "the lack of a circuit split on this question." Every court of appeals that has considered the question has reached the same conclusion: birth in a territory does not automatically confer citizenship under the Citizenship Clause. See Pet. App. 5a (American Samoa); *Tuaua v. United States*, 788 F.3d 300, 302-312 (D.C. Cir. 2015) (American Samoa), cert. denied, 579 U.S. 902 (2016); *Valmonte*, 136 F.3d at 917- 920 (2d Cir.) (Philippines); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (Philippines); *Nolos v. Holder*, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam) (Philippines); *Rabang*, 35 F.3d at 1451-1453 (9th Cir.) (Philippines); see also *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (holding that the Commonwealth of the Northern Mariana Islands does not form part of the United States for purposes of the Naturalization Clause's requirement that naturalization laws be "uniform * * * throughout the United States," U.S. Const. Art. I, § 8, Cl. 4), cert. denied, 570 U.S. 904 (2013).

Petitioners contend (Pet. 33) that this Court should grant review because "there has been a significant split of authority among the judges below." But this Court typically grants review only when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). It does not usually grant certiorari because the court of appeals' decision "conflicts" with the views of the district court or a dissenting judge.

b. The views expressed by the American Samoan people provide a further reason to deny the petition for a writ of certiorari. The people of American Samoa "have not formed a collective consensus in favor of United States citizenship." *Tuaua*, 788 F.3d at 309. To the contrary,

American Samoa's elected government and congressional delegate have participated in this case to oppose the imposition of birthright citizenship on the American Samoan people. See p. 3, *supra*. They have argued 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." Pet. App. 37a (opinion of Lucero, J.). After the court of appeals issued its decision, the American Samoan legislature unanimously passed a resolution that praised the court of appeals for "respecting the right of the American Samoan people to retain our current statutory birthright status as U.S. nationals" and expressed opposition to "efforts to impose U.S. citizenship on our people without our consent through judicial fiat." S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021). Those views do not, of course, control the meaning of the Citizenship Clause, but they do counsel against reaching out to upset the longstanding and settled understanding that Congress may determine the citizenship status of persons born in the territories. See pp. 10-13, *supra*.

Inhabitants of other territories, such as Puerto Rico, have obtained citizenship as a result of legislation, not as a result of judicial decisions. See pp. 10-13, *supra*. The same process remains available to the people of American Samoa. If the American Samoan people form a consensus in favor of birthright citizenship, the territory's delegate to the U.S. House of Representatives could bring that issue to Congress's attention, and Congress could change federal law at that time. As it stands, American Samoa's delegate has already proposed legislation that would further streamline the naturalization process for American Samoans, see H.R. 1941, 117th Cong., 1st Sess. (2021), and the territorial legislature has endorsed that proposal, see S. Con. Res. 37-3, 37th Leg., 2d Reg. Sess. (Am. Sam. 2021).

In contrast, if this Court were now to accept petitioners' invitation to hold that the Citizenship Clause imposes U.S. citizenship on all persons born in American Samoa, it would eliminate the opportunity for the American Samoan people to consider the issue democratically and to develop a consensus as to its proper resolution. Cf. *National Coalition for Men v. Selective Service System*, 141 S. Ct. 1815, 1816 (2021) (statement of Sotomayor, J., respecting the denial of certiorari) (agreeing with the Court's decision to decline review of the constitutionality of the male-only registration requirement for the draft in order to give Congress the opportunity to resolve that issue). Such a decision would also destabilize the long-settled understanding with respect to citizens of other territories, including those, like the Philippines, that are no longer under the sovereignty of the United States. See *Tuaua*, 788 F.3d at 305 n.6 (noting that "[t]he extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children through the operation of statute").

Those disruptive consequences are particularly unwarranted because federal law already allows American Samoans to naturalize as U.S. citizens after moving to any State, to the District of Columbia, or to any territory outside American Samoa, and to use their previous time residing in American Samoa to satisfy the five-year residency requirement for naturalization. 8 U.S.C. 1436; see 8 U.S.C. 1427(a). The individual petitioners complain (Pet. 9-10) that, as noncitizen residents of Utah, they cannot vote or serve as jurors, Utah peace officers, or officers of the U.S. Armed Forces. But petitioners have provided no reason to believe that they could not avail themselves of that favorable naturalization procedure and thus eliminate the disadvantages that they associate with being noncitizen nationals of the United States without also imposing citizenship status on unwilling fellow American Samoans. Cf. Pet. 9 (acknowledging that the

asserted "harms" of a lack of citizenship "fall disproportionately on those who relocate from American Samoa" and are therefore eligible to naturalize under Section 1436).

* * * *

2. Indication of Gender on U.S. Passports

As discussed in *Digest 2021* at 3-5, on June 30, 2021, the State Department announced proposed changes to the Department's policies on gender in U.S. passports and Consular Reports of Birth Abroad ("CRBAs"), and on September 15, 2021, the State Department requested public comment on proposed amendments to U.S. passport application forms based on a change in Department policy announced on June 30, 2021. In Public Notice 11664, 87 Fed. Reg. 10426 (Feb. 24, 2022), the State Department published a 30-day Notice of Proposed Information Collection pursuant to the Paperwork Reduction Act of 1995 requesting further public comment on proposed amendments to U.S. passport application forms preceding submission of the collection for approval by the Office of Management and Budget (OMB). The amendments proposed to permit passport applicants to select the gender marker on their passport without presenting medical documentation of gender transition, and to update passport application forms to add a third gender marker, "X," for applicants identifying as unspecified or another gender identity (in addition to the existing "M" and "F" gender markers).

On March 31, 2022, the Secretary of State announced that beginning on April 11, 2022, U.S. citizens would be able to select an "X" as their gender marker on their U.S. passport applications. The March 31, 2022, State Department press statement, available at https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/, is excerpted below.

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* * * *

Starting on April 11, U.S. citizens will be able to select an X as their gender marker on their U.S. passport application, and the option will become available for other forms of documentation next year.

The Department is setting a precedent as the first federal government agency to offer the X gender marker on an identity document. When we announced in June [2021] that we had begun this work, we referred to the addition of a third gender marker for non-binary, intersex, and gender non-conforming individuals. Since then, we have solicited public feedback through the notice and comment process we undertook to update our passport application forms. We have also continued to consult with partner countries who have already taken this important step to recognize gender diversity on their passports. Finally, we have worked with the Centers for Disease Control and Prevention's National Center for Health Statistics to conduct qualitative research on how to define an X gender marker, interviewing a demographically diverse group of individuals, including many members of the LGBTQI+ community. After thoughtful

consideration of the research conducted and feedback from community members, we concluded that the definition of the X gender marker on State Department public forms will be "Unspecified or another gender identity." This definition is respectful of individuals' privacy while advancing inclusion.

We continue to work closely with our federal government partners to ensure as smooth a travel experience as possible for all passport holders, regardless of their gender identity. We have updated our advice to LGBTQI+ travelers: travel.state.gov/lgbtqi. We reaffirm our commitment to promoting and protecting the freedom, dignity, and equality of all persons – including transgender, non-binary, and gender non-conforming persons around the world.

Information on how to apply for a passport with this new option can be found here: travel.state.gov/gender.

* * * *

3. *AAA I*

On December 8, 2020, L'Association des Americains Accidentels and several of its members (collectively, the Association), sued the State Department in *L'Association des Americains Accidentels et al. v. State, et al.*, No. 20-cv-03573 (D.D.C.) (*AAAI*), alleging that the Department's 2010 Rule increasing the fee for processing a request for a Certificate of Loss of Nationality of the United States (CLN) under Immigration and Nationality Act Section 349(a)(5) (taking an oath of renunciation of U.S. nationality before a U.S. diplomatic or consular officer abroad) from $450 to $2,350 violated the Administrative Procedure Act, the Constitution, and customary international law. On April 23, 2021, the State Department filed motions to dismiss and for summary judgment. The State Department's 2021 brief is excerpted below. On December 5, 2022, the U.S. District Court for the District of Columbia set oral argument. [*]

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* * * *

Plaintiffs also assert that "[v]oluntary expatriation is recognized as a right under customary international law." Compl. ¶ 208. Based on this alleged rule of customary international law, Plaintiffs argue that the $2,350 renunciation processing fee "fails to comport with customary international law" because it "preconditions Plaintiffs' right to expatriate on the payment of an exorbitant fee." *Id.* ¶ 217. Only a "nominal modest fee," they argue, would comport with the customary international norm of the right to expatriate. *Id.* ¶ 15. This claim also lacks merit. Customary international law is formed based on two factors: (1) consistent state practice that (2) flows from a sense of legal obligation. *See, e.g.*, *McKesson Corp. v. Islamic Republic of Iran*,

[*] Editor's note: On January 6, 2023, the State Department gave notice of its intent to pursue rulemaking to reduce the fee for CLN services to $450. On January 9, 2023, the Court heard oral arguments. On February 10, 2023, the Court granted the Department's motions to dismiss and for summary judgment. On February 13, 2023, Plaintiffs filed a notice of appeal.

539 F.3d 485, 488 n.1 (D.C. Cir. 2008). *Cf. North Sea Continental Shelf (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands),* I.C.J. Reports 1969, p. 3, para. 77 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."); Restatement (Third) of Foreign Relations Law § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). Such customary international law is incorporated into domestic law as a matter of federal common law through the *Charming Betsy* principle, which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, The*, 6 U.S. 64, 118 (1804).

The Court need not reach any *Charming Betsy* analysis in this case, however, because Plaintiffs' customary international law claim—that there is, essentially, an absolute right under customary international law to expatriate free of a fee that is more than nominal—fails. Plaintiffs do not and cannot point to any rule of customary international law specifically prohibiting a country from charging more than a nominal fee to process a citizenship renunciation request. *See* Compl. ¶ 208-18. Plaintiffs fail to support their claim with evidence based in the general and consistent practice of states stemming from a sense of legal obligation, the elements that must be established to identify the existence of a rule of customary international law. Plaintiffs cite a law review article asserting that individuals have "the right under international law to expatriate," but that article makes no mention of any restriction on the fee that may be charged for expatriation. *The Right of Nonrepatriation of Prisoners of War,* 83 YALE L. J. 358; *see* Compl. at ¶ 209. Similarly, Plaintiffs' citation to the Universal Declaration of Human Rights of 1948 indicates only that no person shall be "denied the right to change his nationality," *see* Compl. ¶ 210, but fails to indicate that a processing fee of a certain amount would be inappropriate. Thus, even assuming, *arguendo*, that a *general* rule of customary international law existed regarding expatriation, there is no indication that such a general rule would extend to a prohibition of a processing fee that charges the actual cost of providing the renunciation service, and there is certainly no evidence of consistent state practice to that effect based on a sense of legal obligation to keep fees nominal.

In the absence of evidence of consistent state practice based on a sense of legal obligation, there is no rule of customary international law. And, "[i]f there is no relevant international legal norm, then there is no *Charming Betsy* analysis." Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and the Global Rule of Law*, 53 Vand. J. Transnat'l L. 1147, 1192 (2020). Courts may only recognize existing customary international law; they cannot create an international legal obligation where none exists under such law. Because Plaintiffs have failed to identify the existence of a rule of customary international law prohibiting more than a nominal fee for expatriation, the renunciation processing fee cannot violate customary international law.

Plaintiffs' failure to identify a rule of customary international law forbidding the current renunciation processing fee warrants dismissal under Rule 12(b)(6) for failure to state a claim. In the alternative, Defendants are entitled to summary judgment on Plaintiffs' customary international law claim.

* * * *

4. *AAA II*

On September 28, 2022, the U.S. District Court for the District of Columbia issued its memorandum opinion in *L'Association des Americains Accidentels et al. v. State, et al.*, 633 F. Supp. 3d 74 (D.D.C. 2022) (*AAA II*). The Association challenged the Department's suspension and delay of CLN services at its posts during the COVID-19 pandemic and the Department's phased resumption of services. Asserting a fundamental constitutional right to expatriate, the Association claimed that the suspension and delay of CLN services under INA 349(a)(5) (taking an oath of renunciation of U.S. nationality before a U.S. diplomatic or consular officer abroad) violated the Administrative Procedure Act and the Fifth Amendment's Due Process Clause. The Court granted the Department's motion for dismissal and summary judgment finding that the Association's claims about the suspension of CLN services were moot because the Department had resumed such services at posts. The Court also held that the Department was entitled to summary judgment on the APA claim because the Department's "waitlist" policy had not unreasonably delayed CLN services and that the Association had not pled facts suggesting it was entitled to relief on its Fifth Amendment claim. On September 29, 2022, the Association submitted its notice of intent to appeal. Excerpts follow from the September 28, 2022, District Court opinion.[**]

* * * *

B.

Next, mootness. Since the filing of the Amended Complaint, the Department has substantially increased the number of consular services it provides worldwide. *See generally* Supp. Benning Decl., ECF No. 21-1. Relevant here, the Department lifted its previous suspension of renunciation services at those posts that offer them. *See id.* ¶¶ 3–8. That means the Court cannot "[i]ssue an order requiring Defendants to immediately resume renunciation-related services," Amend. Compl. 33, because they have already done so. The same goes for declaratory relief. The Court cannot "[i]ssue a declaratory judgment that the government is not authorized to suspend . . . renunciation services," *id.* at 33, because that declaration would be purely advisory.

The Association asks the Court to disregard these changed circumstances and render declaratory judgment because the Government "can easily reinstate the suspension." Opp. 3 n.4. It appears to rely on an exception to mootness for issues "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515 (1911). That exception applies if: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Clarke v. United States*, 915

[**] Editor's note: On August 18, 2023, the D.C. Circuit Court of Appeals issued an unpublished per curiam order dismissing plaintiffs' claims in *L'Association des Americains Accidentels et al. v. State, et al.*, (*AAA II*) challenging the pandemic-related suspension and subsequent delay of Certificate of Loss of Nationality services at post, because plaintiffs' claims were either moot or they lacked standing. *L'Association des Americains Accidentels et al. v. State, et al.*, No. 22-5262.

F.2d 699, 704 (D.C. Cir. 1990) (en banc) (cleaned up). Importantly, the recurring legal "wrong" "must be defined in terms of the precise controversy it spawns." *People for the Ethical Treat. of Animals, Inc. v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005).

Here, there is no reason to think the Association's members "would be subjected to the same action again." *Clarke*, 915 F.2d at 704. A generational pandemic precipitated the State Department's decision to curtail consular services. The Department and two presidential administrations then "adopted ad hoc policies to respond to that pandemic, which had the effect of substantially curtailing [renunciation services]." *Nepal*, --- F. Supp. 3d at ---, 2022 WL 1500561, at * 8. Since then, the Biden administration's withdrawal from Afghanistan and the Russia-Ukraine war have imposed further emergency responsibilities on Department personnel throughout Europe and Asia.

The Association claims its members are "under constant threat that the government will return to its suspension policy under the guise of a global crisis," Opp. 3 n.4, but the available evidence suggests otherwise. The clear trend across consular posts is that renunciation services are *increasing*, despite the ongoing Russia-Ukraine war and COVID-19 pandemic. *See* Supp. Benning Decl. ¶ 4 ("Post Paris estimates it has approximately 135 people on its CLN wait list and is currently processing requests for CLN appointments at a rate higher than before the pandemic."); *id.* ¶ 5 (noting "all services are currently available at Post Singapore, and are expected to tend towards pre-pandemic levels"); *id.* ¶ 3 ("Post Frankfurt resumed offering CLN services appointments . . . and is no longer operating under any COVID-related restrictions."). Given that trend, there is no reason to think the Association's members are likely to suffer "the same wrong again." *Lewis*, 494 U.S. at 481.

In any case, granting declaratory judgment is discretionary. *See generally Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("[A] district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close."). Courts often decline to grant declaratory judgment where it would have no remedial effect. *See* 10B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2759 (4th ed. 2022) ("One of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the controversy between the parties."). That's doubly true when, as here, declaratory judgment in the Association's favor would render an advisory opinion on a significant question of administrative and constitutional law. *See id.* ("[C]ourts particularly are reluctant to resolve important questions of public law in a declaratory action."). So even if this case raised issues "capable of repetition yet evading review," the Court would still decline to grant declaratory relief.

In sum, the Association's APA and Fifth Amendment claims related to the Department's suspension of renunciation services are moot; its claims related to the Department's delay in rendering those services survive.

* * * *

The Association asserts a substantive due process right to expatriate under the Fifth Amendment. The parties vehemently dispute the existence of such a Constitutional right. But even if such a right exists, the Association has failed to state a claim.

The Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Abigail All. for Better Access to Develop. Drugs v. von Eschenbach*, 495 F.3d

695, 702 (D.C. Cir. 2007) (en banc) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). Because "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), a litigant must offer a "careful description of the asserted fundamental liberty interest," *Glucksberg*, 521 U.S. at 720–721. That requirement is essential, as the judiciary "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (White, J., dissenting).

Cases that challenge executive action on substantive due process grounds, like this one, "present[] an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998). The threshold issue is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.*; *see also Geo. Wash. Univ. v. District of Columbia,* 318 F.3d 203, 209 (D.C. Cir. 2003 (explaining plaintiff must show "egregious government misconduct"); *Tri Cnty. Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (the doctrine prohibits "actions that in their totality are genuinely drastic"). Plaintiffs can satisfy that threshold showing by alleging "a substantial infringement of state law prompted by personal or group animus" or "deliberate flouting of the law that trammels significant personal or property rights." *Tri Cnty. Indus.*, 104 F.3d at 459 (citing *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

Applying these standards, the Association has not stated a viable substantive due process claim.

Congress has statutorily provided U.S. citizens with a means to exercise their right to expatriate. *See Savorgnan v. United States*, 338 U.S. 491, 498 n. 11 (1950) (noting the Expatriation Act is "broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves"). The Supreme Court has affirmed Congress's power to regulate that process, but it held the Constitution requires an "ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship." *Vance v. Terrazas*, 444 U.S. 252, 266 (1980). To that end, the INA requires renunciants to make their oath "before a diplomatic or consular officer of the United States in a foreign state." 8 U.S.C. § 1481(a)(5).

The Association's pleadings reveal the Department has made good-faith efforts to carry out that mandate. Its recent delay in providing renunciation services is attributable to once-in-a-generation pandemic, the American withdrawal from Afghanistan, and the ongoing Russia-Ukraine war. Perhaps the Association believes the Department has erred in setting its priorities, but improper prioritization in the face of sui generis resource constraints is not "deliberate flouting of the law." *Tri Cnty Indus.*, 104 F.3d at 459. And in any case, the Court has already explained the Department's prioritization rationale is well supported. *See* Part III.A, *supra*. Indeed, if the Department began providing telephonic or expedited renunciation services it may well violate its obligation to ensure expatriation is done voluntarily.

There is no basis to conclude the Constitution requires the Department to act more quickly than it did, given the circumstances. This is not a First Amendment case, in which an individual simply wants to speak free from governmental restraint; where it is "necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). Here, Plaintiffs seek government action for them to vindicate their right. The Association thus asserts a right much more like the Sixth

Amendment's Speedy Trial guarantee. And in that context, the Supreme Court has blessed wait times exceeding *five years* even though that right explicitly contains a timeliness component: "speedy". *See, e.g.*, *Barker v. Wingo*, 407 U.S. 514 (1972) (holding five-year delay in bringing criminal prosecution did not violate Speedy Trial Clause). Even assuming there is a constitutional right to expatriate, nothing in the sources the Association cites suggests there is a right to do so "within weeks or, at the very most, a few months." Opp. 20. Indeed, the Court was unable to find a single decision reaching that conclusion. So it does not "shock the contemporary conscience," *Lewis*, 523 U.S. at 847 n.8, that Plaintiffs have waited (on average) just over a year to renounce their citizenship. And unlike the First Amendment context, that delay will not prevent Plaintiffs from exercising their right to expatriate.

This would be a much harder case if Congress had not provided a mechanism for individuals to expatriate, or if that mechanism remained indefinitely suspended. But that is not this case, at least not anymore. The Association's Fifth Amendment claim will be dismissed for failure to state a claim.

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, *Digest 2020* at 22, and at *Digest 2021* at 8, 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 23, 2022, the Secretary of State extended the restriction, which became effective on September 1, 2022, and will expire on August 31, 2023 unless extended or revoked. 87 Fed. Reg. 51,728 (Aug. 23, 2022).

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

The Ninth Circuit affirmed consular non-reviewability in two cases. On January 27, 2022, in *Bechirian v. Blinken*, No. 20-55913, the Ninth Circuit found that appellants' challenge to a consular officer's refusal of their K-1 (fiancé) visa under section 221(g) of the INA is barred by the doctrine of consular non-reviewability. The Ninth Circuit held that section 221(g) "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Digest 2021* at 10-13, discusses several cases that were dismissed 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.

In *Algzaly, et al. v. Blinken et al.*, No. 21-16375 (9th Cir.), appellants challenged visa refusals and U.S. Citizenship and Immigration Services' discretionary denial of a waiver of ineligibility. On June 22, 2022, the Ninth Circuit held that the district court properly dismissed Plaintiffs' claims related to both the visa refusals and waiver denials under the doctrine of consular non-reviewability. The Ninth Circuit found that the district court did not abuse its discretion in denying Plaintiffs leave to amend because the APA does not allow challenges to discretionary decisions such as USCIS's waiver

denial. In applying the doctrine of consular non-reviewability, the court declined to extend a Ninth Circuit holding that adult U.S. citizens do not have a liberty interest in their parent's immigration to the United States, to further preclude claims asserted by a U.S. citizen parent on behalf of an adult child. See *Khachatryan v. Blinken*, 4 F. 4th 841 (9th Cir. 2021).

Excerpts follow from the June 11, 2022 opinion of the U.S. Court of Appeals for the Ninth Circuit in *Algzaly, et al. v. Blinken et al.*, No. 21-16375.

* * * *

2. We assume, without deciding, that Rafiak, a citizen, has a constitutional interest in the admission of his sons to the United States, and therefore do not reach the government's request that we extend the holding of *Khachatryan*, 4 F.4th at 862, to preclude claims asserted by a citizen parent on behalf of a non-resident non-citizen child. While "ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review," if "a U.S. citizen's constitutional rights are alleged to have been violated by the denial of a visa to a foreigner," a court can undertake "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason." *Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008).

a. The inadmissibility determinations for Hani and Gubran were facially legitimate and bona fide. The visa denials cited "valid statute[s] of inadmissibility"—8 U.S.C. § 1182(a)(6)(C)(i) and (a)(10)(A)—which specify "discrete factual predicates the consular officer must find to exist before denying a visa." *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016). Moreover, the complaint alleges facts in the record that provide "at least a facial connection to the statutory ground of inadmissibility." *Id.* (cleaned up).

b. The complaint does not make an "affirmative showing of bad faith," *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring), because it does not plausibly allege that "the consular official did not in good faith believe the information he had," *Bustamante*, 531 F.3d at 1062. The complaint alleges that Hani and Gubran personally submitted materials to the consulate, and the inadmissibility findings do not state that the false representation came from a document submitted by a physician. Even if the consular officer relied on a misrepresentation conveyed by Hani's and Gubran's physician, nothing in the record suggests "that the transfer of information . . . never took place, or that the Consulate acted upon information it knew to be false." *Id.* at 1063.

3. The APA does not provide for review of a United States Citizenship and Immigration Services ("USCIS") denial of a waiver of inadmissibility based on a consular officer's denial of a visa when the applicant is not in the United States. *See Allen*, 896 F.3d at 1108. Bringing an APA claim against USCIS rather than the State Department, does not overcome the consular nonreviewability doctrine. *See Mandel*, 408 U.S. at 759 (addressing the Immigration and Naturalization Service's denial of ineligibility waiver); *Bustamante*, 531 F.3d at 1062 n.1 (refusing to "distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case was not a consular visa denial, but rather the Attorney General's refusal to waive Mandel's inadmissibility," because "[t]he holding is plainly stated in terms of the power delegated by Congress to 'the Executive'"). The district court's denial of leave to amend to assert an APA

claim was not an abuse of discretion.

* * * *

On October 5, 2022, the Ninth Circuit issued a novel decision in *Muñoz v. Dep't of State*, 50 F.4th 906 (9th Cir. 2022), which represented a departure from the doctrine of nonreviewability. At issue was a consular officer's refusal to issue an immigrant visa to the spouse of a U.S. citizen under 8 U.S.C. § 1182(a)(3)(A)(ii), which establishes visa ineligibility for a noncitizen about whom a consular officer has a reason to believe "seeks to enter the United States to engage" in "other unlawful activity." The Department's notices of refusal to the applicant only indicated he was refused under 8 U.S.C. § 1182(a)(3)(A)(ii) and provided no additional explanation. During litigation, the government disclosed to the spouse that the denial was based on a determination that her husband was a member of MS-13. In March 2021, the district court, after denying a motion to dismiss and allowing limited discovery, granted the government's motion for summary judgment finding that the doctrine of consular nonreviewability shielded the decision to deny the visa from judicial review, because the government provided "further explanations" for the visa denial. Plaintiffs appealed. The Ninth Circuit in a 2-1 decision found "where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest." 50 F.4th at 921. The Ninth Circuit concluded that even though the refusal was bona fide and facially legitimate, the government forfeited consular nonreviewability as a defense because the delay in providing a factual basis for refusal violated a "long-standing due process requirement that the government provide any required notice in a timely manner." *Id*. The opinion is excerpted below (footnotes omitted).[***]

* * * *

A. Muñoz's Constitutional Interest

Like the plaintiff in *Din*, *see* 576 U.S. at 101–02, 135 S.Ct. 2128, Muñoz asserts that she has a protected liberty interest in her husband's visa application. We first recognized the existence of this constitutional interest in *Bustamante v. Mukasey*, where we held that, because "[f]reedom of personal choice in matters of marriage and family life is ... one of the liberties protected by the Due Process Clause," a U.S. citizen possesses a protected liberty interest in "*constitutionally adequate procedures* in the adjudication of [a non-citizen spouse]'s visa application" to the extent authorized in *Mandel*. 531 F.3d 1059, 1062 (9th Cir. 2008) (emphasis added). Although a plurality of the Supreme Court in *Din* would have held that a U.S. citizen does not have such a protected liberty interest, 576 U.S. at 101, 135 S.Ct. 2128 (plurality opinion), Justice Kennedy's controlling concurrence declined to reach this issue, *id.* at 102, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment).[22] It was therefore proper for the district court to conclude that,

[***] Editor's Note: The government filed a petition for rehearing en banc on February 2, 2023. The Ninth Circuit denied the petition, over the dissent of 10 Circuit Judges on July 14, 2023. *Muñoz v. Dep't of State*, 73 F.4th 769 (9th Cir. 2023).

under the precedent of this circuit, Muñoz possesses a liberty interest in Asencio-Cordero's visa application. *See FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[I]f we can apply our precedent consistently with that of the higher authority, we must do so.").

Subsequent case law, moreover, reinforces this precedent. Eleven days after the Court decided *Din*, Justice Kennedy and the *Din* dissenters comprised the majority in *Obergefell v. Hodges*, which reiterated longstanding precedent that "the right to marry is a fundamental right inherent in the liberty of the person" and subject to protection under the Due Process Clause. 576 U.S. 644, 675, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *see also id.* at 663, 664, 135 S.Ct. 2584. In so holding, *Obergefell* laid out "a careful description" of how the right to marry constitutes a fundamental liberty interest that is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations and internal quotation marks omitted); *Obergefell*, 576 U.S. at 665–676, 135 S.Ct. 2584 (providing the rigorous description and analysis *Glucksberg* requires). *But see Din*, 576 U.S. at 93–94, 135 S.Ct. 2128 (plurality opinion) (arguing that *Glucksberg* does not support the right Din asserted). *Obergefell* recognized that "[t]he right to marry, establish a home[,] and bring up children" are "varied rights" comprising a "unified whole" that are "a central part of the liberty protected by the Due Process Clause." 576 U.S. at 668, 135 S.Ct. 2584 (internal quotation marks omitted).

In addition to having a fundamental liberty interest in their marriage, U.S. citizens also possess a liberty interest in residing in their country of citizenship. *See, e.g., Agosto v. INS*, 436 U.S. 748, 753, 98 S.Ct. 2081, 56 L.Ed.2d 677 (1978); *Ng Fung Ho v. White*, 259 U.S. 276, 284–85, 42 S.Ct. 492, 66 L.Ed. 938 (1922). Consequently, even though denying a visa to the spouse of a U.S. citizen does not necessarily represent the government's "refus[al] to recognize [the U.S. citizen]'s marriage to [a non-citizen]," and the citizen theoretically "remains free to live with [the spouse] anywhere in the world that both individuals are permitted to reside," *Din*, 576 U.S. at 101, 135 S.Ct. 2128 (plurality opinion), the cumulative effect of such a denial is a *direct* restraint on the citizen's liberty interests protected under the Due Process Clause, *see O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 788, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship).

In light of the foregoing, we remain convinced that *Bustamante* correctly recognized that a U.S. citizen possesses a liberty interest in a non-citizen spouse's visa application. Because Muñoz asserts that the government's adjudication of Asencio-Cordero's visa application infringed on this protected liberty interest, we proceed to evaluate whether the government provided "a facially legitimate and bona fide reason" for denying his visa.[23] *See Mandel*, 408 U.S. at 766–70, 92 S.Ct. 2576; *Din*, 576 U.S. at 104, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment).

B. The "Facially Legitimate and Bona Fide Reason" Requirement

The parties' disagreement about whether the *Mandel* exception to consular nonreviewability applies centers on (1) whether the government provided "a facially legitimate and bona fide reason" for the visa denial; and (2) whether the government's long delay in providing anything more than a citation to § 1182(a)(3)(A)(ii) was consistent with its obligation under step two of the *Din* framework.[24]

1. Satisfying *Din* Step Two in the Absence of Discrete Factual Predicates in the Statute

As we explained in *Cardenas* and *Khachatryan*, a consular officer who denies a visa satisfies *Mandel*'s requirement to provide a "facially legitimate and bona fide reason" if the statutory basis of exclusion "specifies discrete factual predicates the consular officer must find to exist before denying a visa" or, alternatively, if there exists "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Khachatryan*, 4 F.4th at 851 (quoting *Cardenas*, 826 F.3d at 1172). On appeal, the government has wisely abandoned the argument that the statute at issue here contains discrete factual predicates. Unlike surrounding provisions, 8 U.S.C. § 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial, and a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a "discrete" factual predicate. *Compare id.*, with *id.* § 1182(a)(3)(E)(ii), (iii) (deeming inadmissible any alien who has participated in genocide or extrajudicial killings), *id.* § 1182(a)(2)(C) (deeming inadmissible any alien who has engaged in the illicit trafficking of controlled substances), *and id.* § 1182(a)(3)(B) (identifying discrete terrorism-related bases for inadmissibility). Therefore, the government can satisfy its burden at *Din* step two only if the record contains information—what *Cardenas*, 826 F.3d at 1172, and *Khachatryan*, 4 F.4th at 851, referred to as "a fact in the record"—that provides a facial connection to the consular officer's belief that Asencio-Cordero "s[ought] to enter the United States to engage solely, principally, or incidentally in ... any other unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii).

The government contends that it complied with *Cardenas*'s "fact in the record" requirement because, when a visa is denied under § 1182(a)(3)(A)(ii) and "the factual basis for the prediction of criminality [required by the statute] ... is the applicant's membership in a gang," all that matters is whether the *consular officer* "understood ... the predicate factual basis" for denying the visa. To make this argument, which implies that the government can comply with *Mandel* without disclosing any factual justification for a visa denial to a petitioner, the government invokes *Din*, which—it claims—"[n]owhere ... suggested that there needs to be evidence in the record of an [applicant]'s association with terroristic activities for a citation to § 1182(a)(3)(B) to be sufficient." The government contends that "[t]he same is true in the context of members of transnational gangs under 8 U.S.C. § 1182(a)(3)(A)(ii)."[25] But the government's argument misreads *Din*, where the statutory citation to § 1182(a)(3)(B) was deemed sufficient *because* that statute contains discrete factual predicates. *Din*, 576 U.S. at 105, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment) (rejecting Din's claim that "due process requires she be provided with the facts underlying th[e inadmissibility] determination" because the government cited a statute "specif[ying] discrete factual predicates").

Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial,[26] s*ee id.*; *Mandel*, 408 U.S. at 769–70, 92 S.Ct. 2576 (emphasizing that "the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver" and declining to address the scenario in which "no justification whatsoever is advanced"), and both decisions identify due-process principles as the foundation of their reasoning, *see Din*, 576 U.S. at 106, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment) (identifying the issue of whether "the notice given was constitutionally adequate" as relevant for assessing the government's compliance with the "facially legitimate and bona fide reason" requirement); *Mandel*, 408 U.S. at 766–70, 92 S.Ct. 2576 (explaining that, in the realm of consular decision making, the production of a "facially legitimate and bona fide reason" is a substitute for the standard balancing of interests in the procedural due process framework). From these cases, we understand notice to be a key concern of *Mandel*'s facially legitimate and bona fide reason

standard. We thus reject the government's suggestion that it can comply with *Cardenas*'s "fact in the record" formulation without providing the operative fact to a petitioner.

Despite contesting its obligation to provide the factual basis for the denial to petitioners, the government, in fact, eventually provided them with information supporting the denial. Specifically, the government explained that the consular officer denied Asencio-Cordero's visa application "after considering [his] in-person interview, a review of his tattoos, and the information provided by law enforcement saying that he was a member of MS-13." The record contains the November 2018 declaration of attorney adviser Matt McNeil attesting to this information.

This information is quite similar to the information we held in *Cardenas* was sufficient to satisfy *Din* step two. In that case,[27] the government initially did not provide Cardenas or her non-citizen spouse, Mora, any information beyond citing § 1182(a)(3)(A)(ii) to explain the denial of Mora's visa. 826 F.3d at 1168.[28] Within three weeks of the denial, however—after Mora sought additional information[29]—a consular official provided the following explanation by email:

> At the time of Mr. Mora's June 16, 2008 arrest [preceding his removal proceedings and subsequent visa application], Mr. Mora was identified as a gang associate by law enforcement. The circumstances of Mr. Mora's arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient "reason to believe" that Mr. Mora has ties to an organized street gang.

Id. On appeal, we reasoned that the denial of Mora's visa complied with *Mandel*'s "facially legitimate and bona fide reason" requirement because "[t]he consular officer ... cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)" and informed Cardenas and Mora that the visa was denied based on the government's "belief that Mora was a 'gang associate' with ties to the Sureno gang," as documented in the email to Mora three weeks after the visa denial. *Id.* at 1172; *see also id.* at 1167–68.

Appellants nonetheless argue that the record information in this case—though similar in content to the information we held in *Cardenas* was "a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility," 826 F.3d at 1172—falls short of what *Mandel* and *Din* require. Specifically, appellants contend that the information contained within the McNeil Declaration constitutes "conclusions, not facts," and is therefore inadequate under *Cardenas*.

We reject this argument, elaborated over many pages of appellants' opening brief. Although appellants insist that "[n]o court has accepted the government's mere conclusion [regarding inadmissibility] as a substitute for the discrete fact required by *Mandel*," their focus on labeling information as either a "fact" or a "conclusion" overlooks the purpose served by the "fact in the record" requirement. Whether information in the record is characterized as a "fact" or a "conclusion" is ultimately less relevant than whether the information provides a facial connection to the statutory ground of inadmissibility, thereby giving a petitioner notice of the reason for the denial. The McNeil Declaration contains information that provides a facial connection between the reason for the denial—the consular officer's belief that Asencio-Cordero is a member of MS-13, which the officer reached based on the visa interview, a criminal review, and a review of Asencio-Cordero's tattoos—and the cited statute of inadmissibility, § 1182(a)(3)(A)(ii).[30] Under *Cardenas*, this information suffices as a "facially legitimate and bona fide reason" for denying a visa. *See* 826 F.3d at 1172.

Appellants also contend, however, that the government's failure to provide them with "the specific factual basis of the denial *at the time of the denial*" means that the proffered

information is insufficient to satisfy the "facially legitimate and bona fide reason" requirement. This argument carries much more force. In reaching our conclusion in *Cardenas*, we noted that the consular officer himself "provided" the reason within three weeks of the denial. *See* 826 F.3d at 1172 ("He also provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate' with ties to the Sureno gang."). Similarly, the visa applicant in *Din* was apprised of the reason for the denial—by reference to a statutory provision containing discrete factual predicates—within about a month of the denial. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. 86, 135 S.Ct. 2128. In this case, the government waited almost three years to provide comparable information to appellants and did so only when prompted by judicial proceedings.[31]

At oral argument, the government suggested that the long delay in apprising appellants of the factual basis for denying Asencio-Cordero's visa does not matter because appellants now know that the visa was denied due to the consular officer's belief that Asencio-Cordero is a member of MS-13. That position is far too facile. Even if the government would have satisfied *Mandel* had it disclosed the fact of Asencio-Cordero's suspected gang membership at the time of the visa denial, it does not necessarily follow that citing § 1182(a)(3)(A)(ii) at the time of the denial *and then* providing the supporting factual basis *years after* the denial fulfills *Mandel*'s "facially legitimate and bona fide reason" requirement.[32] Indeed, the government cites no case law supporting that proposition.

2. Due Process and Timeliness

To understand the significance of timing to *Mandel*'s disclosure requirement, we revisit the purpose served by that requirement and its relationship to the Due Process Clause.

The doctrine of consular nonreviewability is a rule of decision, formulated by courts and informed by judicial respect for the separation of powers, *Allen*, 896 F.3d at 1101, that curtails judicial review of procedural due process challenges to visa denials in light of "the political branches' broad power over the creation and administration of the immigration system," *Din*, 576 U.S. at 106, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment); *see also Mandel*, 408 U.S. at 766, 770, 92 S.Ct. 2576. Instead of evaluating whether the procedures attendant on the deprivation of a spouse's liberty interest were "constitutionally sufficient"—which we do in other contexts by carefully balancing the private interests, the risk of an erroneous deprivation, and the governmental interests at stake, *see, e.g., Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)—*Mandel* and *Din* instruct courts not to proceed to this balancing test if the government proffers "a facially legitimate and bona fide reason" for denying the visa, *see Din*, 576 U.S. at 104, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment) ("*Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.' Once this standard is met, 'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." (citation omitted)); *see also Mandel*, 408 U.S. at 766–70, 92 S.Ct. 2576.

However, even though *Din* and *Mandel* establish that the substance of the notice is constitutionally adequate when the government produces "a facially legitimate and bona fide reason" for the visa denial, these decisions do not foreclose application of other core due-process requirements. *See Din*, 576 U.S. at 106, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment) (discussing the "constitutional[ ] adequa[cy]" of the notice given). It is a long-standing due process requirement that the government provide any required notice in a timely

manner. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (holding that "timely and adequate notice" of the reasons underlying the deprivation of a right guaranteed by the Due Process Clause is a key requirement of due process). Timeliness of notice was not at issue in *Mandel* or *Din* because in both cases the government identified the reason for the denial soon after the denial. *See Mandel*, 408 U.S. at 757–59, 769, 92 S.Ct. 2576; *Din*, 718 F.3d at 859, *rev'd*, 576 U.S. at 86, 135 S.Ct. 2128. Yet in *Din*, Justice Kennedy contemplated that petitioners will use the information contained in the notice of a visa denial to "mount a challenge to [the] visa denial." 576 U.S. at 105, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment). Such a challenge is impossible if the petitioner is not timely provided with the reason for the denial.

We thus conclude that, where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest. *Goldberg*, 397 U.S. at 267–68, 90 S.Ct. 1011; *Wright v. Beck*, 981 F.3d 719, 727–30 (9th Cir. 2020).[33] As we have explained, the denial of an immigrant visa to the spouse of a U.S. citizen deprives that citizen of the ability to enjoy the benefits of her marriage and to live in her country of citizenship. Her ability to vindicate her liberty interest, whether through the presentation of additional evidence or initiation of a new petition,[34] depends on *timely* and adequate notice of the reasons underlying the initial denial.

The administrative process for visa applications and approvals informs our understanding of what constitutes timely notice. *See Mathews*, 424 U.S. at 334, 96 S.Ct. 893 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972))). The Code of Federal Regulations provides that, "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered." 22 C.F.R. § 42.81(e).[35] Moreover, the Foreign Affairs Manual instructs consular officers that all visa refusals "must" be submitted for supervisory review within 30 days of the denial, 9 FAM 504.11-3(A)(2)(b), and the Manual recognizes that some visa decisions can "be overcome by the presentation of additional evidence," 9 FAM 504.11-3(A)(2)(a)(2).[36]

These provisions for review—including the submission and consideration of additional evidence—provide contextual support for the proposition that receiving timely notice of the reason for the denial is essential for effectively challenging an adverse determination. *See Goldberg*, 397 U.S. at 267, 90 S.Ct. 1011 (" 'The fundamental requisite of due process of law is the opportunity to be heard' ... 'at a meaningful time and in a meaningful manner.' " (first quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914); and then quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965))). By this standard, the government's nearly three-year delay in providing appellants with the reason for the denial of Asencio-Cordero's visa—and only after being prompted by court order—was clearly beyond the pale.[37] *Cf. Wright*, 981 F.3d at 728 ("[O]utright failures to even attempt to provide notice violate due process.").

Although the doctrine of consular nonreviewability imposes a limited disclosure requirement on the government, and essentially gives its rationale the benefit of the doubt in our truncated due-process inquiry, *see Din*, 576 U.S. at 104, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment), the government must first comply, within a reasonable time, with *Mandel*'s requirement to provide a facially legitimate and bona fide reason for denying a visa.[38] We can

determine whether the government provided such a justification without evaluating the substantive merits of the reason advanced. *See Din*, 576 U.S. at 105, 135 S.Ct. 2128 (Kennedy, J., concurring in the judgment) ("The Government ... was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B)."), *vacating* 718 F.3d at 862 ("It appears that ... the Government must cite to a ground narrow enough to allow us to determine that [the statute] has been 'properly construed.' "). Our understanding of reasonable timeliness is informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence.

Because no "fact in the record" justifying the denial of Asencio-Cordero's visa was made available to appellants until nearly three years had elapsed after the denial, and until after litigation had begun, we conclude that the government did not meet the notice requirements of due process when it denied Asencio-Cordero's visa. This failure means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may "look behind" the government's decision. *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576.

* * * *

2. Diversity Visa Lottery

a. Goodluck v. Biden

As discussed in *Digest 2021* at 13-14, there were four cases from 2021 and one from 2020 that challenged the State Department's prioritization guidance that gave 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. The courts ordered the Department to process the cases of diversity visa applicants during September 2020 and 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. The cases were 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.). In April 2022, the district courts stayed the orders in the four cases until the appeals court announces its decisions. In the interim, as ordered by the court, the Department completed the necessary systems modification to process DV cases from prior years. The Department's May 3, 2022 public guidance on diversity visa 2020 and 2021 is available at https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-2020-and-2021-updates.html and includes the following:

> The Department of State is aware of the four court orders regarding the reservation of numbers for and/or adjudication of DV-2020 and DV-2021 diversity visas, as summarized below. The Department is appealing these court orders because the Department believes the courts misinterpreted the law in

finding that the Department's policies were unlawful, and that the courts exceeded their authority in ordering the Department to process and issue diversity visas beyond the statutory deadline. While the appeal is pending, the courts granted stays with respect to adjudicating visas from prior years, meaning that the Department is not required to adjudicate visas from prior years until the appeals court issues its decision. The courts, however, required the Department to complete the systems modifications necessary to process DV cases from prior years, which the Department will do in compliance with the court orders.

The U.S. Court of Appeals for the District of Columbia Circuit held oral arguments in September 2022 but as of July 26, 2023 has not yet made a ruling.

3. Visa Regulations and Restrictions

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

As discussed in *Digest 2021* at 18-19, President Biden signed Proclamation 10141 in January 2021, which revoked Presidential Proclamations (P.P.) 9645 and 9983, which suspended entry into the U.S. of certain nationals. On January 19, 2022, the State Department amended its regulations at 22 C.F.R. 22.1 and 42.71, to exempt from immigrant visa (IV) fees certain applicants previously denied an IV solely due to P.P. 9645 and 9983. 87 Fed. Reg. 2703 (Jan. 19, 2022). The Department's public guidance is available at https://travel.state.gov/content/travel/en/News/visas-news/iv-fee-exemption-for-applicants-previously-refused-under-pps-9645-and-9983.html.

b. Visa Restrictions

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

c. Special Immigrant Visa ("SIV") Program

On May 24, 2022, the State Department filed a motion for relief from a summary judgement order and related injunctive relief of the United States District Court for the District of Columbia (D.D.C.) in *Afghan and Iraqi Allies v. Blinken, et al.*, No. 18-cv-01388. The motion seeks relief from the September 20, 2019, grant of partial summary judgment to Plaintiffs and the June 14, 2020 approved adjudication plan based on a finding that the Department and USCIS unreasonably delayed Afghan and Iraqi SIV processing. Excerpts from the Department's motion for relief are excerpted below.

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* * * *

I. THE COURT SHOULD REVISE ITS UNDUE DELAY DETERMINATION AND VACATE THE INJUNCTION TO ACCOUNT FOR CHANGED LAW AND FACTS UNDER RULE 54(b)

A. Legal Standard under Rule 54(b)

A district court may revise "any order or other decision, however designated, that adjudicates fewer than all of the claims….at any time before the entry of" final judgment. Fed. R. Civ. P. 54(b). Courts may reconsider an interlocutory order under Rule 54(b) "as justice requires," *Cobell v. Norton*, 224 F.R.D. 266, 272–73 (D.D.C. 2004), including when "a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court." *Jud. Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 123 (D.D.C. 2006) (internal citation omitted). Because reconsideration of an interlocutory order does not implicate the same finality and judicial resource concerns as the reconsideration of a final order, the Rule 54(b) standard is "more flexible" than Rule 59(e), which governs the reconsideration of final judgments. *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015). The court has discretion to grant reconsideration under Rule 54(b) so long as there are "good reasons for doing so." *United States v. All Assets Held at Bank Julius Baer & Co.*, 308 F. Supp. 3d 186, 193 (D.D.C. 2018) (citing *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005)).

B. There Are Good Reasons to Revise the TRAC Analysis

As a threshold matter, Rule 54(b) applies here because this Court's summary judgment decision and order of September 20, 2019, and the corresponding injunction, are each interlocutory. The Court has not entered final judgment in this case; it granted partial summary judgment and entered relief only as to Counts 1 and 2 of the Amended Complaint and did not enter judgment on any other counts. *See* Order (Sept. 20, 2019) (ECF No. 76). Rule 54(b) therefore permits the Court to revise its previous undue delay determination and to relieve Defendants from the Plan.

Given the significantly changed circumstances since this Court entered its order, it is appropriate for the Court to grant relief under Rule 54(b). The undue delay determination and remedial order entered by the Court were directly tied to circumstances that no longer exist. The D.C. Circuit has made clear that equitable relief under the APA's unreasonable-delay provision "is an extraordinary remedy [and requires] similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process." *In re United Mine Workers*, 190 F.3d 545, 549 (D.C. Cir. 1999). Thus, courts will not intervene into an agency's administration of a program unless the agency's delay is "so egregious" as to warrant relief. *TRAC*, 750 F.2d at 79. The D.C. Circuit has identified six factors relevant to that determination:

> 1) [T]he time agencies take to make decisions must be governed by a rule of reason;
>
> 2) [W]here Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> 3) [D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> 4) [T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> 5) [T]he court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> 6) [T]he court need not find any impropriety lurking behind agency lassitude in

order to hold that agency action is unreasonably delayed.

Id. at 80 (citations and quotations omitted). No one factor is determinative, and "[e]ach case must be analyzed according to its own unique circumstances." *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984). The first factor, however, which asks whether the agency's adjudication conforms to a rule of reason, carries the most weight. *In re Pub. Emps. for Env't Resp.*, 957 F.3d 267, 273–74 (D.C. Cir. 2020) ("Time is the first and most important factor.") (alteration omitted).

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II. ALTERNATIVELY, IF THE COURT FINDS THAT RULE 54(b) DOES NOT APPLY, DEFENDANTS ARE STILL ENTITLED TO RELIEF UNDER RULE 60(b)(5) AND (b)(6)

Even if the Court finds that its previous orders are not interlocutory (and therefore Rule 54(b) does not apply), Defendants are still entitled to relief from those orders under Rule 60(b)(5) and (b)(6). As Defendants have shown, they have made significant improvements to the processing of SIV applicants and have dedicated extensive resources to that process—but a series of quickly changing global humanitarian crises, unforeseeable when the Plan was adopted, warrant relief from its strictures. Thus, under the circumstances, Defendants' timelines are reasonable and the Plan is a poor fit for the present reality. These significant changes support Rule 60(b) relief from the Court's previous orders.

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III. IF THE COURT OPTS TO MODIFY THE PLAN, IT SHOULD ALLOW DEFENDANTS TO PROPOSE A NEW PLAN

Should the Court decide not to terminate the September 2019 summary judgment decision and the June 2020 Plan, Defendants request that the Court modify the injunction and permit Defendants to propose, within 30 days of resolution of this motion, a new plan for promptly processing and adjudicating the applications of current class members. As discussed above, district courts must employ "a flexible modification standard" in institutional reform litigation because such decrees "often remain in place for extended periods of time" such that "the likelihood of significant changes occurring during the life of the decree increased." *Rufo*, 502 U.S. at 380–81. Indeed, the significant changes to the implementation of the SIV program "warrant reexamination" of a two-year-old Plan. *See Horne*, 557 U.S. at 447–48.

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On June 9, 2022, the State Department issued a press statement seeking to describe the Department's recent actions to improve processing times and to contextualize the government's May 24, 2022, filing. The statement is available at https://www.state.gov/update-on-special-immigrant-visa-processing/ and included below.

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The Department of State remains committed to processing Special Immigrant Visa (SIV) applications from Afghan partners as expeditiously as possible. We have increased staffing, streamlined individual processing steps, made technological improvements, and surged additional staff to support third-country embassies and consulates processing these visa applications following the suspension of operations at Embassy Kabul. As a result, we are processing more initial applications than ever, and we are prioritizing SIV applicants for visa interview at any third-country immigrant visa processing post where applicants can travel and appear.

Through a recent court filing, the Executive Branch is seeking the flexibility to allocate our resources not on burdensome litigation reporting requirements but, instead, on processing of SIV cases and transparent reporting to Congress on our performance. We continue to believe that is in the best interest of our Afghan partners seeking SIV status. We look forward to continuing to share information with stakeholders and the public on our ongoing work to fulfill our commitment to our Afghan partners.

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On July 18, 2022, Secretary Blinken and Secretary of Homeland Security Alejandro N. Mayorkas announced a streamlined process for new Afghan SIV program applicants as part of ongoing efforts to support Afghan SIV applicants. The statement was released as a media note available at https://www.state.gov/ongoing-efforts-to-support-afghan-special-immigrant-visa-applicants/ and excerpted below. See *Digest 2021* at 21 for additional discussion on the SIV Program. 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.

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The United States continues to demonstrate its commitment to the thousands of brave Afghans who stood side-by-side with us over the course of the past two decades. We have already undertaken substantial steps to improve the Afghan Special Immigrant Visa (SIV) Program and today's announcement reflects our commitment to do so.

Today the U.S. Department of State and U.S. Department of Homeland Security are announcing a change to the SIV Program that will simplify and streamline the application process for Afghan applicants. Starting this week, new Afghan SIV Program applicants will only need to file one form, a revised form DS-157, as their SIV petition. New applicants will no longer need to file the Form I-360, Petition for Special Immigrant Status, with DHS's U.S. Citizenship and Immigration Services (USCIS). This new streamlined process, which is part of our ongoing efforts to make the program more efficient, will help to eliminate barriers for applicants and reduce application times. This change does not reduce or remove any of the robust security vetting processes required before the benefit is granted.

This is one of many steps we have taken to improve the SIV process while safeguarding national security. Since the beginning of the Administration, we have surged resources to this vital program and have reviewed every stage of the statutorily required application process to streamline wherever possible.

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On November 30, 2022, D.D.C. issued an order finding continued unreasonable delay in Afghan and Iraqi SIV processing and gave the government 30 days to submit a report on the progress of applications through the SIV process and an additional 30 days to submit a new plan for SIV processing.

d. Visa Ineligibility on Public Charge Grounds

On December 23, 2022, the Department of Homeland Security's ("DHS") Public Charge Ground of Inadmissibility final rule went into effect. 87 Fed. Reg. 55,472 (Sep. 9, 2022). See *Digest 2021* at 22 for background discussion.

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 80-83; *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, *Digest 2020* at 62-70, and *Digest 2021* at 22-25. In 2022, the United States designated Sudan, Ukraine, Afghanistan, Cameroon, and Ethiopia for TPS and extended and/or redesignated for TPS Burma, South Sudan, Syria, and Venezuela.

a. South Sudan

On March 3, 2022, DHS provided notice of the extension of the designation of South Sudan for TPS for 18 months, from May 3, 2022, through November 3, 2023, and the redesignation of South Sudan for 18 months, effective May 3, 2023, through November 3, 2023. 87 Fed. Reg. 12,190 (Mar. 3, 2022). DHS found the extension warranted "because the ongoing armed conflict and extraordinary and temporary conditions supporting South Sudan's TPS designation persist." *Id*. at 12,192.

b. Sudan

On April 19, 2022, DHS announced that the Secretary of Homeland Security is designating Sudan for TPS for 18 months, effective April 19, 2022, through October 19, 2023. 87 Fed. Reg. 23,202 (April 19, 2022). The notice of the designation includes the following overview of the basis for the designation:

> Sudan is enduring a humanitarian crisis in which millions of individuals are exposed to violence, illness, and internal displacement. Political instability, civil unrest, and scarcity of resources are key contributors to the situation. In October 2021, the military removed the civilian-led transitional government, and declared a national state of emergency. Civil unrest and violent clashes rooted in tribal and inter-communal tensions occur across the country. An economic downturn and severe flooding have resulted in shortages of food and clean water and outbreaks of disease.

c. Ukraine

On April 19, 2022, DHS announced that the Secretary of Homeland Security is designating Ukraine for TPS for 18 months, effective April 19, 2022, through October 19, 2023. 87 Fed. Reg. 23,211 (April 19, 2022). The notice of the designation includes the following overview of the basis for the designation (footnotes omitted):

> On February 24, 2022, Russia massively expanded its unprovoked military invasion of Ukraine, marking the largest conventional military action in Europe since World War II. There is widespread fear and flight of Ukrainian nationals as Russia's forces have continued to engage in significant, sustained bombardment of major cities across the country, including attacks on Ukraine's capital, Kyiv. This ongoing armed conflict poses a serious threat to the safety of nationals returning to Ukraine. Extraordinary and temporary conditions, including destroyed infrastructure, scarce resources, and lack of access to healthcare, prevent Ukrainian nationals from returning to their homeland in safety.

d. Afghanistan

On May 20, 2022, DHS announced that the Secretary of Homeland Security is designating Afghanistan for TPS for 18 months, effective May 20, 2022, through November 20, 2023. 87 Fed. Reg. 30,976 (May 20, 2022). The notice of the designation includes the following overview of the basis for the designation (footnotes omitted):

> In August 2021, the Taliban took over Kabul after waging a 20-year insurgency against the government of Afghanistan and U.S. and NATO forces. Armed conflict and insurgency continue throughout the country of Afghanistan. The Taliban is seen as both ill-equipped and unwilling to meet the country's numerous challenges including the current security situation, economic collapse, a crumbling healthcare system, severe food insecurity, and respect for human rights. Afghanistan is undergoing a humanitarian disaster. The United Nations has called the current situation ''unparalleled, with more than 24.4 million people requiring humanitarian assistance to survive.'' ''Half the population [is] facing acute hunger, including 9 million people in emergency food insecurity—the highest number globally [with] [m]alnutrition on the rise, and livelihoods [that] have been destroyed.''

e. Cameroon

On June 7, 2022, DHS announced that the Secretary of Homeland Security is designating Cameroon for TPS for 18 months, effective June 7, 2022, through December 7, 2023. 87 Fed. Reg. 34,706 (June 7, 2022). The notice indicates that Cameroon is being designated for TPS based on ongoing armed conflict and extraordinary and temporary conditions in the country.

f. Syria

On August 1, 2022, DHS provided notice of an 18-month extension of the designation of Syria, as well as a redesignation, effective October 1, 2022, through March 31, 2024. 87 Fed. Reg. 46,982 (Aug. 1, 2022). The extension and redesignation are based on the determination that "the ongoing armed conflict and extraordinary and temporary conditions supporting Syria's TPS designation remain." *Id*. at 46,984.

g. Venezuela

On September 8, 2022, DHS provided notice of an 18-month extension of the designation of Venezuela, effective September 10, 2022, through March 10, 2024. 87 Fed. Reg. 55,024 (Sep. 8, 2022). The extension is based on the determination that "the extraordinary and temporary conditions supporting TPS designation remain based on DHS's review of country conditions in Venezuela, including input received from the Department of State (DOS) and other U.S. Government agencies." *Id*. at 55,026.

h. Ethiopia

On December 12, 2022, DHS announced that the Secretary of Homeland Security is designating Ethiopia for TPS for 18 months, effective December 12, 2022, through June 12, 2024. 87 Fed. Reg. 76,074 (Dec. 12, 2022). The notice of the designation includes the following overview of the basis for the designation (footnotes omitted):

> Ethiopia faces armed conflict in multiple regions of the country resulting in large-scale displacement. In addition, Ethiopia has been experiencing severe climatic shocks exacerbating humanitarian concerns over access to food, water, and healthcare.

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

As discussed in *Digest 2018* at 40-44, *Digest 2019* at 31, *Digest 2020* at 63-70, and *Digest 2021* at 25, several U.S. courts enjoined the termination of TPS for Sudan, Nicaragua, Nepal, Honduras, Haiti, and El Salvador. On November 16, 2022, 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 *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) ("*Bhattarai*"). 87 Fed. Reg. 68,717 (Nov. 16, 2022). As explained in the "summary" section of the Federal Register Notice:

> Beneficiaries under the existing Temporary Protected Status (TPS) designations for El Salvador, Nicaragua, Honduras, and Nepal, the 2011 designation of Haiti, and the 2013 designation of Sudan 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. They may also apply under the more recent designations of Haiti and Sudan in 2021 and 2022, respectively, and if granted, will retain TPS in accordance with their grants regardless of any potential end to the *Ramos* injunction. Other individuals who have been newly granted TPS under the 2021 designation of Haiti and the 2022 designation of Sudan, but who did not have TPS at the time of those designations, are not covered by this litigation compliance notice. Their TPS grants remain valid in accordance with their individual notices of approval from USCIS. This notice further provides information on the automatic extension of the validity of TPS-related Employment Authorization Documents (EADs); Notices of Action (Forms I–797); and Arrival/Departure Records (Forms I–94), (collectively ''TPS-related documentation'') for those beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.

2. Deferred Enforced Departure

In a June 27, 2022, memorandum, President Biden extended and expanded eligibility for deferred enforced departure ("DED") for Liberians present in the United States. 87 Fed. Reg. 38,871 (Jun. 29, 2022). See *Digest 2021* at 25-27.

3. Refugee Admissions and Resettlement

On June 10, 2022, the State Department issued a fact sheet on the U.S. Refugee Admission Program (USRAP). The fact sheet follows and is available at https://www.state.gov/u-s-refugee-admissions-program/.

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Refugee Resettlement from the Americas

- More than 6.1 million Venezuelans have been displaced in the Americas, and hundreds of thousands more people from other countries across Latin America and the Caribbean are also displaced.
- The United States is committed to resettle 20,000 refugees from the Americas over the next two years. This commitment represents a three-fold increase over projected arrivals this fiscal year and reflects the Biden-Harris Administration's strong commitment to welcoming refugees.
- The United States admitted more than 5,300 refugees from Latin America and the Caribbean region beginning in FY 2018 through early June 2022 and expects to resettle an additional 1,800 refugees by the end of FY2022.
- In FY 2022, the Department contributed additional funding to UNHCR for staffing infrastructure in the Americas to increase referrals. It has expanded caseworker staffing at the U.S. Resettlement Support Center for Latin America by more than 300 percent in the last 12 months and will continue to prioritize cases in the region each quarter for U.S. Citizenship and Immigration Services refugee interviews.

Increased Resettlement of Haitian Refugees

- Reflecting the President's commitment to support the people of Haiti, the United States also commits to receiving an increased number of referrals of displaced Haitians into the U.S. Refugee Admissions Program (USRAP).
- The USRAP accepts referrals for individuals across refugee populations determined to be particularly vulnerable and in need of the protection provided by third-country resettlement. The United States will continue to work with UNHCR to increase referrals throughout the Americas and the Caribbean to the USRAP. The United States encourages other governments to join us in opening new legal pathways for protection and opportunities for Haitians and other displaced populations in the Americas.

Ongoing Resettlement Efforts in the Americas

UNHCR Referrals

- UNHCR refers individuals with compelling protection needs who are identified by designated non-governmental organizations in El Salvador, Honduras, and Guatemala for

potential resettlement in the United States through the USRAP. The most at-risk of these applicants may be transferred to Costa Rica via a Protection Transfer Arrangement between UNHCR, IOM, and the Government of Costa Rica. Individuals and families referred to Costa Rica through this mechanism are housed at a facility connected to the United Nation's University of Peace (located outside San Jose). There, they await final refugee processing by the Department of Homeland Security's U.S. Citizenship and Immigration Services. Applicants who are not transferred to Costa Rica can undergo USRAP processing in Northern Central American countries.

- Since 2016, nearly 2,500 refugees from Northern Central America have been resettled in the United States through these lifesaving mechanisms for at-risk Salvadorans, Guatemalans, and Hondurans in need of protection. In South America, during the same period, UNHCR has historically identified cases for referrals among displaced Colombians in Ecuador, resulting in more than 1,600 arrivals to date.
- In the past year, UNHCR's focus throughout the region has grown to include expanded referrals of Venezuelans, Nicaraguans, and Haitians across another seven countries throughout Latin American and the Caribbean. As USRAP partners continue to increase staff capacity, the number of referrals and arrivals throughout the region will increase significantly.

Central American Minors Program

- In March 2021, the Departments of State and Homeland Security announced the reopening of the Central American Minors (CAM) program, which from 2014 – 2018 allowed certain parents with pre-defined categories of lawful presence in the United States to petition on behalf of their children for access to USRAP processing for potential refugee resettlement in the United States while still in their home country of El Salvador, Guatemala, or Honduras. Individuals denied refugee status could, on a case-by-case basis, be considered for humanitarian parole.
- The CAM restart has included two phases. Phase One reopened many of the more than 3,000 cases that were closed prior to the refugee interview stage when the program was terminated in 2018. Phase Two expanded the categories of eligibility to file new applications beginning in September 2021.
- Since the 2021 reopening, the United States has admitted more than 130 CAM applicants as refugees. More than 60 CAM applicants have been granted humanitarian parole to join family members in the United States. This is in addition to the nearly 5,000 arrivals of CAM refugees and parolees welcomed during the initial iteration of the program.

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On September 8, 2022, the State Department announced the transmission of the President's report to Congress proposing to set the refugee admissions target in Fiscal Year 2022 at 125,000. The Report to Congress is available at https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/ and includes the following:

> The proposed FY 2023 allocations are based on refugee resettlement needs and humanitarian policy priorities. Areas of particular focus in FY 2023 include higher expected arrivals of Afghan refugees with the July 2021 P-2 designation (defined

> below) and increased safe and legal pathways, including resettlement, for vulnerable individuals in Honduras, Guatemala, and El Salvador. More detail about each region is provided below in the Regional and Refugee Admissions section. Furthermore, it is expected that the President Determination will, as in the past, authorize the Secretary of State, upon notification to the Judiciary Committees of the Congress, to transfer unused admissions allocated to a particular region to one or more other regions if there is such a need for greater admissions. The only change in regional allocation in FY 2023 is the increase from 10,000 to 15,000 in Europe and Central Asia as a result of the war in Ukraine. This change shifted our unallocated reserve from 10,000 to 5,000 for FY 2023.

On September 27, 2022, President Biden issued the annual determination on refugee admissions, setting the refugee admissions target at 125,000 for Fiscal Year 2023. 87 Fed. Reg. 60,547 (Oct. 6, 2023). The September 27, 2022 State Department press statement on the subject, available at https://www.state.gov/the-presidential-determination-on-refugee-admissions-for-fiscal-year-2023/, includes the following:

> This ambitious target demonstrates that the United States is committed to rebuilding and strengthening the U.S. Refugee Admissions Program (USRAP), including by building capacity, modernizing and streamlining overall operations, and resolving long-delayed applications. A new private sponsorship pilot program will also expand opportunities for communities across the country to participate in welcoming the world's most vulnerable to the United States, recognizing and building on the enormous outpouring of interest we have seen from the American public in supporting our newest neighbors.

4. Migration

a. Afghanistan

On February 1, 2022, the President issued Presidential Determination No. 2022-09, "Unexpected Urgent Refugee and Migration Needs." 87 Fed. Reg. 6759 (Feb. 7, 2022). 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 $1.2 billion 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 Government agencies.

b. Iraq

On March 1, 2022, the State Department announced the restart of the U.S. Refugee Admissions Program (USRAP) Direct Access Program for U.S.-Affiliated Iraqis (Iraqi P-2 Program), which was suspended in January 2021. The press statement is available at https://www.state.gov/restarting-the-direct-access-program-for-u-s-affiliated-iraqis-iraqi-p-2-program/, and includes the following:

> After an extensive review, we have resumed case processing for a select number of Iraqi P-2 cases that had been previously suspended during our review of the program. In coordination with the Department of Homeland Security, we will continue to review and process all other existing Iraqi P-2 cases that can move forward as well as accept new applications to the program.
>
> During our review of the Iraqi P-2 Program, we identified and resolved the issues that led to our suspension of the program in January of 2021. We are committed to ensuring that only bona fide and qualified Iraqis who supported U.S. efforts in Iraq are considered for this important humanitarian program.

c. Costa Rica

On March 16, 2022, the United States and Costa Rica announced a joint Migration arrangement, which outlined mutual commitments to work collaboratively on migration and protection issues. Secretary Blinken's press statement is available at https://www.state.gov/the-united-states-and-costa-rica-announce-collaboration-on-migration-and-protection/ and includes the following:

> … This marks an important step in implementing President Biden's comprehensive plan to collaboratively manage migration in our hemisphere by providing a common framework on stabilization, legal pathways, and protection. These efforts pave the way for a regional declaration on migration and protection and for a more secure, prosperous, and democratic hemisphere.
>
> We welcome the Government of Costa Rica's leadership in providing protection to refugees, asylum seekers, and vulnerable migrants and enhancing secure, humane border enforcement, including through this collaboration. Countries throughout the region have a shared responsibility to improve migration management and provide protection and legal pathways for the region's most vulnerable people.

d. Declaration on Migration and Protection

On October 6, 2022, the Lima Ministerial Meeting on the Los Angeles Declaration on Migration and Protection convened the 21 endorsing countries to identify priority areas for addressing irregular migration in the Western Hemisphere. The State Department issued an October 6 fact sheet Los Angeles Declaration on Migration and Protection Lima Ministerial Meeting, which is excerpted below and available at https://www.state.gov/los-angeles-declaration-on-migration-and-protection-lima-ministerial-meeting/.

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Foreign ministers and representatives from among the 21 endorsing countries presented progress on existing commitments made under the Los Angeles Declaration and announced new initiatives and programs.

Pillar 1: Stability and Assistance for Communities

- **Belize launched an amnesty program to register asylum seekers, refugees, and vulnerable migrants from August 2 through November 30.** More than 5,000 migrants have applied for amnesty, and this number is expected to increase. The government has opened registration offices all over the country and has launched a very successful nationwide program. *(advancing existing commitments)*
- **Canada announced it would provide $55.9 million in development projects to spur job creation in Latin America.** *(new)*
- **Colombia will maintain its regional leadership in migrant regularization by completing the issuing of protection permits to all Venezuelan migrants in its territory** and exploring new regularization pathways for other migration flows. *(advancing existing commitments)*
- **Costa Rica committed to work with the United States and international organization partners to develop and implement a new Temporary Complementary Protection Program (TCPP).** *(advancing existing commitments)*
- **Ecuador published August 17 guidelines and start dates for the registration of migrants in the country.** By October 1 more than 105,000 of the estimated 324,500 Venezuelan migrants who entered regularly had registered for phase 1 of the registration process. Phase 2 will benefit approximately 200,000 non-Venezuelan migrants. Phase 3 will allow the regularization of approximately 200,000 Venezuelans entered irregularly. Phases 2 and 3 will start in early 2023. *(advancing existing commitments)*
- **Guatemala will work with USAID and the International Organization for Migration (IOM) to pursue funding and support for expanded resources to reintegrate returned unaccompanied children.** *(new)*
- **Honduras plans to strengthen and expand the availability of reintegration services in areas of high emigration and forced displacement.** *(new)*
- **Honduras will prioritize finalizing its Internally Displaced Persons legislation, pending in the National Congress.** *(new)*

- **The United States identified $25 million for the Global Concessional Financing Facility (GCFF)** as part of our Los Angeles Declaration efforts to support refugee and host communities in eligible middle-income countries. *(advancing existing commitments)*
- **The United States obligated more than $314 million in humanitarian and development assistance for the region**, with nearly $103 million in humanitarian assistance funding from the Bureau for Population, Refugees, and Migration to support Venezuelan refugees and migrants; $171 million from USAID's Bureau for Humanitarian Assistance providing humanitarian aid funding and emergency food assistance for Venezuelan migrants and refugees in Brazil, Colombia, Ecuador, and Peru, as well as multisectoral humanitarian support for vulnerable Venezuelans still in their home country; and $40 million in development funding from USAID's Bureau for Latin America and the Caribbean to support the integration of migrants in Colombia, Ecuador, Brazil, Costa Rica, Panama, and Belize. *(advancing existing commitments)*
- **The United States has announced nearly $817 million in new assistance since September supporting Los Angeles Declaration efforts.** This includes more than $240 million in new regional humanitarian and security assistance to address the immediate drivers and root causes of migration announced in Lima. This also includes $376 million in additional humanitarian assistance for people affected by the Venezuela regional crisis and more than $199 million in additional humanitarian assistance for Mexico and Central America. *(new)*

Pillar 2: Regular Pathways for Migration and International Protection

- **On August 16, Canada announced two capacity-building projects**. The first focuses on improving recruitment practices and the integration of migrants and refugees into labor markets in Costa Rica, Guatemala, and Honduras; and the second on the socio-economic integration of Venezuelan refugees and migrants in Panama. *(new)*
- **Canada announced a new initiative to support IOM efforts in Panama and Costa Rica** to establish cross-border referral protocols and build capacity of host countries to identify and assist vulnerable migrants. *(new)*
- **Canada is on track to meet the commitment to welcome 50,000 agricultural workers** from Mexico, Guatemala, and the Caribbean this year. *(advancing existing commitments)*
- **Colombia will continue to lead regional efforts to bring awareness to the plight of migrants and refugees in the Americas in order to guarantee adequate financing and support from the international community for origin, transit and destination countries.** *(advancing existing commitments)*
- **Costa Rica will commit to using Temporary Assistance Centers for Migrants (CATEMs)** to increase protection for refugees and asylum seekers at the northern and southern borders. *(new)*
- **Mexico's AMEXCID Sembrando Vida program provided agricultural assistance to 2,000 Belizean farmers**, in addition to those farmers it works with in El Salvador, Honduras, and Guatemala. The program seeks to reduce irregular migration. *(new)*
- **Mexico, in collaboration with UNHCR, is expanding labor integration programs for recognized refugee and asylum seekers.** Since June, Mexico and UNHCR had internally relocated 3,289 refugees to secure areas of Mexico's industrial corridor where they are paired with jobs and apartments and receive help to enroll their children in

schools to ensure successful local integration and contributions to the Mexican economy. *(advancing existing commitments)*

- **The United States announced it doubled legal labor pathways for Central America in FY2022 while enhancing worker protections.** The United States issued more than 19,000 seasonal labor H-2 visas to northern Central American nationals in FY2022 compared to 9,796 in FY2021 – a 94 percent increase. Legal labor pathways provide an alternative to irregular migration while meeting domestic labor needs for employers who can demonstrate no U.S. workers are able, willing, qualified, and available to do the temporary work, and the United States is working to further expand those pathways in FY 2023 in addition to collaborating with interagency partners to help reduce H-2 workers' significant vulnerabilities. The United States government is working concurrently to improve safeguards for ethical recruitment and to strengthen worker protections and will have additional announcements on these steps soon. *(advancing existing commitments)*
- **The United States dramatically expanded refugee resettlement in the Western Hemisphere.** The United States resettled 2,485 individuals in FY 2022, a 521 percent increase over FY2021 and an eight-year high for the region. The United States will further expand protection pathways in FY2023. *(advancing existing commitments)*
- **The United States began refugee resettlement for Haitian refugees.** In September, the United States began refugee resettlement interviews for Haitian refugees. *(advancing existing commitments)*
- **The United States announced the resumption of processing immigration visas in Cuba and accelerated processing of Cuban family reunification.** The United States announced in September an expansion of legal pathways available to Cubans wishing to come to the United States and an increase in personnel at the U.S. Embassy in Havana. Beginning in early 2023, the U.S. Embassy in Havana will resume full immigrant visa processing for the first time since 2017. Additionally, following the successful resumption of the Cuban Family Reunification Parole (CFRP) program in August, the United States announced it will increase the number of personnel in Havana to efficiently and effectively process cases and conduct interviews. *(new)*
- **The United States will conduct six refugee processing trips** in Latin America to interview more than 2,500 refugee applicants in the first quarter of FY2023. *(new)*

Pillar 3: Humane Migration Management

- **Barbados and IOM hosted a conference** September 22-23 to advance a regional approach to managing migration in the Caribbean. Discussion focused on harmonizing policies and the pressures of climate change. *(new)*
- **Canada announced a new initiative to support IOM's efforts to strengthen government and civil society capacity to implement effective migration policies and promote well-managed migration in Latin America and the Caribbean.** Areas of focus include socio-economic integration of migrants, combatting xenophobia, strengthening border management processes, and raising awareness of the risks associated with irregular migration. *(new)*
- **Canada announced a new initiative to strengthen UNHCR's support of asylum capacity building in Panama** through training and mentoring to improve asylum processing and to reduce Panama's existing backlog of asylum cases. *(new)*

- **Canada is on track to meet its commitment to resettle 4,000 individuals from the region by 2028** and continues to work closely with the UNHCR on these efforts. *(advancing existing commitments)*
- **Colombia will recognize and strictly apply the Declaration of Cartagena in adjudicating refugee status requests.** *(new)*
- **Colombia will work with all relevant partners to strengthen regional policies and initiatives to combat trafficking in persons and dismantle transnational criminal organizations that profit from it.** *(new)*
- **Guatemala will enhance child protection measures** to identify human smuggling cases and assess protections needs and vulnerabilities among unaccompanied children. *(new)*
- **Honduras committed to implementing additional internal checkpoints** for transiting migrants and detection of unaccompanied children. *(new)*
- **Mexico increased its capacity to humanely house migrant and refugee families with shelter, food, labor opportunities, and health and education services** with the opening of the 676-person capacity Integrated Center for Migrants in Matamoros. (new)
- **The United States has made more than 5,000 arrests of people of suspected crimes related to human smuggling** and association with transnational criminal organizations since April 2022. The interruptions to criminal activities resulted the seizure of hundreds of thousands of dollars, electronic devices, weapons, ammunition, and vehicles. This campaign will continue. *(advancing existing commitments)*
- **The United States supports Transnational Criminal Investigative Units** to improve host-country capacity to investigate transnational crime, including human trafficking and migrant smuggling in Mexico, Panama, Guatemala, Honduras, and El Salvador. *(advancing existing commitments)*
- **The United States implemented the Asylum Processing Interim Final Rule (IFR)** in May to allow for expedited processing of asylum claims of noncitizens who enter the United States via the U.S. border. *(advancing existing commitments)*

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e. Global Compact on Migration

On November 21, 2022, U.S. Adviser to the Second Committee Jason Lawrence provided the explanation of position on a UN General Assembly Second Committee resolution on "International Migration and Development," which is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-international-migration-and-development/.

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The United States supports fair, orderly, and humane immigration systems with appropriate legal and procedural protections that are respected for all migrants, and with particular safeguards for the most vulnerable, including migrant children.

In joining consensus on this resolution, we would like to clarify our views on several elements of this text. The United States noted its understanding of the International Migration Review Forum Progress Declaration in May 2022 and, as several paragraphs in this resolution are drawn from the Progress Declaration, we reiterate our understanding of such language here. In December 2021 the United States issued a Revised National Statement on the Global Compact on Migration (GCM), reflecting certain clarifications and limitations. That statement remains our position on the references to the GCM in this resolution. At the same time, we reiterate our endorsement of the vision contained in the GCM and our commitment to work with other countries to enhance cooperation to manage migration in ways that are grounded in human rights, transparency, non-discrimination, responsibility-sharing, and State sovereignty.

We underscore that the GCM is an aspirational document that does not create or change rights or obligations under international or domestic law. The same is true for this resolution, which outlines non-legally binding political commitments that the United States aspires to achieve, to the extent consistent with our domestic law and particular international obligations. For example, the United States stands committed to working to eliminate acts of discrimination and hate crimes against migrants and to countering other expressions of racism, xenophobia, and related intolerance, in a manner consistent with the U.S. Constitution and our international obligations regarding freedom of opinion and expression.

We interpret references to due process and other protections, including for migrants in U.S. government custody and in the context of returns and removals, to be consistent with our international legal obligations and U.S. law and practice. We understand the Declaration's abbreviated references to certain human rights, such as the "right to family life" to be shorthand for the more accurate terms used in the applicable treaties. We maintain our longstanding positions on specific rights and on the territorial scope of our obligations under the treaties to which we are party, as further elaborated in our December 2021 National Statement.

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Cross References

HRC on international refugee law, **Ch. 6.A.6.b**
Visa restrictions, **Ch. 16.A**

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 the *Case Concerning Avena and other Mexican Nationals (Mexico v. United States),* 2004 ICJ 128 (Mar. 31)., 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 continue providing this vital training to U.S. law enforcement officers. 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. Uniform Law Commission Model State Law Project

In 2010, the Uniform Law Commission (ULC) Joint Editorial Board for International Law (JEB) recommended to the ULC Committee on Scope and Program ("Scope Committee")—a group of commissioners that evaluates new project proposals and makes recommendations to the ULC Executive Committee—that it establish a study committee to examine the need for and feasibility of a uniform or model act on consular notification and access (CNA). If enacted by state legislatures, such an act would implement U.S. obligations under Article 36 of the Vienna Convention on Consular Relations (VCCR) and analogous provisions of bilateral consular conventions between the United States and 56 countries. ULC Commissioner Grant Callow was named Chair of this study committee, on which two U.S. Department of State ("State Department") attorneys sat as observers along with one Department of Justice (DOJ) attorney. The

State Department and DOJ thereafter worked with the study committee to provide information that ultimately fed into the study committee's June 9, 2011, report recommending to Scope that a drafting committee be established. At the Scope Committee's request, the study committee submitted a supplemental final report on July 6, 2013, in which the committee reiterated its recommendation that a drafting committee be established and provided further information in support of its recommendation. The 2011 and 2013 reports each had a single dissent. See *Digest 2010* at 25-26 and *Digest 2012* at 15-16 for additional background information on the State Department's collaboration with the ULC during this phase of the ULC CNA project.

Thereafter, the Scope Committee took no action on the study committee's recommendation due to apparent workload constraints at the time, and the recommendation remained unacted upon for nine years. In anticipation of a September 27, 2022, meeting of the JEB, the State Department's Acting Legal Adviser, Richard C. Visek, sent a letter to Timothy Schnabel, the ULC's Executive Director, dated September 26, 2022, expressing support for a renewed dialogue about developing a model state law on consular notification requirements. Set forth below is the body of this letter.

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In anticipation of the upcoming meeting of the Joint Editorial Board for International Law of the Uniform Law Commission (ULC) and the American [Bar Association Section of] International Law, I write to recommend that the ULC revisit the prospect of drafting a model state law to promote compliance with the consular notification and access provisions of the Vienna Convention on Consular Relations (VCCR). As you know, after a thorough review from 2010–13, a Study Committee recommended that the ULC proceed with drafting a model law. It is our understanding that the decision not to undertake a drafting project at that time was motivated more by competing priorities than by any substantive disagreement with the Study Committee's conclusions and recommendations.

The Department of State, in partnership with the Department of Justice, has long worked to raise domestic awareness and understanding of our obligations to provide consular notification and access in cases in which foreign nationals are arrested or detained in the United States. The consular notification and access rules codified in Article 36 of the VCCR, as well as numerous bilateral consular conventions, are the law of the land by virtue of the Constitution's Supremacy Clause, and are therefore binding on federal, state, and local government authorities. These rules contain reciprocal rights and duties that protect Americans when they travel abroad, and in return provide certain protections for foreign nationals in our own country. Yet unlike most other state parties to the treaty, the United States has a distinct system in which it is usually not the federal government, but individual law enforcement officers in state and local jurisdictions, who must implement these rules on a day-to-day basis. While law enforcement officers generally do a good job complying with these rules, instances of noncompliance can cause significant tension with allies, exacerbate tensions with countries with which we have strained relations, and raise concerns about reciprocity for Americans abroad. Such noncompliance can be largely ascribed to a lack of awareness of the obligations. Model state legislation would serve to inform state and

local law enforcement both of what their consular notification and access obligations are and how best to comply with them.

The Departments of State and Justice appreciate the important work done by the Study Committee during the 2010–13 effort and we would welcome a renewed dialogue with the ULC about the possibility of reviving that effort, with a view to the possible development of a model state law. We stand ready to assist in any way possible.

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The State Department attended the JEB's September 27, 2022, meeting. James Bischoff, Attorney-Adviser in the State Department's Office of the Legal Adviser, delivered remarks in support of reviving the project to appoint a drafting committee for a uniform or model act on CNA. The JEB went on to recommend by consensus that a drafting committee be established without the need to reconstitute a study committee beforehand.

On October 21, 2022, Mr. Bischoff delivered remarks on behalf of the State Department at a meeting of the Scope Committee to review the JEB's recommendation. Set forth below are those remarks.

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* * * *

Thank you for the opportunity to participate in today's meeting on this important subject and to share some of the State Department's views. I am joined by two colleagues from the Office of the Legal Adviser, Colleen Flood and Joe Khawam. I am also joined by Rebecca Pasini, who heads the office in the State Department's Bureau of Consular Affairs that handles outreach and training on consular notification, and Megan Brown, also of that office.

As explained in the September 26 letter from Acting Legal Adviser Richard Visek to the ABA-ULC Joint Editorial Board for International Law, … the State Department strongly supports any effort to revive the ULC's project aimed at drafting a model state law on providing consular notification and access when a foreign national is arrested or detained.

The findings and conclusions from the Study Committee's 2011 and 2013 reports remain accurate.

While consular notification and access obligations apply equally to federal officials and state and local officials, our experience continues to demonstrate that failures to provide consular notification and access occur far more often at the state and local levels than at the federal level. These failures almost always occur because law enforcement and prison officials are simply not aware that they have such obligations and do not know what steps to take to comply.

In the time since the Study Committee's 2013 report, the State Department has continued its efforts to increase awareness and understanding of our obligations under the Vienna Convention on Consular Relations and the several bilateral conventions that contain similar obligations. We have updated our key guidance booklet—the Consular Notification and Access Manual—most recently in 2018 and maintain a recently updated page on our travel.state.gov website with pocket cards, sample consular notification scripts in several languages, and other materials available for download and use by state and local law enforcement.

We also continue to train law enforcement officials across the country. Since the beginning of the pandemic, this training has been in virtual form, and has reached approximately 2,000 officers and cadets since April 2020. Notwithstanding these efforts, we are only able to reach a small fraction of the hundreds of thousands of law enforcement and prison officials across the country, any of whom may be in a position to arrest or detain a foreign national.

Lack of compliance with consular notification and access treaty obligations remains a serious concern, as evidenced by the large number of diplomatic complaints the State Department receives from other countries. Each year, we receive approximately 70 to 75 complaints alleging a failure of notification or access to an arrested or detained foreign national at the state or local level. Upon examination, we find about two-thirds of these to be substantiated and advise the relevant officials to provide notification and access forthwith, and on how to comply in the future. Once informed about the error, state and local officials are almost always interested in learning how to take corrective action. It bears emphasizing that these 70 to 75 complaints are certainly a subset of the actual number, because this figure represents only those cases in which the foreign government found out about the alleged violation and determined that it warranted reporting to the State Department.

The United States prides itself on its record of compliance with its international legal obligations which, as we frequently assert in international fora, we take very seriously. Our flawed record of compliance with consular notification and access obligations poses a serious challenge in this regard. Indeed, with at least 70—and probably many more—alleged violations by state and local officials each year, the relevant articles of the Vienna Convention and the bilateral consular conventions are extreme outliers compared with the United States' general compliance with its treaty obligations. This situation could be largely remedied by greater state and local compliance, which a uniform or model state law would promote and facilitate.

As Mr. Visek explained in his letter, instances of noncompliance can cause significant tensions with other countries—partners and adversaries alike—which can complicate our work to advance other important U.S. foreign policy goals with those countries. Noncompliance can also give rise to claims by the foreign national that his or her conviction or sentence should be overturned. Courts have had a difficult time grappling with these issues that could have been avoided had consular notification and access been provided when the person was first arrested.

Moreover, as Mr. Visek also explained, compliance with the rules by law enforcement officers in the United States is important for our ability to make the case to foreign governments that they must provide these protections to Americans detained abroad. Each year, hundreds of U.S. citizens are arrested abroad, and U.S. embassies and consulates provide them critical services, such as checking on their welfare and pressing the foreign government to ensure humane conditions, access to a lawyer, and communication with their family. Our consular officers can only provide these services if they know about the arrest and are able to communicate with the detainee, so compliance with consular notification and access requirements is critical.

Three states—California, Illinois, and Oregon—already have consular notification statutes setting forth procedures to be followed, but they differ from one another in certain respects. Oregon's statute, in particular, lacks some important procedures required by the Vienna Convention and bilateral conventions. Statutes in other states cover aspects of consular notification and access or make reference to it, but do not set forth any procedures at all. While exact uniformity among state laws would not be necessary, any state law needs to accurately and

fully reflect our international treaty requirements, making the ULC's involvement and unique expertise especially important.

If the Scope and Program Committee decides to establish a drafting committee, the drafting committee would not be starting from scratch. In addition to the statutes in California, Illinois, and Oregon, a fourth state—Massachusetts—requires law enforcement agencies to develop protocols with such procedures and numerous Massachusetts agencies and agencies in other states have SOPs in this area. The Departments of Justice and Homeland Security also have consular notification and access regulations, and these and other federal agencies have adopted SOPs. All these sources could be drawn upon in developing elements for a uniform or model law.

In sum, we welcome this renewed dialogue about a uniform or model consular notification and access law, and strongly support the establishment of a drafting committee as recommended by the Study Committee. We believe that a uniform or model law will go a long way toward facilitating states' adoption of clear, accurate, and binding rules that state and local law enforcement and prison officials will be aware of and will follow. As more and more states adopt such a law, we would anticipate a virtuous cycle where other states follow suit, significantly improving our overall compliance.

In these efforts, we stand ready to assist the ULC in any way possible. I'm happy to address questions the members may have. Thank you.

* * * *

During the question-and-answer session that followed, Mr. Bischoff explained the four elements the State Department views as essential for compliance with the United States' obligations under Article 36 of the VCCR and analogous provisions in bilateral consular conventions: (1) ascertain whether a person being arrested or detained is a foreign national; (2) if the person is a foreign national, inform him or her as soon as reasonably possible that he or she may have his or her consulate contacted; (3) if the person requests notification, notify the nearest consulate as soon as reasonably possible; and (4) if the consulate so requests, allow communication and access. He added that the law would need to contain an alternate procedure for nationals of countries with which the United States has a bilateral agreement providing for mandatory notification, i.e., notification regardless of the arrested or detained person's wishes.

Mr. Bischoff also explained the State Department's assessment that many U.S. states will likely be willing to consider adopting a law setting forth CNA procedures. Separate and apart from U.S. treaty obligations, states have an interest in preventing CNA violations because such violations can create difficulties for prosecutors and courts if criminal defendants later challenge their convictions or sentences on the basis of a CNA violation. Mr. Bischoff expressed the State Department's commitment to sending experts to a state that adopts a CNA law to help it develop training protocols and materials and to train state officials on how to train their law enforcement and custodial officers on CNA. He noted that the State Department can provide state law enforcement and custodial officers with ready-to-use training materials such as its CNA Manual and pocket cards summarizing consular notification procedures.

When asked about the federal government's efforts to promote federal legislation on CNA, Mr. Bischoff explained that successive administrations—Democratic and Republican—have proposed federal legislation each year for the past decade aimed at bringing the United States into compliance with a 2004 International Court of Justice (ICJ) judgment known as *Avena*, which found the United States violated the VCCR with respect to consular notification failures related to 51 Mexican nationals. 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 for background on *Avena* and efforts to comply with the VCCR regarding consular notification and access. He noted that a version of this draft legislation was included in a Fiscal Year 2023 State Department appropriations bill, S. 4662, 117th Cong. § 7075(a) (2022). If enacted, this legislation would give federal and state death row inmates the ability to bring a federal petition claiming a consular notification and access violation. If such an inmate can show "actual prejudice," the court must order a new trial or sentencing proceeding. The legislation would also provide persons arrested and charged with death penalty crimes the ability to raise a lack of consular notification with the trial court and would require notification to the consulate at that time. Mr. Bischoff added that while federal legislation is an optimal way of giving domestic legal effect to the ICJ's judgment in the *Avena* case, U.S. obligations under *Avena* are distinct from ongoing obligations under the VCCR and bilateral consular agreements to go through CNA procedures with respect to arrested or detained foreign nationals. It is compliance with this latter set of obligations where the State Department sees uniform or model state legislation as particularly important.[*]

At the close of the October 21, 2022, meeting, the Scope Committee took no decision on appointing a drafting committee for a uniform or model act on CNA. Instead, it appointed a working group of commissioners, chaired by former Attorney-General Alberto Gonzales, to work with the State Department to gather further information on the issues raised at the October 21 meeting. The dialogue between the working group and the State Department continued into 2023.

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3. Wrongful Detention and Hostage Taking

a. Russia

On April 27, 2022, Secretary Blinken announced the release of U.S. citizen Trevor Reed, who was wrongfully detained in Russia and noted the U.S. commitment to securing the freedom of all U.S. nationals wrongfully detained abroad. The press statement is available at https://www.state.gov/release-of-u-s-citizen-trevor-reed-from-russia/.

[*] Editor's note: S. 4662 § 7075(a) was not included in the final appropriations act for fiscal year 2023 that was passed by Congress on December 23, 2022. It is too early to tell whether such legislation might be reintroduced in the 118th Congress. See *Digest 2011* at 11-23 for a discussion of the State Department's involvement in the original effort to pass federal CNA compliance legislation.

On May 3, 2022, the State Department determined that U.S. citizen Brittney Griner was wrongfully detained by Russia. Following this determination, the United States released several statements in 2022 on the continued wrongful detention of Griner.

A June 14, 2022 State Department press briefing, available at https://www.state.gov/briefings/department-press-briefing-june-14-2022/, includes the following:

> Our position for some time on this has been very clear: Brittney Griner should not be detained. She should not be detained for a single day longer. We have characterized her, we have characterized Paul Whelan, who has also spent far too long in Russian detention, as wrongful detainees. The team here, individuals around the world, are working around the clock to secure and to effect their safe and prompt release and also the safe and prompt release of wrongful American detainees around the world.

On August 4, 2022, Secretary Blinken released a statement following the conviction and sentencing of Griner by a Russian court. The statement is available at https://www.state.gov/conviction-and-sentencing-of-u-s-citizen-brittney-griner-in-russia/ and includes the following:

> Today's conviction and sentencing by a Russian court of U.S. citizen Brittney Griner to nine years in prison further compounds the injustice of her wrongful detention. This step puts a spotlight on our significant concerns with Russia's legal system and the Russian government's use of wrongful detentions to advance its own agenda, using individuals as political pawns.
>
> Nothing about today's decision changes our determination that Brittney Griner is wrongfully detained, and we will continue working to bring Brittney and fellow wrongfully detained U.S. citizen Paul Whelan home. This is an absolute priority of mine and the Department's.
>
> We will also continue to press for fair and transparent treatment for all U.S. citizen detainees in Russia.
>
> Russia, and any country engaging in wrongful detention, represents a threat to the safety of everyone traveling, working, and living abroad. The United States opposes this practice everywhere.

On October 25, 2022, National Security Advisor Jake Sullivan provided a statement on the continued wrongful detention of Griner. "President Biden has been very clear that Brittney should be released immediately. In recent weeks, the Biden-Harris Administration has continued to engage with Russia through every available channel and make every effort to bring home Brittney as well as to support and advocate for other Americans detained in Russia, including fellow wrongful detainee Paul Whelan." The statement is available at https://www.whitehouse.gov/briefing-

room/statements-releases/2022/10/25/statement-from-national-security-advisor-jake-sullivan-on-the-continued-wrongful-detention-of-brittney-griner/.

On December 8, 2022, Secretary Blinken released a statement on Griner's release from Russia. The statement is available at https://www.state.gov/the-release-of-brittney-griner-from-russia/ and includes the following:

> This morning, I joined President Biden, Vice President Harris, National Security Advisor Sullivan, and Cherelle Griner in the Oval Office, as Cherelle spoke to her wife Brittney, who is now on her way back to the United States and to her wife's loving embrace. I am grateful to the State Department team and to our colleagues across the government who worked tirelessly to secure her release. I especially commend Special Presidential Envoy for Hostage Affairs Roger Carstens, who is accompanying Brittney back to the United States, as well as his entire team. We also extend deep appreciation to our many partners who helped achieve this outcome, including our Emirati friends, who assisted in the transfer today.
>
> While we celebrate Brittney's release, Paul Whelan and his family continue to suffer needlessly. Despite our ceaseless efforts, the Russian Government has not yet been willing to bring a long overdue end to his wrongful detention. I wholeheartedly wish we could have brought Paul home today on the same plane with Brittney. Nevertheless, we will not relent in our efforts to bring Paul and all other U.S. nationals held hostage or wrongfully detained abroad home to their loved ones where they belong.

b. New Executive Order 14078

President Biden issued a new executive order on wrongful detention on July 19, 2022, Executive Order (E.O.) 14078, entitled, "Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home." 87 Fed. Reg. 43,389 (Jul. 21, 2022). The executive order prioritizes enhanced ways to address the hostage-taking and wrongful detention of U.S. nationals abroad, including creating a new sanctions authority to target those responsible for or complicit in holding hostage or wrongfully detaining U.S. nationals overseas. See Chapter 16 for a discussion of the sanctions authority included in E.O. 14078. Excerpts follow from E.O. 14078.

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I, JOSEPH R. BIDEN JR., President of the United States of America, find that hostage-taking and the wrongful detention of United States nationals are heinous acts that undermine the rule of law. Terrorist organizations, criminal groups, and other malicious actors who take hostages for financial, political, or other gain — as well as foreign states that engage in the practice of wrongful detention, including for political leverage or to seek concessions from the United States — threaten the integrity of the international political system and the safety of United States nationals and other persons abroad. I therefore determine that hostage-taking and the wrongful

detention of United States nationals abroad constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. I hereby declare a national emergency to deal with this threat.

The United States Government must redouble its efforts at home and with partners abroad to deter these practices and to secure the release of those held as hostages or wrongfully detained. Processes established under Executive Order 13698 of June 24, 2015 (Hostage Recovery Activities) and Presidential Policy Directive 30 of June 24, 2015 (U.S. Nationals Taken Hostage Abroad and Personnel Recovery Efforts) (PPD-30) have facilitated close interagency coordination on efforts to secure the safe release of United States nationals taken hostage abroad, including engagement with the families of hostages and support of diplomatic engagement with partners abroad. This order reinforces the roles, responsibilities, and commitments contained in those directives and seeks to ensure that — as with hostage recovery activities — interagency coordination, family engagement, and diplomatic tools are enshrined in United States Government efforts to secure the safe release and return of United States nationals wrongfully detained by foreign state actors. This order also reinforces tools to deter and to impose tangible consequences on those responsible for, or complicit in, hostage-taking or the wrongful detention of a United States national abroad.

Accordingly, I hereby order:

Section 1. Executive Order 13698 and PPD-30 shall continue to apply to United States hostage recovery activities. Nothing in this order shall alter the responsibilities of the Hostage Recovery Fusion Cell (HRFC), the Hostage Response Group (HRG), or the Special Presidential Envoy for Hostage Affairs (SPEHA), established by Executive Order 13698, with respect to hostage recovery activities under Executive Order 13698 or PPD-30. Nor shall this order alter the scope of PPD-30, which applies to both suspected and confirmed hostage-takings in which a United States national is abducted or held outside of the United States, as well as to other hostage-takings occurring abroad in which the United States has a national interest, but does not apply if a foreign government confirms that it has detained a United States national.

Sec. 2. (a) The HRG shall, in coordination with the National Security Council's regional directorates as appropriate, convene on a regular basis and as needed at the request of the National Security Council to work to secure the safe release of United States nationals held hostage or wrongfully detained abroad.

(b) The HRG, in support of the Deputies Committee of the National Security Council and consistent with the process outlined in National Security Memorandum 2 of February 4, 2021 (Renewing the National Security Council System), or any successor memorandum, shall:

(i) identify and recommend options and strategies to the President through the Assistant to the President for National Security Affairs to secure the recovery of hostages or the return of wrongfully detained United States nationals;

(ii) coordinate the development and implementation of policies, strategies, and procedures for the recovery of hostages or the return of wrongfully detained United States nationals;

(iii) coordinate and deconflict policy guidance, strategies, and activities that potentially affect the recovery or welfare of United States nationals held hostage or the return or welfare of United States nationals wrongfully detained abroad, including reviewing proposed recovery or return options;

(iv) receive regular updates from the HRFC, the Office of the SPEHA, and other executive departments and agencies (agencies), as the HRG deems appropriate, on the status of

United States nationals being held hostage or wrongfully detained abroad and measures being taken to effect safe releases;

(v) receive regular updates from the Department of State on all new wrongful detention determinations; and

(vi) where higher-level guidance is required, make recommendations to the Deputies Committee of the National Security Council.

Sec. 3. (a) The SPEHA shall report to the Secretary of State on a regular basis and as needed to advance efforts to secure the safe release of United States nationals wrongfully detained abroad.

(b) The SPEHA shall, as appropriate and consistent with applicable law:

(i) coordinate diplomatic engagements and strategy regarding hostage and wrongful detention cases, in coordination with the HRFC and relevant agencies, as appropriate and consistent with policy guidance communicated through the HRG;

(ii) share information, including information acquired during consular interactions and engagements, regarding wrongful detention cases with relevant agencies to facilitate close interagency coordination;

(iii) draw on the experience and expertise of the HRFC to support efforts to return wrongfully detained United States nationals, including by providing support and assistance to the families of those wrongfully detained;

(iv) develop and regularly update, in coordination with relevant agencies, strategies for wrongful detention cases for review by the HRG;

(v) ensure, in coordination with the Office of the Director of National Intelligence, that relevant agencies have access to necessary information, including intelligence information, on wrongful detention cases to inform strategies and options; and

(vi) share, in coordination with the Office of the Director of National Intelligence, relevant information, including intelligence information, on developments in wrongful detention cases with the families of wrongfully detained United States nationals, in a timely manner, as appropriate and consistent with the protection of sources and methods.

(c) To ensure that the United States Government provides a coordinated, effective, and supportive response to wrongful detentions, the Secretary of State shall identify adequate resources to enable the SPEHA to:

(i) ensure that all interactions by executive branch officials with the family of a wrongfully detained United States national occur in a coordinated fashion and that the family receives consistent and accurate information from the United States Government, as appropriate and consistent with applicable law;

(ii) provide support and assistance to wrongfully detained United States nationals and their families throughout their detention, including through coordination with the HRFC, as appropriate and consistent with applicable law; and

(iii) provide support and assistance to United States nationals upon their return to the United States from wrongful detention, including through coordination with the HRFC and the Department of Health and Human Services, as appropriate and consistent with applicable law.

Sec. 4. The SPEHA, in coordination with the HRG, the HRFC, and relevant agencies, as appropriate, shall identify and recommend options and strategies to the President through the Assistant to the President for National Security Affairs to reduce the likelihood of United States nationals being held hostage or wrongfully detained abroad. The options shall seek to counter and deter hostage-takings and wrongful detentions by terrorist organizations, foreign

governments, and other actors by imposing costs on those who participate in, support, or facilitate such conduct. The strategies shall seek to deter any effort to engage in hostage-taking or the wrongful detention of United States nationals abroad through cooperation with like-minded foreign governments and organizations.

Sec. 5. The Secretary of State shall publicly or privately designate or identify officials of foreign governments who are involved, directly or indirectly, in wrongful detentions, as appropriate and consistent with applicable law, including section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022 (Division K of Public Law 117-103).

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Secretary Blinken's July 19, 2022 press statement regarding Executive Order 14078 is available at https://www.state.gov/issuance-of-executive-order-on-bolstering-ongoing-efforts-to-bring-hostages-and-wrongfully-detained-u-s-nationals-home/ and excerpted below.

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We continue to demonstrate our unwavering commitment to bring home U.S. nationals held hostage or wrongfully detained abroad. Today, the President signed a new executive order (E.O.), which builds on the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act, to provide the U.S. government expanded tools to deter and disrupt hostage-taking and wrongful detentions.

When Americans are taken captive abroad, we must do everything in our power to secure their release. The President, National Security Advisor Sullivan, and I have spoken to families who are meeting the extraordinary challenge of advocating for a loved one held captive. I am grateful for their partnership, and we are all humbled by their courage. This E.O. prioritizes U.S. government support for families and instructs U.S. officials to expeditiously share relevant information and strategies, as appropriate, for securing their loved one's release.

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c. Afghanistan

On September 19, 2022, Secretary Blinken announced the release of U.S. citizen Mark Frerichs from Afghanistan. The press statement is available at https://www.state.gov/welcoming-the-release-of-mark-frerichs/ and includes the following:

> I have no higher priority than the safety and security of Americans around the world. We will remain tireless in our efforts to seek the release of Americans held hostage or wrongfully detained. Our commitment to bring Mark home never wavered, and it will never waver for the Americans who are held captive

anywhere around the world. His release is a testament to that priority and our around-the-clock work to reunite our citizens with their loved ones.

d. Venezuela

On October 1, 2022, President Biden issued a statement following the release from Venezuela of six wrongfully detained U.S. citizens and a U.S. legal permanent resident. The statement is below and available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/01/statement-from-president-joe-biden-on-the-return-of-americans-wrongfully-detained-in-venezuela/.

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* * * *

Today, after years of being wrongfully detained in Venezuela, we are bringing home Jorge Toledo, Tomeu Vadell, Alirio Zambrano, Jose Luis Zambrano, Jose Pereira, Matthew Heath, and Osman Khan. These individuals will soon be reunited with their families and back in the arms of their loved ones where they belong. I am grateful for the hard work of dedicated public servants across the U.S. Government who made this possible, and who continue to deliver on my Administration's unflinching commitment to keep faith with Americans held hostage and wrongfully detained all around the world. Today, we celebrate that seven families will be whole once more. To all the families who are still suffering and separated from their loved ones who are wrongfully detained – know that we remain dedicated to securing their release.

It is also a priority of my Administration to prevent Americans from having to endure the unimaginable pain of being held hostage or wrongfully detained. This summer, I signed an executive order that will impose new costs, including sanctions and visa bans, against the perpetrators of such acts. In addition, the State Department has introduced a new warning indicator "D" that is designed to help Americans understand where and when travel may incur increased risks of wrongful detention, potentially for long periods of time. If travelers make the decision to go despite this "D" warning, they need to know that they are incurring massive personal risk and that it may not be feasible for the U.S. Government to secure their release.

* * * *

Secretary Blinken's October 1, 2022 press statement on the release of the seven individuals from Venezuela is available https://www.state.gov/the-release-of-u-s-nationals-from-venezuela/.

B. CHILDREN

1. Adoption

a. Annual Reports

As discussed in *Digest 2021* at 60 and *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 second annual report submitted pursuant to the IAIA was released in July 2022. The Fiscal Year 2021 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 2021, average times to complete adoptions, and median fees charged by adoption service providers.

As required by reporting requirements, the FY 2021 report references the Department's determination that it could not yet issue Hague Adoption Certificates for adoptions from Saint Kitts and Nevis or Niger following both countries' accession to the Adoption Convention on February 1, 2021, and September 1, 2021, respectively. Saint Kitts and Nevis and Niger do not yet have implementing legislation authorizing the designated central authority to carry out its responsibilities under the Convention. See also *Digest 2021* at 62. Also, in accordance with the IAIA, the Department addresses in the FY 2021 report the impact of the accrediting entity's fees on U.S. families seeking to adopt through intercountry adoption.

b. Ukraine

On March 23, 2022, Special Advisor for Children's Issues Michelle Bernier-Toth delivered a statement on the Ukrainian government's decision not to approve Ukrainian children for temporary travel to the United States and reaffirming the United States support for Ukraine's sovereignty. The statement is available at https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ukraine---statement-by-department-of-state-s-special-advisor-for.html, and excerpted below.

* * * *

President Putin's premeditated, unjustified, and unprovoked war against Ukraine has had a devastating impact on Ukraine's most vulnerable citizens: its children. The global child protection community, including non-profit organizations, has been working tirelessly with the Ukrainian government to evacuate children to safety. A critical part of this effort is to prevent children from being permanently separated from their parents and caregivers.

The United States and Ukraine have a long history of intercountry adoptions. Every year, hundreds of U.S. families open their hearts and homes to Ukrainian orphans in need of a permanent family. These adoptions occur with protections from U.S. and Ukrainian laws and

regulations. Ultimately, Ukrainian authorities have jurisdiction over and responsibility for the safety of the orphans in their custody, including decisions about what is in their best interests. The Ukrainian government has informed us it has moved many of the children in its care to Poland and other European countries for safety and medical treatment.

The majority of children living in orphanages in Ukraine are not orphans. Most have parents and families who have placed them in orphanages for economic reasons or for assistance with a child's special needs. It can be extremely difficult during crises to determine whether children who appear to be orphans are truly eligible for adoption and immigration under U.S. laws. Children may be temporarily separated from their family, and their parents or other caregivers may be looking for them. Families may make the difficult choice to send children on their own or in the care of non-family members in order to achieve their safety. When a child's parents have died, other relatives may be willing and able to care for them.

For these and other reasons, the Ukrainian government informed the Department of State they do not approve Ukrainian children for temporary travel to the United States at this time. This decision was made by the National Social Services Office of Ukraine, which must approve the transfer of any orphan. Ukraine has also confirmed there is no plan for simplifed procedures, including for those already in the process of being adopted, and on March 13, 2022, announced that adoption is not possible at this time.

The Ukrainian government and many international organizations have serious concerns about children being taken out of the region, since this would hamper efforts to reunite them with their families once the crisis is over. UNICEF and the UN High Commission on Refugees have published information regarding the protection of unaccompanied and separated children in Ukraine and throughout the region. The National Council for Adoption issued a statement Regarding Refugee Children Fleeing the War in Ukraine, which explains why, given the uncertainty in the current situation, now is not the time for U.S. citizens to be considering adoption of children whom the Ukrainian authorities have not already identified as eligible for adoption and approved for adoption by a specific family.

In some cases, Ukrainian courts issued final approvals of an adoption by U.S. families before Russia invaded. The Department of State is working closely with adoption service providers and the families involved in these cases. We are facilitating the departure of these children with final adoption decrees and the issuance of immigrant visas by the U.S. Embassy in Warsaw. We are sharing information and updates with a larger group of families who had initiated but not yet completed the process to adopt children from Ukraine. We will continue this dialogue and continue our work with the Ukrainian government as it seeks to ensure the safety of all its children. Please review Information for U.S. Citizens in the Process of Adopting Children from Ukraine for more information.

The United States reaffirms its unwavering support for Ukraine's sovereignty, and we are inspired by the many families, individuals, and organizations in the United States who are moved by the plight of the children of Ukraine and want to help.

* * * *

c. U.S. Adoption Service Providers

To carry out the functions prescribed by the Hague Convention with respect to the accreditation of agencies and approval of persons to provide intercountry adoption

services, Section 202(a) of the Intercountry Adoption Act of 2000 ("IAA"), Pub. L. 106-279, 114 Stat. 825, authorizes the Department to designate qualified non-profit or public entities to accredit, approve, monitor, and oversee adoption service providers in the United States. In June 2022, the Department renewed the designation of one accrediting entity and designated one new accrediting entity. These designations achieve the State Department's long-standing goal to have two national-level accrediting entities in order to strengthen the viability of intercountry adoption in the United States.

On June 2, 2022, the Department of State entered into a renewed Memorandum of Agreement (MOA) with Intercountry Adoption Accreditation and Maintenance Entity, Inc. ("IAAME"), designating IAAME as an accrediting entity for five years, for the purpose of accreditation of agencies and approval of persons to provide adoption services in intercountry adoptions pursuant to the Hague Convention, the IAA, and the Intercountry Adoption Universal Accreditation Act ("UAA"). 87 Fed. Reg. 39,578 (Jul. 1, 2022). The text of the MOA is available as part of the notice in the Federal Register. *Id*.

Also on June 2, 2022, the State Department entered into an MOA with Center for Excellence in Adoption Services ("CEAS"), designating CEAS as an accrediting entity for five years, designating CEAS as an accrediting entity for five years, for the purpose of accreditation of agencies and approval of persons to provide adoption services in intercountry adoptions pursuant to the IAA, and the UAA. 87 Fed. Reg. 39,582 (Jul. 1, 2022). The text of the MOA is available as part of the notice In the Federal Register. *Id*.

d. Convention on Intercountry Adoption

From July 4 – 8, 2022, the United States participated in the Fifth Meeting of the Special Commission on the Practical Operation of the 1993 Convention on Intercountry Adoption, organized by the Hague Conference on Private International Law. The Special Commission brought together the States party to the Convention, intergovernmental and non-governmental organizations observers, to discuss how to prevent and address illicit practices in intercountry adoption and the Central Authorities' role with post-adoption services. The 5-day meeting was attended by nearly 400 participants and resulted in conclusions and recommendations available on the Hague Conference website available at https://www.hcch.net/en/publications-and-studies/details4/?pid=6668&dtid=57.

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the Sean and David Goldman International Child Abduction Prevention and Return Act of 2013 ("ICAPRA"), Pub. L. 113-150, 128 Stat. 1807, 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/travel/en/International-Parental-Child-Abduction/for-providers.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 September 2022 Annual Report on International Child Abduction is available at https://travel.state.gov/content/dam/NEWIPCAAssets/2022%20Action%20Report%20-%20Actions%20Against%20International%20Child%20Abductions%20Noncompliance%20Countries.pdf. The 2022 report cites fifteen countries for a pattern of noncompliance: Argentina, Austria, Belize, Brazil, Costa Rica, Ecuador, Egypt, Honduras, India, Jordan, Peru, Republic of Korea, Romania, Trinidad and Tobago, and the United Arab Emirates. The State Department issued a media note announcing the release of the report, available at https://www.state.gov/release-of-the-2022-action-report-on-international-child-abduction/.

b. Hague Abduction Convention Case: Golan v. Saada

For background discussion on the *Golan v. Saada* case, see Digest 2021 at 63-70. On June 15, 2022, the Supreme Court issued its decision in *Golan v. Saada*, a case involving a question of interpretation of the Hague Abduction Convention. 596 U. S. ___, 142 S. Ct. 1880 (2022). In a 9-0 opinion, the Court struck down the Second Circuit's rule requiring an evaluation of ameliorative measures upon a finding of grave risk, calling it "atextual" and inconsistent with the Convention. It also noted that other than the European Union, most Contracting States, including the United States, had no legislative requirement to consider ameliorative measures. The Court also found that if a court decides to do a consideration of ameliorative measures, it (1) must prioritize the child's safety, (2) should not usurp the role of the custody court, and (3) must respect the Convention's requirement to act expeditiously. The Court remanded, with instructions to consider the request for return in light of the correct legal standard.'. The opinion is excerpted below (with footnotes omitted).

* * * *

II

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott*, 560 U. S., at 10 (internal quotation marks omitted). As described above, when "a child has been wrongfully removed or retained" from his country of habitual residence, Article 12 of the Hague

Convention generally requires the deciding authority (here, a district court) to "order the return of the child." Treaty Doc., at 9. Under Article 13(b) of the Convention, however, a court "is not bound to order the return of the child" if the court finds that the party opposing return has established that return would expose the child to a "grave risk" of physical or psychological harm. Id., at 10, 130 S.Ct. 1983. By providing that a court "is not bound" to order return upon making a grave-risk finding, Article 13(b) lifts the Convention's return requirement, leaving a court with the discretion to grant or deny return.

Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion. The Convention itself nowhere mentions ameliorative measures. Nor does ICARA, which, as relevant, instructs courts to "decide the case in accordance with the Convention" and accordingly leaves undisturbed the discretion recognized in the Convention. 22 U.S.C. § 9003(d). The longstanding interpretation of the Department of State offers further support for the view that the Convention vests a court with discretion to determine whether to order return if an exception to the return mandate applies. See 51 Fed. Reg. 10510 (1986) (explaining that "a court in its discretion need not order a child returned" upon a finding of grave risk); see also *Abbott*, 560 U.S. at 15, 130 S.Ct. 1983 (explaining that the Executive Branch's interpretation of the Convention "is entitled to great weight" (internal quotation marks omitted)).

Unable to point to any explicit textual mandate that courts consider ameliorative measures, Saada's primary argument is that this requirement is implicit in the Convention's command that the court make a determination as to whether a grave risk of harm exists. Essentially, Saada argues that determining whether a grave risk of harm exists necessarily requires considering whether any ameliorative measures are available.

The question whether there is a grave risk, however, is separate from the question whether there are ameliorative measures that could mitigate that risk. That said, the question whether ameliorative measures would be appropriate or effective will often overlap considerably with the inquiry into whether a grave risk exists. See *Simcox v. Simcox*, 511 F.3d 594, 607–608 (C.A.6 2007) (explaining that the appropriateness and utility of ameliorative measures correlate with the gravity of the risk to the child). In many instances, a court may find it appropriate to consider both questions at once. For example, a finding of grave risk as to a part of a country where an epidemic rages may naturally lead a court simultaneously to consider whether return to another part of the country is feasible. The fact that a court may consider ameliorative measures concurrent with the grave-risk determination, however, does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists. See *Simcox* v. *Simcox*, 511 F. 3d 594, 607–608 (CA6 2007) (explaining that the appropriateness and utility of ameliorative measures correlate with the gravity of the risk to the child). In many instances, a court may find it appropriate to consider both questions at once. For example, a finding of grave risk as to a part of a country where an epidemic rages may naturally lead a court simultaneously to consider whether return to another part of the country is feasible. The fact that a court may consider ameliorative measures concurrent with the grave-risk determination, however, does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists.

Under the Convention and ICARA, district courts' discretion to determine whether to return a child where doing so would pose a grave risk to the child includes the discretion whether to consider ameliorative measures that could ensure the child's safe return. The Second Circuit's

rule, "in practice, rewrite[s] the treaty," *Lozano v. Montoya Alvarez*, 572 U.S. 1, 17, 134 S.Ct. 1224, 188 L.Ed.2d 200 (2014), by imposing an atextual, categorical requirement that courts consider all possible ameliorative measures in exercising this discretion, regardless of whether such consideration is consistent with the Convention's objectives (and, seemingly, regardless of whether the parties offered them for the court's consideration in the first place). See *Blondin I*, 189 F.3d at 249 (requiring district court not to "limit itself to the single alternative placement initially suggested by [the appellant]" but instead affirmatively to "develop a thorough record to facilitate its decision," including by "mak[ing] any appropriate or necessary inquiries" of the government of the country of habitual residence and invoking the aid of the Department of State).

B

While consideration of ameliorative measures is within a district court's discretion, "[d]iscretion is not whim." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005). A "motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Ibid.* (internal quotation marks and alteration omitted). As a threshold matter, a district court exercising its discretion is still responsible for addressing and responding to nonfrivolous arguments timely raised by the parties before it. While a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case, such as in the example of the localized epidemic. See *supra,* at 1892 – 1893.

In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives. *Blondin I*, 189 F.3d at 248. The Convention does not pursue return exclusively or at all costs. Rather, the Convention "is designed to protect the interests of children and their parents," *Lozano*, 572 U.S. at 19, 134 S.Ct. 1224 (ALITO, J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures in at least three ways.

First, any consideration of ameliorative measures must prioritize the child's physical and psychological safety. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." *Id.*, at 16, 134 S.Ct. 1224 (majority opinion) (cataloging interests). A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed. See, *e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 221 (C.A.1 2000) (providing example of parent with history of violating court orders).

Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from

resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U.S.C. § 9001(b)(4). Accordingly, a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.

Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." Art. 11, Treaty Doc., at 9.[10] Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. *Monasky*, 589 U. S., at ——, 140 S.Ct., at 723 (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." *Chafin v. Chafin*, 568 U.S. 165, 180, 133 S.Ct. 1017, 185 L.Ed.2d 1 (2013). A requirement to "examine the full range of options that might make possible the safe return of a child," *Blondin II*, 238 F.3d at 163, n. 11, is in tension with this focus on expeditious resolution. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, *id.,* at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard.

III

The question now becomes how to resolve the instant case. Golan urges that this Court reverse, arguing that the ameliorative measures adopted by the District Court are inadequate for B. A. S.' protection and otherwise improper. The United States, as *amicus curiae*, suggests remanding to allow the District Court to exercise its discretion in the first instance under the correct legal standard. Brief for United States as *Amicus Curiae* 32.

Under the circumstances of this case, this Court concludes that remand is appropriate. The Convention requires courts to make a discretionary determination as to whether to order return after making a finding of grave risk. The District Court made a finding of grave risk, but never had the opportunity to engage in the discretionary inquiry as to whether to order or deny return under the correct legal standard. This Court cannot know whether the District Court would have exercised its discretion to order B. A. S.' return absent the Second Circuit's rule, which improperly weighted the scales in favor of return. Accordingly, it is appropriate to follow the ordinary course and allow the District Court to apply the proper legal standard in the first

instance. Cf. *Monasky*, 589 U. S., at —— – ——, 140 S.Ct., at 731 (declining to follow the "[o]rdinar[y]" course of ordering remand where the determination in question was nondiscretionary and there was no "reason to anticipate that the District Court's judgment would change on a remand").

Remand will as a matter of course add further delay to a proceeding that has already spanned years longer than it should have. The delay that has already occurred, however, cannot be undone. This Court trusts that the District Court will move as expeditiously as possible to reach a final decision without further unnecessary delay. The District Court has ample evidence before it from the prior proceedings and has made extensive factual findings concerning the risks at issue. Golan argues that the ameliorative measures ordered intrude too greatly on custodial determinations and that they are inadequate to protect B. A. S.' safety given the District Court's findings that Saada is unable to control or take responsibility for his behavior. The District Court should determine whether the measures in question are adequate to order return in light of its factual findings concerning the risk to B. A. S., bearing in mind that the Convention sets as a primary goal the safety of the child.

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Cross References

Special Immigrant Visa program, **Ch.1.B.3.c**
Children, **Ch.6.C**
Determination under Foreign Missions Act with respect to the Afghan Embassy in the U.S., **Ch.10.C.2**
Executive Order 14078, "Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home," **Ch.16.A.13**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Case: *Bowman v. Stafford*

On January 12, 2022, a federal district court in California denied habeas relief to William Bowman. *Bowman v. Stafford*, No. 20-cv-02250 (S.D. Cal. Jan. 12, 2022). Bowman's extradition on charges of lewd, indecent, and libidinous practices and behavior, and rape, was certified in accordance with the extradition treaty between the United States and the United Kingdom by a magistrate court in the Southern District of California. See *In re Extradition of William Mitchell Bowman*, No. 19-mj-05089 (S.D. Cal. Nov. 12, 2020). Bowman subsequently petitioned the district court for writ of habeas corpus on the grounds that his extradition is barred based on the Kingdom of Scotland's failure to follow the mandatory provisions of the extradition treaty and because the United States did not present competent evidence to establish probable cause to believe that he committed the offenses for which extradition was sought. The district court denied the petition. Excerpts follow from the order of the court (with most footnotes omitted).

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Petitioner challenges the Magistrate Judge's probable cause determination and questions whether the allegations in the Complaint fell within the Extradition Treaty's terms. Petitioner's challenge over the Extradition Treaty's terms has several sub-arguments. First, Petitioner argues Scotland failed to provide the "text" of the law for the offense underlying the extradition request. Second, Petitioner argues Scotland's request fails to meet the dual criminality requirement in the Extradition Treaty because juvenile delinquency proceedings are civil proceedings, and because any prosecution of Petitioner in the United States would be barred under the Fifth and Sixth Amendments to the U.S. Constitution for excessive and prejudicial delay.

Ultimately the Court finds Petitioner's challenges lacking in merit and affirms the Magistrate Judge's certification order. Even under de novo review, Petitioner's alleged offense falls within the treaty's terms. Under the terms of the Extradition Treaty, Scotland provided the text of the law underlying the extradition request, and Scotland's request satisfied the dual criminality requirement. As to Petitioner's challenge of the probable cause determination, the

Court considers multiple documents provided by Scotland to be "competent evidence" supporting the Magistrate Judge's decision.

A. The "Text" of Scotland's Law

First, Petitioner challenges the extradition based on Scotland's failure to provide "the text of the law" for the offense underlying the extradition. Am. Pet. 4-5, ECF No. 15. Article 8 of the Extradition Treaty requires that all extradition requests be supported by: "the relevant text of the law(s) describing the essential elements of the offense for which extradition is requested; [and] the relevant text of the law(s) prescribing punishment for the offense for which extradition is requested." Annex, art. 8.2€, (d). Petitioner asserts that Scotland's extradition request fails to meet the requirements of the Extradition Treaty because the request merely described what the essential elements of the offense and resultant punishment would be if the case were to be in front of a Scottish court—in contrast to providing a citation or a passage of the primary source. *See, e.g.*, Compl. Ex. 1, Request for Extradition 9–11, *In re Bowman*, Dkt. No. 1. In the extradition request, the Scottish Prosecutor explained why a description of Scotland's criminal law was provided rather than a primary source: "Scotland does not have a penal code. Criminal offences can be offences under the common law or under statute. Common law is an unwritten law, based on custom and usage and developed by case law.... All the crimes set out in the petition ... are common law offences." *Id.* At 8.

Petitioner has not provided any case law which interprets "text of the law" under the Extradition Treaty as requiring a citation to a law or a passage of the primary source of the law. In the two instances where a federal district court concluded that the requesting country did not provide a text of the law as required by the treaty, such country's criminal laws were codified—thus a precise reproduction of the statutory provision was available. *See* *In re Extradition of Ferriolo*, 126 F. Supp. 3d 1297, 1301 (M.D. Fla. 2015); *In re Extradition of Molnar*, 202 F. Supp. 2d 782, 787 (N.D. Ill. 2002). The Scottish Prosecutor has explained that such reproduction is impossible for Scottish criminal law because the charged offenses are based on the common law, not statutory law. Here, Scotland has provided sufficient description of the underlying offenses such that Petitioner has maintained the ability to concede or contest whether the dual criminality requirement in the Treaty has been met. *Cf.* *In re Extradition of Ferriolo*, 126 F. Supp. 3d at 1301 (failure to provide text of the charged statutory offenses unfairly impaired Ferriolo's ability to concede or contest whether the dual criminality requirement had been met). As such, these cases do not persuade the Court that Scotland's request fails to adequately provide the text of the applicable law.

Further, the term "text" as expressed in the Extradition Treaty is ambiguous. Ambiguity in the treaty's terms must be construed in favor of extradition. *See* *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933) ("In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements."). While Petitioner cites to the Merriam-Webster Dictionary to define text as "the original words and form of a written or printed work," he omits another possible definition that is listed in the same entry: "an edited or emended copy of an original work." *Text*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/text (last visited July 21, 2021). Alternatively, the Oxford English Dictionary ("OED") defines text as "The wording of anything written or printed; the structure formed by the words in their order; the very words, phrases, and sentences as written." *Text*, OED Online (June 2021), https://www.oed.com/view/Entry/200002?rskey=7u9rH4&result=1 (last visited July 16, 2021). Under such definition, the Scottish Prosecutor's set of "worded"

explanations that are "written" in her Extradition Request would constitute "text." This is true especially when the same OED entry considers a different definition—one that would insist on quoting a primary source ("Applied vaguely to an original or authority whose words are quoted")—as "obsolete." *Id.* In sum, the language of the treaty is ambiguous.

Under a construction of a treaty that respects Scotland's criminal law system—one which only manifests itself via customs, principles, and precedents—a written explanation of a law that is otherwise unwritten may constitute a "text of the law." Petitioner's interpretation would render any extradition request by Scotland based upon the common law unworkable, since there is no "text" that a prosecutor can provide to capture laws that result from customs and legal principles. This Court declines to adopt an interpretation that would unravel an entire treaty. *Cf.* *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. Of Iowa*, 482 U.S. 522, 546 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation.").

B. Dual Criminality

Petitioner also challenges the extradition request for failing to meet the "dual criminality" requirement as specified in the Extradition Treaty. Petitioner argues this dual criminality requirement has not been met for two reasons. First, Petitioner argues his conduct involves juvenile delinquencies, which would not undergo a criminal proceeding in the United States. Am. Pet. 11, ECF No. 15. Second, Petitioner argues that Scotland was not diligent in pursuing extradition and that he could not be prosecuted in the United States for the underlying offenses because the Fifth and Sixth Amendments to the U.S. Constitution would prohibit undue delays in prosecution. Am. Pet. 12–13, ECF No. 15.

The Extradition Treaty expressly articulates the dual criminality requirement, and its terms guide the Court's dual criminality analysis here. *Cf.* *United States v. Anderson*, 472 F.3d 662, 666, 670 (9th Cir. 2006) (discussing how the doctrine of dual criminality is "incorporated into the extradition treaty" and thus how analyzing dual criminality is part of interpreting the treaty). Article 2 of the Extradition Treaty states: "An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty." Annex, art. 2.1. If such conditions are met, the two countries have agreed to extradite the person "for trial or punishment for extraditable offenses." *Id.* Art. 1.

Applying the express terms of the Extradition Treaty to the instant dispute, Petitioner's dual criminality arguments are unavailing because Petitioner's "conduct on which the offense is based" is "punishable" under U.S. law "by deprivation of liberty for a period of one year or more." *See* 18 U.S.C. §§ 2, 2241(a)(1), 2241(c) (discussing potential life imprisonment for sexual acts either by force or with a person younger than 12 years, or aiding/abetting thereof); Cal. Penal Code § 288(a), (b)(1) (discussing punishment of at least 3 years for lewd or lascivious acts upon a child under 14 years with the intent of arousing). Whether Petitioner would have undergone a juvenile delinquency proceeding in the United States or whether the prosecution of Petitioner would be barred in the United States for undue delays are a much more expansive interpretation of the dual criminality requirement than what is permitted in the Extradition Treaty. None of Petitioner's arguments concern the *conduct*, but rather how the prosecution would materialize in the United States, which is not part of the dual criminality analysis. *Cf.* *United States v. Knotek*, 925 F.3d 1118, 1131–32 (9th Cir. 2019) (discussing how the dual criminality inquiry focuses on whether "the essential character of the acts criminalized is

the same," not whether the elements of the offense are identical or whether the scope of the liability is coextensive/same). The Court addresses Petitioner's arguments in more detail below.

C. Juvenile Delinquencies

Petitioner argues that dual criminality is not met because any proceeding for the alleged conduct would have undergone a juvenile delinquency proceeding, which is civil in nature, *see* *United States v. Male Juv.*, 280 F.3d 1008, 1023 n.4 (9th Cir. 2002) ("Strictly speaking, juvenile delinquency proceedings are civil rather than criminal proceedings."). As an initial observation, some of the alleged conduct occurred when Petitioner was 18 years old or older, since Petitioner was born in 1949 yet the allegations state the sexual abuse continued in 1968 when Petitioner moved to the United States. *See* Compl. Ex. 1, Request for Extradition 1, 4, *In re Bowman*, Dkt. No. 1. Further, Petitioner could be prosecuted as an adult for the violation of 18 U.S.C. §§ 2, 2241(a)(1), 2241(c), even when he was a minor. *See* 18 U.S.C. § 5032 (discussing that a juvenile may be prosecuted as an adult for such violations if he was 13 years at the time of the offense). These facts and applicable criminal provisions alone render Petitioner's argument unpersuasive.

More importantly, whether the U.S. proceeding would have been civil versus criminal in nature is not the appropriate inquiry in the dual criminality analysis of the Extradition Treaty. Instead, the operative inquiry is whether the conduct would be punished in the United States by a deprivation of liberty for a period of one year or more. Even if Petitioner underwent a juvenile proceeding, a deprivation of liberty for a period of one year or more would have occurred. *See generally id.* § 5037. Thus, regardless of whether Petitioner would have undergone a juvenile proceeding or criminal proceeding, the underlying conduct constitutes an "extraditable offense" under the Extradition Treaty.

2. Delay in Prosecution

Petitioner also argues that dual criminality is lacking because his conduct cannot be "punishable" in the United States per the Fifth and Sixth Amendments to the U.S. Constitution. According to Petitioner, the Fifth and Sixth Amendments would bar any punishment in the United States due to the lapse of time, which occurred in this case since Scotland has not been diligent in its prosecution and extradition request. Yet in contrast to an extensive Fifth and Sixth Amendment analysis, *see* Am. Pet. 12–16, ECF No. 15, Petitioner provides no case law in which a court rejected a foreign country's extradition request because the Fifth and Sixth Amendments would fail the dual criminality provision in the treaty. *Cf.* *Knotek*, 925 F.3d at 1124, 1132 (affirming the extradition order even if such would mean "uprooting a 62-year-old U.S. citizen to serve a four-and-a-half year sentence for an economic crime committed two decades ago," with no explanation in the record as to why the extradition request was delayed seven years after the arrest warrant).

Indeed, Petitioner's understanding of the Fifth and Sixth Amendments' reach to any dual criminality provision contravenes countless precedents, where "it has long been settled that United States due process rights cannot be extended extraterritorially," *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984) (affirming habeas denial even though the extradition request was made eight years after the offense), *cert. denied*, 499 U.S. 817 (1984). *See, e.g.,* *In re Extradition of Drayer*, 190 F.3d 410, 415 (6th Cir. 1999) (affirming habeas denial despite a 14-year delay); *Martin v. Warden*, 993 F.2d 824, 827–30 (11th Cir. 1993) (17 years). As Respondent and the Magistrate Judge have pointed out, the case law provided by Petitioner concern extradition *to* the United States (i.e., requests made by the United States), not *from. See* *United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008); *United States v. Fernandes*, 618 F. Supp.

2d 62, 69 (D.D.C. 2009). It makes sense for an extradition to the United States to be concerned about speedy trial, since ultimately that extradition is part of a criminal prosecution in the United States and thus the Fifth and Sixth Amendment protections would apply. In contrast, an extradition from the United States is not a criminal proceeding. *See Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976) ("Orders of extradition are sui generis. They embody no judgment on the guilt or innocence of the accused but serve only to insure [sic] that his culpability will be determined in another and, in this instance, a foreign forum."); *accord Valencia v. Limbs*, 655 F.2d 195, 198 (9th Cir. 1981). At minimum, concerns over delayed prosecution must be directed either to the Secretary of State or the country requesting the extradition, not this Court. *See, e.g., Man-Seok Choe v. Torres*, 525 F.3d 733, 742 (9th Cir. 2008) (Secretary of State); *Kamrin*, 725 F.2d at 1227 (9th Cir. 1984) (the requesting country).

In sum, the Court declines to interpret Article 2.1 ("conduct on which the offense is based is punishable under the laws in both States") of the Extradition Treaty to mean that any potential undue delay in Scotland's request would bar extradition. Cases have uniformly affirmed extradition despite the treaty containing a dual criminality provision and the foreign country requesting extradition years later. Such an approach is required given the interpretative maxim to construct the treaty in favor of extradition. *See Laubenheimer*, 290 U.S. at 293.

C. Evidence for Probable Cause

Finally, Petitioner challenges the probable cause determination of the Magistrate Judge. Here, Petitioner proclaims that all Scotland has provided are allegations labeled as a "Statement of Facts," which is equivalent to a complaint. According to Petitioner, the Scottish Prosecutor should have at least provided something to "indicate[ ] that she, herself, has reviewed the statements and that based on her review these are true summaries of the allegations," Am. Pet. 9, ECF No. 15. With no indication that the Scottish Prosecutor has personal knowledge of the facts alleged and no indication on how she could conclude whether the sources of information were credible/reliable, Petitioner argues that no competent evidence exists.

As discussed *supra* Section II, "if there is *any* competent evidence in the record" to support the Magistrate Judge's probable cause finding, the Court must uphold the finding. *See Quinn*, 783 F.2d at 791 (emphasis added). To begin, there are at least three pieces of competent evidence—beyond Scotland's Statement of Facts or the Scottish Prosecutor's allegations, i.e., the documents to which Petitioner objects—that support the Magistrate Judge's probable cause finding. First and second, Scotland provided a photograph of the Petitioner, and a Witness Statement by Detective Constable Paul Richardson in which KH confirmed that the person depicted in the photograph is Petitioner "who is accused in this case." Compl. Ex. 1, Request for Extradition, Annexes A and B, *In re Bowman*, Dkt. No. 1. "An identification based on a single photograph may be competent evidence of identity in an extradition proceeding." *In re Extradition of Velasquez Pedroza*, No. 19MJ1696-RBB, 2020 WL 549715, at *12 (S.D. Cal. Feb. 4, 2020) (quoting *Manta v. Chertoff*, 518 F.3d 1134, 1145 (9th Cir. 2008)). Third, Scotland provided a document prepared by the Crown Office and Procurator Fiscal Service, which directly quoted a statement made by RBJ: "[Petitioner] was looking at me. He and a few friends came over. [Petitioner] was watching his 2 friends on top of his sisters and [Petitioner] was masturbating." Compl. Ex. 1, *Extradition Request for William Mitchell Bowman, In re Bowman*, Dkt. No. 1. Such statements may be considered competent evidence for extradition purposes. *See Collins v. Loisel*, 259 U.S. 309, 317 (1922) ("[U]nsworn statements of absent witnesses may be acted upon by the committing magistrate...."). Thus, the Court upholds the

Magistrate Judge's probable cause finding even without relying on any of the documents that Petitioner contests.

Next, as to Petitioner's challenge over the conclusory nature of the Statement of Facts, Petitioner omits certain parts of the document which satisfy his demand that the Scottish Prosecutor "identify the basis for her assertions," Am. Pet. 9–10, ECF No. 15. First, the Prosecutor explicitly mentioned the photograph of Petitioner and KH's identification of Petitioner based on the photograph. *See* Compl. Ex. 1, Request for Extradition 1, *In re Bowman*, Dkt. No. 1. Second, the Prosecutor described how the evidence was collected. *See id.* At 7 (discussing EK's contact with the Scottish police and the subsequent statements obtained by both the Scottish and U.S. police). Third, the Prosecutor stated the following:

> All the evidence in this case comes from the statements provided by the victims describing what happened to them and what they saw happening at the time and, in the case of witnesses [EK] and [KH], and Richard Bowman Senior, admissions the accused has made to them since the offending. In relation the three witnesses who were children at the time of the offending, aspects of each of their statements corroborates evidence the other two have provided.

Id. At 13. Finally, the Prosecutor set forth the charges in great detail, organized by victim, and noted that the charges are supported by witness statements and mutual corroboration between the witnesses. *See id.* At 13–15; *see also* Dkt. No. 49 at 14 (discussing witness statements in the Statement of Facts with direct attributions to the victims). For example, the Magistrate Judge noted several instances in which the Prosecutor directly provided evidence from the victims themselves, i.e. "Witness Kato also described the accused bringing two neighbourhood boys who were around the same age as the accused to the house to have sex with her and her sister, witness Hyland ... She describes instances in which the accused masturbated in her presence." *Id.* At 14 (citing Dkt. No. 1, Compl. Ex. 1 at 13).

Such passages move the Statement of Facts from a conclusory document to competent evidence supporting probable cause, and provide a foundation for the prosecutor's allegations. *Cf.* Dkt. No. 15, Am. Pet. At 8 ("... the government must present ... at least some foundation for the prosecutor's allegations."). "The extradition judge may consider hearsay evidence, ... and summaries by the police or prosecutor of a witness's testimony or statement, provided that those documents are properly authenticated and ... the governing extradition treaty does not require that a witness's statements be executed under oath." *In re Extradition of Luna-Ruiz*, No. CV 13-5059 VAP AJW, 2014 WL 1089134, at *4 (C.D. Cal. Mar. 19, 2014) (collecting cases), *aff'd sub nom. Luna-Ruiz v. Barr*, 753 F. App'x 472 (9th Cir. 2019). Here, the Statement of Facts is properly authenticated, *see* Compl. Ex. 1, Certificate of Authentication, *In re Bowman*, Dkt. No. 1, and the Extradition Treaty does not require the witness's statements to be executed under oath.

With the slate of evidence discussed above, the Court finds the supporting case law provided by Petitioner to be either inapplicable or distinguishable. For example, *In re Ribaudo*, No. 00 CRIM.MISC.1PG.(KN, 2004 WL 213021, at *4 (S.D.N.Y. Feb. 3, 2004) the court found a lack of probable cause because an express provision in the extradition treaty required more than just a judgment of conviction when the person is convicted *in absentia*—a requirement that was not met. Neither that provision, nor the circumstances under which the district court reviewed probable cause in *Ribaudo*, apply here. *See Ribuado*, 2004 WL 213021 at *4; *cf.* Annex, art. 8.4(d) (requiring from *in absentia* convictions "information regarding the circumstances under which the person was voluntarily absent," which was provided by the

description of Petitioner residing in the United States). In *Petition of France for Extradition of Sauvage*, 819 F. Supp. 896, 903 (S.D. Cal. 1993), the court required "a statement of the sources for the affiant's belief and the circumstances from which the affiant concluded that the sources were reliable and credible." *See Sauvage*, 819 F. Supp. At 903 (describing prosecutor's statement in a cited case as sufficient because it "contained detailed summaries of witnesses' statements."). The Scottish Prosecutor described such sources, *see* Compl. Ex. 1, Request for Extradition 7, 13, *In re Bowman*, Dkt. No. 1, and how each source corroborates another, *see id.* At 13–15.

Petitioner also relies on *In re Extradition of Platko*, 213 F. Supp. 2d 1229 (S.D. Cal. 2002). But *Platko* was more concerned about the extradition treaty's language than any precedential requirement that hearsay statements must always be vouched for in affidavits. *See id.* At 1237–39 (discussing the treaty's requirement that "statements offered in support of the Warrant be made under oath"); *cf. Matter of Yordanov*, No. CV 16-170-CAS€, 2017 WL 216693, at *7 n.3 (C.D. Cal. Jan. 18, 2017) (distinguishing *Platko* for the same reasons). In fact, while *Platko* relies on *Emami v. U.S. Dist. Ct. for N. Dist. Of California*, 834 F.2d 1444, 1450–51 (9th Cir. 1987), *Emami* itself "dealt with a treaty that, unlike the United States-Spain extradition treaty, required submissions to be made under oath." *In re Extradition Lanzani*, No. CV 09-07166GAFMLG, 2010 WL 625351, at *6 (C.D. Cal. Feb. 18, 2010). Here, the Extradition Treaty does not contain equivalent or analogous language requiring an oath. And to the extent that *Platko* imposes a more exacting requirement on hearsay statements, such proposition has been rejected by binding Ninth Circuit law. *See, e.g., Manta*, 518 F.3d at 1146–47 ("[S]uch a requirement would run contrary to our well-established case law that evidence offered for extradition purposes need not be made under oath.").

Competent evidence supporting the Magistrate Judge's probable cause determination exists, both in the Scottish Prosecutor's Statement of Facts and in other documents separate from it. Since the terms of the Extradition Treaty do not present a higher evidentiary burden requiring that evidence supporting probable cause be presented under oath, the Court also rejects Petitioner's challenge over the probable cause determination.

* * * *

2. Extradition Case: *Ali Yousif Ahmed Al-Nouri*

On April 1, 2022, a federal district court in Arizona certified the extradition of Ali Yousif Ahmed Al-Nouri, whom the United States filed a complaint for extradition on behalf of the government of Iraq pursuant to the Extradition Treaty between Iraq and the United States. *In re Extradition of Ali Yousif Ahmed Al-Nouri*, No. 20-mj-08033 (D. Arizona Apr. 1, 2022). The extradition related to Iraq's criminal charges against Al-Nouri for premeditated murder. Excerpts follow from the court's order (with most footnotes omitted).

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* * * *

In June 2006, Lieutenant Issam Hussein of the Fallujah police in Iraq was murdered when a group of men emerged from their vehicles and fired pistols and automatic weapons at him. Several months later in October 2006, Officer Khalid Mohammed was murdered in similar fashion.

The government of Iraq asserts these murders were carried out by al-Qaeda of Iraq ("AQI"), the transnational affiliate of al-Qaeda operating in Iraq. In particular, Iraq asserts Relator Ali Yousif Ahmed Al-Nouri was a local AQI leader involved in planning and executing Lieutenant Hussein's and Officer Mohammed's murders.

On behalf of the government of Iraq, the United States filed a Complaint seeking Relator's extradition pursuant to the Extradition Treaty between Iraq and the United States. Doc. 3. After reviewing the evidence presented, the Court certifies Relator is extraditable under 18 U.S.C. § 3184 for the offenses described in the Complaint.

I. EXTRADITION CERTIFICATION

To certify extradition under 18 U.S.C. § 3184, the Court must find: (1) subject matter jurisdiction; (2) personal jurisdiction over the relator; (3) an extradition treaty in force and effect; (4) offenses covered by the treaty; and (5) competent evidence that the relator committed those offenses. *Santos v. Thomas*, 830 F.3d 987, 991 (9th Cir. 2016) (en banc).

A. SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

The parties acknowledge the Court has subject matter and personal jurisdiction in this matter. Doc. 273 at 107.

* * * *

B. APPLICABLE EXTRADITION TREATY

The Extradition Treaty ("Treaty") between the United States and Iraq was ratified in 1934. Doc. 3-3 at 7–14. Relator asserts the Treaty was annulled by hostilities between the United States and Iraq in 1991 and 2003, and the United States and Iraq did not negotiate a new treaty after those hostilities. Doc. 200 at 42–44 (citing *Karnuth v. United States*, 279 U.S. 231, 239 (1929)).

This Court should not "easily disregard the determination of the Executive Branch" that an extradition treaty remains in effect. *Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996). In *Then*, the Court concluded a 1932 extradition treaty between the United States and the United Kingdom, which included the United Kingdom's "dominions overseas," was a valid extradition treaty between the United States and Singapore—despite Singapore becoming a separate state after its independence from the United Kingdom in 1965. *Id.* at 853. The *Then* Court advised "federal courts are not as well equipped as the Executive to determine when the emergence of a new country brings changes that terminate old treaty obligations." *Id.* at 854. Other courts have observed "it is extremely doubtful that war ipso facto abrogates a treaty of extradition" and concluded that "controlling importance" must be given to how governments have acted in relation to a treaty. *Argento v. Horn*, 241 F.2d 258, 262 (6th Cir. 1957) (quoting *Terlinden v. Ames*, 184 U.S. 270, 285 (1902)).

The Court finds the governments of the United States and Iraq have maintained the Treaty's force and effect by their conduct. Declarations by the Office of the Legal Adviser for the United States Department of State and the Iraqi Ministry of Foreign Affairs declare the Treaty is in force. Doc. 3-3 at 2, 6. Further, the Department of State's official Treaties in Force publication lists the Treaty as in effect as of January 1, 2020, before Relator was arrested. *See* U.S. Dep't of

State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020*, at 215 (2020). Accordingly, the Court concludes the Treaty between the United States and Iraq was in force and effect at all relevant times.

C. OFFENSES COVERED BY TREATY

The Court must determine whether the offense: (1) is listed as an extraditable crime; (2) whether the alleged conduct is criminalized in both countries; and (3) whether the offenses in both countries are "substantially analogous." *United States v. Knotek*, 925 F.3d 1118, 1128–29 (9th Cir. 2019).

1. Extraditable Crime

The "Arrest and Investigation Warrant" issued by the Magistrate Court of Al-Karkh accuses Relator of committing two murders as defined by Article 406/1/A of the Iraqi Penal Code. *See* doc. 3-3 at 49-51 (specifying "Type of Crime: Murder"). The parties agree the Treaty is a "list treaty," listing certain defined crimes as subject to extradition. Doc. 226 at 22–24; Doc. 273, Tr. 133:7–9. Article II of the Treaty lists, as an extraditable offense, "[m]urder, including parricide, assassination," and willful murder with premeditation. Doc. 3-3 at 9. Accordingly, the Court finds that the offenses alleged are listed in the Treaty.

2. Whether Criminalized in Both Countries

The conduct alleged is criminalized in both the United States and Iraq. Article 406/1/A of the Iraqi Penal Code prohibits murder, including premeditated murder. In the United States, 18 U.S.C. § 1111 prohibits murder, including willful and premeditated killing.

3. Whether the Offenses are Substantially Analogous

In deciding whether the offenses are "substantially analogous," the Court considers whether "[t]he essential character of the transaction is the same, and made criminal by both statutes." *Knotek*, 925 F.3d 1131 (internal citations omitted). To be "substantially analogous," statutes need only be "directed to the same basic evil." *Id.* (quoting *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998)). The criminal codes in the United States and Iraq punish the deliberate killing of another by an individual without lawful authority to do so. Accordingly, both statutes are "directed to the same basic evil" and are substantially analogous. *Knotek,* 925 F.3d at 1132. The offenses for which Relator's extradition is sought are covered by the Treaty.

D. COMPETENT EVIDENCE

Certification of extradition requires a showing of probable cause that the relator committed the offense for which extradition is sought. Probable cause for extradition is assessed according to the standard for probable cause in American courts. *Santos v. Thomas*, 830 F.3d 987 at 1006. "Simply because evidence has been authenticated does not mean any evidence the government submits is sufficient to satisfy probable cause. Were that the case, the judiciary's role in the extradition process would be meaningless." *Id.* This Court must "determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether evidence is sufficient to justify a conviction." *Barapind v. Enomoto*, 400 F.3d 744, 752 (9th Cir. 2005) (en banc) (internal quotation marks omitted). The Court "does not weigh conflicting evidence and make factual determinations but, rather, determines only whether there is competent evidence to support the belief that the accused has committed the charged offense." *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986); *see also United States ex rel. Sakaguchi v. Kaulukulkui*, 520 F.2d 726, 730 (9th Cir. 1975) ("The magistrate's function is to determine whether there is 'any' evidence sufficient to establish reasonable or probable cause."). The relator's evidence is "limited to that which explains the requesting country's proof and

excludes contradictory or impeaching evidence." *In re Extradition of Handanovic*, 826 F. Supp. 2d 1237, 1239 (D. Or. 2011).

Iraq alleges Relator was a leader in AQI in 2006 and, as part of AQI, planned and carried out the murders of Iraqi police officers in Fallujah, Iraq. Doc. 3 at 2–5. Lieutenant Hussein was murdered on or about June 1, 2006; Officer Mohammed was murdered on or about October 3, 2006. Doc. 3 at 2–3.

A cooperator provided statements admitting that, while "working with an armed militant group of al-Qaeda terrorist organization," he, Relator, and others planned and carried out the murders of Lieutenant Hussein and Officer Mohammed; the cooperator named Relator as Emir of the al-Qaeda organization. Docs. 3-3 at 80; 3-4 at 7. A different individual said Relator was present at the murder of Lieutenant Hussein and identified Relator as Emir of a group of militants in the "Islamic State." Doc. 3-4 at 5.

* * * *

III. DEFENSES TO EXTRADITION

Having concluded that there is probable cause that Relator committed the offenses described in the extradition request, and that the Iraqi government has produced sufficient documentation to comply with the terms of the Treaty, the Court considers various defenses Relator raises.

A. IRAQI CRIMINAL JUSTICE SYSTEM

Relator argues the Court should decline certification because of the "abusive and arbitrary procedures he would face in the Iraqi criminal justice system." Doc. 200 at 33. However, as the Court previously noted in its May 20, 2021 Order:

> Under the rule of non-inquiry, an extradition court "does not inquire into the penal system of a requesting nation, or try to determine whether an extraditee is likely to be treated humanely if extradited, leaving such determinations to the Secretary of State." *Garcia v. Benov*, 715 F. Supp. 2d 974, 981-82 (C.D. Cal. 2009), citing *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005). The extraditing court "lacks discretion to inquire into the conditions that might await a fugitive upon return to the requesting country." *Prasoprat*, 421 F.3d at 1016.

Doc. 238 at 2–3. To the extent Relator raises concerns about the fairness and efficacy of the Iraqi criminal justice system, those considerations are reserved for the Secretary of State. *Garcia*, 715 F. Supp. 2d at 981-82.

Relator asserts, notwithstanding the rule of non-inquiry, an unspoken "humanitarian exception" prohibits extradition. Doc. 226 at 33–34. However, the Ninth Circuit has declined to establish a humanitarian exception to extradition. *See Prasoprat*, 421 F.3d at 1016–17; *Mainero v. Gregg*, 164 F.3d 1199, 1210 (9th Cir. 1999); *Emami*, 834 F.2d at 1452-53; *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983). *But see Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) (stating a humanitarian exception may exist in "situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of [the general principle upholding extradition]."). This Court will not deviate from the principle—which the Ninth Circuit has consistently re-affirmed—that humanitarian justifications to refuse extradition are for the Secretary of State to decide, not the courts. *Santos*, 830 F.3d at 1007 n.9; *Prasoprat*, 421 F.3d at 1016.

B. APPLICATION OF THE DEATH PENALTY

Relator asserts he cannot be extradited because "he is exempt from punishment for the one treaty-enumerated crime mentioned in the complaint." Doc. 200 at 30. Specifically, Relator argues that death is the only punishment under Iraqi law for premeditated murder, which in Relator's view is the only conceivable charge the Iraqi government could theoretically press against him. Doc. 200 at 31 (citing doc. 3-3, Ex. B at 22).

As the Court also explained in its May 20, 2021 Order:

> The Ninth Circuit in *Prasoprat* held that it was not an abuse of discretion for the extradition court to exclude expert witness testimony regarding use of the death penalty in Thailand. *Prasoprat*, 421 F.3d at 1014-15. The Ninth Circuit reasoned that "[t]he only purpose of the extradition hearing is for the magistrate judge to determine whether the crime is extraditable and whether there is probable cause to support the charge." *Id.* at 1014. Therefore, information as to how Thailand imposes the death penalty "would not be relevant to the magistrate judge's decision regarding whether to certify Prasoprat as extraditable." *Id.* at 1015.

Doc. 238 at 3. To the extent Relator's argument concerns how Iraq imposes the death penalty, that argument is foreclosed by the rule of non-inquiry. Further, as the United States observes, Coalition Provisional Authority Order Number 7, Section 3(1) states that "[c]apital punishment is suspended. In each case where the death penalty is the only available penalty prescribed for an offense, the court may substitute the lesser penalty of life imprisonment, or such other lesser penalty as provided for in the Penal Code." Doc. 200-3, Ex. B-3 at 62. In the United States's Supplemental Exhibits, Judge Hussain states Order Number 7 applies to Relator under "Article 2 of the Amended Iraqi Penal Code, 111 for 1969." Doc. 254-2, Ex. 2 at 4–5. According to Judge Hussain, because the crimes occurred while the death penalty was suspended in Iraq, the death penalty would not be an available punishment if Relator was convicted. Doc. 254-2, Ex. 2 at 4–5. Accordingly, the Court is not persuaded that Relator is exempt from punishment under Iraqi law and not extraditable on that basis.

C. CONVENTION AGAINST TORTURE

Relator asserts certifying extradition would violate the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Doc. 200 at 39. This Court is not the correct forum for that argument. In *Trinidad y Garcia v. Thomas*, the Court noted that "the *Secretary of State* must make a torture determination before surrendering an extraditee who makes a CAT claim." *Id.* 683 F.3d 952, 957 (9th Cir. 2012) (emphasis added). Further, *Trinidad y Garcia* suggests the Secretary of State's determination may be issued after a magistrate judge has certified extradition. *Id.* ("The Secretary must consider an extraditee's torture claim and find it not 'more likely than not' that the extraditee will face torture before extradition can occur." (citing 22 C.F.R. § 95.2)). Although the Ninth Circuit is clear that a CAT certification is mandatory prior to *extradition*, the posture of *Trinidad y Garcia* strongly suggests CAT certification is not required prior to *certification.*

D. UNITED STATES CITIZEN

Relator reads *Valentine v. United States ex rel. Neidecker*, as prohibiting his extradition absent authorization in the Treaty because he is a United States citizen. 299 U.S. 5, 7–18 (1936). Relator argues the Treaty between the United States and Iraq does not provide that authorization, as it does not compel the United States or Iraq to extradite its own citizens. Doc. 200 at 45–46.

18 U.S.C. § 3196 provides:

> If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met.

The Treaty states "[u]nder the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens." Doc. 3-3 at 11. *Knotek* addressed comparable language in an extradition treaty between the United States and the Czech Republic and concluded Section 3196 "fill[ed] a void" between what the United States was *permitted* to do versus what it was *prohibited* from doing under the terms of the extradition treaty in that case. "In other words, the Treaty states that there is no obligation to extradite a U.S. citizen, while section 3196 grants the U.S. government discretion to do so. 'There is a vast difference between not being bound to do an act and being forbidden to do it.' " *Knotek*, 925 F.3d at 1126–27 (alteration omitted) (quoting *Bašić v. Steck*, 819 F.3d 897, 900 (6th Cir. 2016)). Because Section 3196 similarly "fills a void" in the Treaty here, the United States may extradite a United States citizen even if not obligated by the Treaty to do so.

Relator asserts both Section 3196 and *Knotek* are inapplicable. First, Relator asserts the government "has forfeited any ability to rely on Section 3196 by failing to include or specifically reference it in its extradition complaint." Doc. 200 at 47. Relator relies on *Faretta v. California*, 422 U.S. 806, 818 (1975), which holds that criminal defendants in the United States are entitled to "notice, confrontation, and compulsory process," and cites *Quinn*'s instruction that a magistrate judge should order discovery procedures "as law and justice require." *Quinn*, 783 F.3d at 817 n.41.

An extradition proceeding is not a criminal proceeding. *Matter of Extradition of Mainero*, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997). "The person whose return is sought is not entitled to the rights available in a criminal trial at common law." *Id.* (citing *Neely v. Henkel*, 180 U.S. 109 (1901)). Moreover, Relator's general argument regarding fair notice is unfounded; Relator himself raised the Section 3196 issue in his initial extradition brief. Doc. 200 at 47. An additional round of briefing followed (doc. 226) and the extradition hearing was held several months later. Relator had ample notice that Section 3196 might apply to him. Further, as the United States notes, the United States also did not mention Section 3196 in the complaint in *Knotek*, in which the Ninth Circuit upheld the certification of extradition. Doc. 228 at 36 n.16 (citing *United States v. Knotek*, No. 2:13-mj-02421, Doc. 1 (C.D. Cal. Aug. 30, 2013)).

Relator also distinguishes *Knotek* by arguing the Treaty, unlike the treaty at issue in *Knotek*, was ratified prior to Section 3196's enactment and argues Section 3196 does not apply retroactively. Doc. 200 at 49–50. However, the Sixth Circuit in *Bašić* applied Section 3196 to an extradition treaty ratified in 1902. 819 F.3d at 898–99. The Ninth Circuit followed *Bašić* in *Knotek*. 925 F.3d at 1123 ("We agree with the Sixth Circuit and nearly every district court that has considered the applicability of 18 U.S.C. § 3196 that, in the absence of a treaty authorization or prohibition, the statute confers discretion on the U.S. Department of State to seek extradition of U.S. citizens.").

E. POLITICAL OFFENSE EXCEPTION

Relator asserts that even if probable cause exists, the offenses alleged were non-extraditable political offenses.

For a court to apply the political offense exception, a relator must prove: "(1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense,

and (2) a charged offense that is 'incidental to' 'in the course of,' or 'in furtherance of' the uprising." *Quinn*, 783 F.2d at 797 (internal citations omitted). The test is ideologically neutral: "[i]t is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal." *Id.* at 804–05.

1. The United States's Evidence Regarding AQI's Role in Violence in Iraq

Professor Whiteside is a professor of national security affairs with the United States Naval War College. In 2006 he served as a United States Army officer in Iraq conducting counterinsurgency operations against insurgent groups, "including the group the United States called 'al-Qaeda in Iraq.' " Doc. 199-2, Ex. 2 at 1.

Whiteside's Report described AQI's origins: it began as "Tawhid wal-Jihad." Upon pledging its allegiance to Osama Bin Laden in 2004, the group's leader, Abu Musab al-Zarqawi, changed its name to "al-Qaeda's Base of Jihad in the Land of Two Rivers," though the United States referred to the group as "al Qaeda in Iraq" or "AQI." Doc. 199-2 at 4–5. Al-Zarqawi was Jordanian. Under his leadership:

> [f]rom October 2004 to October 2006 the group would operate in the region as an official al-Qaeda franchise dedicated to preparing the groundwork for a caliphate that would allow implementation of Sharia in lands liberated from both U.S. and allied forces and Iraq's neighboring 'apostate' governments.

Doc. 199-2 at 5. According to Whiteside, AQI's leadership was drawn heavily from non-Iraqis, who maintained continuous ties with external terror groups such as the main al-Qaeda group. The leader of AQI after Zarqawi's death in June 2006 was Abu Hamza al-Muhajir, an Egyptian. Doc. 199-2 at 7.

Whiteside notes that AQI's regional commanders in Iraq were not Iraqi natives. When Relator allegedly killed Lieutenant Hussein and Officer Mohammed—between June to October 2006—AQI's leader in Fallujah was Jarrah al-Shami, a native Syrian. Doc. 199-2 at 8. Whiteside states AQI was not an "indigenous group" as it was "led by non-Iraqis whose objectives were global" and "were responsive to higher-level leaders in Pakistan." Doc. 199-2 at 5. Whiteside explains that AQI did not engage in violence on behalf of Iraqis to change the government of Iraq. AQI's goal was to establish a caliphate in the Levant region, a region that would include part of Iraq, Kuwait, Syria, and Turkey. Doc. 199-2 at 9. AQI was a "transnational terrorist group which operated and conducted terror attacks around the region and beyond in the pursuit of its global jihadist agenda." Doc. 199-2 at 6. AQI "planned attacks and struck targets in Jordan, Israel, and Turkey." Doc. 199-2 at 6. Rather than committing violent acts in a domestic struggle to change the form of the Iraqi government, AQI sought to replace international borders and establish a "pan-Islamic state that transcended current borders and aligned with the borders of the Islamic Empire at its greatest extent." Doc. 199-2 at 9. Emphasizing AQI's goal of destroying the Iraqi state to subsume it within parts of Iraq, Kuwait, Syria, and Turkey, Whiteside notes that AQI's Arabic name for itself—"al-Qaeda's Base of Jihad in the Land of Two Rivers":

> referr[ed] to the Euphrates and Tigris. None of the logos of the movement that ultimately became the Islamic State—not Tawhid wal-Jihad (2003-2004), AQI (2004-2006), Mujahidin Shura Council (2006), Islamic State of Iraq (2006-2013)—have ever included an image of the borders of Iraq.

Doc. 199-2 at 9.

Whiteside states AQI conducted a "campaign to assassinate police officers for allegedly publicly apostatizing and working for a democratic government." Doc. 199-2 at 5. He notes that during his tour in Iraq as an officer in the United States Army, AQI in 2006 and 2007 claimed responsibility for a suicide attack on an Iraqi police station as well as the capture and summary execution of an Iraqi police chief and his security detail. Doc. 199-2 at 12. As an example of AQI not being part of a domestic Sunni insurgency, Whiteside notes AQI repeatedly targeted "Sunni Iraqis who joined or negotiated with the [Iraqi] government" and "openly targeted civilians and Iraqis who joined police, military, or government jobs." Doc. 199-2 at 10. Whiteside notes that under Jarrah al-Shami, the Syrian who led AQI in Fallujah in 2006, "[a]ll local AQI amirs in Fallujah" followed al-Shami's "instructions and guidance, especially directives to kill Iraqi policemen." Doc. 199-2 at 8.

2. Relator's Expert

Professor Hamoudi is a Professor of Law at the University of Pittsburgh School of Law. In Hamoudi's view, AQI was "part of the insurgency" in Iraq. Doc. 200-3 at 31, ¶ 111. As to Zarqawi's and AQI's public pledge of allegiance to Osama Bin Laden, Hamoudi states "while there was a formal affiliation between Zarqawi as nominal head of AQI and Bin Laden and Al Qaeda, this affiliation was in name only." Doc. 200-3 at 31, ¶ 113. Hamoudi states the two groups "did not even share the same basic strategic or tactical goals." Doc. 200-3 at 31, ¶ 113.

As to attacks on police officers, Hamoudi states "there *was* international terrorism in Iraq at the time of the insurgency, and Zarqawi *was* leading much of it." Doc. 200-3 at 34, ¶ 127. But "neither Zarqawi nor international terrorists engaged in the meticulous targeting of ranked police officers in the new Iraqi state," because they lacked the skill, experience, and operational capacity to do so. Doc. 200-3 at 34, ¶ 128. Instead, attacks on police officers "were classic features of the Sunni insurgency." Doc. 200-3 at 34, ¶ 129. In disputing that AQI was capable of carrying out murders of police officers, Hamoudi writes "[i]t is possible that the alleged killings, if they took place, were carried out by members of the Army of Omar and were misattributed to AQI." Doc. 200-3 at 34 ¶ 130. Hamoudi asserts "[w]hat *is* important is to focus on the relevant act—the targeted assassination of police officers—and not on who committed it." Doc. 200-3 at 34 ¶ 130.

At the extradition hearing, Relator argued that even assuming AQI was "involved in this and assuming Mr. Al-Nouri was involved with them in this is fully consistent with the definition of a political offense because it was an attack that fit the profile of an act under the indigenous conspiracy." Doc. 273, Tr. 150:18–22. Relator asserted he was not downplaying "the involvement of foreigners and foreign groups in this uprising" or asking "the Court to ignore the involvement of foreigners in AQI" but "their presence and involvement doesn't change the degree to which this uprising fits within *Quinn*'s definition." Doc. 273, Tr. 147:8–13.

3. The Analysis Under *Quinn*

A relator does not need to "prove membership in the uprising group" to invoke the political offense exception. *Quinn*, 783 F.2d at 811. In applying the test, the Court will assume that the murders were committed by individuals acting on behalf of AQI, as no competent evidence suggests that any group other than AQI committed the murders. In particular, the Court finds no basis in the record to support Professor Hamoudi's speculation that the murders were misattributed to AQI.

Under *Quinn*, it matters *who the insurgents were* who carried out the murders of Lieutenant Hussein and Officer Mohammad, as "not all politically motivated violence undertaken by dispersed forces and directed at civilians is international terrorism." *Id.* at 805.

International terrorism is categorically excluded from the "protection afforded by the exception." *Id.* As the *Quinn* Court explained:

> [t]he exception was designed, in part, to protect against foreign intervention in internal struggles for self-determination. When we extradite an individual accused of international terrorism, we are not interfering with any *internal* struggle; rather it is the international terrorist who has interfered with the rights of others to exist peacefully under their chosen form of government.

Id. at 806.

The Court in *Quinn* was clear that under the test for the political offense exception, the Court does *not* analyze "the nature of the acts" by which insurgents seek to change their government. 783 F.2d at 805. "[T]he tactics that are used in such internal political struggles are simply irrelevant" to the analysis. *Id.* Accordingly, following *Quinn*, the Court does not adopt Relator's view that the identity of the murderers is irrelevant so long as the murders "fit the profile of an act under the indigenous conspiracy." Docs. 273, Tr. 150; doc. 200-3 at 34, ¶ 130. To the contrary, under *Quinn* the crucial question is not the nature of the act but whether the act was incidental to or in furtherance of an *indigenous* uprising.

The parties agree that there was a violent Sunni insurgency in Iraq in 2006; the Sunni insurgency opposed the Iraqi government and the United States. *See* doc. 199-2, Ex. 2 at 10 (Report of Professor Whiteside for the United States); doc. 200-3, Ex. B at 30 ¶ 106 (Report of Professor Hamoudi for Relator); doc. 273, Tr. 142:20–23. Based on the existence of a Sunni insurgency, Relator asserts he satisfies the first prong of the political offense exception, even if the many groups involved in the violence had disparate characteristics. Doc. 273, Tr. 142–44. According to Relator, even assuming he was involved with AQI and following "orders to fire at policeman in Fallujah," the murders are protected under the political offense exception because "insurgencies have never been hermetically sealed off from the rest of the world." Doc. 200 at 21.

The Court credits the ample evidence in the Whiteside Report that AQI was an international and transnational terrorist group committing violence in multiple nations besides Iraq, and that AQI often stood in violent opposition to other Sunni insurgent groups in Iraq. Indeed, the violent conflict towards the end of 2006 known as "the Awakening," during which the "local grassroots movement" groups violently opposed AQI's attempt to dominate the domestic insurgency and impose AQI's goals, supports the conclusion that AQI was in opposition to indigenous Sunni groups, and not part of a domestic insurgency. *See* doc. 199-2 at 1, 4, 10.

In illustrating the differences between AQI and indigenous groups, Whiteside identifies AQI's targeting of Iraqi police forces—the subject of the Complaint seeking Extradition—as one cause of the armed resistance Sunni militant groups conducted against AQI. For some Sunni tribes, jobs in the Iraqi police force were an important source of revenue and employment at a time of widespread unemployment. Doc. 199-2 at 11. AQI favored attacks on police officers for its goals; *the indigenous Sunni insurgency did not*, as "local Iraqi police had a negligible influence on insurgent activity and focused more on their roles as community arbiters of citizen behavior." Doc. 199-2 at 12.

In discussing the armed resistance to AQI in 2006 and 2007, Whiteside summarizes how AQI differed from the domestic insurgency:

> many felt that the group's [AQI's] killing of Iraqis that joined the government as soldiers and police, largely to earn a living, was an affront to the cultural, tribal,

> and societal norms of Anbar province and many other Sunni dominated areas. In many cases, these rival resistance members and tribal auxiliaries joined together to fight with the same U.S. and Iraqi government forces they were recently fighting against. This massive shift alone should speak to the bitter feelings that the extremists of AQI engendered among the very people they were trying to govern, or more accurately, coerce on their way to establishing a cross-boundary caliphate. It is a categorical error to paint AQI as just another Iraqi resistance group during this time period.

Doc. 199-2 at 13. This description—of rival resistance groups fighting *against* AQI, and *with* "the same U.S. and Iraqi government forces"—supports the inapplicability of the political offense exception to acts committed on behalf of AQI, an international and transnational terrorist group.

This Court finds AQI in 2006 was not part of an internal "uprising or other violent political disturbance" within the meaning of the first prong of the political offense exception defined in *Quinn.* Here, the cooperator named Relator as Emir of the al-Qaeda organization (doc. 3-4 at 7), and an eyewitness identified Relator as Emir of a group of militants in the Islamic State (doc. 3-4 at 5). Relator acknowledges AQI was present in Iraq and conducted acts of international terrorism in Iraq. Docs. 200-3 at 34, ¶ 127; 273, Tr. 147–48. On the evidence presented, the Court finds that the murders were acts of international terrorism constituting "foreign intervention in internal struggles for self-determination." *Quinn*, 783 F.3d at 806. As the *Quinn* Court stated repeatedly, international terrorism is not protected by the political offense exception. *Id.* at 805. "Acts of international terrorism do not meet the incidence test and are thus not covered by the political offense exception." *Id.* at 817.

Additionally, in light of the evidence that, in contrast to AQI, indigenous insurgents did not target police officers, the murders of Lieutenant Hussein and Officer Mohammed were not in furtherance of, or incidental to, any domestic uprising. In *Barapind,* the Court noted that the Relator "has the burden of showing a factual nexus between the crime and the political goal." 400 F.3d at 751. Here, in relying on the "nature of the act" of murdering police officers, Relator has not met his burden of showing the acts were "causally or ideologically related" to an indigenous political uprising. *Id.* at 752 (quoting *Quinn*, 783 F.2d at 809).

Relator argues against characterizing the acts as *international* terrorism, pointing out that if he was involved in these acts at the behest of a foreign organization, he was still a native of Iraq at the time of the two murders, and did not travel into Iraq from a foreign country to commit any act. Doc. 273, Tr. 149–50. In Relator's view, declining to apply the political offense exception here would cause it to "cease to have any function, because the reality of the world is foreigners do get involved; foreign entities and countries do get involved." Doc. 273, Tr. 148:14–20. To the contrary, in this Court's view, *Quinn* supports declining to apply the political offense exception under these circumstances in which an international terrorist group, with its own foreign command structure in place in Iraq, employed an Iraqi national to carry out its foreign intervention as it attempted to obliterate the government of Iraq as a sovereign entity and subsume the Iraqi nation within a caliphate. Exportation of violence is not protected by the political offense exception. *See Quinn*, 783 at 813. Indeed, the Court in *Quinn* anticipated the scenario of violence exported by foreign entities when it noted the political offense exception does not bar extradition of an international terrorist who "has interfered with the rights of others to exist peacefully under their chosen form of government." *Quinn*, 783 F.2d at 806. Relator's alleged acts of murder, on behalf of AQI and in service of destroying the Iraqi government from

without as opposed to supporting a domestic political struggle from within, fit squarely within the category of foreign intervention in internal struggles that *Quinn* excluded from the protection of the political offense exception.

* * * *

3. Extradition Case: Hyuk Kee Yoo

On August 1, 2022, the U.S. Court of Appeals for the Second Circuit affirmed the judgement of the district court against Hyuk Kee Yoo. *Yoo v. United States*, 43 F.4th 64. The case is related to criminal charges for embezzlement in South Korea. South Korea sought extradition pursuant to an extradition treaty with the United States. A magistrate court in the Southern District of New York found Yoo extraditable and issued a certificate of extraditability. Yoo moved to dismiss the complaint, arguing that the allegations of criminal conduct lacked probable cause and that his extradition was time-barred under the terms of the treaty. The magistrate judge determined that the extradition request demonstrated probable cause, but the determination of whether to deny extradition on the grounds that the statute of limitations had run was reserved for the Secretary of State. On November, 2021, the district court denied Yoo's subsequent petition for a writ of habeas corpus, agreeing with the magistrate judge's interpretation that the treaty's lapse of time provision leaves the determination to the Secretary's discretion. *Yoo v. United States*, 21-cv-06184 (Nov. 1, 2021.) The Second Circuit agreed that the application of the provision is a discretionary decision for the Secretary of State. The following excerpts (with footnotes omitted) are from the Court's discussion of whether the use of the word "may" in Article 6 of the treaty is discretionary or mandatory in nature.

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* * * *

This appeal centers on the meaning of the Treaty's Lapse of Time provision – specifically, whether the use of the word "may" in the first sentence of that provision is discretionary or mandatory in nature. The Lapse of Time provision appears in Article 6 of the Treaty and provides:

> Extradition *may* be denied under this Treaty when the prosecution or the execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State had the same offense been committed in the Requested State. The period during which a person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. Acts or circumstances that would suspend the expiration of the statute of limitations of either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a written statement of the relevant provisions of its statute of limitations, which shall be conclusive.

S.A. at 46 (emphasis added). The question on appeal is who decides whether the statute of limitations of the Requested State – here, the United States – applies to bar an extradition: the

court, in making a mandatory determination before issuing a certificate of extraditability, or the Secretary of State, in making a discretionary decision in his capacity as part of the Executive Branch of the United States government.

Yoo argues that whether the applicable statute of limitations has run is a mandatory determination for the court – and not the Secretary of State – to make; that the untimeliness of those charges is a mandatory bar to his extradition; and that the magistrate judge therefore erred in issuing the Certificate. The government in turn argues that the application of the Treaty's Lapse of Time provision is a discretionary decision to be made by the Secretary of State when the United States is the Requested State, or by the relevant executive authority in South Korea when South Korea is the Requested State. Both parties draw on the federal courts' traditional role in extradition proceedings, the Treaty's text, and the Treaty's legislative history to support their arguments. After our review of the Treaty's text and legislative history, as well as the parties' arguments, we agree with the government and find that the district court did not err in denying Yoo's habeas petition.

* * * *

B. The Text of the Treaty

Yoo argues that under the terms of the Treaty, the embezzlement charges he faces in South Korea are time-barred. Yoo focuses primarily on the meaning of the word "may" in the first sentence of the Lapse of Time provision in Article 6, which states that "[e]xtradition may be denied under this Treaty when the prosecution or execution of punishment of the offense for which extradition is requested would have been barred because of the statute of limitations of the Requested State." S.A. at 46 (emphasis added). Yoo argues that even if the use of the word "may" usually implies discretion, that reading "should not be controlling when other considerations point differently," as he argues they do in this case. Appellant's Br. 14-15. We disagree.

The interpretation of treaties is a familiar exercise in the federal courts: "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, —— U.S. ——, 140 S. Ct. 1637, 1645, 207 L.Ed.2d 1 (2020) (citation and quotation marks omitted). In interpreting both statutes and treaties, courts seek to "avoid readings that 'render statutory language surplusage' or 'redundant.' " *Sacirbey*, 589 F.3d at 66, quoting *Filler v. Hanvit Bank*, 378 F.3d 213, 220 (2d Cir. 2004). But where the "language of a treaty is plain, a court must refrain from amending it because to do so would be to make, not construe, a treaty." *Georges v. United Nations*, 834 F.3d 88, 92 (2d Cir. 2016) (brackets, quotation marks, and citation omitted).

In addition to the treaty's text, courts have also "considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin v. Texas*, 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996). And while the matter of treaty interpretation is ultimately a question of law for the courts, "given the nature of the document and the unique relationships it implicates, the Executive Branch's interpretation of a treaty is entitled to great weight." *Georges*, 834 F.3d at 93 (quotation marks and citation omitted).

We are not the first Court of Appeals to consider the meaning of the word "may" in Article 6 of the Treaty between the United States and South Korea. In *Patterson v. Wagner*, 785

F.3d 1277 (9th Cir. 2015), the Ninth Circuit reasoned that because the "normal reading of 'may' is permissive, not mandatory," the "most natural reading of Article 6 ... is that untimeliness is a discretionary factor for the Secretary of State to consider in deciding whether to grant extradition." *Id.* at 1281. Under the Ninth Circuit's reading, "the Secretary 'may' decline to extradite someone whose prosecution would be time-barred in the United States, but he or she is not required to do so," and "there is no mandatory duty that a court may enforce." *Id.*

Another of our sister Circuits has similarly read the language of Article 6's Lapse of Time provision as discretionary in nature. The Sixth Circuit, sitting en banc, discussed the U.S.-Korea Treaty, as well as several other treaties with similar provisions to which the United States is a party, in interpreting the lapse of time provision in the extradition treaty between the United States and Mexico. *Martinez v. United States*, 828 F.3d 451, 460-61 (6th Cir. 2016). The court cited Article 6 of the Treaty as an example of a provision that "*permits* the parties to deny extradition" in the relevant circumstances. *Id.* at 460 (emphasis added). The court contrasted the U.S.-Korea Treaty with the extradition treaty between the United States and France, noting that the latter "*forbids* extradition if prosecution is 'barred by *lapse of time*' in the requested State." *Id.* at 461 (citation omitted, first emphasis added, and second emphasis in original).

We agree with the conclusions of our sister Circuits in *Patterson* and *Martinez* that the most natural reading of the word "may" in Article 6 is permissive, not mandatory. The use of the word "may" – in contrast to words like "shall" or "must" – authorizes, rather than commands. *See N.Y. State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n*, 991 F.3d 439, 446 (2d Cir. 2021); *see also Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("The word 'may' customarily connotes discretion."). On a plain reading of Article 6's text, we see no reason to disagree with the reading given to that provision by the Ninth and Sixth Circuits.

Yoo objects to the district court's reliance on *Patterson* and its ultimate determination that the "natural reading of the first sentence [of Article 6] is that it is permissive rather than mandatory." *See Yoo*, 2021 WL 5054726, at *5. Of course, the use of the word "may" is not "necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000). We have also acknowledged that "in some limited scenarios, the word 'may' can impose a mandatory directive," because "[a]lthough 'the word "may," when used in a statute, usually implies some degree of discretion, this common-sense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.' " *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 66 (2d Cir. 2021) (brackets omitted), quoting *United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983).

Yoo argues that a "careful reading of the Treaty demonstrates that the drafters did not use 'may' consistently to identify those issues that were for the Secretary of State to consider in the exercise of his discretion," Appellant's Br. 12. The Treaty does, of course, use the words "may" and "shall," along with related terms in multiple places and with multiple variations. For instance, as Yoo points out, Article 2(4) of the Treaty, which addresses situations in which the charged offense was committed outside of the Requesting State's territory, provides that "[i]f the laws in the Requested State do not" provide for "punishment of an offense committed outside of its territory in similar circumstances" then the "executive authority of the Requested State *may, in its discretion*, grant extradition, provided that the requirements of this Treaty are met." S.A. at 44 (emphasis added). Yoo argues that if " 'may' always means executive branch discretion, then

the words 'executive authority' and 'in its discretion' would be surplusage" in Article 2(4), as "[t]he word 'may' would be enough." Appellant's Br. 12.

But Yoo's argument ignores the fact that the Treaty uses the word "may," standing alone, in several other provisions, including in Article 2(4) itself. For instance, Article 2(4) also states that "[e]xtradition *may* be refused when the offense for which extradition is sought is regarded under the law of the Requested State as having been committed in whole or in part in its territory and a prosecution in respect of that offense is pending in the Requested State." S.A. at 44 (emphasis added). As another example, Article 2(7) provides that "[w]here the request for extradition relates to a person sentenced to deprivation of liberty by a court of the Requesting State for any extraditable offense, extradition *may* be denied if a period of less than four months remains to be served." *Id.* at 45 (emphasis added). Similarly, Article 4(4) provides that "[t]he executive authority of the Requested State *may* refuse extradition for offenses under military law which are not offenses under ordinary criminal law." *Id.* at 46 (emphasis added). And Article 7(1) provides that "[w]hen the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State *may* refuse extradition" unless certain conditions are met. *Id.* at 47 (emphasis added). Yoo himself concedes that the use of the word "may" in Article 7(1) "implies a degree of discretion," Appellant's Br. 13, though he maintains that the use of the word "may" in Article 6 does not.

The Treaty also uses the word "shall" in several places. For example, Article 4(1) provides: "Extradition *shall* not be granted if the Requested State determines that the offense for which extradition is requested is a political offense." S.A. at 45 (emphasis added). And Article 5 provides: "Extradition *shall* not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested." *Id.* at 46 (emphasis added).

The Treaty's uses of both "may" and "shall" demonstrate that its drafters were well aware of the difference between permissive and mandatory determinations and how to provide for each of them when drafting the Treaty's text. Moreover, the Treaty uses the word "shall" in Articles 4 and 5, the Articles immediately preceding Article 6, to delineate instances in which extradition "shall not be granted" – that is, where the relevant offense is a political offense or where the person sought has already been convicted or acquitted of the relevant offense in the Requested State – but then uses the word "may" in the very next Article to describe when extradition is available for offenses whose prosecution would have been barred by the Requested State's statute of limitations had the offense been committed within that State's jurisdiction. The mandatory refusals in Articles 4 and 5 sharply contrast with the permissive nature of Article 6, and it is difficult to escape the implication that the shift from using "*shall* not be granted" to "*may* be denied" in back-to-back Articles was deliberate.

The Supreme Court has "caution[ed] against ignoring contexts in which 'Congress' use of the permissive "may" contrasts with the legislators' use of a mandatory "shall" in the very same section,' and where 'elsewhere in the same statute, Congress use[s] "shall" to impose discretionless obligations.'" *Clinton Nurseries, Inc.*, 998 F.3d at 66 (brackets omitted), quoting *Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001). The Treaty does indeed use the words "may" and "shall," or similar phrases, within the same provision. For example, Article 2(4), which, as we previously noted, uses both "may" and the formulation "may, in its discretion," also provides that "[i]f the offense was committed outside the territory of the Requesting State, extradition *shall* be granted in accordance with this Treaty" under

certain circumstances. S.A. at 44 (emphasis added). And Article 3(1) provides: "Neither Contracting State *shall* be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, *in its discretion*, it be deemed proper to do so." *Id.* at 45 (emphasis added).

Both of those provisions – as well as others throughout the Treaty – demonstrate that the Treaty's drafters knew the difference between a mandatory determination and a discretionary consideration and drafted the Treaty's provisions accordingly. The fact that the Treaty's drafters sometimes used additional, perhaps superfluous, phrases like "in its discretion" in other provisions of the Treaty does not mean that the word "may," standing alone, lacks its customary meaning of being permissive or providing for discretion, absent compelling evidence to the contrary. As the Supreme Court has instructed, in some situations it is "appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007).

We think this is just such a situation. We conclude that the word "may" has it customary meaning when used in Article 6 and that it is, based on the plain text, permissive or discretionary in nature. There is nothing in the Treaty's text that indicates that the word "may" has any meaning other than its customary one.

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4. Extradition of Former President Hernández

On April 21, 2022, the United States announced the extradition of former Honduras president Juan Orlando Hernández to the United States from Honduras. The extradition was completed in accordance with the extradition treaty between the United States of America and the Republic of Honduras. The former president was indicted on drug-trafficking and firearms charges. The Department of Justice press release announcing the extradition is available at https://www.justice.gov/opa/pr/juan-orlando-hern%C3%A1ndez-former-president-honduras-indicted-drug-trafficking. See Chapter 16 for a discussion of visa restrictions imposed on former president Hernández.

5. Universal Jurisdiction

On October 12, 2022, Legal Adviser Mark Simonoff delivered remarks at the 77th General Assembly Sixth Committee meeting on the scope and application of the principle of universal jurisdiction. His statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-86-scope-and-application-of-the-principle-of-universal-jurisdiction/.

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The United States greatly appreciates the Sixth Committee's continued interest in this important agenda item. We thank the Secretary-General for his reports, which have usefully summarized the submissions made by States on this topic.

Despite the importance of this issue and its long history as part of international law relating to piracy, the view of the United States continues to be that basic questions remain about how jurisdiction should be exercised in relation to universal crimes and States' views and practices related to the topic.

During the years since this issue was taken up by the Committee, we have engaged in thoughtful discussions on a number of important topics concerning universal jurisdiction, including with respect to its definition, scope, and application. The submissions made by States to date, the continued effort of the Working Group in this Committee, and the Secretary-General's reports have been valuable in helping us to identify differences of opinion among States as well as points of consensus on this issue. We remain interested in further exploring issues related to the practical application of universal jurisdiction.

The United States continues to analyze the contributions of other States and organizations. We welcome this Committee's continued consideration of this issue and the input of more States about their own practice. We look forward to exploring these issues in as practical a manner as possible.

* * * *

In December 2022, the United States Congress passed the Justice for Victims of War Crimes Act (the "Act"), which amends the War Crimes Act of 1996 by "broaden[ing] the scope of individuals subject to prosecution for war crimes." Justices for War Crimes Act, S.4240, 117th Cong. (2022). The Act expands jurisdiction to include offenders present in the U.S. regardless of the nationality of the victim or offender. On December 22, 2022, Attorney General Merrick B. Garland issued a press statement on the passage of the Act. The statement is available at https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-passage-justice-victims-war-crimes-act and includes the following.[*]

> The Justice Department and our partners stand with the people of Ukraine and will pursue every avenue of accountability to bring to justice those responsible, wherever they are located. The Justice for Victims of War Crimes Act will strengthen those efforts by enabling the Department to prosecute alleged war criminals who are found in the United States.
>
> In the United States of America, there must be no hiding place for war criminals and no safe haven for those who commit such atrocities. This bill will help the Justice Department fulfill that important mandate.

[*] Editor's note: On January 5, 2023, President Biden signed the Justice for Victims of War Crimes Act. Pub. L. No. 117-351, 136 Stat. 6265.

B. INTERNATIONAL CRIMES

1. General

On May 16, 2022, James A. Walsh, Principal Deputy Assistant Secretary of Bureau of International Narcotics and Law Enforcement Affairs delivered the U.S. remarks at the 31st UN Commission on Crime Prevention and Criminal Justice in Vienna, Austria. The CCPCJ met in person for the first time after two years of virtual sessions. The remarks are available at https://www.state.gov/principal-deputy-assistant-secretary-walshs-national-statement-at-the-31st-un-commission-on-crime-prevention-and-criminal-justice/ and excerpted below.

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We have much to celebrate but we must focus on the fact that one of our Member States, Ukraine, is experiencing ongoing aggression from another, Russia. Russia launched an unprovoked and premeditated attack on Ukraine's sovereignty and territorial integrity. This aggression continues to this today, resulting in catastrophic loss of life and human suffering. These horrific actions contravene international law, particularly our obligations under the UN Charter.

As we gather for the CCPCJ, with its thematic focus on cybercrime, the United States notes that Russia continues to use aggressive cyber means to attack and destabilize its neighbor. Membership to this Commission carries with it the responsibility to promote the rule of law and advance criminal justice policies – but Russia is operating in a sphere of lawlessness similar to the bad actors we seek to combat.

While horrific and reprehensible, Russia's actions will not deter our critical work in this Commission – work that is vital to help Member States protect their citizens, promote rule of law, and foster international cooperation to address a wide range of crimes. We welcome the Commission's timely focus on strengthening the use of digital evidence in criminal justice and countering cybercrime, and its focus on addressing the abuse and exploitation of minors in illegal activities with the use of the Internet. The United States looks forward to hosting a side event today highlighting Operation Ladybird – a case study in international cooperation to takedown cyber criminals.

We look forward to similar expert-driven discussions throughout the week, including in the CCPCJ's thematic debate. We also appreciate the enhanced focus within the CCPCJ on crimes that affect the environment. We applaud UNODC for convening the recent CCPCJ expert group on this topic, which gathered more than 800 participants from all over the world. This meeting highlighted the importance of using the UN Convention against Transnational Organized Crime – the existing international framework –to advance international cooperation to combat crimes that affect the environment. While we welcome further discussions on the challenges in this important area, we believe innovative solutions to address them can be found within this existing framework.

Finally, the United States underscores the critical role played by civil society in the CCPCJ and other Vienna-based counter drug and anti-crime fora. Member States benefit from

hearing directly from civil society and their unique experience, expertise, and diverse perspectives. We should be on guard for attempts to shrink civil society participation in Vienna-based fora. It is only with their partnership that we can truly identify challenges and generate ways to solve them.

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2. Terrorism

a. United Nations

On September 8, 2022, Ambassador Linda Thomas-Greenfield delivered the U.S. statement at the first-ever UN Global Congress for Victims of Terrorism. The statement is excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-the-un-global-congress-for-victims-of-terrorism/.

* * * *

Every year, tens of thousands of lives are impacted by terrorist violence around the globe. These are brothers, sisters, sons, and daughters. They are just like us. People who want the freedom to live in peace.

So today is a somber day. And it's a day to recommit ourselves to doing everything in our power to keep our citizens safe. We can honor victims of terrorism by holding terrorists accountable for their crimes. And we can honor victims by working to prevent future attacks.

The international community has made great strides in detecting and disrupting terrorist attacks. But we still face a terrorist threat landscape that is increasingly dynamic, fluid, and complex. Terrorist groups are more ideologically diverse and geographically diffuse than ever.

So to effectively counter terrorism, including racially or ethnically motivated violent extremism, we must constantly adapt. We must employ a broad range of tools. And we must stand united – as partners, as allies.

Last year, we took an important step forward when we strengthened the Global Counterterrorism Strategy. Together, we bolstered the mandate of the Counterterrorism Executive Directorate in the Security Council. As these resolutions make clear, to effectively stamp out terrorism, we must respect the rule of law and human rights.

Let me be also clear about the fact that victims' voices must be front and center in all this work. As such, the United States also supports programming to strengthen the work of Member States to protect, promote, and respect the rights and needs of victims of terrorism.

Friends, the work ahead will not be easy, but our charge could not be more important. So as we mourn the victims of terrorism, let us renew our commitment to the pursuit of justice and peace for all.

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On October 3, 2022, Attorney Adviser Elizabeth Grosso delivered the U.S. statement at the 77th meeting of the General Assembly Sixth Committee on agenda item 113: measures to eliminate international terrorism. Her statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-113-measures-to-eliminate-international-terrorism/.

* * * *

Before giving our first remarks, the United States joins others in condemning the Russian Federation's unprovoked and unjustified use of force against Ukraine. We also categorically reject the illegal referenda and purported annexations of Ukrainian territory taking place over recent days. Russia's attempts to enlarge its own territory through the threat and use of force is a clear violation of the UN Charter, and must be of grave concern to the Legal Committee of the United Nations. We call upon the Russian Federation to immediately cease using force against Ukraine and withdraw its military from Ukrainian territory. I will now turn to our remarks on measures to eliminate international terrorism.

Every year, tens of thousands of lives are impacted by terrorist violence around the globe. The effect on communities, families, and individual lives is profound, with many continuing to suffer for years to come. On this occasion, we take a moment to acknowledge the victims of terrorism and to remember why we come together as an international community to counter terrorism and violent extremism.

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. Together, we have taken many steps to diminish terrorist threats, including by targeting terrorist networks' financing and support systems, countering their propaganda, and preventing their travel.

While recognizing the great strides we have made as an international community to address terrorism, we also must recognize that terrorism remains a serious concern and there is more that remains to be done. 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. 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 foreign terrorist fighters to countries of origin in the future.

Violent white supremacists and other Racially or Ethnically Motivated Violent Extremists, or "REMVEs" [REM-Vs]–often loosely organized and not formally affiliated with any single group–are exploiting the internet to spread their corrupt ideologies and to encourage attacks, including through international networks and connections. Of note, the Secretary General's Report from August 3 this year identified research which indicated a 320 percent rise

in attacks conducted by individuals affiliated with so-called "right-wing terrorism" between 2014 to 2018. The United States is pleased that last year's resolution that reviewed the Global Counterterrorism Strategy (GCTS) reflected for the first time a recognition of this REMVE threat. We believe that REMVE is one of the most pressing counterterrorism challenges facing the international community today.

The United States is continuing our efforts to implement the 2021 National Strategy for Countering Domestic Terrorism and to bring to justice those who violated U.S. law in the January 6, 2021 attack on the U.S. Capitol. We must remain united in our collective efforts to prevent and counter the rising and changing threat posed by REMVE and its international networks and connections. Through multilateral efforts led by the United Nations, the Global Counterterrorism Forum, the International Institute for Justice and the Rule of Law, the Aqaba Process led by Jordan, the Christchurch Call to Action to Eliminate Terrorist and Violent Extremist Content Online, and the industry-led Global Internet Forum to Counter Terrorism, and regional organizations such as the OSCE and the Council of Europe, we are also leveraging our respective tools and capabilities against REMVE challenges. We hope that further cooperation and conversation on how to address this scourge will be forthcoming.

We continue to strengthen and expand our voluntary collaboration and partnerships with private technology companies to counter terrorism online, including through improving information sharing on terrorist and violent extremist trends and tactics and by companies' continuing to strengthen and enforce 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.

The international community must recommit to multilateral efforts to prevent and counter terrorism and violent extremism, coming together to address this international threat to peace and security. In so doing, we must always remember that successful efforts to counter and prevent terrorism and violent extremism respect human rights, including freedom of expression, and the rule-of-law. Indeed, efforts to stifle freedom of expression or freedom of religion or belief and other human rights and fundamental freedoms under the guise of counterterrorism are counterproductive. In fact, according to some former REMVEs, such government overreach has reinforced their narratives and proven useful in recruiting new supporters.

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, and reiterates its commitment to work with the international community to counter terrorism and violent extremism.

* * * *

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

On May 20, 2022, 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." 87 Fed. Reg. 31,051 (May 20, 2022). The countries are: Iran, Democratic People's Republic of Korea, Syria, Venezuela, and Cuba.

c. Country Reports on Terrorism

Each year, the State Department releases its annual Country Reports on Terrorism, detailing key developments in the global fight against ISIS, al-Qa'ida, Iran-supported terrorist groups, and other terrorist groups. 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 2021 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 2021 Country Reports on Terrorism are available at https://www.state.gov/reports/country-reports-on-terrorism-2021/.

d. 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

During 2022, 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.

[**] Editor's Note: The 2021 Country Reports on Terrorism were released on February 27, 2023. See State Department media note, available at https://www.state.gov/release-of-the-2021-country-reports-on-terrorism/.

On May 20, 2022, Secretary Blinken revoked the designation of five organizations as Foreign Terrorist Organization (FTO): Basque Fatherland and Liberty, Aum Shinrikyo, Mujahidin Shura Council in the Environs of Jerusalem, Kahane Chai, and Gama'a al-Islamiyya. The revocation is based on the conclusion that, as defined by the Immigration and Nationality Act, the five organizations are no longer engaged in terrorism or terrorist activity and do not retain the capability and intent to do so. 87 Fed. Reg. 31,050-51 (May 20, 2022). The press statement on this revocation is available at https://www.state.gov/revocation-of-five-foreign-terrorist-organizations-designations-and-the-delisting-of-six-deceased-individuals-as-specially-designated-global-terrorists/. Also on May 20, 2022, the State Department published the determination, after review, that the designation as FTO of al-Qa'ida should be maintained. 87 Fed. Reg. 31,051 (May 20, 2022).

On June 9, 2022, the State Department published the determination, after review, that the designation as FTO of al-Qa'ida in the Arabian Penninsula should be maintained. 87 Fed. Reg. 35,281 (June 9, 2022).

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

On February 7, 2022, the U.S. Department of State announced an RFJ reward offer of up to $10 million each for information leading to the identification or location of ISIS-K leader Sanaullah Ghafari, also known as Shahab al-Muhajir, and for information leading to the arrest or conviction in any country of those responsible for the August 26, 2021, terrorist attack at the Kabul airport. The State Department media note, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-isis-k-leader-sanaullah-ghafari-and-kabul-airport-attack/, includes the following:

> In June 2020, Sanaullah Ghafari was appointed by the ISIS core to lead ISIS-K. Ghafari is responsible for approving all ISIS-K operations throughout Afghanistan and arranging funding to conduct operations. On November 22, 2021, the Department of State designated Ghafari as a Specially Designated Global Terrorist under Executive Order (E.O.) 13224, as amended.
>
> On August 26, 2021, terrorists launched a suicide bombing against the airport as the United States and other governments conducted a large-scale evacuation of their citizens and vulnerable Afghans from the country. At least 185 people were killed in the attack, including 13 U.S. service members supporting evacuation operations. More than 150 people, including 18 U.S. service members, were wounded. ISIS-K claimed responsibility for the attack. On September 29, 2015, the U.S. government designated ISIS-K as a Specially Designated Global Terrorist (SDGT), and on January 14, 2016, the Department of State designated it a Foreign Terrorist Organization (FTO).

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

On November 18, 2022, the State Department announced a RFJ offer of up to $10 million each for information leading to the identification or location of al-Shabaab key leaders Ahmed Diriye, Mahad Karate, and Jehad Mostafa and a reward of up to $10 million for information leading to the disruption of the financial mechanisms of al-Shabaab. This announcement marks the first time that the Department has offered a reward for information on al-Shabaab's fundraising and financial facilitation networks. The press statement announcing the rewards is available at https://www.state.gov/rewards-for-justice-reward-offers-for-information-on-key-leaders-of-al-shabaab-ahmed-diriye-mahad-karate-and-jehad-mostafa-and-the-disruption-of-its-financial-mechanisms/ and excerpted below.

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Al-Shabaab is al-Qa'ida's principal affiliate in East Africa. Al-Shabaab is responsible for numerous terrorist attacks in Somalia, Kenya, and neighboring countries that have killed thousands of people, including U.S. citizens. The Department of State designated al-Shabaab as a Foreign Terrorist Organization (FTO) and Specially Designated Global Terrorist (SDGT) in March 2008. In April 2010, Al-Shabaab was also designated by the UNSC's Somalia Sanctions Committee pursuant to paragraph 8 of resolution 1844 (2008).

Ahmed Diriye, al-Shabaab's emir since September 2014, was designated by the Department as an SDGT on April 21, 2015, and by the UNSC's Somalia Sanctions Committee on September 24, 2014. He was seen in a video meeting with al-Shabaab fighters prior to the January 2020 attack on Camp Simba in Manda Bay, Kenya, that killed one U.S. Army soldier and two U.S. contract personnel and wounded three additional U.S. personnel and one Kenyan soldier.

Mahad Karate was designated by the Department as an SDGT on April 21, 2015, and by the UNSC's Somalia Sanctions Committee on February 26, 2021. Karate is al-Shabaab's second or shadow deputy emir and continues to lead some al-Shabaab operations. Karate maintains some command responsibility over Amniyat, al-Shabaab's intelligence and security wing, which oversees suicide attacks and assassinations in Somalia, Kenya, and other countries in the region, and provides logistics and support for al-Shabaab's terrorist activities.

Jehad Mostafa is a U.S. citizen and former resident of California. Mostafa has served as a military instructor at al-Shabaab training camps, a leader of foreign fighters, a leader in al-Shabaab's media wing, an intermediary between al-Shabaab and other terrorist organizations, and a leader in al-Shabaab's use of explosives in terrorist attacks. In December 2019, he was indicted in federal court on charges of conspiring to provide material support to terrorists, conspiring to provide material support to al-Shabaab, and providing material support to al-Shabaab. The FBI assesses Mostafa to be the highest-ranking terrorist with U.S. citizenship fighting overseas.

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e. Global Coalition to Defeat ISIS Africa Focus Group

On October 27, 2022, the State Department published as a media note the joint statement on the occasion of the Global Coalition to Defeat ISIS Africa Focus Group meeting, co-signed by Morocco, Niger, Italy, and the United States of America. The joint statement follows and is available at https://www.state.gov/joint-statement-of-the-co-chairs-of-the-global-coalition-to-defeat-isis-africa-focus-group/.

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Upon invitation of the Republic of Niger, the Global Coalition to Defeat ISIS Africa Focus Group co-chairs, Italy, Morocco, Niger, and the United States met on October 26 in Niamey. This was the first meeting of the Africa Focus Group in the region of sub-Saharan Africa since its establishment in December 2021.

The Africa Focus Group is African-led and is a collaborative, civilian led counterterrorism effort that draws upon the Defeat ISIS Coalition's experiences in Iraq and Syria and adapts them to counter specific ISIS and other terrorist group affiliates in the region. The Group is uniquely positioned to enhance the fight against ISIS and other terrorist groups in Africa, by engaging with African members, coordinating with other regional and multilateral entities on existing initiatives and with the Defeat ISIS Coalition working groups on countering ISIS terrorism financing, furthering stabilization efforts in liberated areas, deterring foreign terrorist fighter flows, and countering ISIS violent extremist messaging to vulnerable populations.

In Niamey, the Africa Focus Group co-chairs recognized the importance of supporting African efforts in the fight against terrorism at the national and sub regional levels, enhancing African ownership of counterterrorism initiatives and policies, and reinforcing counterterrorism capacity building efforts through a comprehensive approach addressing security and development.

The co-chairs focused on the efficacy of members' counterterrorism programs by identifying overlapping efforts and resources and potential geographic and programmatic gaps. They shared assessments on the threat of ISIS and other terrorist organizations on the African continent and ways to coordinate and collaborate on effective and efficient methods to combat violent extremism through proactive information sharing and border management, as well as stabilization and deradicalization projects with the involvement of civil society.

The Co-Chairs agreed that the Global Coalition to Defeat ISIS remains committed to confronting and defeating ISIS in Africa and elsewhere in the world where it operates.

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f. Arria-Formula Meeting on Transnational Activities of Terrorist Groups

On August 31, 2022, Ambassador Jeffrey DeLaurentis, Senior Advisor for Special Political Affairs, delivered remarks at a UN Security Council Arria-Formula meeting on

transnational activities of terrorist groups. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-transnational-activities-of-terrorist-groups/.

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ISIS and al-Qa'ida in particular continue to exploit conflict, governance failure, political turmoil, socioeconomic inequalities, and grievances to attract followers and resources, as well as to incite and organize terrorist attacks. The international community must augment the efforts of vulnerable populations to reject these appeals to violent extremism.

As the Secretary-General recently noted in his bi-annual report on ISIS and al-Qa'ida, this threat is increasing across various areas of the African continent. ISIS and al-Qa'ida affiliates continue to exploit Africa's standing conflicts and grievances to bolster their illicit activities, providing them heightened lethality.

As has already been noted, Al-Shabaab's deadly siege on the Hayat Hotel in Mogadishu on August 20-21, and its July incursion into Ethiopia, are just its latest large-scale attacks undermining the peace and stability of Somalia and East Africa.

The United States continues to assist our African partners to build and sustain capable, professional, and accountable military and civilian security services to prevent and counter terrorist threats.

I want to say up front that we continue to believe that maintaining Al-Shabaab's listing in the UNSC 751 regime, which is tailored to the Somali context, so far offers the best opportunity to address the Al-Shabaab threat. This is admittedly a particularly complex challenge with many factors to consider, thus we welcome further collaboration with Somalia, the African Union Transition Mission in Somalia and its troop contributors, and the members of the Security Council, to address better the al-Shabaab threat and enable Somalia to take more responsibility for its own security.

We underscore the continuing importance of the 751 Somalia Sanctions Committee as the venue for productive technical discussions regarding sanctions listings. We also emphasize the need for 751 to be able to operate free from unrelated bilateral political considerations.

In order to promote the peace and stability of Somalia and East Africa, we urge all Council members to support nominations in the committee.

Among new and emerging technologies, as we have heard unmanned aerial systems are particularly exploited by terrorist groups to facilitate attacks, conduct intelligence, and develop propaganda. The Global Counterterrorism Forum's Berlin Memorandum on Good Practices for Countering Terrorist Use of Unmanned Aerial Systems provides recommendations to counter the illicit use of UAS.

The United States is committed to continuing our Counterterrorism-UAS capacity-building efforts and appreciates Kenya's dedication to this important mission. We have seen an increase in terrorist use of unmanned aerial systems and multi-use technologies to threaten soft targets, and we look forward to continuing cooperation with Kenya on these efforts.

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3. Narcotics

a. Majors List Process

(1) International Narcotics Control Strategy Report

On March 1, 2022, the Department of State submitted the 2022 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 2021. 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 2022 INCSR is available at https://www.state.gov/2022-international-narcotics-control-strategy-report-2/.

(2) Major Drug Transit or Illicit Drug Producing Countries

On September 15, 2022, the White House issued Presidential Determination No. 2022-23, "Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2023." 87 Fed. Reg. 58,251 (Sept. 23, 2022). 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 Afghanistan, Bolivia, Burma, and 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 Afghanistan, Bolivia, Burma, and Venezuela are vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2022 by virtue of § 706(3)(A) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350.

b. Narcotics Rewards Program

On February 2, 2022, the Department of State announced a reward of up to $5 million under its Narcotics Rewards Program ("NRP") for information leading to the conviction of Maximiliano Dávila Perez, a Bolivian national. The press statement is available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-bolivian-narcotics-trafficker-to-justice/ and includes the following:

> Dávila is the former Director of the Bolivian Special Forces for the Fight Against Drug Trafficking (Fuerza Especial de Lucha Contra el Narcotráfico, or FELCN). During his time as FELCN Director, Dávila is believed to have used his position to safeguard aircraft used to transport cocaine through third countries for distribution in the United States. Moreover, both prior to and during his time as FELCN Director, Dávila was allegedly involved in narcotics trafficking and money laundering.
>
> On September 22, 2020, Dávila and associates were indicted by a federal grand jury in the Southern District of New York. The indictment charges Dávila with conspiring to import cocaine into the United States and conspiring to use or carry machine guns during and in relation to, and to possess machine guns in furtherance of, the drug trafficking conspiracy.

On March 18, 2022, the State Department offered a reward under the Narcotics Rewards Program ("NRP") of up to $10 million for information leading to the arrest and/or conviction of Guatemalan Eugenio Darío Molina-Lopez, a key leader of the transnational criminal organization ("TCO") known as Los Huistas. See press statement, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-guatemalan-drug-trafficker-to-justice/. The press statement further explains:

> Los Huistas is primarily based in the Huehuetenango region of Northwest Guatemala that borders Mexico. Molina's leadership within Los Huistas is well known to the U.S. and Guatemalan governments, and we are working together to bring him to justice.
>
> This reward offer complements a Department of Justice indictment against Molina and other co-conspirators, as well as a Department of the Treasury action taken by the Office of Foreign Assets Control to impose financial sanctions on Molina and other individuals and entities associated with Los Huistas under Executive Order 14059.

c. Joint Action Plan on Opioids

On November 8, 2022, the governments of United States and Canada released a joint statement on the meeting of the Canada-United States Joint Action Plan on Opioids Steering Committee. Senior officials met to address substance use disorder and the opioid overdose crisis and discuss progress in multiple areas. The joint statement is available at https://www.state.gov/joint-statement-of-the-canada-united-states-joint-action-plan-on-opioids-steering-committee/ and excerpted below.

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Key Milestones in 2022:

- **Health:** Published a joint white paper, **Substance Use and Harms During COVID-19 and Approaches to Federal Surveillance and Response**, that examines rapid and innovative approaches used by both countries to monitor substance use trends during the pandemic. The paper includes information on substance use harms and deaths in Canada and the United States, the impact of COVID-19 on the opioids crisis, and policy responses to address substance use from the outset of the COVID-19 pandemic to September 2022;
- **Law Enforcement:** Shared more than 275 samples of seized controlled substances since the OAP's inception. The Royal Canadian Mounted Police shares such samples with the U.S. Drug Enforcement Administration for supplemental analysis that provides additional insight into drug trafficking trends and routes; and,
- **Border Security:** Improved information sharing and collaboration between the Canada Border Services Agency and the Department of Homeland Security's Homeland Security Investigations to target the trafficking of precursor chemicals used in the production of deadly synthetic opioids like illegal fentanyl;
- **Postal Security:** Continued implementation of the successful Canada-U.S. Postal Security Action Plan, including information sharing, high-level meetings, and joint training exercises to address the opioid overdose crisis.

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4. Trafficking in Persons

a. Trafficking in Persons Report

In July 2022, the Department of State released the 22nd edition of the annual Trafficking in Persons Report (TIP 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 2021 through March 2022 and evaluates anti-trafficking efforts around the world. Through the report, the Secretary determines the ranking of countries and territories 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 2022 report lists 22 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/2022-trafficking-in-persons-report/. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On July 19, 2022, Secretary Blinken and the Office to Monitor and Combat Trafficking in Persons Acting Director Kari Johnstone delivered remarks at a launch

ceremony for the 2022 TIP Report. During the ceremony, Secretary Blinken announced the 2022 TIP Heroes. The remarks were livestreamed. A video recording and transcript of the remarks are available at https://www.state.gov/secretary-antony-j-blinken-at-the-2022-trafficking-in-persons-tip-report-launch-ceremony/ and excerpted below.

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* * * *

SECRETARY BLINKEN: Well, good afternoon. Thank you very, very much. And welcome to the State Department, welcome to the Benjamin Franklin Room, and especially to our heroes, welcome. It's wonderful to be with you here in person at the State Department.

Today, we're releasing the 2022 Trafficking in Persons Report. It assesses how 188 countries and territories, including the United States, are performing in terms of preventing trafficking, protecting victims, prosecuting traffickers. That makes this one of the most comprehensive sources of information anywhere on anti-trafficking efforts by governments – what works, what doesn't, and how we can continue to do better.

* * * *

And finally, again, thank you to our six 2022 TIP Report Heroes. Five are here with us in person, as Kari said, and we'll honor them later this afternoon. So I'd just like to mention the one hero who's not actually with us today, for obvious reasons. Let me just say a few words.

Kahtehrynah Chehrehpahkha leads the Ukrainian chapter of the anti-trafficking NGO La Strada. As we all know, since the start of Russia's aggression against Ukraine, millions of Ukrainians have had to flee their homes – some internally within Ukraine, some leaving the country altogether – many, most with just what they were able to carry – and that makes them highly vulnerable to exploitation. La Strada has a hotline. It's received an unprecedented number of calls over the past five months. The organization has given literally thousands of Ukrainians the information and assistance that they need to try to stay safe as they're forced from their homes.

Kahtehrynah – and all of our TIP Heroes – are making a huge difference in the lives of people around the world.

I think most of you know this, but it's worth repeating: The scale of this problem is vast. There are nearly 25 million people currently victims of trafficking. 25 million people. The United States is committed to fighting it because trafficking destabilizes societies, it undermines economies, it harms workers, it enriches those who exploit them, it undercuts legitimate business, and most fundamentally, because it is so profoundly wrong.

Trafficking in persons violates the rights of all people to be free: free to do what you want, be who you want, make the life that you wish.

Earlier this year, I had an opportunity to chair the first meeting of President Biden's Interagency Task Force to Monitor and Combat Trafficking in Persons. We brought together 20 agencies across our government to talk about how to implement the National Action Plan that the President released last November. This, for those who don't know, is a three-year strategy that includes strengthening prosecutions of traffickers, enhancing victim protection, preventing the crime from occurring within our borders and abroad.

This report is a key part of our strategy. It's something that we do every year, and as I said, a huge amount of work goes into actually bringing it to fruition.

So here's where we are. I think if you look at the report, you're going to see a mixed picture of progress. Twenty-one countries were upgraded a tier, because those governments made significant, increasing efforts to combat trafficking at home as well as for their citizens abroad. Eighteen countries were downgraded a tier, indicating that they either didn't make significant, increasing efforts to combat trafficking – or worse, that their governments have a state-sponsored policy or pattern of trafficking.

As the report details, corruption continues to be a top tool of traffickers. Complicit government officials may turn a blind eye to illicit activities, provide false documents for workers, tip off traffickers to impending raids. Corruption allows traffickers to continue to act with impunity.

Meanwhile, in 11 countries, the government subjects its own people to trafficking – for example, as retaliation for political expression or through forced labor on projects of national interest.

That can look like subjecting people, including children, to forced labor in key sectors – mining, logging, manufacturing, farming – or sending members of ethnic minority groups to be "deradicalized" in camps.

It can also mean deploying workers around the world without telling them where they're going or what they'll be doing, confiscating passports and salaries, forcing them into dangerous work conditions, and constantly monitoring their movements.

That's what happened to Zhang Qiang, a Chinese laborer who signed onto a Belt and Road project in Indonesia last year. He was drawn by the higher pay, which he promised his daughter would be used to buy her a bed. But when he arrived in Indonesia, he was stripped of his passport, instructed to sign a contract for a longer duration and lower pay than he'd been promised. Armed guards patrolled the workers' camp, making escape virtually impossible. After failing to get help from the Chinese embassy in Jakarta, he managed to board a boat to escape Indonesia via Malaysia, but then was apprehended by Malaysian authorities. By the last reporting, he was on track to be deported back to China.

Another challenge that you'll see laid out in this year's report is the climate crisis and the instability that it helps accelerate and create. As we're seeing in our hemisphere, climate is a key driver of mass migration, which can create, alas, ideal conditions for traffickers. And according to the UN Environment Programme, natural disasters – as well as the loss of livelihoods that they produce – may increase trafficking by up to 30 percent.

Even the higher demand for clean energy can have unintended consequences.

Consider, for example, the Democratic Republic of Congo, that's home to much of the world's cobalt, which is a critical component for lithium-ion batteries for electric vehicles – something very important for our efforts to combat climate change. Some of that cobalt is mined by children, who are then pushed into work through coercion, through fraud, through force.

I make this point because we need to be aware that as we tackle issues like climate and corruption throughout our – through our diplomacy, we also have to address how they intersect with trafficking in persons. Traffickers seize every opportunity to exploit victims for profit. We've got to be just as determined – in fact, more determined and more creative – to stop them.

Now, the report also identifies several interventions that are making anti-trafficking efforts more effective. And one is this year's theme: more survivor engagement.

Survivors of human trafficking know – through deeply painful experience – the tactics that traffickers use, the obstacles that survivors face as they get free, the support that can help the most as they work to rebuild their lives. So what the report emphasizes and what I want to emphasize today is that need for us to listen – listen to them, empower them, partner with them at every level of our work.

We're seeing more organizations around the world ask survivors to serve as advisors – for example, the Albanian Coalition of Shelters for Victims of Trafficking, which provides victims and survivors with safe housing. They helped create an advisory board of survivors to make sure that their interventions are designed to actually fit the real-world needs of the populations that they're serving.

Our own United States Advisory Council on Human Trafficking is comprised entirely of survivors who make recommendations on federal anti-trafficking policies to the President's interagency task force.

Another important tool is better data collection, making sure that our practices and bringing this together to help track cases, to help allocate resources, to measure the effectiveness of anti-trafficking policies. And so we're focusing on that.

In the Philippines, to cite one example, the government launched a technology platform so that multiple agencies can work together to manage cases of victims as well as prosecute their traffickers.

In Uganda, the government partnered with two NGOs to launch the Trafficking in Persons mobile app platform. That helps investigators share details of cases they're working on. That helps bring more traffickers to justice.

These examples highlight the kind of information-sharing and partnership that we believe will bring us closer to our goal of a world that is free from human trafficking in all of its forms. And that's precisely the kind of information-sharing and partnership we hope this year's TIP Report will spur for governments as well as for advocates around the world.

Traffickers don't respect borders. The harm caused by this crime is vast; it's varied. And it will continue to take relentless diplomacy, coordination, advocacy, and commitment, which is in this room and on this stage, if we're going to stop it.

So I simply want to say this: Thank you. Thank you to everyone here for the dedication that you're showing to fighting trafficking and advancing human freedom and dignity, because at the heart of everything is the dignity that every human being deserves. And thank you, again, to everyone whose hard work – Kari, you and your team – made this report possible.

Thank you very much, and back to you. (Applause.)

MS JOHNSTONE: Thank you so much, Mr. Secretary, for your poignant and effective words. I am now thrilled to turn to celebrating the 2022 TIP Report Heroes. Please join me as we recognize and honor this year's six heroes.

Mr. Mohammed Tariqul Islam. (Applause.) In recognition of his unyielding determination to provide assistance to victims of human trafficking, improve the investigation and prosecution capacity of the Bangladeshi Government, and increase cross-border collaboration to facilitate repatriation of survivors.

Major Mohammad al-Khlaifat. (Applause.) In recognition of his critical role in implementing new ways to cooperate with the Jordanian anti-trafficking community, which led to formalized information sharing within the Public Security Directorate and with prosecutors, as

well as a formal agreement with the Civil Aviation Regulatory Authority, to improve anti-trafficking efforts and ensure victims receive vital services.

Judge Cornelius Wennah. (Applause.) In recognition of his resolute efforts to build capacity in Liberia's criminal justice sector to successfully prosecute human traffickers and his strong advocacy for the active inclusion of traditional leaders and civil society organizations in Liberia's National Anti-Trafficking Task Force. (Applause.)

Ms. Irena Dawid-Olczyk. (Applause.) In recognition of her extraordinary leadership in directly assisting victims of human trafficking for more than a quarter of a century, lending her expertise in the creation of anti-trafficking training materials and films, and maintaining a strong relationship with the Polish Government to prevent the exploitation of refugees across the Poland-Ukraine border. (Applause.)

Ms. Apinya Tajit. (Applause.) In recognition of her heartfelt and unwavering persistence in advocating for workers exploited in forced labor, particularly in the fishing industry, assisting victims with their reintegration into society, and sharing her expertise with government officials and anti-trafficking authorities. (Applause.)

Unfortunately, our TIP Report Hero from Ukraine was not able to join us for this momentous occasion. However, we still want to honor her accomplishments. And you will see her photo on the screens: Ms. Kateryna Cherepakha. In recognition of her remarkable engagement with the Government of Ukraine and international stakeholders to build the capacity of officials to identify victims of human trafficking, her tireless victim advocacy, and her work developing and conducting training courses for first responders as an OSCE National Expert. (Applause.)

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b. National Action Plan

On January 25, 2022, Secretary Blinken convened the Biden Administration's first meeting of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons. Agencies from across the U.S. government shared their initiatives, including through implementation of the National Action Plan to Combat Human Trafficking. See *2021 Digest* at 102-03 for discussion of the National Action Plan. 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. Secretary Blinken released a press statement following the meeting, available at https://www.state.gov/working-together-to-address-human-trafficking/ and is excerpted below.

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In the year ahead, the State Department affirms our dedication to:

- Revitalizing collaboration with two of our most important partners, Canada and Mexico, through the Trilateral Working Group on Trafficking in Persons, to promote legal pathways for protection and opportunity that encourage orderly, safe, and humane

migration, in ways that do not create or exacerbate vulnerabilities among migrants that traffickers can exploit,
- Providing funding for projects around the world that support those made increasingly vulnerable to human trafficking because of the COVID-19 pandemic,
- Incorporating trauma-informed and survivor-centered approaches into our anti-trafficking work, including by launching publicly available online training developed in partnership with subject matter experts with lived experience,
- Better integrating equity-based approaches in our work, including incorporating findings from the Human Trafficking Expert Consultant Network's project about the intersection of institutional racism with human trafficking,
- Continuing to call out governments of countries that themselves engage in human trafficking – including Cuba, North Korea, Russia, and the People's Republic of China.

We remain deeply committed to combating human trafficking and recognize that we all have a role to play – as individuals and a society, in coordination across the whole-of-government.

* * * *

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 October 14, 2022, 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/2022/10/14/memorandum-on-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 2022 Trafficking in Persons Report lists as Tier 3 countries. See section B.4.a., *supra*, for discussion of the 2022 report.

5. Corruption

On November 22, 2022, U.S. Advisor to the Second Committee Jenni Kennedy the U.S. explanation of position combatting illicit financial flows. Kennedy's remarks are excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-combating-illicit-financial-flows/.

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The United States appreciated the opportunity to participate in these important discussions over the past weeks and is pleased to join consensus on this resolution. The United States strongly supports the 2030 Agenda for Sustainable Development and particularly its emphasis on issues such as transparency, rule of law, and inclusive and sustainable economic growth — all issues that are relevant to this resolution. However, some of the language in this resolution undermines our ability to work constructively to address these challenges.

The international framework for asset recovery is primarily outlined in the UN Convention against Corruption (UNCAC). This important treaty prescribes the measures States parties must adopt and implement to successfully detect, restrain, and confiscate the proceeds of crime. Unfortunately, this resolution mischaracterizes and misinterprets many of these obligations. The United States therefore reiterates that nothing in this resolution changes or nullifies the existing asset recovery treaty obligations; obligations that the United States takes very seriously.

Additionally, the United States expresses its concern the resolution places an overemphasis on asset return to the detriment of other integral parts of the asset recovery process. Countries are only successful in the asset recovery when they have the sufficient political will and capacity to investigate and prosecute corruption crimes domestically. Member States should focus their time and attention on supporting and encouraging all Members to pursue their own asset recovery cases domestically.

The UNCAC Conference of States Parties (COSP) serves as the UN's lead body promoting anti-corruption and related anti-crime policy and is the appropriate venue for relevant experts to consider issues addressing the recovery and return of the proceeds of these crimes. This resolution undermines the UNCAC COSP's role in leading discussion at the global level. Calls for a new report by the UNGA Secretary General are inappropriate. We reiterate longstanding concerns that language in this resolution undermines our ability to work together constructively to address money laundering, corruption, and other related crimes.
Finally, we regret that one Member State could not accept long-standing precedent language welcoming the Global Forum for Asset Recovery (GFAR) and its Communique. The Global Forum for Asset Recover Principles adopted at the Forum recognized that transparency and accountability are essential in the asset return process. We will continue to work with all willing partners to reaffirm the important role that GFAR Principles can play in the asset return process.

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6. Organized Crime

On April 6, 2022, the Department announced a TOCRP reward offer of up to $5 million for information leading to the arrest and/or conviction of Semion Mogilevich, a longtime transnational criminal currently living in Russia. The press statement announcing the reward, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-transnational-criminal-to-justice/, includes the following information about Mogilevich.

> Mogilevich is wanted in the United States for his alleged participation between 1993 and 1998 in a multi-million dollar scheme to defraud thousands of investors related to a public company headquartered in Newtown,

> Pennsylvania. The scheme collapsed in 1998 after thousands of investors lost more than $150 million. Mogilevich was indicted in 2002 and again in 2003.

On April 12, 2022, the Department announced a TOCRP reward offer of up to $5 million for information leading to the arrest and/or conviction of Irish transnational organized criminal Christopher Vincent Kinahan and his two sons, Daniel Joseph Kinahan and Christopher Kinahan, Jr., for participating in, or conspiring to participate in, transnational organized crime. The press statement announcing the reward, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-three-irish-transnational-criminals-to-justice/, includes the following.

> After initially distributing South American cocaine and heroin in Ireland, the Kinahans later expanded their narcotics trafficking organization to include the United Kingdom and then throughout mainland Europe. In addition to narcotics trafficking, the Kinahans have engaged in money laundering, firearms trafficking, and murder.

On May 6, 2022, the State Department's Transnational Organized Crime Rewards Program (TOCRP) program announced the following reward offers: (1) a reward of up to $10,000,000 for information leading to the identification and/or location of any individual(s) who hold a key leadership position in the Conti ransomware variant transnational organized crime group; and (2) a reward of up to $5,000,000 for information leading to the arrest and/or conviction of any individual in any country conspiring to participate in or attempting to participate in a Conti variant ransomware incident. The press statement, available at https://www.state.gov/reward-offers-for-information-to-bring-conti-ransomware-variant-co-conspirators-to-justice/, includes the following:

> The Conti ransomware group has been responsible for hundreds of ransomware incidents over the past two years. The FBI estimates that as of January 2022, there had been over 1,000 victims of attacks associated with Conti ransomware with victim payouts exceeding $150,000,000, making the Conti Ransomware variant the costliest strain of ransomware ever documented. In April 2022, the group perpetrated a ransomware incident against the Government of Costa Rica that severely impacted the country's foreign trade by disrupting its customs and taxes platforms. In offering this reward, the United States demonstrates its commitment to protecting potential ransomware victims around the world from exploitation by cyber criminals. We look to partner with nations willing to bring justice for those victims affected by ransomware.

On May 26, 2022, the Department announced a TOCRP reward offer of up to $5 million for information leading to the arrest and/or conviction of two fugitive Kenyan nationals, Abdi Hussein Ahmed and Badru Abdul Aziz Saleh, for participating in, or

conspiring to participate in, transnational organized crime. The press statement announcing the reward, available at https://www.state.gov/department-of-state-offers-reward-for-information-to-bring-two-kenyan-nationals-to-justice/, includes the following.

> Ahmed has been charged in the United States with wildlife trafficking in violation of the Lacey Act and with conspiracy to commit wildlife trafficking in violation of the Endangered Species Act and Lacey Act. Fugitives Ahmed and Saleh have also been charged in the United States with conspiracy to distribute heroin. Additionally, Ahmed is charged in Uganda and Kenya with violations of the Uganda Wildlife Act, the Kenya Wildlife Conservation and Management Act, and the Kenya East Africa Customs Act.

On November 7, 2022, the State Department announced a TOCRP offer of up to $1 million each for information leading to the arrests and/or convictions of three Haitian nationals—Lanmò Sanjou, a/k/a Joseph Wilson, Jermaine Stephenson, a/k/a Gaspiyay, and Vitel'Homme Innocent—for conspiring to participate in or attempting to participate in transnational organized crime. The press statement announcing the reward, available at https://www.state.gov/u-s-department-of-state-announces-reward-offers-for-information-leading-to-the-arrests-and-or-convictions-of-three-haitian-gang-leaders/, includes the following.

> On October 16, 2021, the 400 Mawozo gang engaged in a conspiracy to kidnap 16 U.S. Christian missionaries and one Canadian missionary and hold them for ransom. The missionaries were abducted after visiting an orphanage in the town of Ganthier, east of Port-au-Prince. The kidnapping victims of the missionary group included twelve adults and five children.

On November 17, 2022, the State Department announced a TOCRP offer of up to $5 million for information leading to the arrests and/or conviction of as yet unknown individuals who conspired or attempted to participate in the May 19, 2022 homicide of Paraguayan prosecutor Marcelo Pecci. The press statement announcing the reward, available at https://www.state.gov/department-of-state-announces-reward-offer-for-unknown-co-conspirators-responsible-for-murder-of-paraguayan-prosecutor-marcelo-daniel-pecci-albertini/, includes the following information about the assassination of Pecci.

> Paraguayan Prosecutor Marcelo Pecci was a well-respected prosecutor who successfully pursued many high-profile organized crime cases. Pecci was assassinated on May 10, 2022, while on his honeymoon in Cartagena, Colombia. Subsequent investigation by Colombian National Police (CNP) identified six of the coconspirators who carried out the murder. The United States extends a profound thanks for the outstanding investigation by Colombian authorities, which led to the capture of five of the individuals who committed this ruthless

assassination. The purpose of this reward offer is to seek information leading the arrest and/or conviction of any additional coconspirators, including those responsible for financing and ordering the assassination.

7. International Crime Issues Relating to Cyberspace and Election Interference

a. UK CLOUD Agreement

As discussed in *Digest 2019* at 93-94 the United States and the United Kingdom signed the Agreement on Access to Electronic Data for the Purpose of Countering Serious Crime ("Data Access Agreement") under the Clarifying Lawful Overseas Use of Data Act, Consolidated Appropriations Act, 2018, Div. V, Pub. L. 115-141, 132 Stat. 348 ("CLOUD Act") on October 3, 2019.

On July 21, 2022, the United States and the United Kingdom issued a joint statement announcing intent to bring into force the Agreement. The joint statement is available at https://www.justice.gov/opa/pr/joint-statement-united-states-and-united-kingdom-data-access-agreement.

On October 3, 2022, the Data Access Agreement between the United States and the United Kingdom entered into force. The Department of Justice issued a press release on announcing the agreement entering into force, which is available at https://www.justice.gov/opa/pr/landmark-us-uk-data-access-agreement-enters-force.

See the Department of Justice resources webpage at https://www.justice.gov/criminal-oia/cloud-act-resources for CLOUD Act-related materials and information.

b. Reward Offers

On February 1, 2022, the State Department's Rewards for Justice (RFJ) program announced a reward offer 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, interferes with U.S. elections in violation of the Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213, partly codified at 18 USC § 1030 ("CFAA"). The press statement, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-iranian-cyber-actors-interference-with-2020-u-s-presidential-election/, includes the following:

> The Department seeks information on Iranian cyber actors Seyyed Mohammad Hosein Musa Kazemi and Sajjad Kashian – contractors employed by Iranian cyber company Emennet Pasargad – who participated in an Iranian state-sponsored, multi-phased online operation that attempted to interfere with the 2020 U.S. presidential election. This malicious cyber operation ran from at least August through November 2020 and sought to sow discord and undermine voters' faith in the U.S. electoral process. In November 2021, these individuals and their

employer, Emennet Pasargad, were designated under Executive Order 13848 for their role in attempting to influence the 2020 U.S. presidential election.

Kazemi helped to carry out the voter intimidation and influence campaign by compromising servers, which were used to send the threatening voter emails, preparing emails for the voter threat email campaign, and compromising the email accounts of an American media company.

Kashian managed computer network infrastructure used to conduct the voter intimidation and influence campaign and sought to purchase social media accounts in furtherance of the voter intimidation and influence campaign.

On March 24, 2022, the State Department sought information on Russian Federal Security Service (FSB) officers Pavel Aleksandrovich Akulov, Mikhail Mikhailovich Gavrilov, or Marat Valeryevich Tyukov for their alleged involvement in computer intrusions, wire fraud, aggravated identity theft, and damage to the property of an energy facility offenses under the Department's $10 million critical infrastructure reward offer. This marks the first time that the Rewards for Justice program has named any foreign government security personnel under its critical infrastructure reward offer. See press statement, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-russian-fsb-officers-conducting-malicious-activity-against-u-s-critical-infrastructure-between-2012-2017/ and includes the following information.

These officers were members of an FSB component known as Center 16 and worked at a specific operational group known as Military Unit 71330, known by cybersecurity researchers as "Dragonfly," "Energetic Bear," and "Crouching Yeti."

These FSB officers conspired to commit computer intrusions, including "supply chain attacks," in furtherance of the Russian government's efforts to maintain surreptitious, unauthorized, and persistent access to the computer networks of companies and other entities in the international energy sector, including oil and gas firms, nuclear power plants, and other utility and electrical grid companies. Specifically, the conspirators targeted the software and hardware that controls equipment in power generation facilities, known as industrial control systems or supervisory control and data acquisition systems. Access to such systems would have provided the Russian government the ability to, among other things, disrupt and damage such computer systems at a future date of its choosing..

In total, the defendants and the co-conspirators targeted more than 500 U.S. and foreign energy-sector companies in 135 other countries. In just one phase of their hacking campaign, the conspirators installed malware on more than 17,000 unique devices worldwide.

More information about this reward offer is located on the Rewards for Justice website at https://rewardsforjustice.net/english/malicious_cyber_activity.html .

On June 30, 2022, the State Department's RFJ program announced a reward offer of up to $10 million for information leading to the identification or location of any foreign person, including a foreign entity, who knowingly engaged or is engaging in foreign election interference, as well as information leading to the prevention, frustration, or favorable resolution of an act of foreign election interference. The reward offer is broader than the reward offer above requiring a CFAA violation and was issued following an amendment to section 36 of the State Department Basic Authorities Act (22 USC 2708). The press statement is available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-foreign-interference-in-u-s-elections/ and includes the following:

> Foreign election interference includes certain conduct by a foreign person that violates federal criminal, voting rights, or campaign finance law, or that is performed by any person acting as an agent of or on behalf of, or in coordination with, a foreign government or criminal enterprise. This conduct includes covert, fraudulent, deceptive, or unlawful acts or attempted acts, or knowing use of information acquired by theft, undertaken with the specific intent to influence voters, undermine public confidence in election processes or institutions, or influence, undermine confidence in, or alter the result or reported result of a general or primary federal, states, or local election or caucus. Such conduct could include vote tampering and database intrusions; certain influence, disinformation, and bot farm campaigns; or malicious cyber activities.

On July 28, 2022, the State Department's RFJ program sought information on Internet Research Agency LLC ("IRA"), Yevgeniy Viktorovich Prigozhin, and linked Russian entities and associates for their engagement in U.S. election interference under the global foreign election interference reward offer. The press statement is available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-russian-interference-in-u-s-elections/ and includes the following:

> The Department seeks information on Internet Research Agency LLC ("IRA"), Yevgeniy Viktorovich Prigozhin, and linked Russian entities and associates for their engagement in U.S. election interference.
>
> IRA is a Russian entity engaged in political and electoral interference operations. Beginning as early as 2014, IRA began operations to interfere with the U.S. political system, including the 2016 U.S. presidential election, with a strategic goal to sow discord. IRA operated through several Russian entities, including Internet Research LLC, MediaSintez LLC, GlavSet LLC, MixInfo LLC, Azimut LLC, and NovInfo LLC.
>
> Yevgeniy Viktorovich Prigozhin is a Russian national who provided funding to IRA through the companies he controlled, Concord Management and Consulting LLC and Concord Catering (collectively "Concord"). Concord sent funds, recommended personnel, and oversaw IRA's activities through reporting and interaction with IRA's management.

> Mikhail Ivanovich Bystrov, Mikhail Leonidovich Burchik, Aleksandra Yuryevna Krylova, Anna Vladislavovna Bogacheva, Sergey Pavlovich Polozov, Maria Anatolyevna Bovda, Robert Sergeyevich Bovda, Dzheykhun Nasimi Ogly Aslanov, Vadim Vladimirovich Podkopaev, Gleb Igorevich Vasilchenko, Irina Viktorovna Kaverzina, and Vladimir Venkov worked in various capacities to carry out IRA's interference operations targeting the United States. They knowingly and intentionally conspired to defraud the United States by impairing, obstructing, and defeating the lawful functions of the government through fraud and deceit for the purpose of interfering with the U.S. political and electoral processes, including the presidential election of 2016.

c. UN Cybercrime Treaty

See Chapter 4 for discussion of negotiations on a UN cybercrime treaty which began in January 2022.

d. Second Additional Protocol to the Cybercrime Convention

On May 12, 2022, the U.S. signed the Second Additional Protocol to the Convention on Cybercrime ("Budapest Convention") on enhanced cooperation and disclosure of electronic evidence (CETS No. 224) at the Council of Europe in Strasbourg, France. The text of the protocol is available at https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=224. The Department of Justice issued a press release available at https://www.justice.gov/opa/pr/united-states-signs-protocol-strengthen-international-law-enforcement-cooperation-combat.

8. Money Laundering and Financial Crimes

On November 3, 2022, the Department announced an RFJ reward offer of up to $5 million for information leading to the disruption of financial mechanisms of Singaporean Kwek Kee Seng for engaging in certain activities that support the Democratic People's Republic of Korea (DPRK), including money laundering, exportation of luxury goods to the DPRK, specified cyber-activity, and actions that support weapons of mass destruction proliferation. The press statement announcing the reward, available at https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-kwek-kee-seng/, includes the following.

> The Department is seeking information on Kwek Kee Seng, a Singaporean national and director of the Singapore-based shipping agency and terminal operations company known as Swanseas Port Services (S) Pte Ltd, who has engaged in an extensive scheme to evade U.S. and U.N. sanctions by covertly transporting fuel to the DPRK, in violation of U.S. law.

Kwek Kee Seng has directed the delivery of petroleum products directly to the DPRK as well as ship-to-ship transfers of fuel destined for the DPRK using one of Kwek's oil tankers, the M/T Courageous.

Kwek and his co-conspirators sought to obscure their identities and activities by conducting financial transactions through a series of shell companies. He directed payments in U.S. dollars that were routed from his shell companies based in Panama, Singapore, and elsewhere, and through U.S. banks to pay for oil, the M/T Courageous, services and materials for the vessel, and salaries for crewmembers. These transactions violated the prohibition of the export of financial services for the benefit of the DPRK.

C. INTERNATIONAL TRIBUNALS AND OTHER ACCOUNTABILITY MECHANISMS

1. International Criminal Court

a. General

On October 31, 2022, Andrew Weinstein, public delegate for the U.S. Mission to the UN, delivered remarks at the UN General Assembly meeting on a report of the International Criminal Court. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-on-a-report-of-the-international-criminal-court/.

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As noted in the Court's report on developments between August 2021 and August 2022, the Court's trial activity is now at an unprecedented level. The ICC has significantly advanced justice for victims around the world, including for situations in which the ICC was invited to act by national governments. The United States welcomed the opening of trial in April in the case against a former Janjaweed commander, known as Ali Kushayb. This marked the first trial against any senior leader for crimes committed by the Omar al-Bashir regime and government-supported forces following the genocide and other atrocities in Darfur.

The ICC has also made meaningful progress in advancing justice for atrocities committed in the Central African Republic; the United States commends the ICC for progress on those cases and for closely coordinating with CAR national authorities in the Special Criminal Court of CAR. The ongoing trials against Alfred Yekatom, Patrice Ngaisonna, and Mahamat Said Abdel Kani for crimes against humanity and war crimes represent a strong blow against impunity.

The ICC's activities in situations around the world underscore its important role as a key piece of the global architecture for accountability – and a reminder of the imperative for justice, even when it may take time to achieve. With regard to the situation in Mali, the Court continued the trial against the individual known as "Al Hassan," on charges of crimes against humanity and war crimes committed in Timbuktu between 2012 and 2013. As well, the Prosecutor has opened

investigations into the situation in Venezuela, and the United States welcomes the OTP's ongoing efforts.

I must also address the horrific war in Ukraine, where civilians face brutal attacks on a daily basis carried out by Russia's forces. The United States supports a range of international investigations into atrocities in Ukraine, including those conducted by the ICC, the United Nations, and the Organization for Security and Cooperation in Europe. We will continue to stand with Ukraine in the face of Russia's brutal aggression and in seeking justice and accountability.

While commending the achievements of ICC over the past year, the United States is troubled by the large number of outstanding arrest warrants, a matter that should concern all states. Individuals subject to warrants of arrest by the ICC must face justice before fair, independent, and credible judicial proceedings. The United States continues to encourage the authorities in Sudan to transfer suspects to the Court; and we continue to offer monetary rewards for information leading to the arrest of Lord's Resistance Army leader Joseph Kony, to provide justice for victims of the LRA. We call on all states to cooperate in ensuring that Nouradine Adam, accused of crimes against humanity in CAR, faces justice.

The ICC plays an important role in relation to broader efforts to seek justice for atrocity crimes. Across the world, a range of national, hybrid, and other international tribunals are also making progress in the fight against impunity for atrocity crimes. This includes the commencement of the trial against Felicien Kabuga, indicted for genocide and crimes against humanity by the International Residual Mechanism for Criminal Tribunals; the opening of trials in CAR's Special Criminal Court; the war crimes convictions in Ukrainian national courts; and the increasing prosecutions by national authorities, including in Germany, of atrocities committed in other states, such as Syria.

Such efforts, especially where prosecutions are not possible before international courts or courts in the jurisdiction where the crimes were committed, ensure there is no safe haven for those responsible for crimes that shock the conscience of humankind. National systems must be the first and foremost venue for accountability, and the United States continues to assist countries to build their own domestic capacity in this regard.

Turning back to the ICC, the United States is pleased to announce that we intend to participate in the upcoming Assembly of States Parties, as an Observer Delegation. As the Court reflects on its first 20 years and charts a course for its future, the United States is committed to engaging with States Parties, the Court, and others to ensure the Court achieves its core mission as a court of last resort in punishing and deterring atrocity crimes. While we maintain our concerns about the ICC in certain areas that are well-known, we believe our concerns are best addressed through engagement with all stakeholders.

We strongly commend all organs of the Court, States Parties, civil society, and victims who have engaged over the past years in considering a broad review to address issues to help the Court better achieve its core mandate, including those identified by the Independent Expert Review of the ICC.

Justice is not only a moral imperative, but it is essential for the maintenance of international peace and security. The United States is a strong supporter of meaningful accountability and justice for the victims of atrocities. These are core values, best advanced through a shared commitment, and the ICC is an integral component of that shared commitment to justice.

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On December 6, 2022, Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice, delivered the U.S. statement to the 21st session of the Assembly of States Parties (ASP) to the ICC. The U.S. hosted a side event on witness protection. The statement is excerpted below and available at https://www.state.gov/statement-of-the-united-states-at-the-21st-session-of-the-assembly-of-states-parties-of-the-international-criminal-court/.

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Supporting the International Criminal Court

In the midst of all this activity at the Court, the Biden-Harris Administration launched a sorely needed reset of the U.S. relationship with the ICC. When I assumed my post, I inherited a clear mandate to

- continue rebuilding the U.S.-ICC relationship and put it on a more durable path,
- engage constructively with the Court and ASP members, and
- support the Rome Statute system across a wide range of situations, in a manner consistent with our laws, policy, values, and enduring commitment to international justice.

Over the past year, senior-level U.S. officials have interacted with Court and ASP principals in Washington and The Hague, and last month, a bipartisan delegation of U.S. Senators traveled here for official meetings to learn about the Court's work and explore potential areas of further cooperation.

Although the United States signed the Rome Statute, we are not a full party; nonetheless, there is much that we can do, and have done, to advance the work of the Court. In the remainder of my remarks, I would like to focus on three pragmatic areas that are essential to the Court's efficacy and where the United States is uniquely positioned to help.

Bringing Fugitives to Justice

First, apprehending fugitives and successfully bringing them to trial is imperative for any Court. The United States is proud to have a played a key role in the successful transfer of two fugitives to the ICC who were both convicted of war crimes and crimes against humanity, including sexual violence. The remaining fugitives must similarly face justice.

To support the execution of ICC arrest warrants, the United States is continuously updating our own sources of information and working with national authorities and the ICC to locate, and strategize about how to apprehend, fugitives. We are also reinvigorating the War Crimes Rewards Program, administered by my office, including for the reward for Lord's Resistance Army commander Joseph Kony. In this regard, we welcome the Prosecutor's recent application for a hearing to publicly confirm the charges against Kony. Survivors of the LRA's crimes deserve the chance to bear witness even as Kony continues to elude capture.

Time and again, the rewards program has proven itself to be a valuable tool. We will continue to evaluate all situations in which offering rewards for other fugitives might help advance the ICC's efforts, and we are looking to make additional designations in the coming months.

Witness Protection

Second, we are committed to ensuring that all witnesses can meaningfully, and safely, participate in justice processes and to supporting comprehensive justice for survivors. In this regard, we are spurring a global conversation about the imperative of witness protection, on behalf of vulnerable survivor witnesses, but also insiders who have made the decision to offer testimony against their former confederates. We are pleased to deepen the conversation through a side event this week, co-sponsored by the ICC Registry and the delegations of Argentina and Sweden. We also pledge to continue working with the ICC to respond positively to its needs related to witnesses.

But we all know that trials are not enough: shattered communities must have the resources they need to heal, rebuild, and ultimately thrive for genuine peace and reconciliation to be possible. The Trust Fund for Victims exists to ensure that the Rome Statute can deliver comprehensive justice, and we were pleased to participate in the TFV's recent monitoring mission to Northern Uganda. Inspired by this vital work and the resiliency of survivor communities, the United States is actively considering how we might contribute to the Trust Fund, in addition to the direct support we provide to many of its implementing partners in affected communities.

Complementarity

This brings me, third, to the principle of complementarity. States retain legal and moral primacy in ensuring justice for grave crimes, but this can be enhanced by cooperation with international courts. In this regard, we welcome the Prosecutor's approach to building partnerships with national authorities, for example, by participating in joint investigation teams devoted to Libya and Ukraine.

The United States is similarly committed to strengthening the capacity of national and hybrid courts to investigate and prosecute mass atrocities. As Ambassador-at-Large, I have pledged to visit ICC situation countries and other societies around the world that are engaged in justice processes to look for ways to assist:

- In Central African Republic, where there is a grand experiment in hybrid justice underway with three levels of activity—trials in national courts, at the hybrid Special Criminal Court (SCC), which just issued its first verdict, and at the ICC. We commend the enhanced cooperation between the SCC and the ICC.
- In The Gambia, where there are encouraging steps towards creating a new hybrid court, following up on the successful Truth, Reconciliation, and Reparations Commission, which the United States is proud to have supported.
- In Colombia, where advocates continue to forge a path towards justice through implementation of the 2016 Peace Accord, which provides for a comprehensive system to seek truth, justice, reparation, and non-repetition.

All these justice innovations point to the rich lessons to be learned from national systems and the value of deepening cooperation with regional and multilateral bodies.

Ukraine

Yet despite these encouraging steps toward justice, we are painfully reminded by ongoing atrocities in Syria, Burma, and Ukraine of the consequences of impunity and the imperative of the international community working in concert to secure justice.

Russia's aggression against Ukraine is a manifest violation of the UN Charter. Mounting evidence reveals that this aggression has been accompanied by atrocities in every region where Russia's forces are deployed. The information gathered suggest these abuses are not the acts of

rogue units; rather, they are part of a deeply disturbing pattern of abuse consistent with what we have seen from Russia's prior military engagements—in Chechnya, Syria, and Georgia.

It falls to all of us to ensure that those responsible are held to account. We commend the international community for swiftly activating a range of accountability mechanisms in the global system of international justice, including here at the ICC.

Our support to these international efforts is complemented by assistance we are providing to Ukraine's Office of the Prosecutor General. We have deployed teams of international investigators and prosecutors to assist Ukraine in preparing war crimes cases for prosecution. This work is part of a multilateral initiative—the Atrocity Crimes Advisory Group—launched by the United States, the European Union, and the United Kingdom.

In short: This is complementarity in action.

Conclusion

Mr. Vice President, esteemed colleagues, in conclusion, the United States pledges to enhance our efforts on these fronts, including through robust engagement and cooperation with the ICC and states parties. And we encourage other friends of the Court—parties and non-party states alike— join us.

As we have said before, the United States respects the rights of every country to join the ICC. Indeed, we are encouraged by the many states that have undertaken commitments to promote justice and accountability for genocide, war crimes, and crimes against humanity.

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b. Sudan

On April 5, 2022, the State Department issued a press statement welcoming the opening of trial proceedings at the ICC in the case of Ali Mohammed Ali Abd-al Rahman, a former Janjaweed commander also known as Ali Kushayb, for war crimes and crimes against humanity. The statement is excerpted below and available at https://www.state.gov/opening-of-trial-of-former-janjaweed-commander-for-atrocities-in-darfur/.

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… This marks the beginning of the first trial against any senior leader for crimes committed by the Omar al-Bashir regime and government-supported forces following the genocide and other atrocities in Darfur.

In 2004, then-Secretary of State Colin Powell determined, based in part on evidence collected by the State Department, that a genocide was taking place. Since that day, the United States has steadfastly called for those responsible for genocide and other atrocities to be held accountable.

The ICC has charged Abd-al Rahman with thirty-one counts of war crimes and crimes against humanity for his alleged role in the killing of civilians, rape, torture, and other cruel treatment in Darfur. For 13 years after a warrant was issued for his arrest, Abd-al Rahman

evaded capture. Due to the commendable efforts of the authorities of the Central African Republic, Chad, France, and the leaders of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), Abd-al Rahman was arrested in the Central African Republic and transferred to the ICC in 2020. We urge Sudan to continue to cooperate with the ICC when it comes to the provision of evidence and to hand over other individuals who are subject to arrest warrants so that they can stand trial.

The United States is committed to the principle that those who commit atrocities must be held accountable. We are at a moment when we are again witnessing increased violence in Darfur and the Two Areas. This trial is a signal to those responsible for human rights violations and abuses in Darfur that impunity will not last in the face of the determination for justice to prevail.

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c. Central African Republic

On September 27, 2022, Secretary Blinken issued a press statement welcoming the opening of trial proceedings at the ICC in the prosecution of Mahamat Said Abdel Kani, a former Séléka commander in the Central African Republic (CAR). The press statement is available at https://www.state.gov/opening-of-the-trial-of-former-seleka-commander-for-atrocity-crimes-in-the-central-african-republic/ and includes the following:

> …This case marks the first Séléka-rebel defendant to face charges at the ICC for atrocities committed against civilians in CAR.
>
> Amidst ongoing armed violence in the Central African Republic, the opening of these proceedings affirms the unwavering importance of justice. This trial at the ICC complements the vital parallel proceedings in CAR, including in domestic courts and the Special Criminal Court. The United States is committed to promoting accountability for war crimes and human rights violations and the end of impunity, which is foundational to lasting peace in the country and region.

d. Libya

On November 9, 2022, Ambassador Richard Mills, Deputy U.S. Representative to the UN, delivered the U.S. statement at a UN Security Council briefing by the ICC Prosecutor on 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-3/.

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We commend the efforts of the Court to investigate and prosecute those most responsible for the heinous atrocities committed against the Libyan people since February 2011. We welcome the renewal of the UN Support Mission in Libya and the appointment of the Special Representative, in addition to the reinvigorated efforts to secure an agreement on a constitutional framework for elections, and for Libya to hold free and fair elections as soon as possible. We likewise welcome the report of the independent Fact-Finding Mission in Libya, the FFM, that was released in June; as well as the detailed findings on the situation in Tarhuna.

We note that the Fact-Finding Mission's report called for the need to urgently address the proliferation and legitimization of armed groups acting as "islands of control" in Libya outside of any State authority. We note the report urged the international community to provide support to disarmament, demobilization, and reintegration programs. It further encouraged states to exercise universal jurisdiction to arrest and prosecute perpetrators who are found on their territories and who stand accused of committing the international crimes that are detailed in the FFM's reports. It likewise called out social media platforms that are active in Libya to exercise greater due diligence in combating and prohibiting incitement to hatred, particularly attacks on activists, human rights defenders, and vulnerable groups.

As we've heard this morning on the situation in Tarhuna, the Fact-Finding Mission had found reasonable grounds to believe members of the al-Kaniyat militia committed war crimes and a number of crimes against humanity through underlying acts of murder, extermination, imprisonment, torture, enforced disappearance, and other inhumane acts. The FFM also identified three possible locations of undiscovered mass graves. It therefore offered its assistance to the Libyan authorities to use its findings in the search for buried victims. The FFM also emphasized that victims with whom it spoke demanded truth, justice, reparations, peace, and accountability as we just so eloquently heard from the prosecutor.

The FFM is unfortunately scheduled at this juncture to release a final report and then conclude its excellent reporting, which has helped to shed light on some of the atrocities perpetrated in Libya. We commend its work and those who have investigated and reported on these crimes.

The United States continues to believe that resolving political uncertainty and promoting accountability in Libya will go a long way toward addressing the chronic instability Libya continues to face, including the mobilization of armed groups. So, we call on Libyan authorities to do more – more to support and advance accountability efforts, including through cooperation with the ICC in the areas identified in the Prosecutor's report, such as providing access to key documentation, supporting greater technical engagement, and responding promptly to requests for assistance and visas.

Former senior officials of the Qaddafi regime such as Saif al-Islam Qaddafi, who is still subject to an ICC arrest warrant on charges of crimes against humanity and war crimes, must face justice. Victims and survivors deserve the justice that has eluded them. It should be emphasized that the Court's investigation into the situation in Libya and against Saif al-Islam Qaddafi have been pending for over 11 years, since 2011, yet the Libyan authorities still have not cooperated to help bring him to face justice in The Hague. This must happen as soon as possible.

We remain deeply concerned about the fate of migrants, including women and children who experience sexual violence, fleeing from Libya and we urge Libyan authorities to take credible measures to dismantle the trafficking and smuggling routes. In conclusion Madam President, promoting peace and security in Libya remains critical. We call for the withdrawal of

all armed groups and mercenaries from Libya, in line with Council Resolution 2656 and the October 2020 ceasefire agreement.

The ICC plays a crucial role in our shared commitment to accountability, peace, and security. We support its effort to help bring justice to the people of Libya.

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e. Verdict in the case against LRA Commander Dominic Ongwen

On December 15, 2022, the State Department issued a press statement welcoming the ICC judgment affirming the conviction of Dominic Ongwen, former Lord's Resistance Army (LRA) commander, for war crimes and crimes against humanity. See *Digest 2021* at 116. The press statement is available at https://www.state.gov/judgment-in-the-appeal-of-dominic-ongwen-at-the-international-criminal-court/ and further states:

> … The conclusion of Ongwen's appeal, filed against the February 2021 verdict that sentenced him to a 25-year prison term, confirms his culpability for violence resulting in the horrific and irreversible destruction of thousands of lives and scars upon multiple generations. This is the ICC's first appeals judgment related to crimes committed in Uganda.
>
> For the thousands of abducted young women and girls subjected to horrific sexual violence, torture, and forced labor in the Lord's Resistance Army, and all the victims and survivors of LRA violence and abuse, we hope this judgment demonstrates that justice must and will be done.
>
> The United States played a key role in ensuring the transfer of Dominic Ongwen to the ICC, and we continue to offer a reward of up to $5 million for information leading to the arrest, transfer, or conviction of Joseph Kony, founding leader of the LRA.

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

On September 29, 2022, the State Department issued a press statement welcoming the opening statements in the trial of Félicien Kabuga at the Hague branch of the International Residual Mechanism for Criminal Tribunals (IRMCT). The press statement, available at https://www.state.gov/the-trial-of-felicien-kabuga-for-genocide-in-rwanda/, includes the following:

> The United States welcomes the opening statements in the trial of Félicien Kabuga at the Hague branch of the International Residual Mechanism for Criminal Tribunals (IRMCT), the successor mechanism to the International Criminal Tribunal for Rwanda (ICTR). Indicted for genocide and crimes against humanity, Kabuga is accused of acting as the primary financier of the militia and political groups that perpetrated the genocide in Rwanda in 1994.

After nearly a quarter century as a fugitive, Kabuga faces prosecution for allegedly using his power, vast resources, and influence to incite the killing of hundreds of thousands of Tutsi civilians. He is accused of enabling the radio broadcast of messages identifying and denouncing Tutsis, as well as providing weapons and transport to Interahamwe militia members who carried out acts of genocide. The United States strongly supported the establishment of the ICTR by the United Nations Security Council and worked closely with the IRMCT in the long effort to bring Kabuga to justice, including by offering a reward for information leading to his arrest or conviction through the Office of Global Criminal Justice's War Crimes Rewards Program.

On October 19, 2022, Andrew Weinstein, public delegate for the U.S. Mission to the UN, delivered remarks at a UN General Assembly debate on the report of the International Residual Mechanism for Criminal Tribunals. The remarks are available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-the-report-of-the-international-residual-mechanism-for-criminal-tribunals/, and excerpted below.

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The Mechanism's activities and accomplishments over the past year are truly commendable. With each fugitive apprehended, prosecution completed, and appeal adjudicated, this Mechanism is supporting the goals the Security Council set out at its establishment. Last month's opening of the trial of Félicien Kabuga, alleged financier of the Rwandan genocide, marked a milestone for the Mechanism. Although Kabuga eluded capture for years, his arrest and the commencement of his trial gives hope to victims of the genocide who have waited so long for him to be brought to justice.

The United States fully supports the priorities 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 Mechanism has taken significant action on cases that move us closer to these collective objectives.

In addition to the opening of the Kabuga trial, we welcome the recent delivery of the appeal judgment in the Fatuma contempt case in Arusha. We look forward to the expeditious conclusion of the appeal in the Stanisic and Simatovic case by next summer.

While the Mechanism and its predecessors have done so much to establish the facts and clarify the historical record of atrocity crimes committed in Rwanda and the former Yugoslavia, national authorities must carry on with the important work of reconciliation and healing. Strong countries speak honestly about the past, even when it is painful, to meaningfully address the root causes of conflict and move forward into a peaceful, stable future. We welcome President Gatti Santana's comments on the anniversary of the genocide at Srebrenica that "you cannot achieve a meaningful reconciliation if you don't consider the truth – you cannot forget what happened."

We know that the atrocity crimes committed in Rwanda and the former Yugoslavia were not accidental or unavoidable but were the result of deliberate choices by those in power to unleash terrible violence against innocent civilians. The denial of historical facts and the celebration of those who have committed grave crimes is an affront to the victims and witnesses who have courageously come forward to tell their stories and an insult to our common humanity.

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 Rwandan fugitives. We call on Member States that may be harboring them to cooperate with the investigation.

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 Mechanism'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 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.

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3. Other Accountability Proceedings and Mechanisms

a. Ukraine: Support for Efforts to Promote Accountability for Atrocity Crimes

See also Chapters 6, 17, and 18 for additional discussion of Russia's aggression against Ukraine.

On May 19, 2022, the Quintet of Attorneys General (United Kingdom, Australia, Canada, New Zealand, and U.S.) released a joint statement of support for the Prosecutor General of Ukraine and Investigations and Prosecutions for Russian War Crimes. The statement is included below and available at https://www.justice.gov/opa/pr/quintet-attorneys-general-statement-support-prosecutor-general-ukraine-and-investigations-and.

> The Attorneys General of the United Kingdom, the United States of America, Australia, Canada, and New Zealand join in support of Prosecutor General Iryna Venediktova, her Office, and the Ukrainian people in ensuring accountability for war crimes committed during the Russian invasion.
>
> We support the pursuit of justice by Ukraine and through other international investigations, including at the International Criminal Court, the

United Nations, and the Organisation for Security and Cooperation in Europe, and in our own jurisdictions, in order to the ensure prompt, fair and effective investigation and prosecution of such offences under Ukrainian, domestic or international law.

We join in condemning the Russian Government for its actions, and call upon it to cease all violations of international law, to halt its illegal invasion and to cooperate in efforts to achieve accountability.

We look forward to working together with the Prosecutor General and her Office to ensure every perpetrator faces justice.

On May 25, 2022, the European Union, the United Kingdom, and the United States released a joint statement on the establishment of the Atrocity Crimes Advisory Group (ACA) for Ukraine. The joint statement follows and is available as a State Department media note at https://www.state.gov/joint-statement-from-the-european-union-the-united-states-and-the-united-kingdom-on-the-establishment-of-the-atrocity-crimes-advisory-group-aca-for-ukraine/.

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Today, the European Union, the United States, and the United Kingdom announced the creation of the Atrocity Crimes Advisory Group (ACA), a mechanism aimed at ensuring efficient coordination of their respective support to accountability efforts on the ground. The ACA will reinforce current EU, US and UK efforts to further accountability for atrocity crimes in the context of Russia's ongoing war of aggression against Ukraine. It advances commitments made by the European Union, the United States, and the United Kingdom to demonstrate international support and solidarity at this crucial historical moment for Ukraine.

The overarching mission of the ACA is to support the War Crimes Units of the Office of the Prosecutor General of Ukraine (OPG) in its investigation and prosecution of conflict-related crimes. The ACA seeks to streamline coordination and communication efforts to ensure best practices, avoid duplication of efforts, and encourage the expeditious deployment of financial resources and skilled personnel to respond to the needs of the OPG as the legally constituted authority in Ukraine responsible for dealing with the prosecution of war crimes on its own territory.

EU High Representative/Vice-President Josep Borrell said: "*It is critical to ensure that all those responsible for the terrible atrocities committed during the unprovoked Russian military aggression in Ukraine are brought to justice. There can be no impunity for war crimes. The Atrocity Crimes Advisory Group will be providing advice and supporting the ongoing efforts of Ukraine's Prosecutor General's War Crimes Units to collect, preserve, and analyze evidence of atrocities to help the investigations and ensure justice takes its course.*"

US Secretary of State Antony J. Blinken said: "*This initiative will directly support efforts by the Ukrainian Office of the Prosecutor General to document, preserve, and analyze evidence of war crimes and other atrocities committed by members of Russia's forces in*

Ukraine, with a view toward criminal prosecutions. The ACA is an essential element of the United States' commitment that those responsible for such crimes will be held to account."

UK Foreign Secretary Liz Truss said: "*We are determined to ensure those responsible for the vile atrocities committed in Ukraine are held to account. The UK has already made a clear commitment to supporting Ukraine in its investigations, including through deploying war crimes experts to the region and releasing additional funding to aid the ICC in their investigations. We are now stepping up our efforts through this landmark initiative with our partners in the US and EU. Justice will be done."*

General Prosecutor of Ukraine, Iryna Venediktova said: *"There is ample evidence of the atrocities committed by Russia's forces on the territory of Ukraine against civilians, including children. The creation of this support group and the advice of international experts with experience in other international criminal tribunals and national criminal law practice will help the ongoing work of our teams in investigating and prosecuting these crimes."*

Operational support

The ACA will bring together multinational experts to provide strategic advice and operational assistance to OPG specialists and other stakeholders in areas such as collection and preservation of evidence, operational analysis, investigation of conflict-related sexual violence, crime scene and forensic investigations, drafting of indictments, and co-operation with international and national accountability mechanisms. This engagement with the OPG and other justice, law enforcement and security agencies of Ukraine has been and will continue to be driven by the needs of the Ukrainian government and the parameters of its support will be developed in close consultation with the OPG. To this end, it will closely associate its activities with the ongoing operational work taking place in cooperation with EU Member States, partner third countries and the International Criminal Court, including the Joint Investigation Team coordinated by Eurojust.

The ACA brings together a multi-national group of war crimes experts from European Union countries, the United States, the United Kingdom and other countries. Due to the current security situation in Ukraine, the experts are primarily based in south-eastern Poland but are operationally engaged in Ukraine, including by means of short-term missions and on-site interaction with the OPG staff and other international partners engaged. As the security situation permits, it is anticipated that experts and support staff will relocate entirely to Ukraine.

The ACA activity will cover coordination of two key elements:

- **Advisory Group to the OPG:** Experienced senior war crimes prosecutors, investigators, military analysts, forensic specialists, and other experts based in the region on an ongoing basis provide expertise, mentoring, advice and operational support to the OPG and to the field-level Mobile Justice Teams, as well as a wider range of state and non-state actors.
- **Mobile Justice Teams:** Several Mobile Justice Teams (MJTs) are being created and deployed to increase the capacity of the OPG War Crimes Unit and regional prosecutors to conduct field investigations. The MJTs will be composed of both international and Ukrainian experts and will be deployed at the request of the OPG to assist Ukraine's investigators on the ground. They will be part of the holistic chain for documentation, investigation and prosecution of grave international crimes that is led by the OPG.

The ACA is supported by the U.S. State Department's Office of Global Criminal Justice (GCJ) and Bureau of International Narcotics and Law Enforcement Affairs (INL). ACA partners

include the Arizona State University Sandra Day O'Connor College of Law, Global Rights Compliance, and the International Development Law Organization (IDLO). On the EU side, coordination will be ensured by the European External Action Service (EEAS), through the EU Delegation to Ukraine, in coordination with the European Commission, the EU Project Pravo-Justice II and the EU Advisory Mission Ukraine (EUAM). The UK contribution will be coordinated by the Foreign, Commonwealth and Development Office (FCDO) and other relevant UK Government Departments.

Background

The ACA is an operational hub that coordinates assistance in response to the technical and legal needs of the Government of Ukraine to hold perpetrators of international crimes to account. It constitutes one essential component of a broader multilateral effort to support Ukraine.

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Also on May 25, 2022, Secretary Blinken issued a press statement announcing the launch of the ACA. The press statement is available at https://www.state.gov/launch-of-the-atrocity-crimes-advisory-group-aca-for-ukraine/ and includes the following:

> The United States, along with the European Union and the United Kingdom, has created the Atrocity Crimes Advisory Group (ACA). This joint initiative will directly support the efforts of the War Crimes Units of the Office of the Prosecutor General of Ukraine (OPG) to document, preserve, and analyze evidence of war crimes and other atrocities committed in Ukraine, with a view toward criminal prosecutions. As we launch this initiative, the Department of State will continue to work closely with the Department of Justice and other partners to support the pursuit of justice and accountability. As the **recent joint statement** issued by the Attorney General and his international counterparts makes clear, we are united across the globe in our resolve to hold perpetrators responsible.

On June 15, 2022, Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice, provided a briefing on war crimes and accountability in Ukraine at the Washington Foreign Press Center in Washington, D.C. The briefing remarks are available at https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine and excerpted below.

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AMBASSADOR VAN SCHAACK:… We've seen and have determined that a number of war crimes have been committed by Russia's forces. At first, this took the form of what looked like deliberate and indiscriminate attacks against elements of the civilian infrastructure within

Ukraine. This included schools, hospitals, theaters, playgrounds, et cetera. Then, once journalists, human rights advocates, and others got access to areas where Russian troops had been active and had then retreated, we saw violence really of a different order. This was much more interpersonal violence. We saw bodies with evidence of torture. We saw individuals who'd been executed with their hands tied behind their back. We have had and heard horrific accounts of sexual violence against women and girls. And these allegations continue to mount, and the reports from human rights organizations and journalists continue to come in.

What we are seeing is not the results of a rogue unit, but rather a pattern and practice across all the areas in which Russia's forces are engaged. The United States has been very active in supporting a whole range of efforts towards accountability for these abuses. In addition to our multifaceted work on security assistance, on sanctions, on humanitarian assistance, et cetera, we are working with civil society actors and others to document abuses for future accountability purposes. We are supporting the Office of the Prosecutor General in her efforts to prepare war crimes files and cases, and some of those have been proceeding now in Ukrainian courts. We have also stood up a Conflict Observatory, which will be scouring open-source information, including satellite feeds and social media feeds, in order to bring together and then analyze data coming out of Ukraine and using some of the tools that are within the unique capacity of the United States to be able to collect and analyze.

My particular office is working closely with the Office of the Prosecutor General. We had a project in place prior to the February 24th invasion in which we were surging some experts who are veterans of the world's international war crimes tribunals to the Office of the Prosecutor General in Kyiv to assist her, providing strategic guidance and operational support in pursuing war crimes cases. The office is very experienced – she had already launched a number of cases arising out of the Donbas and Crimea – but since the relaunch of the invasion on February 24th, the entire country of Ukraine has become an enormous crime base. And so the work ahead of her is extremely daunting. We have now pivoted and are starting to scale that work in order to make sure that she has the resources and expertise that she needs in order to bring these cases.

We are also launching through implementing partners from the civil society sector what are called Mobile Justice Teams. These individuals will be multidisciplinary – again, veterans of the war crimes tribunals, experienced investigators and prosecutors, who will be working with regional prosecutors around the country as they bring cases within their particular spheres of operations. There will also be Mobile Justice Teams that will be thematic in terms of focusing on the use of starvation as a weapon of war, sexual violence against women of – and women and girls, attacks on cultural property. These are not crimes that ordinary prosecutors are used to doing in their daily lives, and so the hope is that having this expertise on the ground, in the field, will be helpful to enable these cases to move forward.

The United States is also supporting a range of multinational efforts to advance accountability. This includes cases that are being considered by the International Criminal Court. The new prosecutor, Karim Khan, has recently opened an investigation. I understand he's in Ukraine right now working with local officials there to coordinate their efforts around prosecutions. We're also supporting the Organization for Security and Cooperation in Europe, which has recently relaunched the Moscow Mechanism, which will take a second look at abuses committed since the last mechanism was deployed. There is a human rights monitoring mission that has been sent out by the Office of the High Commissioner for Human Rights in Geneva. I've just come from Europe, where I was – had meetings in Brussels, The Hague, Geneva, et cetera, to try and help coordinate some of these efforts. And there's a whole range of civil

society actors that are actively engaged in documenting these abuses from a trauma-informed perspective.

Finally, I'll just close by saying that we are expressing our solidarity with victims everywhere. All parties are governed by the laws of war, and that includes Ukrainian forces, Russian forces, and others that are active within the theater of war within Ukraine, and all parties are obliged to adhere to the laws of war at the peril of war crimes prosecutions, because we know that serious violations of the laws of war give rise to individual criminal responsibility. That means that individuals can be held responsible – not just the direct perpetrators, but also individuals up the chain of command who are aware that their subordinates are committing abuses and who failed to do what is necessary to either prevent those abuses or to punish the perpetrators after the fact.

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AMBASSADOR VAN SCHAACK:…Now, the ICC is based upon the principle of complementarity. It will step in when national courts with jurisdiction are either unable or unwilling to move forward with cases. So in the Ukrainian case, you can imagine the Ukrainian system potentially being overwhelmed by the number of cases that are out there, and so the ICC can step in and help with some of the maybe senior officials or charges that are not able to be brought under Ukrainian law because it doesn't fully incorporate ICC crimes into the domestic penal code. That may be a good division of labor between an international court and a domestic court.

We've also seen Ukraine be quite effective at invoking other international courts such as the European Court of Human Rights and the International Court of Justice. And so the United States stands ready to assist with all of these efforts – in the Ukrainian courts, in foreign courts exercising various forms of extraterritorial jurisdiction, at the ICC, and then, again, courts adjudicating state responsibility like the ICJ or the European Court of Human Rights.

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b. Special Criminal Court in the Central African Republic

On November 8, 2022, the State Department released a statement welcoming the first trial verdict by the Special Criminal Court in the Central African Republic on October 31, 2022, against Issa Sallet Adoum, Yaouba Ousmane, and Mahamat Tahir. The press statement is available at https://www.state.gov/first-trial-judgment-by-the-special-criminal-court-in-the-central-african-republic-car/, and included below.

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The United States welcomes the first verdict issued by the Special Criminal Court (SCC) on October 31 against Issa Sallet Adoum, Yaouba Ousmane, and Mahamat Tahir, all members of the rebel group known as 3R. In the judgment, the accused were convicted of crimes against

humanity and war crimes for severe violence committed in a massacre of at least 46 civilians in May 2019.

The verdict, which is subject to appeal, comes on the heels of other successes for the SCC and Central African authorities, including the arrest of two former Central African Armed Forces members and one ex-Séléka militia general on charges of crimes against humanity. The achievements of the hybrid court model should signal that atrocities will not be tolerated.

In convicting one perpetrator based on his responsibility for rapes committed by his subordinates, the Court concluded that the rapes in this case constituted crimes against humanity and war crimes. This holding brings vital recognition to the women who suffered these horrendous crimes, some of whom were minors at the time, and to survivors of gender-based violence in the conflict more broadly.

We are proud to stand alongside the Central African authorities and people in their quest for justice. The people of CAR deserve to see the perpetrators of international crimes held to account, and ending impunity is a necessary foundation for peace, prosperity, and rule of law.

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c. Decision in Dutch Criminal Trial Against MH17 Suspects

On November 17, 2022, Secretary Blinken issued a statement welcoming the decision by the District Court of The Hague finding three members of Russian proxy forces in eastern Ukraine guilty for their roles in the downing of Malaysia Airlines Flight MH17. The press statement is available at https://www.state.gov/verdict-in-dutch-trial-against-mh17-suspects/, and includes the following:

> The United States welcomes today's decision finding three members of Russian proxy forces in eastern Ukraine guilty for their roles in the downing of Malaysia Airlines Flight MH17. The decision by the District Court of The Hague is an important moment in ongoing efforts to deliver justice for the 298 individuals who lost their lives on July 17, 2014.
>
> Today's decision is the result of sustained work by a Joint Investigation Team comprised of authorities from the Netherlands, Australia, Belgium, Malaysia, and Ukraine, and reflects the Netherlands' firm commitment to establish the truth and pursue accountability in this case. While this is a solid step towards justice, more work lies ahead to meet the UN Security Council's demand in resolution 2166 that "those responsible…be held to account."

d. Kosovo Specialist Chambers

On December 16, 2022, the State Department welcomed the judgment of a Trial Panel of the Kosovo Specialist Chambers in the case of Salih Mustafa for the war crimes of arbitrary detention, torture, and murder. The press statement is available at https://www.state.gov/verdict-in-the-trial-of-salih-mustafa-at-the-kosovo-specialist-chambers/ and includes the following:

The United States welcomes the verdict in the case against Salih Mustafa, the first case at the Kosovo Specialist Chambers involving war crimes charges. Mustafa, a former commander in the BIA Guerrilla unit of the Kosovo Liberation Army (KLA), was convicted of the war crimes of arbitrary detention, torture, and murder committed at a BIA detention and interrogation site in 1999 and sentenced to 26 years.

As the Trial Panel noted, the decision is not a judgment against the KLA or Kosovo but relates only to the defendant's individual criminal responsibility. This verdict is a strong step towards helping Kosovo uphold the rule of law and ensure justice for victims. We also commend the bravery of the individual victims and witnesses who came forward and condemn the threats and intimidation that they have faced. Without these courageous individuals, justice would not be possible.

Cross References

Extradition and Mutual Legal Assistance Treaties with Croatia, **Ch.4.A.1&B.5**
UN Cybercrime Treaty, **Ch.4.B.1***HRC on accountability*, **Ch. 6.A.6**
Children in Armed Conflict, **Ch. 6.C**
ICJ, **Ch.7.B**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
U.S. v. Saab Moran *(case relating to diplomatic immunity from criminal prosecution),* **Ch. 10.C.1.b.**
U.S. v. Dávila-Reyes and U.S. v. Reyes Valdiva *(case related to drug trafficking in violation of the Maritime Drug Law Enforcement Act)*, **Ch. 12.A4**
Wildlife trafficking, **Ch. 13.C.6**
Cyber sanctions, **Ch. 16.A.11**
Terrorism sanctions, **Ch. 16.A.10**
Specially designated global terrorists, **Ch. 16.A.11**
Visa restrictions on former Honduran president Juan Orlando Hernández, **Ch. 16.A.12.c**
Sanctions related to transnational organized crime and global drug trade, **Ch. 16.A.14**
Atrocities in Burma, **Ch.17.C.3**
Atrocities in Northern Ethiopia, **Ch.17.C.4**
Atrocities in Ukraine, **Ch.17.C.5**
Cyber Attacks against Ukraine, **Ch. 18.A.6.c**

CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. Senate Testimony in Support of Law Enforcement Treaties

On April 6, 2022, Acting Legal Adviser Richard Visek testified before the U.S. Senate Committee on Foreign Relations on two law enforcement treaties under consideration by the Committee: the Extradition and Mutual Legal Assistance Treaties with Croatia. Excerpts follow from Mr. Visek's April 6, 2022 testimony. See section B.5, *infra* for additional discussion of both treaties.

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The administration appreciates the committee's prioritization of these treaties. Both the Croatia extradition and mutual legal assistance treaties advance U.S. interests. They will modernize and strengthen our law enforcement cooperation relationship with an important European partner, and thereby improve our ability to combat transborder crime, including terrorism, other forms of violent crime, drug trafficking, cybercrime, and the laundering of the proceeds of criminal activity. In addition, these treaties will advance our project to conform our law enforcement treaties with Member States of the European Union to the standards established in the extradition and mutual legal assistance agreements we have concluded with the European Union. The administration supports both of these treaties and urges the Senate to provide its advice and consent to their ratification. The U.S. extradition relationship with Croatia is currently governed by the Treaty Between the United States of America and the Kingdom of Servia for the Mutual Extradition of Fugitives from Justice, signed on October 25, 1901 ("the 1901 Treaty"). This treaty is not as effective as the modern treaties we have in force with other countries in ensuring that fugitives may be brought to justice, and it does not incorporate the provisions required by the Agreement on Extradition between the United States of America and the European Union signed on June 25, 2003 ("the U.S.-EU Extradition Agreement"), and to which the Senate gave its advice and consent in 2008.

We do not currently have a mutual legal assistance agreement in place with Croatia, and the treaty now before you would fill that gap and serve to implement the Agreement on Mutual

Legal Assistance between the United States of America and the European Union, signed on June 25, 2003 ("the U.S.-EU Mutual Legal Assistance Agreement"), and to which the Senate gave its advice and consent in 2008.

Both of the treaties before you today are self-executing and were ratified by Croatia in April of 2020. As such, U.S. ratification would allow the parties to bring these instruments into force and immediately begin making use of them for enhanced law enforcement cooperation.

These two treaties would establish a modern law enforcement relationship with Croatia. Replacing outdated extradition treaties with modern ones (as well as negotiating extradition treaties with new partners where appropriate) is necessary to create a seamless web of mutual obligations to facilitate the prompt location, arrest and extradition of international fugitives. Similarly, treaty-based mutual legal assistance mechanisms facilitate our ability to obtain evidence and other forms of assistance in support of our criminal investigations and prosecutions. As a result, these two treaties are an important part of the administration's efforts to ensure that those who commit crimes against Americans will face justice in the United States.

The new U.S.-Croatia Extradition Agreement contains several important provisions that will serve our law enforcement objectives:

First, it defines extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a period of more than one year in both States. This is the so-called "dual criminality" approach. Our older treaties, including the 1901 Treaty, provide for extradition only for offenses appearing on a list contained in the instrument. The problem with this approach is that, as time passes, the lists grow increasingly out of date. The dual criminality approach eliminates the need to renegotiate treaties to cover new offenses in instances in which both States pass laws to address new types of criminal activity. By way of illustration, so called "list treaties" from the beginning of the 20th century do not clearly cover various forms of cybercrime or money laundering. The new treaty would fix this problem.

Second, unlike the 1901 Treaty, the new extradition treaty contains a provision that would permit the temporary surrender of a fugitive to the United States of a person facing prosecution, or serving a sentence, in Croatia. This provision is important because it can enable pending charges against a person to be resolved while the evidence is still fresh, as well as enable the prosecution of a person together with his or her codefendants.

And third, the new extradition treaty incorporates a number of other improvements over the 1901 Treaty, including procedural improvements that have the potential to expedite extradition processes by streamlining and clarifying the requirements for extradition. For example, the new treaty provides clarity on the materials required to be included in a formal extradition request, allows for direct transmission of provisional arrest requests through Justice Department channels, and sets out criteria for situations where more than one State has requested the extradition of an individual. The treaty also provides for a simplified procedure when an individual consents to extradition.

For its part, the new U.S.-Croatia Mutual Legal Assistance Agreement formalizes a framework for effective cooperation on the issues covered by the U.S.-EU Mutual Legal Assistance Agreement, including provisions on: the identification of bank information relating to individuals suspected or charged with criminal offenses; the establishment and operation of joint investigative teams; the use of video-conferencing technology to take testimony; the ability to make requests by expedited means; and the provision of assistance to administrative authorities that are conducting investigations of criminal activity. The new treaty also contains provisions

concerning limitations on use, confidentiality, and grounds for refusal of a request. This treaty is consistent with treaties concluded with other EU Member States with which the United States did not have an existing mutual legal assistance treaty and establishes a crucial framework to facilitate assistance between our countries in criminal investigations and prosecutions.

For all these reasons, U.S. ratification of these two law enforcement treaties will help us and our colleagues at the Department of Justice to deepen an important law enforcement relationship and advance our objective of combatting transnational crime.

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2. Enactment of Amendments to the Case-Zablocki Act

The Case-Zablocki Act (1 U.S.C. 112b), as implemented by 22 CFR Part 181 (the Act), requires coordination with the Secretary of State prior to concluding international agreements, and timely reporting to Congress of concluded international agreements upon entry into force. On December 23, 2022, President Biden signed into law the H.R. 7776, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA), Pub. L. No. 117-263, which amends the Act. See December 23, 2022 White House press release available at https://www.whitehouse.gov/briefing-room/legislation/2022/12/23/press-release-bill-signed-h-r-7776/. Section 5947 of the 2023 NDAA contains several amendments to the Act that modify the reporting and listing requirements for international agreements. The NDAA also enacted for the first-time monthly reporting and publication requirements for "qualifying non-binding instruments" that "could reasonably be expected to have a significant impact on the foreign policy of the United States."

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

1. Negotiation of UN Cybercrime Treaty

As discussed in *Digest 2021* at 110-11, the United States has expressed support for the negotiation of a treaty relating to cybercrime under the auspices of the United Nations. The first session of the Open-Ended Ad Hoc Intergovernmental Committee of Experts ("AHC"), postponed from 2021 to 2022 in light of the impact of the coronavirus disease, convened from February 28 to March 11, 2022 in New York. The submission of the United States related to the first session is available at https://www.unodc.org/documents/Cybercrime/AdHocCommittee/First_session/Comments/USA_National_Statement_-_Cybercrime_AHC.pdf. The second and third sessions of the AHC occurred from May 30 to June 10, 2022 in Vienna, and from August 29 to September 9, 2022 in New York, respectively. Submissions related to the second and third sessions of the AHC are available at

https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Second_session/USA_Contriution.pdf [sic] and https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Third_session/Documents/Submissions/United_States.pdf.

On August 30, 2022, Ambassador Deborah McCarthy reviewed progress made on the negotiations in a press briefing available at https://www.state.gov/briefings-foreign-press-centers/cybercrime-treaty-negotiations.

2. Patent Cooperation Treaty

On June 1, 2022, the U.S. Patent and Trademark Office (USPTO) notified the Russian Federal Service for Intellectual Property, Patents and Trademarks (Rospatent) of its intent to terminate the agreement under the Patent Cooperation Treaty (PCT), effective December 1, 2022. The USPTO June 1, 2022 announcement is available at https://www.uspto.gov/about-us/news-updates/update-termination-rospatent-isa-and-ipea-international-applications, and includes the following.

> Today the United States Patent and Trademark Office (USPTO) notified the Russian Federal Service for Intellectual Property, Patents and Trademarks (Rospatent) of the USPTO's intent to terminate their agreement concerning Rospatent functioning as an International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA) for international applications received by the USPTO as a Receiving Office under the Patent Cooperation Treaty (PCT). Per the terms of the agreement, the termination will be effective December 1, 2022. In the interim, applicants filing international applications under the PCT are advised to exercise caution before selecting Rospatent as an ISA or IPEA.

The June 1, 2022 announcement followed USPTO statements on the termination of engagement with officials from Rospatent and with the Eurasian Patent Organization in March 2022. See the USPTO March 22, 2022 press release, originally published on March 4, 2022 and updated on March 8, 2022 and March 10, 2022, available at https://www.uspto.gov/about-us/news-updates/uspto-statement-engagement-russia-and-eurasian-patent-organization. The USPTO's announcement also stated that, effective March 11, 2022, it would no longer grant requests to participate in the Global Patent Prosecution Highway (GPPH) at the USPTO when such requests are based on work performed by Rospatent as an Office of Earlier Examination under the GPPH.

3. Treaties Transmitted to the Senate

On April 7, 2022, President Biden transmitted the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Albania to the U.S. Senate for its advice and consent to ratification. The extradition treaty was signed at Tirana December 22, 2020. Treaty Doc. 117-2. The text of the treaty is available at https://www.congress.gov/treaty-document/117th-congress/2?s=1&r=2. The President's message to the Senate on transmittal is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/07/a-message-to-the-senate-transmitting-the-extradition-treaty-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic-of-albania/.

On July 11, 2022, President Biden transmitted the Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden (the "Protocols") to the U.S. Senate for its advice and consent to ratification. The Protocols were signed at Brussels July 5, 2022. Treaty Doc. 117-3. The President's message to the Senate on transmittal is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/11/message-to-the-senate-regarding-the-protocols-to-the-north-atlantic-treaty-of-1949-on-the-accession-of-the-republic-of-finland-and-the-kingdom-of-sweden/.

4. Postal Services

In 2022, the United States deposited instruments of accession and acceptance with the Director General of the International Bureau of the Universal Postal Union (UPU), for certain UPU agreements ("UPU Acts"). Depositing these instruments and becoming a party to these international postal agreements marked a return to traditional U.S. practice. See *Digest 2019* at 119-20 and *Digest 2018* at 113-14 and 472-75 for additional background on U.S. participation in the UPU. See https://www.upu.int/en/Universal-Postal-Union/About-UPU/Acts for UPU Acts and other decisions, generally. The United States became party to the following UPU Acts:

- General regulations of the Universal Postal Union. Signed at Doha October 11, 2012. Entered into force January 1, 2014. Entered into force for the United States June 28, 2022.
- Universal Postal Convention and its Final Protocol. Signed at Abidjan August 26, 2021. Entered into force July 1, 2022.
- Postal Payment Services Agreement and its Final Protocol. Signed at Abidjan August 26, 2021. Entered into force July 1, 2022.
- First Additional Protocol to the General Regulations of the Universal Postal Union. Signed at Istanbul October 16, 2016. Entered into force January 1, 2018. Entered into force for the United States June 28, 2022.

- Second Additional Protocol to the General Regulations of the Universal Postal Union. Done at Addis Ababa September 7, 2018. Entered into force July 1, 2019. Entered into force for the United States June 28, 2022.
- Third Additional Protocol to the General Regulations of the Universal Postal Union. Signed at Abidjan August 26, 2021. Entered into force July 1, 2022.
- Ninth Additional Protocol to the Constitution of the Universal Postal Union. Signed at Istanbul October 16, 2016. Entered into force January 1, 2018. Entered into force for the United States June 28, 2022.
- Tenth Additional Protocol to the Constitution of the Universal Postal Union. Done at Addis Ababa September 26, 2019. Entered into force July 1, 2019. Entered into force for the United States June 28, 2022.
- Eleventh Additional Protocol to the Constitution of the Universal Postal Union. Signed at Abidjan August 26, 2021. Entered into force July 1, 2022.

5. Senate Advice and Consent to Ratification of Treaties

On August 3, 2022, the U.S. Senate passed a resolution providing advice and consent to ratification of the Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden, signed at Brussels on July 5, 2022. Treaty Doc. 117-3. The text of the treaty and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/117th-congress/3?s=1&r=1. President Biden's August 3, 2022 statement on the Senate's advice and consent to ratification is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/statement-statement-from-president-biden-on-senate-ratification-of-the-nato-accession-protocols-for-sweden-and-finland/ and includes the following.

> Today, the Senate overwhelmingly endorsed our close partners Finland and Sweden joining NATO. This historic vote sends an important signal of the sustained, bipartisan U.S. commitment to NATO, and to ensuring our Alliance is prepared to meet the challenges of today and tomorrow. I thank the members of the Senate – especially Majority Leader Schumer, Minority Leader McConnell, Senator Menendez and Senator Risch — for their leadership and for quickly advancing the ratification process, the fastest Senate process for a NATO protocol since 1981. Finland and Sweden joining the Alliance will further strengthen NATO's collective security and deepen the transatlantic partnership.

On August 9, 2022, President Biden signed the United States Instruments of Ratification of the Accession Protocols to the North Atlantic Treaty for the Republic of Finland and the Kingdom of Sweden. Secretary Blinken issued a press statement available at https://www.state.gov/signing-of-u-s-instruments-of-ratification-of-finland-and-swedens-nato-accession-protocols/, and includes the following.

> We are pleased with the swift progress toward Finland and Sweden becoming NATO Allies. There is strong Allied and bipartisan support for the membership applications of Finland and Sweden, and we look forward to quickly bringing them into the strongest defensive Alliance in history. We appreciate the swift action of all of the Allies who have already ratified the accession protocols and encourage all to complete the process soon so that Finland and Sweden can accede to the North Atlantic Treaty and join the NATO Alliance.
>
> It bears repeating at this historic moment that the U.S. commitment to our NATO Allies and Article 5 of the Washington Treaty is ironclad. Allies are united in their shared mission to defend the Euro-Atlantic community, deter aggression, project stability, and uphold NATO's values of democracy, individual liberty, and the rule of law. We also remain firmly committed to NATO's Open Door policy and to further strengthening our bilateral defense and security cooperation.

On August 18, 2022, the U.S. Instruments of Ratification were deposited with the U.S. Department of State, which performs the depositary duties of the Government of the United States of America under the Protocols. The notifications of deposit are available at https://www.state.gov/nato-sweden-accession-deposit-usa-august-18-2022 and https://www.state.gov/nato-finland-accession-deposit-usa-august-18-2022.

On September 12, 2022, the U.S. Senate passed a resolution providing advice and consent to ratification of the Agreement between the Government of the United States of America and the Government of the Republic of Croatia comprising the instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union, signed June 25, 2003, as to the Application of the Treaty on Extradition signed on October 25, 1901 (the "U.S.-Croatia Extradition Agreement"). On the same date, the U.S. Senate also passed a resolution providing advice and consent to ratification of the Agreement between the Government of the United States and the Government of the Republic of Croatia comprising the Instrument as contemplated by Article 3(3) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed at Washington on June 25, 2003 (the "U.S.-Croatia Mutual Legal Assistance Agreement"). Both treaties were signed at Washington on December 10, 2019. Treaty Doc. 116-2. The texts of the treaties and the resolution of advice and consent are available at https://www.congress.gov/treaty-document/116th-congress/2?s=1&r=3.

Cross References

Golan v. Saada *(case relating to the Hague Abduction Convention),* **Ch. 2.B.2.b**
Convention on Intercountry Adoption, **Ch. 2.B.1.d**
UK CLOUD Agreement, **Ch. 3.B.7.a**
Second Additional Protocol to the Cybercrime Convention, **Ch.3.B.7.d**
Negotiations relating to Compacts of Free Association, **Ch. 5.D**
Human Rights Treaty Bodies, **Ch. 6.A.3**
Committee on the Elimination of Racial Discrimination ("CERD"), **Ch. 6.B.1.d**
Negotiations for an Instrument on Business and Human Rights, **Ch. 6.H**
Ukraine's Allegations against Russia under the Convention on the Prevention and Punishment of the Crime of Genocide, **Ch. 7.B.3**
Negotiations with Canada concerning the Transit Pipelines Treaty, **Ch. 8.C**
Air Transport Agreements, **Ch. 11.A.1**
U.S.-Croatia Double Taxation Treaty, **Ch. 11.F.4**
The International Solar Alliance, **Ch. 13.A.1.c**
International instrument to combat ocean plastic pollution, **Ch. 13.B.9**
International instrument on pandemic prevention, preparedness, and response, **Ch. 13.C.3.a**
International 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"), **Ch. 13.C.4**
Colombia River Treaty negotiations, **Ch. 13.C.7**
Cultural property agreements, **Ch. 14.A**
Israel-Lebanon maritime boundary agreement, **Ch. 17.A.2**
Defense agreements and arrangements, **Ch. 18.A.5***Nuclear arrangements and agreements*, **Ch. 19.B**
New START Treaty, **Ch. 19.C.2**
Chemical Weapons Convention, **Ch. 19.D.2**
Biological and Toxin Weapons Convention, **Ch. 19.D.3**

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 and *Digest 2021* at 142-43, 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. In 2021, Venezuela appealed the January 14, 2021 order of the district court. On January 18, 2022, the U.S. Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction. 24 F.4th 242.

2. *Fuld* and other cases under the Promoting Security and Justice for Victims of Terrorism Act

In 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). See *Digest 2021* at 143-150 for a discussion of 2021 U.S. briefs in *Fuld* and in the similar cases of *Sokolow v. PLO*, No. 04-cv-00397 (S.D.N.Y) and *Shatsky v. PLO*, No. 18-cv-12355 (S.D.N.Y.). On January 6, 2022, the district court found that the PSJVTA's personal jurisdiction provisions are unconstitutional. The court's opinion is excerpted below (footnotes omitted). *Fuld v. PLO*, 578 F. Supp. 3d 577 (S.D.N.Y. 2022).

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To make a *prima facie* showing of personal jurisdiction, a plaintiff must demonstrate: (1) procedurally proper service of process, (2) "a statutory basis for personal jurisdiction that renders

such service of process effective" and (3) that "the exercise of personal jurisdiction ... comport[s] with constitutional due process principles." *In Re LIBOR-Based Financial Instruments Antitrust Litig.*, 22 F.4th 103, 121 (2d Cir. 2021) (internal quotation marks omitted). In this case, Defendants have waived any defenses regarding proper service of process. *See* ECF No. 13. And, at least for purposes of this motion, Defendants do not dispute Plaintiffs' allegation that they have made payments that trigger the PSJVTA's first "deemed consent" condition. *See* Am. Compl. ¶¶ 63, 66-67.[3] Thus, as in *Waldman I*, whether the exercise of personal jurisdiction over Defendants in this case is proper turns on "whether the third jurisdictional requirement is met — whether jurisdiction over the [D]efendants may be exercised consistent with the Constitution." 835 F.3d at 328.

In general, due process — pursuant to both the Fifth and the Fourteenth Amendments, *see id*. ("[T]he minimum contacts and fairness analysis is the same under the Fifth Amendment and the Fourteenth Amendment in civil cases.") — conditions "a tribunal's authority ... on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable ...,' and 'does not offend traditional notions of fair play and substantial justice.' " *Ford Motor Co. v. Montana Eighth Judicial District Court*, —— U.S. ——, 141 S. Ct. 1017, 1024, 209 L.Ed.2d 225 (2021) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). More specifically, there are three traditional bases for personal jurisdiction that comport with constitutional due process principles. First, a court may exercise "general jurisdiction" over a foreign defendant "when the defendant's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State." *Waldman I*, 835 F.3d at 331 (cleaned up). In such cases, jurisdiction encompasses "any and all claims against that defendant." *Id*. Second, a court may exercise "specific or conduct-linked jurisdiction" where there is a sufficient "affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 225 (2d Cir. 2014) (cleaned up). In other words, "to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum." *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L.Ed.2d 12 (2014).

In this case, Plaintiffs make no argument for general or specific jurisdiction, and for good reasons: Any such argument would be foreclosed by the Second Circuit's decision in *Waldman I*. First, to the extent relevant here, the Second Circuit held in *Waldman I* that the neither the PA nor the PLO can be fairly regarded as "at home" in the United States for purposes of general jurisdiction; instead, both "are 'at home' in *Palestine*, where these entities are headquartered and from where they are directed." *See Waldman I*, 835 F.3d at 332-34; *see also Shatsky*, 955 F.3d at 1036 ("The Palestinian Authority and the PLO are not subject to general jurisdiction because neither one is 'at home' in the District of Columbia within the meaning of *Daimler*."). Second, the *Waldman I* Court held that the alleged tortious actions by the PA and the PLO, "as heinous as they ***585** were, were not sufficiently connected to the United States to provide specific personal jurisdiction in the United States. There is no basis to conclude that the defendants participated in these acts in the United States or that their liability for these acts resulted from their actions that did occur in the United States." 835 F.3d at 337. These conclusions apply, with equal force, to this case.[4] It follows that the Court cannot "constitutionally exercise either general or specific personal jurisdiction over the defendants in this case." *Id.* at 344.

Instead of relying on general or specific jurisdiction, Plaintiffs here rely entirely on the third traditional basis for personal jurisdiction: consent. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011) (plurality opinion); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).[5] Unlike subject-matter jurisdiction, "personal jurisdiction represents ... an individual right," which "can, like other such rights, be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) ("*Bauxites*"). Thus, the Supreme Court has acknowledged "[a] variety of legal arrangements" that "have been taken to represent express or implied consent to the personal jurisdiction of the court." *Id.* The archetypal example of express consent occurs when "parties to a contract ... agree in advance to submit to the jurisdiction of a given court." *Id.* at 704, 102 S.Ct. 2099 (internal quotation marks omitted). Examples of "legal arrangements" that constitute "implied" consent are (1) a party's agreement to arbitrate, *see id.* (citing *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964) ("By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, [the respondent] must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York.")); and (2) "state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures," *id.* (citing *Adam v. Saenger*, 303 U.S. 59, 67, 58 S.Ct. 454, 82 L.Ed. 649 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts.")). Additionally, the Federal Rules of Civil Procedure provide that a defendant waives any defense based on lack of personal jurisdiction — and, in that sense, "consents" to personal jurisdiction — by failing to raise the issue either in an answer or in an initial motion. *See* Fed. R. Civ. P. 12(h)(1); *see Bauxites*, 456 U.S. at 704, 102 S.Ct. 2099.

Significantly, the reason that consent suffices to support personal jurisdiction is rooted in the fact that "personal jurisdiction flows from the Due Process Clause." *Id.* at 694, 102 S.Ct. 2099. "The personal jurisdiction requirement recognizes and protects an individual liberty interest." *Id.* at 702, 102 S.Ct. 2099. If a party consents to appear in a particular forum, whether explicitly or implicitly, it follows that "maintenance of the suit" in that forum does "not offend traditional notions of fair play and substantial justice." *Id.* (cleaned up). "The actions of the defendant ... amount to a legal submission to the jurisdiction of the court." *Id.* at 704-05, 102 S.Ct. 2099. After all, "[c]onsent, by its very nature, constitutes 'approval' or 'acceptance.' " *WorldCare Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (quoting *Black's Law Dictionary* definition of "consent" as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent"). Put differently, like presence in a forum that is sufficient to support general jurisdiction, consent "reveals circumstances ... from which it is proper to infer an intention to benefit from and *thus an intention to submit to the laws of the forum*." *J. McIntyre Mach.*, 564 U.S. at 881, 131 S.Ct. 2780 (plurality opinion) (emphasis added); *see also, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 203-04, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (describing cases in which the Court "purported ... to identify circumstances under which ... consent [could] be attributed to [a foreign defendant]" as an "attempt[ ] to ascertain what *dealings* make it just to subject a foreign corporation to local suit" (emphasis added) (internal quotation marks omitted)).

That inference is reasonable, however, only where the defendant's statements or conduct actually signal approval or acceptance. That, in turn, requires the "consent" to meet certain minimum requirements. Thus, the law generally requires the party's consent to be "knowing and voluntary" before it is treated as effective. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 384 F. Supp. 3d 532, 538 (E.D. Pa. 2019) ("It is axiomatic ... that consent is only valid if it is given both knowingly and voluntarily."). After all, if a party giving consent does not understand the consequences of its actions or lacks the ability to withhold consent, it cannot be said that its "consent" signals anything, let alone "an intention to submit to the laws of the forum." *J. McIntyre Mach.*, 564 U.S. at 881, 131 S.Ct. 2780 (plurality opinion). Relatedly, courts may not enforce a party's express consent to personal jurisdiction where doing so "would be unreasonable and unjust," *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), or where the agreement was affected by "fraud, undue influence, or overweening bargaining power," *id.* at 13, 92 S.Ct. 1907; *see also id.* at 10-11, 92 S.Ct. 1907 (noting that these limits are "merely the other side of the proposition ... that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found"). And for conduct to imply consent, the conduct must be "of such a nature as to justify the fiction" that the party actually consented to submit itself to the jurisdiction of the court. *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154. Put simply, for waiver of personal jurisdiction through consent to satisfy the requirements of due process, it "must be willful, thoughtful, and fair. 'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process." *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 889 (S.D. Tex. 1993).

Measured against these standards, the PSJVTA does not constitutionally provide for personal jurisdiction over Defendants in this case. Congress simply took conduct in which the PLO and PA had previously engaged — conduct that the Second and D.C. Circuits had held was insufficient to support personal jurisdiction in *Waldman I*, *Livnat*, *Shatsky*, and *Klieman* — and declared that such conduct "shall be deemed" to be consent. 18 U.S.C. § 2334(e)(1); *see, e.g.*, *Shatsky*, 955 F.3d at 1022-23, 1037 (holding that alleged "martyr payments" did not confer specific jurisdiction over Defendants). But the conduct to which Congress attached jurisdictional consequence in the PSJVTA is not "of such a nature as to justify the fiction" that Defendants actually consented to the jurisdiction of the Court. *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154. Inferring consent to jurisdiction in the United States from the first prong of the "deemed consent provision" — for "martyr payments," 18 U.S.C. § 2334(e)(1)(A), that have no direct connection to the United States, let alone to litigation in a United States court — would strain the idea of consent beyond its breaking point. And while the second prong — relating to offices or other facilities in the United States and activities "while physically present in the United States," *id.* § 2334(e)(1)(B) — does relate to conduct in the United States, the conduct (at least as alleged in this case) is too thin to support a meaningful inference of consent to jurisdiction in this country. Neither form of conduct, as alleged in this case, even remotely signals approval or acceptance of the Court's jurisdiction. Nor do they support an inference that Defendants intended "to submit to the laws of the [United States]" or to the jurisdiction of an American court. *J. McIntyre Mach.*, 564 U.S. at 881, 131 S.Ct. 2780 (plurality opinion). It may be that, under different circumstances, Congress or a state legislature could constitutionally "deem" certain conduct to be consent to personal jurisdiction. (The Court need not and does not decide that question here.) To pass muster, however, the predicate conduct would have to be a much closer proxy for actual consent than the predicate conduct at issue is here. To be blunt: The PSJVTA is too cute by half to satisfy the requirements of due process here.

That conclusion finds strong support in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). The question there was whether a state could be deemed to have waived its Eleventh Amendment immunity from suit merely by engaging in conduct that violated federal law. The Supreme Court held that it could not because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680, 119 S.Ct. 2219. "There is a fundamental difference," the Court observed, "between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81, 119 S.Ct. 2219. In the former situation, the state has voluntarily consented to suit. "In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an altogether voluntary decision to waive its immunity." *Id.* at 681, 119 S.Ct. 2219. The fact that "the asserted basis for constructive waiver" was "conduct that the State realistically could choose to abandon," the Court declared, had "no bearing on the voluntariness of the waiver." *Id.* at 684, 119 S.Ct. 2219. To be sure, *College Savings Bank* involved the Eleventh Amendment, not the Due Process Clause of either the Fifth or Fourteenth Amendments, and there are differences between the two contexts. Significantly, however, the Court's reasoning was not specific to any particular constitutional right. To the contrary, the Court explicitly noted that constructive — i.e., "deemed" — consents were "simply unheard of in the context of *other* constitutionally protected privileges.... *Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.*" *Id.* (cleaned up) (latter emphasis added). Underscoring the point, the Court then offered an example involving a very different constitutional right, the Sixth Amendment right to trial by jury:

> [I]magine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.

Id. at 681-82, 119 S.Ct. 2219 (cleaned up). In short, the principles underlying *College Savings Bank* are not specific to the Eleventh Amendment, but rather apply to constitutional rights broadly. And there is no reason to believe that they apply any less forcefully to the constitutional right at issue here — the due process right not to be subjected to suit absent sufficient " 'contacts' with the forum," *Ford Motor Co.*, 141 S. Ct. at 1024 — than they do to the Sixth Amendment jury trial right.

Thus, *College Savings Bank* all but compels the conclusion that personal jurisdiction is lacking here. Yes, Congress "express[ed] unequivocally its intention that if" either the PLO or PA "takes certain action it shall be deemed to have" consented to suit in an American court. 527 U.S. at 680-81, 119 S.Ct. 2219. From that fact, however, "the most that can be said with certainty is that" the PLO and PA have "been put on notice that Congress intends to subject

[them] to suits" in the United States. *Id.* at 681, 119 S.Ct. 2219. "That is very far from concluding that" either *the PLO or the PA* "made an altogether voluntary decision to" submit to such suits. *Id.* Moreover, the fact that "the asserted basis for" deemed consent jurisdiction in the PSJVTA is "conduct that" the PLO and PA "realistically could choose to abandon" is of no moment. *Id.* at 684, 119 S.Ct. 2219. That fact simply has "no bearing on the voluntariness of the waiver." *Id.*

That would be enough, but a pair of recent Second Circuit decisions concerning business registration statutes provides additional support for the Court's conclusion that the exercise of jurisdiction over Defendants here would violate due process. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639-41 (2d Cir. 2016); *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 498-99 (2d Cir. 2020). In *Brown*, the Court rejected the plaintiff's argument that by registering to do business in Connecticut and appointing an agent for service of process as required by Connecticut statute, the defendant had "consented to the jurisdiction of Connecticut courts for all purposes." 814 F.3d at 630. In *Chen*, the Court held the same with respect to registration under New York law. *See* 954 F.3d at 499. Most relevant here, the Court did so in part because giving "broader effect" to the registration statutes "would implicate Due Process and other constitutional concerns." *Brown*, 814 F.3d at 626; *accord Chen*, 954 F.3d at 498-99. "If mere registration and the accompanying appointment of an in-state agent — without an express consent to general jurisdiction — nonetheless sufficed to confer general jurisdiction by implicit consent," the Court reasoned, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Brown*, 814 F.3d at 640; *accord Chen*, 954 F.3d at 499.

Admittedly, *Brown* and *Chen* do not speak directly to the constitutionality of the PSJVTA. The plaintiffs in both cases argued that the statutes at issue gave rise to general jurisdiction. Here, by contrast, Plaintiffs and the United States make no such argument, as the PSJVTA's jurisdictional provisions are specific to claims against Defendants under the ATA. Moreover, the statutes at issue in *Brown* and *Chen* were not explicit in deeming registration to be consent. The PSJVTA, of course, is. In point of fact, *Brown* and *Chen* explicitly left open the possibility "that a carefully drawn state statute that *expressly* required consent to general jurisdiction as a condition on a foreign corporation's doing business in the state, at least in cases brought by state residents, might well be constitutional," *Brown*, 814 F.3d at 641 (emphasis added), and ultimately did not reach the question squarely presented here, namely whether a court's assertion of jurisdiction over a foreign defendant, "even when exercised pursuant to [the defendant's] purported 'consent,' [is] limited by the Due Process clause," *id.*[6] But the decisions strongly suggest — even if they do not hold — that "deemed consent" jurisdiction is limited by the Due Process Clause and that allowing Congress by legislative fiat to simply "deem" conduct that would otherwise not support personal jurisdiction in the United States to be "consent," as it tried to do here, would "rob[ ]" the case law conditioning personal jurisdiction on sufficient contacts with the forum "of meaning by a back-door thief." *Id.* at 640.

Notably, in arguing that the PSJVTA passes constitutional muster, Plaintiffs and the United States do not dispute that a statute "deeming" certain conduct to be "consent" to personal jurisdiction must be consistent with due process. *See* U.S. Mem. 7-9; Pls.' Mem. 13. In their view, however, to comply with due process, a "deemed consent" statute need only give 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." U.S. Mem. 9 (internal quotation marks omitted); *see* Pls.' Mem. 13.[7] If a statute does so, they argue, a defendant who thereafter engages in the predicate conduct has "knowingly" and "voluntarily" consented to jurisdiction and the exercise of jurisdiction over such a defendant comports with due process. As applied here, Plaintiffs and the United States argue that Defendants knowingly and voluntarily "consented" because they "knew" the activities that would "be deemed consent" to jurisdiction and were given "the opportunity to 'voluntarily' choose whether or not to continue such activities and thereby consent to jurisdiction in the courts of the United States." U.S. Mem. 10; *see* Pls.' Supp. Mem. 5. In short, in their view, nothing more than fair notice and an opportunity to conform is required for "deemed consent" to satisfy due process.

The Court cannot agree. Separate and apart from the fact that the argument of Plaintiffs and the United States is the very one rejected by the Supreme Court in *College Savings Bank*, to accept it would effectively mean that there are *no* due process limitations on the exercise of personal jurisdiction. Congress or a state legislature could provide for jurisdiction over *any* defendant for *any* conduct so long as the conduct post-dated enactment of the law at issue. That is, Congress or the legislature could simply "deem" a substantive violation of the law at issue to be "consent" and, on that basis, subject any defendant who later committed a violation to jurisdiction without regard for its "contacts, ties, or relations" with the forum. *Int'l Shoe*, 326 U.S. at 319, 66 S.Ct. 154. Congress, for example, could simply "deem" a substantive violation of the ATA to mean that a defendant had "consented" to jurisdiction. Or, perhaps more revealingly, a state legislature could pass a statute declaring that any foreign corporation that distributed vehicles to in-state dealerships would be "deemed" to have consented to personal jurisdiction in that state — circumventing the Supreme Court's holding in *Daimler*. 571 U.S. at 136, 134 S.Ct. 746; *cf. Coll. Savings Bank*, 527 U.S. at 683, 119 S.Ct. 2219 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)]."). In short, to hold that fair notice and an opportunity to conform one's behavior are the only requirements for "deemed consent" jurisdiction to comport with due process would be to hold that personal jurisdiction is limited only by reach of the legislative imagination — which is to say, that there are no constitutional limits at all.

Congress should not be permitted to circumvent fundamental constitutional rights through such sleight of hand. *See Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593, 46 S.Ct. 605, 70 L.Ed. 1101 (1926) ("[C]onstitutional guarantees, so carefully safeguarded against direct assault, [should not be] open to destruction by the indirect but no less effective process of requiring a surrender which, though in form voluntary, in fact lacks none of the elements of compulsion."). Indeed, to give such power to a legislature would be to violate the longstanding proposition that "it was not left to the legislative power to enact any process which might be devised" and that due process "cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276, 18 How. 272, 15 L.Ed. 372 (1856); *see Quill Corp. v. N. Dakota*, 504 U.S. 298, 305, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (noting that Congress does not "have the power to authorize violations of the Due Process Clause"), *overruled on other grounds by S. Dakota v. Wayfair, Inc.*, —— U.S. ——, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018). More directly on point, it would offend the fundamental principle that a statute "cannot create personal jurisdiction where the Constitution forbids it." *In re Terrorist Attacks on Sept. 11, 2001*,

538 F.3d 71, 80 (2d Cir. 2008) (internal quotation marks omitted), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010); *see Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002) ("[I]t is well-settled that a statute cannot grant personal jurisdiction where the Constitution forbids it." (internal quotation marks omitted)). Or as the Second Circuit put it in *Waldman I* (when rejecting the plaintiffs' argument that the PLO and the PA had consented to personal jurisdiction through their appointment of an agent for service of process in Washington): A *statute* cannot itself "answer the *constitutional* question of whether due process is satisfied." 835 F.3d at 343 (emphasis added).

Moreover, as the Supreme Court's reference to the jury trial right in *College Savings Bank* makes plain, to accept the argument advanced by Plaintiffs and the United States could (and likely would) have staggering implications beyond the realm of personal jurisdiction. After all, the concepts of consent and waiver have legal significance with respect to a host of individual constitutional rights. Law enforcement may conduct a warrantless search on consent. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A defendant cannot be prosecuted for a felony absent an indictment unless he waives the right to be indicted by a grant jury. *See, e.g.*, *Matthews v. United States*, 622 F.3d 99, 101 (2d Cir. 2010). Parties entitled to a civil jury trial under the Seventh Amendment can consent to a bench trial. *See, e.g.*, *Texas v. Penguin Grp. (USA) Inc.*, No. 11-MD-2293 (DLC), 2013 WL 1759567, at *6-7 (S.D.N.Y. Apr. 24, 2013). Parties in a federal civil case are entitled to litigate their claims before an Article III judicial officer absent consent to proceed by other means. *See, e.g.*, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 674-78, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015). And so on. To accept that fair notice and an opportunity to alter conduct are all that is required for a legislature to "deem" conduct to be "consent" is to accept that the rights underlying these doctrines are subject to mere legislative whim. Congress could simply say that a person who is arrested on probable cause with a cellphone is "deemed" to have "consented" to a search of the phone, *cf. Riley v. California*, 573 U.S. 373, 386, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (holding that law enforcement officers "must generally secure a warrant" before searching a cellphone seized incident to an arrest); that by merely filing or answering a lawsuit in federal court, a party is "deemed" to have "consented" to a bench trial or to have "consented" to the jurisdiction of a Magistrate Judge; and so on. Constitutional rights are not so fickle.

Conspicuously, Plaintiffs and the United States do not cite any case suggesting, let alone holding, that a legislature may simply "deem" conduct unrelated to actual consent to be consent, in the personal jurisdiction context or otherwise.[8] The closest they come is the Supreme Court's decision in *Bauxites*, but *Bauxites* does not bear the weight they put on it. In *Bauxites*, the district court found that the petitioners had violated various discovery orders relating the question of personal jurisdiction. Exercising its authority under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure, the district court sanctioned the petitioners by deeming the facts that formed the basis for personal jurisdiction to be established. On appeal, the petitioners argued that this violated due process because a court "may not create" personal jurisdiction "by judicial fiat." 456 U.S. at 695, 102 S.Ct. 2099. The Supreme Court rejected the argument, holding that application of Rule 37(b)(2) supported the presumption, established in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 53 L.Ed. 530 (1909), "that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." 456 U.S. at 705-06, 102 S.Ct. 2099. "The sanction," the Court concluded, "took as established the facts — contacts with Pennsylvania — that [the respondent]

was seeking to establish through discovery. That a particular legal consequence — personal jurisdiction of the court over the defendants — follows from this, does not in any way affect the appropriateness of the sanction." *Id.* at 709, 102 S.Ct. 2099.

* * * *

Second, and in any event, Plaintiffs and the United States do not cite, and the Court has not found, any authority for the proposition that the test for personal jurisdiction — which, again, is an individual constitutional right — varies by context or by the nature of a plaintiff's claim. *See Livnat*, 851 F.3d at 56 ("[A]lthough congressional interests may be relevant to whether personal jurisdiction comports with due-process standards, they cannot change the standards themselves." (citation omitted)); *see also Waldman I*, 835 F.3d at 329-30 & n.10 (holding that personal jurisdiction standards are the same under the Fifth and Fourteenth Amendments, citing cases against foreign defendants and involving terrorism, and specifically rejecting the argument that there is " 'universal' — or limitless — personal jurisdiction in terrorism cases"). And finally, such an "expansive view" of Congress's authority to create personal jurisdiction where it otherwise would not exist, even if limited to the context of foreign affairs, would pay insufficient "heed to the risks to international comity." *Daimler*, 571 U.S. at 141, 134 S.Ct. 746. "Considerations of international rapport thus reinforce" the Court's "determination that subjecting" foreign parties to jurisdiction based on conduct that has no direct contact with the United States, let alone nexus with litigation in the United States, "would not accord with the 'fair play and substantial justice' due process demands." *Id.* (quoting *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154).

In the final analysis, the Court cannot acquiesce in Congress's legislative sleight of hand and exercise jurisdiction over Defendants here pursuant to the PSJVTA. A defendant's knowing and voluntary consent is a valid basis to subject it to the jurisdiction of a court, but Congress cannot simply declare anything it wants to be consent. To hold otherwise would let fiction get the better of fact and make a mockery of the Due Process Clause. *See McDonald*, 243 U.S. at 91, 37 S.Ct. 343 (Holmes, J.) ("[G]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact"); *M3 USA Corp. v. Qamoum*, No. CV 20-2903 (RDM), 2021 WL 2324753, at *12 (D.D.C. June 7, 2021) ("[T]he Court must avoid treating 'consent' as simply a 'legal fiction' devoid of content or engaging in 'circular' reasoning that premises 'consent' on the presumption that defendants know the law and then defines the law so that anyone engaging in the defined conduct is deemed to have consented to personal jurisdiction."). That is not to say that "deemed consent" jurisdiction in all its forms would necessarily be unconstitutional.[10] If the underlying conduct were a closer proxy for actual consent, perhaps a statute deeming the conduct to be consent would pass muster. The Court leaves that question for another day. For today's purposes, it suffices to say that the provisions of the PSJVTA at issue push the concept of consent well beyond its breaking point and that the predicate conduct alleged here is not "of such a nature as to justify the fiction" of consent. *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154. It follows that exercising jurisdiction under the facts of this case does not comport with due process and Defendants' motion must be granted.

* * * *

On March 8, 2022, the United States appealed the decision to the U.S. Court of Appeals for the Second Circuit. *Fuld v. PLO*, Nos. 22-76, 22-496. On June 21, 2022, the United States filed a brief, excerpted below (footnotes omitted).

* * * *

A. The PSJVTA Establishes Personal Jurisdiction Based on Defendants' Knowing and Voluntary Consent

This Court has held that the PA and PLO are entitled to due process rights, and therefore the Fifth Amendment requires a federal court to establish personal jurisdiction over those entities. *Waldman*, 835 F.3d at 329. "[T]he test for personal jurisdiction requires that 'the maintenance of the suit not offend traditional notions of fair play and substantial jus- tice.' " *Bauxites*, 456 U.S. at 702–03 (quoting *International Shoe*, 326 U.S. at 316–17 (some quotation marks omitted)); *accord Ford Motor Co.*, 141 S. Ct. at 1024; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

But "[b]ecause the requirement of personal juris- diction represents first of all an individual right," it "can, like other such rights, be waived." *Bauxites*, 456 U.S. at 703. Specifically, a defendant may consent to a court's exercise of personal jurisdiction through a "variety of legal arrangements." *Id.*; *accord Burger King*, 471 U.S. at 472 n.14; *Brown*, 814 F.3d at 625 ("a party may simply consent to a court's exercise of per- sonal 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 Net- work v. Sharif*, 575 U.S. 665, 685 (2015)—and 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 the conduct by which the PA and PLO may, knowingly and voluntarily, constructively consent to personal jurisdiction to ATA claims, *Baux- ites*, 456 U.S. at 703, and gives the PA and PLO "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 describes what actions will cause the PA and PLO to be "deemed to have consented to personal jurisdiction" in ATA cases in U.S. courts. 18 U.S.C. § 2334(e)(1). And it provides a 120-day implementation period before consent will be deemed based on the payments prong, *id.* § 2334(e)(1)(A), and a fifteen-day period before consent will be deemed from non- excepted activities in the United States, *id.* § 2334(e)(1)(B). Thus, the PA and PLO were given a reasonable period to " 'structure their primary conduct with some minimum assurance as to where that con- duct will and will not render them liable to suit.' " *Daimler*, 571 *Burger King*, 471 U.S. at 472).

B. The PSJVTA, as an Enactment in the Field of Foreign Affairs, Must Be Accorded Deference

Furthermore, whether an assertion of personal jurisdiction comports with fair play and substantial justice depends on "the circumstances of the particular case." *Waldman*, 835 F.3d at 331. Here, a critical circumstance is the fact that the PSJVTA was enacted "on a matter of foreign policy," and therefore "warrants respectful review by courts." *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (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. And the narrow limits of the consent to personal jurisdiction required by the PSJVTA—only *sui generis* foreign entities, sued under the ATA for claims related to acts of international terrorism that injure U.S. victims, are deemed to have consented, 18 U.S.C. § 2334(e)(1), (5)—underscore that the deemed-consent provision is a reasonable exercise of Congress's foreign-affairs powers. 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 be- tween 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.").

Congress's framework for deemed consent under the PSJVTA is consistent with this legislative purpose. First, the only defendants that may be deemed to have consented to personal jurisdiction are the PA, PLO, and their successors or affiliates. 18 U.S.C. § 2334(e)(5). And one of the two prongs of the deemed- consent provision directly concerns those entities' presence and activities in the United States. *Id*. § 2334(e)(1)(B). Conditioning permission for the PA and PLO to operate in the United States on their con- sent to personal jurisdiction in ATA actions is both rea- sonable and proportional, and arises from a long his- tory of congressional and Executive actions. 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 their renunciation of terrorism and commitment to peace in the Middle East. Their ability to operate within the United States is de- pendent on the judgments of the political branches, which have long imposed restrictions on their U.S. activities and 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, 2022, Pub. L. No. 117-103, div. K, § 7041(l)(3)(B), 136 Stat. 49, 641(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, 120 Stat. 3318 (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 that kill or injure U.S. nationals to constitute consent to personal jurisdiction, Congress furthered critical interests in national security and foreign affairs by acting to dis- courage support for violence harming U.S. nationals abroad. *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). Congress specifically tied the qualifying payments to acts of terrorism that injure U.S. nationals, thus implicating the vital 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). The link between the payments prong and opening the courts to vindicate the claims of U.S. terrorism victims is obvious: 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).

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 very 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 ap- propriate 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").

Because the PSJVTA is centrally concerned with matters of foreign affairs, it requires deferential con- sideration by the Judicial Branch. But nothing about that principle implies that the courts must "abdicat[e]" their responsibility to protect constitutional rights, or adopt a novel due process test in this case, as the district court suggested. (JA 90–92); *cf. ACLU v. Department of Defense*, 901 F.3d 125, 136 (2d Cir. 2018) ("Judges do not abdicate their judicial role by acknowledging their limitations and deferring to an agency's logical and plausible justification in

the context of national security; they fulfill it."). Whether an exercise of personal jurisdiction is permissible turns on the question of whether it is " 'reasonable, in the context of our federal system of government,' and 'does not offend traditional notions of fair play and substantial justice.' " *Ford Motor Co.*, 141 S. Ct. at 1024 (quoting *International Shoe*, 326 U.S. at 316–17). Congress's and the Executive's broad authority to act in matters of foreign affairs, and the courts' relative lack of competence in those matters, are important factors in the balancing of interests that will ultimately determine the reasonableness of an assertion of personal jurisdiction. *Cf. United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (in assessing service of process, due process depends on "all the circumstances" (quotation marks omitted)); *Snyder v. Massachusetts*, 291 U.S. 97, 117 (1934) (Cardozo, J.) (in due process analysis, "[w]hat is fair in one set of circumstances may be an act of tyranny in others"), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964). That balancing, and the deference courts must afford in foreign-affairs matters, are fully consistent with the Supreme Court's established tests for considering the due process limits of personal jurisdiction.

In sum, the PSJVTA's provisions deeming certain actions by the PLO and PA to be consent to personal jurisdiction—limited to specified foreign entities, applicable only to ATA claims, and in furtherance of U.S. foreign policy—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. And those important government interests are closely linked to the two prongs of the PSJVTA's deemed-consent provisions. In this context, requiring the PA and PLO to answer civil suits in U.S. courts for any alleged role in specific acts of terrorism that injure U.S. nationals is reasonable, just, and in accordance with due process.

* * * *

3. *Sakab v. Aljabri*

Plaintiff Sakab Saudi Holding Company, a Saudi Arabian company, sought an order freezing the assets of Dr. Saad Aljabri, a former Saudi official, in Massachusetts. The United States intervened in the federal district court proceedings and asserted the state secrets privilege to protect sensitive information that could reasonably be expected to cause harm to national security if disclosed. The court accepted the U.S. government's assertion of the privilege. The court then dismissed the case, determining that the defendants could not fairly defend themselves against Sakab's claims without the use of privileged information. *Sakab Saudi Holding Co. v. Aljabri*, 578 F. Supp. 3d 140 (D. Mass. 2021). On appeal, the U.S. filed an intervenor-appellee brief on June 17, 2022 in the United States Court of Appeals for the First Circuit. No. 22-1052. The brief, which focused on the appropriate standard for dismissal of a suit where the state secrets

privilege has been asserted but did not take a position on whether dismissal was warranted in this case, is excerpted below (footnotes omitted).*

* * * *

DISMISSAL OF A SUIT IS REQUIRED IF LITIGATION OF THE MERITS WOULD RISK OR REQUIRE DISCLOSURE OF EXCLUDED STATE SECRETS

The government's fundamental interest in this litigation is to protect the sensitive national security information that the district court properly excluded from the suit. The parties do not challenge the district court's decision to uphold the United States' assertion of the state secrets privilege. Sakab Br. 23-24; Aljabri Defs. Br. 21. Thus, the principal issue on appeal is whether the district court correctly dismissed Sakab's suit as a consequence of the assertion of the privilege.

The United States takes no position on whether its invocation of the state secrets privilege should result in the dismissal of this suit. The United States' interest in this suit is to protect sensitive information from disclosure that could reasonably be expected to cause serious harm to the national security. If this Court affirms the district court's dismissal, there will be no risk of disclosure of the privileged information in further litigation of this suit. If the Court reverses and remands the case, it should, at a minimum, direct the entry of the protective order the United States previously requested in the district court, and it should direct the district court to take all necessary steps to protect against the risk of disclosure of sensitive national security information.

The parties in this litigation disagree about the standards this Court should use in deciding whether the district court correctly dismissed the suit on state secrets grounds. *Compare* Sakab Br. 33-43, *with* Aljabri Defs. Br. 26-41. As explained below, dismissal is required following the assertion of the state secrets privilege when a court determines that continued litigation risks or requires disclosure of privileged information. At times, both parties have urged that the district court should assess the privileged information in deciding whether to dismiss. *See* Sakab Br. 33-43; Aljabri Defs. Br. 15-17; A1018-A1024. That would be impermissible. In determining whether dismissal is required, a court may not weigh the excluded evidence or consider its probative value.

I. Dismissal Is Required If a Court Determines That Adjudication of the Claims and Defenses Would Risk or Require Disclosure of Privileged Information

A.

Following the assertion of the state secrets privilege, if "the circumstances make clear that sensitive [information] will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy." *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007) (quoting *Sterling v.Tenet*, 416 F.3d 338, 348 (4th Cir. 2005)) (quotation marks omitted); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc) (stating that dismissal is required

* Editor's note: On January 27, 2023, the U.S. Court of Appeals for the First Circuit affirmed the district court dismissal. *Sakab Saudi Holding Co. v. Aljabri*, 58 F.4th 585 (1st Cir. 2023).

if "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets"). That standard reflects the fundamental concern underlying the privilege's constitutional underpinnings—the need to protect against harm to national security that can be expected to result from disclosure of the privileged information. "The state secrets privilege permits the Government to prevent disclosure of information when that disclosure would harm national security interests." *United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022).

To illustrate the application of this standard—that dismissal is required when further litigation would risk or require disclosure of privileged information—courts have identified a variety of circumstances where dismissal would protect against the undue risk of disclosure. They have observed that a suit must be dismissed when the "very subject matter" of the action is a state secret, when a plaintiff cannot establish a *prima facie* case in the absence of the excluded evidence, when the exclusion deprives the defendant of a legally available defense, or when privileged information is so intertwined with nonprivileged information that litigation will present an unacceptable risk of disclosing state secrets. *See Mohamed*, 614 F.3d at 1079, 1083 (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007)); *Fitzgerald v. Penthouse Int'l Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985); *see also, e.g.*, *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Those categories are not exhaustive. But they demonstrate the point that a court must consider the nature of the privileged information and its centrality to the likely course of litigation proceedings. Courts must then evaluate the risk of disclosure of the privileged information—with the attendant risk of harm to national security—if litigation proceeds. *See El-Masri*, 479 F.3d at 309 (affirming dismissal, in part, because adjudication of plaintiff 's claims "would require disclosure" of state secrets that would be needed to establish "[t]he main avenues of defense"); *Mohamed*, 614 F.3d at 1088 ("Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected.").

* * * *

II. A District Court May Not Evaluate the Excluded Privileged Evidence or Weigh Its Probative Value in Deciding Whether to Dismiss a Suit

Evidence protected by the state secrets privilege is excluded from the case. *General Dynamics*, 563 U.S. at 485; *see also Abilt v. CIA*, 848 F.3d 305, 315 (4th Cir. 2017) ("Finding the information in question to be properly privileged, we necessarily 'remove[] it from the proceedings entirely.'") (alteration in original). That evidence therefore cannot be relied on by the parties or considered by the court. And where further litigation of the case would require reliance on, or would risk disclosure of, privileged evidence, dismissal is the proper remedy. *E.g.*, *Abilt*, 848 F.3d at 313-14. In this case, both Sakab and the Aljabri Defendants incorrectly asked the district court to consider privileged evidence for different purposes despite its exclusion from the litigation. The Aljabri Defendants asserted that they would need to disclose privileged information in any motion to dismiss. Aljabri Defs. Br. 15-17; A1018-A1024. And Sakab suggested (and urges again on appeal) that the district court should have undertaken an in camera review of privileged information to determine whether the Aljabri Defendants could prevail on the merits of any defense. Sakab Br. 33-38; A1080-A1081.

But once the government has invoked the state secrets privilege to protect certain information, the privileged information is excluded from the litigation and, as a result, cannot be

evaluated by the district court *ex parte* and in camera to determine whether one party or the other would prevail on the merits. Nor, contrary to Sakab's contention, does dismissal turn on whether the defendants would be entitled to judgment if they relied on privileged information. *Cf.* Sakab Br. 34-37. Such an argument misinterprets the case law and is inconsistent with the fundamental purpose of the state secrets privilege. Instead, dismissal is appropriate where further litigation would risk or require disclosure of privileged information. Sakab relies on a D.C. Circuit decision that reversed a dismissal on state secrets grounds. *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007). In that case, the court of appeals upheld the assertion of the state secrets privilege and the consequent exclusion of privileged information, *id.* at 144-45, but concluded that the litigation could continue on the unprivileged record, which permitted the plaintiff to make out a *prima facie* case and the defendant to raise at least some defensive merits arguments, where the court also held that the subject matter of the case was not a state secret, *id.* at 145-52. That decision should not be used to support the broader contention that a court should rely on the content of privileged information to determine whether dismissal is appropriate in this case, where the district court concluded that further litigation would require the court to consider privileged information in order to issue a decision on the merits. Consideration by a court of privileged information is fundamentally inconsistent with the principle that privileged information is removed from the case altogether and cannot be relied on by any party or by the court. *See*, *e.g.*, *General Dynamics*, 563 U.S. at 485 (the "privileged information is excluded" from the case); *Abilt*, 848 F.3d at 313 ("[A suit] must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." (quoting *El-Masri*, 479 F.3d at 308)); *Sterling*, 416 F.3d at 348, 349 (holding that a court is "neither authorized nor qualified to inquire further" into privileged matters "even in camera").

Nothing in *Sealed Case*, which allowed that suit to continue without consideration of the protected information, suggests that a court can or should rely on privileged evidence to determine whether dismissal is appropriate when the court has concluded that the suit *cannot* continue without consideration of protected information. The D.C. Circuit has not addressed that question in later cases, and this Court should not adopt a reading of *Sealed Case* that is so fundamentally at odds with the purpose of the state secrets privilege—to prevent the harm to national security that is reasonably likely to result from disclosure of privileged information.

A standard that would require a district court to hold a mini-trial in which it weighs the probative value of privileged evidence that had been excluded from the case is inconsistent with the Executive Branch's constitutional responsibility to safeguard state secrets. *See Department of the Navy v. Egan*, 484 U.S. 518, 527, 529 (1988); *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also* Sakab Br. 27 & n.9 (recognizing the "constitutional underpinnings" of the state secrets privilege). The United States' assertion of the state secrets privilege and the removal of the privileged information from the suit is based on the Executive Branch's determination that any disclosure of the privileged evidence, even in chambers, presents an unwarranted risk to the national security. That is a determination that courts are not well suited to second guess. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("[W]e cannot substitute our own assessment for the Executive's predictive judgments on [nationalsecurity] matters[] …."); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 n.31 (D.C. Cir.1983) (noting the "factors that limit judicial competence to evaluate the executive's predictions of the harms likely to result from disclosure of particular materials").

The kind of in camera and *ex parte* mini-trial that Sakab urges would be inconsistent with the Supreme Court's instruction that when "the occasion for the privilege is appropriate, … the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *see El-Masri*, 479 F.3d at 306 ("After information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure—even for the purpose of in camera examination by the court."). The risk of harm to national security is not limited to the possibility of mistaken or inadvertent disclosure that might occur when privileged information is provided to a court in chambers to undertake an evidentiary evaluation. That risk also includes the possibility that dismissal based on an in camera determination that the excluded evidence would mandate judgment for one party or another could itself reveal some of the very information sought to be protected. *See General Dynamics*, 563 U.S. at 487 ("State secrets can also be indirectly disclosed.").

When the United States asserts the state secrets privilege to protect against harm to national security and the court excludes the privileged evidence from the litigation, it is not appropriate for the court to weigh the excluded evidence in camera in deciding whether dismissal is required. Instead, a court should dismiss a suit when further litigation would risk or require disclosure of the privileged information.

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B. ALIEN TORT STATUTE

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.

On May 5, 2022, U.S. Senators Dick Durbin and Sherrod Brown introduced the Alien Tort Statute Clarification Act, S. 4155, 117th Congress (2022). In light of *Kiobel* and *Nestlé USA, Inc. v. Doe*, 593 U.S. ___, 141 S. Ct. 1931 (2021), the proposed legislation would amend the ATS to expressly grant federal courts extraterritorial jurisdiction over

any tort in violation of the law of nations if the alleged defendant is a U.S. citizen or lawful permanent resident, or any non-U.S. person who is present in the U.S. . See *Digest 2021* at 151-53 for a discussion of *Nestlé*.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES, COMITY, AND *FORUM NON CONVENIENS*

1. *Usoyan v. Republic of Turkey*

In this case, also discussed in Chapter 10, petitioners filed a petition for *writ of certiorari* with the U.S. Supreme Court on January 13, 2022, following a 2021 decision from the U.S. Court of Appeals for the D.C. Circuit. *Usoyan v. Turkey*, 6 F.4th 31 (D.C. Cir. 2021). *See Digest 2021* at 155-58. The appeals court rejected its contentions under the political question doctrine and on international comity grounds, and petitioner did not seek Supreme Court review of those issues. The United States filed an amicus brief, and the Supreme Court denied *certiorari*, consistent with the views of the United States.

2. *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 *Digest 2021* at 158; 385-91; see also Chapter 10 of this *Digest* for discussion of the 2022 decision in these cases, which analyzes the expropriation exception under the Foreign Sovereign Immunity Act and does not reach the question of comity. See *Philipp v. Stiftung Preussischer Kulturbesitz*, 628 F. Supp. 3d 10 (D.D.C. 2022).

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 2022, Secretary Blinken announced the appointment of Ambassador Joseph Yun as Special Presidential Envoy for Compact Negotiations by President Biden. Secretary Blinken emphasized that "[w]e are currently engaged in negotiating amendments to certain provisions of the Compacts of Free Association with the FAS, and completing the negotiations is a priority for this Administration." See March 22, 2022 press statement, available at https://www.state.gov/announcing-the-special-presidential-envoy-for-compact-negotiations/.

Cross References

Germany v. Philipp *and* Hungary v. Simon*,* **Ch. 10.A.3**
Fallahi v. Sayyid Ebrahim Raisolsadati, **Ch. 10.B.2**
Usoyan v. Turkey, **Ch. 10.C.1.d**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On April 12, 2022, the Department of State released the 2021 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/2021-country-reports-on-human-rights-practices/. Secretary Blinken delivered remarks on the release of the 2021 Country Reports, which are available at https://www.state.gov/secretary-antony-j-blinken-on-the-release-of-the-2021-country-reports-on-human-rights-practices/.

2. Universal Periodic Review

See *Digest 2006* at 341 for background on the Universal Periodic Review ("UPR"). On November 7, 2022, Ambassador Michèle Taylor delivered remarks at the opening of the 41st session of the UPR. The video of her remarks is available at https://geneva.usmission.gov/2022/11/07/ambassador-michele-taylor-on-the-upr-process/.

3. Human Rights Treaty Bodies

On June 2, 2022, Kara Eyrich, United Nations Economic and Social Council ("ECOSOC") Advisor, delivered remarks the 34th meeting of chairs of the human rights treaty bodies. The remarks are available at https://usun.usmission.gov/remarks-at-the-thirty-fourth-meeting-of-chairs-of-the-human-rights-treaty-bodies/ and excerpted below.

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The treaty body system plays a critical role in holding States accountable for their human rights obligations. We firmly support efforts to strengthen it and to enhance coordination among the bodies.

We welcome the progress the treaty bodies have made to improve working methods and enhance coordination despite the limitations placed on them by the pandemic.

We echo the call of others that failure to fully fund and support the work of these bodies by timely filing of reports and cooperation with treaty bodies is detrimental to their success. Without the support and cooperation of the states that created these bodies, they cannot complete their important work.

We must also improve safeguards against intimidation and reprisals against individuals and groups cooperating with treaty bodies.Finally, we welcome and encourage a transparent process that engages all stakeholders, in particular civil society organizations, throughout the entire process.

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4. Death Penalty

On November 11, 2022, Anthony Bestafka-Cruz, Adviser to the Third Committee, delivered the U.S. explanation of vote on a UN General Assembly Third Committee resolution on the death penalty. The statement is available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-the-death-penalty/ and follows.

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We sincerely thank the sponsors of the resolution for their efforts and collaborative approach to negotiating the text. Those negotiations made clear there is wide divergence of views on the use of the death penalty. While we appreciate that this resolution sets forth policy objectives shared by advocates for abolition of this form of punishment, we must emphasize, as we have in the past, that the ultimate decision regarding these issues must be addressed through the democratic processes of individual Member States and be consistent with their obligations under international law. International human rights law establishes clearly that Member States may, within certain established parameters, use this form of punishment as confirmed by Article 6 of the ICCPR, to which the U.S. is a party. Accordingly, the U.S. does not understand the lawful use of this form of punishment as contravening respect for human rights, both as it relates to the convicted and sentenced individual as well as the rights of others. Those states wishing to abolish the death penalty within their jurisdiction may choose to ratify the Second Optional Protocol to the ICCPR.

Under Article 6, the death penalty may be imposed for the most serious of crimes in conformity with the law in force at the time of the commission of the crime and when carried out pursuant to a final judgment rendered by a competent court. For parties subject to ICCPR, imposition of the death penalty must abide by exacting procedural safeguards under Articles 14

and 15. Within the United States, judicial enforcement of the Eighth Amendment of the U.S. Constitution ensures substantive due process that applies at both the federal and state levels and prohibits methods of execution that would constitute cruel and unusual punishment. The U.S. is firmly committed to complying with these Article 6, 14, and 15 obligations, and strongly urges other countries that employ the death penalty to do the same.

The United States urges all States, including supporters of this resolution, to focus their attention toward addressing and preventing human rights violations that may result from the improper imposition and application of capital punishment. We strongly urge Member States to ensure that they cannot apply capital punishment in an extrajudicial, summary or arbitrary manner. Capital defendants must be provided a fair trial before a competent, independent, and impartial tribunal established by law, with full fair trial guarantees. Moreover, through their legal processes, States should carefully evaluate both the class of defendants subject to the death penalty, as well as the crimes for which it may be imposed, in order to ensure that the use of capital punishment comports with their international obligations. Methods of execution designed to inflict undue pain or suffering must be strictly prohibited.

As a result of these concerns, the United States must vote "no" on this resolution. That said, the U.S. remains open to continued discussions related to the use of the death penalty with the hope that compromise language might ultimately be found. Once again, we thank the sponsors for their efforts.

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5. UN Third Committee

a. General Statement

On November 10, 2022, Sofija Korac, U.S. Advisor to the Third Committee, delivered a short-form Third Committee General Statement on the 77th session of the Third Committee, which is available at https://usun.usmission.gov/third-committee-general-statement-on-unga-77-short-form/ and excerpted below. The as prepared full statement is available at https://usun.usmission.gov/unga-77-third-committee-general-statement-full-version/.

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The United States thanks the Third Committee Bureau and takes this opportunity to clarify our key priorities. We deliver this statement to address cross-cutting priorities and provide important points of clarification related to resolutions adopted during this entire session. As such, not all of these points pertain directly to this specific resolution under consideration. For further points of clarification, we refer you to the non-truncated version of our statement, which will be posted on the U.S. Mission's website on the final day of the 77th session of the Third Committee.

We note that Third Committee resolutions do not change the current state of conventional or customary international law and do not create new legal obligations. The

United States understands that any reaffirmation of prior instruments in resolutions applies only to those States that affirmed them initially.

Points of clarification with regards to:

2030 Agenda: The United States supports the full implementation of the 2030 Agenda. We note that the 2030 Agenda is a non-binding document that does not create rights or obligations under international law.

The "Right to Development": The "right to development" does not have an agreed international meaning. Therefore, we continue to oppose references to this "right."

Economic Social, and Cultural Rights: The United States is not a party to the International Covenant on Economic, Social, and Cultural Rights. While the United States supports policies to advance respect for economic, social, and cultural rights both domestically and in our foreign policy, the rights contained in the Covenant are not justiciable in U.S. courts.

International Covenant on Civil and Political Rights (ICCPR): The language in these resolutions does not inform the U.S. understanding of its obligations under the ICCPR.

Education: When resolutions call on Member States to strengthen various aspects of education, including curricula, we understand these texts consistent with our respective federal, state, and local authorities.

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.

Sanctions: The United States does not accept that sanctions are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play a valuable role in discouraging human rights violations and abuses, promoting accountability, and addressing threats to peace and security.

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b. Other thematic statements at the UN Third Committee

On November 10, 2022, James Strait, U.S. Adviser to the Third Committee, provided the explanation of vote a Third Committee resolution on human rights and unilateral coercive measures. The U.S. statement follows and is available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-human-rights-and-unilateral-coercive-measures-2/.

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This resolution does not advance respect for or protection of human rights. Instead, this resolution serves to highlight that in the view of some States the impacts from sanctions on those responsible for human rights abuses are more important than the abuses themselves. Sanctions are an important and effective tool to promote peace, respond to malign behavior, deny financing to threats, and counter terrorism and proliferation of weapons of mass destruction.

For instance, sanctions can, among other things, promote accountability for human rights violations and abuses, corruption, or the undermining of democracy.

Those who point to sanctions as a problem advance a false narrative like the one outlined 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. This 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, national security, and other national and international objectives, and the United States is not alone in that view or in that practice.

We also are committed to taking extraordinary measures to minimize the potential humanitarian impact of our sanctions on vulnerable communities. The United States has numerous humanitarian authorizations in our domestic sanctions programs that are specifically designed to ensure our sanctions impact intended targets while limiting the unintended consequences on innocent people. Secretary of State Blinken has also announced our government's commitment to ensuring food, medicine, and humanitarian assistance are always carved out across UN sanctions regimes. We hope to work with members of the Security Council to pass a resolution achieving that goal.

Making sure our sanctions are truly targeted and smart is essential to achieving our intended goals, including preventing nefarious actors from abusing the international financial system or undermining respect for human rights.

For these reasons, we request a vote, and we will vote against this resolution.

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6. Human Rights Council

a. General

On April 7, 2022, Secretary Blinken released a statement on the suspension of Russia from the UN Human Right Council ("HRC"). The statement follows and is available at https://www.state.gov/russias-suspension-from-the-un-human-rights-council/.

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By suspending Russia from the UN Human Rights Council, countries around the world chose to hold Moscow to account today for gross and systematic violations of human rights in its premeditated, unprovoked, and unjustified war of choice against Ukraine. We have seen growing evidence of Russia's brutal disregard for international law and human rights in Ukraine, most notably in the death and devastation it has caused in communities such as Bucha, Irpin, and Mariupol. The atrocities the world has witnessed appear to be further evidence of war crimes, which serves as another indication that Russia has no place in a body whose primary purpose is to promote respect for human rights. As I said earlier today, today a wrong has been righted.

The world is sending another clear signal that Russia must immediately and unconditionally cease its war of aggression against Ukraine and honor the principles enshrined in

the UN Charter. The international community will continue to hold Russia to account, and the United States will continue to stand with the people of Ukraine as they fight for their sovereignty, democracy, and freedom.

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b. 49th Session

On February 28, 2022, Secretary Blinken released a press statement on the U.S. joining the HRC's 49th regular session. The statement follows and available at https://www.state.gov/49th-session-of-the-un-human-rights-council/.

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Today the United States joins the UN Human Rights Council at the Council's 49th regular session. The U.S. return to that body fulfills a pledge made by President Biden and reflects the centrality of human rights to our nation's foreign policy. The timing of this session could not be more appropriate.

Since the opening moments of Russia's premeditated, unprovoked, and unjustified attack on Ukraine, reports of human rights abuses have been widespread. Let there be no confusion: Russia attacked Ukraine because Ukraine dared to pursue a democratic path. Russia's invasion has damaged and destroyed schools, hospitals, radio stations, and homes, killing and injuring civilians, including children.

On March 1, Secretary of State Antony J. Blinken will deliver remarks to the assembled Council and will use that opportunity to spell out clearly the threat posed by Russia, while noting that Ukraine is far from the only part of the world where the Council's attention is needed.

Events in Ukraine only underscore the crucial importance of a credible human rights body dedicated to promoting the UN Charter and the Universal Declaration of Human Rights and documenting human rights violations and abuses.

U.S. Permanent Representative to the United Nations and Other International Organizations in Geneva Ambassador Sheba Crocker will head the U.S. delegation at this session, supported by recently confirmed Ambassador to the UN Human Rights Council Michèle Taylor. Under Secretary of State for Civilian Security, Democracy, and Human Rights Uzra Zeya will join the delegation in Geneva February 28-March 1 for meetings with high-level counterparts and international humanitarian partners.

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On April 1, 2022, Secretary Blinken released a press statement as the 49th regular session of the HRC ended. The statement is follows and available at https://www.state.gov/the-49th-session-of-the-un-human-rights-council/.

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Human rights are under threat in far too many parts of the world. Protecting and advancing respect for human rights requires all governments and peoples to come together and demand action and accountability.

When the United States returned to the UN Human Rights Council, we committed to participate in and help lead the global effort to promote and protect these precious rights. We do so as a nation willing to acknowledge our own shortcomings, and one committed to transparency and accountability.

Now, as the 49th session of the Human Rights Council closes, the impact of the United States' return is apparent. The United States co-sponsored more than half of all resolutions considered during this session. These resolutions reinforce actions to promote respect for the human rights of persons with disabilities, demand an end to attacks on human rights defenders, emphasize the need for adequate housing for all, and underscore freedom of religion or belief. We also highlighted human rights abuses in Belarus, Burma, DPRK, Iran, Nicaragua, South Sudan, and Syria, as well as in Georgian territories occupied by the Russian Federation. The United States led the first HRC resolution on how governments can counter disinformation while fully promoting respect for human rights and fundamental freedoms, including freedom of expression. We were pleased to host two signature events during this session bringing attention to the dangers faced by women human rights defenders and underscoring the critical role of equity and inclusion for members of racial and ethnic minority groups in healthy democracies.

The Human Rights Council also played an important role in beginning the process of holding the Kremlin to account for its war on Ukraine. Our restored and strengthened partnerships were instrumental in helping pass a resolution that created a new Commission of Inquiry — a powerful investigative mechanism. Because of this work, the international community will now document Russia's horrific conduct in Ukraine as well as the Kremlin's ongoing repression of its own domestic civil society.

As the 49th HRC session closes, the United States looks forward to building upon this good work to continue to address human rights challenges around the world.

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On April 1, 2022, the State Department issued a fact sheet summarizing key outcomes of the 49th regular session of the HRC. The fact sheet follows and is available at https://www.state.gov/outcomes-at-the-49th-session-of-the-un-human-rights-council/.

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The United States advanced U.S. foreign policy objectives at the 49th session of the UN Human Rights Council (HRC) during our first session back as a voting member. We worked alongside

Ukraine and HRC members to establish a Commission of Inquiry (CoI) – the first ever on Russia – to investigate alleged violations and abuses of human rights and violations of international humanitarian law in the context of Russia's unprovoked war against Ukraine. The United States was also a member of the core group on Ukraine's resolution to counter disinformation.

The United States co-sponsored more than half of the resolutions adopted and was a key member of the core groups on country-specific resolutions for South Sudan and Syria. The United States advanced other country-specific and thematic actions to promote greater respect for the human rights and fundamental freedoms of women and girls in all their diversity, indigenous persons, members of ethnic and religious minority groups, persons with disabilities, and members of other marginalized and vulnerable groups. The United States supported 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.

Russia: During an Urgent Debate on March 4, the United States voted to support Ukraine's call for a CoI. The HRC voted overwhelmingly (32Y-2N-13A) to condemn Russia's brutal and unprovoked invasion of Ukraine, called on it to immediately halt its assault on the people of Ukraine, and demanded that it withdraw its forces immediately. The vote illustrated Russia's growing isolation in the international community. The CoI is the most robust investigative mechanism the Council possesses, and this is the first time since the Council's creation in 2006 that it has established a CoI on Russia. The detailed information this Commission collects will help ensure the Kremlin's horrific conduct in Ukraine is carefully documented to hold those responsible for human rights violations and abuses to account.

Belarus: The United States co-sponsored the European Union's resolution extending the Office of the High Commissioner for Human Rights (OHCHR) Examination for a year. It was established in 2021 to investigate human rights violations surrounding the fraudulent August 9, 2020 presidential election in Belarus and the ongoing violent crackdown against civil society. Among other things, the resolution condemns reports of the regime's holding of political prisoners and continued arbitrary arrests and detentions by Belarusian authorities, including of individuals who have peacefully protested or spoken out against Russia's unprovoked war in Ukraine and against the Lukashenka regime's repression. The OHCHR Examination issued its first written report on March 4, 2022, detailing widespread human rights violations by Belarusian authorities. The Examination will issue a second written report in March 2023.

Nicaragua: The United States co-sponsored the resolution led by eight Western Hemisphere partners on the promotion and protection of human rights in Nicaragua. The resolution established a group of human rights experts on Nicaragua to conduct thorough and independent investigations into all alleged human rights violations and abuses committed in Nicaragua since April 2018. The resolution also continues the urgent call for a stop to unjust arrests and detentions and for the immediate and unconditional release of political prisoners.

South Sudan: The United States, along with the United Kingdom, Norway, and Albania, led the renewal of the mandate of the Commission on Human Rights in South Sudan for another year. The Commission plays a crucial and unique role in collecting and preserving evidence of human rights violations and abuses with a view to promoting accountability and transitional justice in South Sudan. We continue to work with the Government of South Sudan and other regional partners to improve the lives of the South Sudanese people and support their path to peace.

Syria: As part of the core group on Syria, the United States co-sponsored a resolution that highlighted ongoing atrocities by the Assad regime in Syria, renewed the mandate of the Independent International Commission of Inquiry on Syria (COI), and called on OHCHR to document and report on civilian casualties. The United States stands with survivors of the Assad regime's atrocities and will continue to strongly support Syrian human rights defenders and civil society, the COI, the International Impartial Independent Mechanism for Syria, and other UN mechanisms and agencies as they document the regime's ongoing egregious abuses and violations.

Georgia: The United States proudly co-sponsored the Item 10 resolution on cooperation with Georgia. While much of the world's attention is now rightly focused on Ukraine and Russia's brutal invasion, we must also remember that Georgia continues to suffer under a 14-year Russian occupation of 20 percent of its territory.

Housing Resolution: The United States recognizes that access to adequate, affordable, and safe housing is important to leading a dignified life. We supported the addition by the core group (Brazil, Germany, Finland, and Namibia) of more inclusive language to the resolution, particularly on housing discrimination and the disparate impact of homelessness on members of vulnerable and marginalized populations, including in the aftermath of COVID-19. We were pleased to see that the resolution addressed racial discrimination in the housing market, including in the provision of credit and home appraisals, and encouraged the adoption of measures that lead to more diverse, inclusive communities.

Countering Disinformation: The United States, Ukraine, United Kingdom, Poland, Japan, Latvia, and Lithuania led the first-ever HRC resolution on the crucial role that countries play in leading inclusive, multistakeholder processes to counter disinformation. The resolution emphasized protection for the right to freedom of expression and encouraged countries to support increased transparency and media independence, literacy, education, and inclusion. It called on all countries not to conduct or sponsor disinformation campaigns and to condemn those countries that take such steps.

Agenda Item 7: The United States opposed Agenda Item 7, which singles out Israel. We voted against all resolutions that unfairly target Israel, including one under Agenda Item 2 on Accountability and Human Rights and three resolutions under Agenda Item 7.

The United States also supported the renewal of Special Rapporteurs for the human rights situations in **Iran**, **North Korea**, and **Burma**.

The United States strongly opposed several resolutions, as well as provisions in other resolutions, which sought to introduce vague language with no agreed meaning that implies human rights are held by groups or States rather than individuals, undermining respect for human rights and long-standing frameworks in the United Nations system. The use of language seeking to collectivize rights undermines the HRC's focus on the universality of human rights and fundamental freedoms and seeks to subordinate individually held human rights to policy goals of development and economic progress.

Thematic Issues: The United States also co-sponsored resolutions on **Freedom of Religion or Belief**; **Mandate Renewal for Human Rights and Terrorism**; **Cultural Rights and the Protection of Cultural Heritage**; **Participation of Persons with Disabilities in Sport**; **Prevention of Genocide**; **Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**; **Right to Work**; **Human Rights Defenders**; and **Promoting the Voluntary Technical Assistance Trust Fund to Support Least Developed Countries and Small Island Developing States**.

Joint Statements: The United States signed onto 13 thematic or country-specific joint statements. The United States led a joint statement co-signed by 85 countries reaffirming a shared commitment to **territorial integrity**. We joined **over 50 countries** to sign a Poland-led joint statement condemning human rights abuses against anti-war protesters, independent media, representatives of the political opposition, and civil society organizations inside **Russia**. We also joined **50 countries** in a joint statement highlighting the critical human rights situation in **Yemen** and calling for further justice and accountability for human rights abuses. Additionally, we joined country-specific statements on **Afghanistan and Sri Lanka** and supported thematic joint statements on **Freedom of Religion or Belief**, **Environmental Human Rights Defenders**, **UN Voluntary Fund for Torture**, **Children in Armed Conflict**, **International Women's Day**, **the Responsibility to Protect and Minority Issues**, and **Mainstreaming Human Rights**.

Side Events: The United States led two side events: one on racial justice and another on women human rights defenders and technology. Building upon the themes discussed during the 2021 Summit for Democracy and in commemoration of the UN International Day for the Elimination of Racial Discrimination, Howard University (Ralph J. Bunche International Affairs Center and Thurgood Marshall Civil Rights Center) and CIVICUS hosted a virtual HRC side event on March 24 which highlighted the importance of inclusion in democracies. A panel moderated by Dr. Paul Mulindwa (Uganda) featured civil society and former government leaders from around the world. Dr. Mulindwa posed a wide range of questions to the panelists on topics such as the sustainability of global movements for racial equity, importance of inclusion and representation in governmental leadership, disproportionate impact of COVID-19 on racial, ethnic, and religious minorities, institutional challenges to achieving equity, and recommendations for governments and civil society.

On March 29, the United States and the European Union Special Representative for Human Rights co-hosted a side event in partnership with Access Now and Frontline Defenders entitled "Protecting Women Human Rights Defenders Online." The event was the first in a series of multilateral engagements within the U.S.-EU Trade and Technology Council (TTC) working group to address the misuse of technology. Participants included Costa Rica's Permanent Representative to the UN in Geneva, the Senior Advisor to the UN Special Rapporteur on Human Rights Defenders, and two prominent women human rights defenders. In co-hosting this event, the United States and EU sent a strong message to human rights defenders and those who threaten them that the U.S. and the EU prioritize this issue within the TTC and will work together to bring this to the forefront of our foreign policy and advocate for proper accountability.

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On April 20, 2022, the United States provided points of clarification on resolutions adopted at the 49th regular session of the Human Rights Council. The statement is available at https://geneva.usmission.gov/2022/04/20/points-of-clarification-on-resolutions-adopted-at-the-49th-hrc/.

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During this 49th regular session of the UN Human Rights Council (HRC), the United States co-sponsored 19 resolutions and joined consensus on important thematic priorities such as human rights defenders and freedom of religion of belief, and on country-specific priorities such as South Sudan, Burma, and DPRK.

We take this opportunity to provide important points of clarification with respect to resolutions adopted by the Human Rights Council at its 49th regular session that the United States co-sponsored or for which the United States otherwise joined consensus.

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. 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. It is the prerogative of each State to decide which treaties to join. 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. With respect to language referring to global issues affecting or impacting all human rights, we understand such statements in the context of reaffirming that human rights and fundamental freedoms are universal, indivisible, interrelated, interdependent, and mutually reinforcing. We do not understand such language to necessarily imply specific impacts on the enjoyment of individual human 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 continues to reject the argument advanced by some delegations that criticism of States' human rights records constitutes impermissible interference in their domestic affairs. Professed concerns about sovereignty cannot be used as a shield to prevent scrutiny from the Council, and states have a responsibility to promote respect for human rights.

While the United States strongly supports the use of measures to prevent or protect individuals from acts of violence committed by non-State actors, we clarify that international human rights law does not obligate States to take such measures. We note that co-sponsorship of, or otherwise joining consensus on, 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.

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 affect the interpretation of 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. Further, to the extent resolutions refer to the right to water and sanitation, we understand this right to be derived from the right to an adequate standard of living. Similarly, we understand references to the right to housing, as recognized in the ICESCR, to refer to the right as a component of the right to an adequate standard of living.

Measures Restricting Human Rights: 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 do not read references in resolutions to specific principles, including proportionality and transparency, to imply that States have an obligation under international law to apply or act in accordance with those principles.

Justice and Accountability: The United States strongly supports calls for justice and accountability for perpetrators of 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.

Privacy: Given differences in views as to the meaning and scope of privacy as a human right, the United States does not support use of the term "right to privacy." To the extent this term is used in resolutions that we support, we read it as specifically referencing the right not to be subjected to arbitrary or unlawful interference with one's privacy as set forth in Article 17 of the ICCPR. We further note our understanding that expressions of concern regarding interference with anonymity and encryption tools specifically refer to situations where such interference is arbitrary or unlawful.

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 the 48th regular 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 should not be understood to imply that such actors bear obligations under international human rights law. Nevertheless, the United States remains committed to promoting accountability for human rights abuses by non-state actors.

Business and Human Rights: The United States strongly supports the multistakeholder approach to implementing the United Nations "Protect, Respect, and Remedy" Framework taken in the UN Guiding Principles on Business and Human Rights (UNGPs). Consistent with Resolution 26/22, the United States recognizes that national measures that require businesses to undertake human rights due diligence is one of many ways that states can help ensure that businesses meet their responsibility to respect human rights.

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.

International Trade: We underscore our position that trade language negotiated or adopted by the General Assembly or under its auspices, including by the Human Rights Council, has no relevance for U.S. trade policy, for our trade obligations or commitments, or for the agenda at the WTO, including discussions or negotiations in that forum. While the UN and WTO share common interests, they have different roles, rules, and memberships.

The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 49. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; and preparing for the 50th Session of the HRC.

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c. 50th Session

On July 7, 2022, Ambassador Michèle Taylor provided the U.S. explanation of vote on Enhancement of International Cooperation in the field of Human Rights at the 50th regular session of the HRC. The statement is excerpted below and available at https://geneva.usmission.gov/2022/07/07/adoption-of-resolution-on-enhancement-of-international-cooperation-in-the-field-of-human-rights-hrc50/.

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The United States believes the resolution on International Cooperation in the Field of Human Rights does not adequately address the necessary means to protect and promote human rights through multilateral efforts and international fora.

We reiterate our long-standing concern with controversial elements in this resolution, including the reference in preambular paragraph 9 to the declaration signed by Movement of Non-Aligned Countries in 2019, that many members of this Council did not endorse. We additionally oppose the reference to "Unilateral Coercive Measures," which does not have an agreed-upon international definition and suggests that states bear responsibility for the human rights obligations of other states.

The United States understands that references to dissemination of technology and transfer of, or access to, technology are to voluntary technology transfers on mutually agreed-upon 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 language concerning technology transfer in this resolution does not, from the U.S. perspective, serve as a precedent for future negotiated documents.

The concerns of the United States on the existence of a "right to development" are long-standing and well known, as further summarized in our General Statement. Notwithstanding, the United States has ongoing, demonstrated commitments to alleviating poverty and promoting development globally through programs in food security, electrification, education, and health care, to name a few of our Official Development Assistance-funded initiatives. We are dedicated to incorporating respect for human rights into our development strategies to promote inclusion and dignity of all.

For these reasons, the United States calls for a vote and will vote against this resolution.

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On July 12, 2022, the State Department issued a fact sheet summarizing key outcomes of the 50th regular session of the HRC. The fact sheet follows and is available at https://www.state.gov/outcomes-of-the-50th-session-of-the-un-human-rights-council/.

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n line with the Biden-Harris Administration's commitment to robust re-engagement and leadership in multilateral institutions, the United States marked its second session back on the UN Human Rights Council (HRC) by actively advancing respect for and protection of human rights and fundamental freedoms during the body's 50th regular session.

The United States supported the Council's role of shining a spotlight on countries of concern, promoting accountability for governments and actors that abuse human rights, and addressing human rights issues across the globe.

Defending the Human Rights of LGBTQI+ Persons: The United States strongly supported the mandate renewal of the UN Independent Expert (IE) on protection against violence and discrimination based on Sexual Orientation and Gender Identity (SOGI). As a co-sponsor of the resolution, the United States successfully worked with partners to galvanize support to renew the mandate for the next three years and to secure inclusion of new language on intersectionality;

decriminalization of consensual adult, same-sex conduct; and the importance of non-discrimination. The United States welcomes the SOGI IE's official visit to the United States in August.

Supporting the Rights of Women and Girls: Across several resolutions, joint statements, interactive dialogues, and side events, the United States strongly advocated for greater respect for the human rights and health of women and girls in all their diversity. The United States co-sponsored resolutions focused on the Elimination of Discrimination Against Women and Girls and the mandate renewal of the Special Rapporteur on violence against women and girls, its causes and its consequences. The Biden-Harris Administration remains resolutely committed to advancing and protecting sexual and reproductive health and rights (SRHR) at home and abroad—SRHR are essential to health, gender equality and equity, and sustainable development and are a central U.S. foreign policy priority.

Highlighting Human Rights Concerns in Afghanistan with an Urgent Debate: The United States, with the international community, supported an Urgent Debate and a resolution focused on the human rights of women and girls in Afghanistan. We are alarmed by human rights abuses in Afghanistan, often attributed to the Taliban, and are disturbed by the extensive restrictions on the enjoyment of human rights and fundamental freedoms by Afghan women and girls. The resolution will enable Afghan civil society to address the HRC directly during its September session.

Opposing the Open-Ended Commission of Inquiry (COI) on Israel: The United States led a joint statement on behalf of 22 countries (representing all UN regional groups) expressing deep concern about the unprecedented and open-ended COI on the situation in Israel and the West Bank and Gaza.

Condemning the Human Rights Situation in the People's Republic of China (PRC): The United States was proud to be one of the record-breaking 47 countries to publicly condemn Beijing's domestic human rights record via a Netherlands-led joint statement that expressed deep concern over human rights abuses in Xinjiang, Tibet, and Hong Kong.

Addressing the Deteriorating Human Rights Situation in Russia: The United States was one of 47 signatories to a strong European Union (EU)-led joint statement addressing the deteriorating human rights situation inside Russia. This statement highlighted serious concerns about the arrest of peaceful protestors, political prisoners including Alexei Navalny, the closure of civil society and media outlets, the particularly concerning situation in the Chechen Republic up to and including extrajudicial executions and enforced disappearances, and discriminatory laws, policies, and practices against LGBTI persons and members of religious minority groups.

Upholding Freedoms of Peaceful Assembly and of Association (FOAA): The United States was a member of the Core Group that drafted the resolution renewing the mandate for the Special Rapporteur on FOAA. As a co-sponsor, the United States successfully lobbied for the resolution to include language encouraging States to support diverse civil society participation in UN fora, stressing the importance of ensuring internet access extends to everyone, and calling upon States to establish and maintain a safe environment in which civil society can operate freely.

Promoting and Protecting Peaceful Protest: The United States co-sponsored the resolution on the promotion and protection of human rights in the context of peaceful protests. This resolution urges States to facilitate peaceful protests by providing protesters with access to public space within sight and sound of their intended target audience and to promote a safe and

enabling environment for individuals to exercise their rights to freedoms of peaceful assembly, expression, and association, both online and offline.

Exposing Violations and Abuses in Belarus: The United States co-sponsored the EU-led resolution to extend the mandate for the Special Rapporteur on Belarus so they can continue to expose the Lukashenka regime's systemic and systematic human rights violations and abuses, including restrictions on the media and freedom of expression and interference with the work of journalists and civil society.

Addressing Ongoing Violations and Abuses in Syria: As part of the Core Group, the United States supported a resolution addressing a range of ongoing human rights violations and abuses in Syria, particularly against women and girls and including the issues of arbitrarily detained and missing persons.

Renewing the Independent Fact-Finding Mission on Libya: The United States worked closely with Libya to renew the mandate for the Independent Fact-Finding Mission (FFM) on Libya. The FFM will release its final report in March 2023.

Calling for Cooperation on the Situation in Eritrea: The United States co-sponsored the EU-led resolution that successfully extended the mandate for the Special Rapporteur on the situation of human rights in Eritrea. The resolution calls for the government to fully cooperate with the Special Rapporteur.

Ensuring Continued Reporting on Sudan: As part of the Core Group, the United States helped draft and co-sponsored the resolution on the situation in Sudan, ensuring continued support for the Independent Expert (IE) on Sudan and ensuring the IE's mandate remains, along with reporting requirements on the human rights situation, until the restoration of Sudan's civilian-led government.

Co-sponsored Resolutions: The United States co-sponsored more than half of the resolutions adopted this session, including the resolutions on SOGI, FOAA, Freedom of Expression and Opinion, Peaceful Protest, Elimination of All Forms of Discrimination Against Women and Girls, Violence Against Women and Girls, Internally Displaced Persons, the Independence and Impartiality of the Judiciary with a focus on women's participation, the situation of women and girls in Afghanistan, as well as the human rights situations in Belarus, Eritrea, Libya, Sudan, and Syria.

Joint Statements: Besides leading the joint statement on the COI on the situation in Israel and the West Bank and Gaza and signing onto the joint statements on the PRC and Russia, the United States also joined the joint statements on Sri Lanka and Ukraine (with a specific focus on Mariupol). The United States also supported thematic joint statements focused on SOGI, food security, special procedures, migrants, responsibility to protect, women and girls in the context of atrocities, the importance of ensuring stronger language on gender equality across HRC activity, water, and extreme poverty.

Across resolutions, joint statements, and interactive dialogues, the United States advanced language to promote equity and inclusion, including regarding women and girls in all their diversity, internally displaced persons, LGBTQI+ persons, persons with disabilities, indigenous persons, members of ethnic and religious minority groups, and members of other marginalized and vulnerable groups.

Additionally, the United States participated in multiple interactive dialogues related to the human rights situation in Ukraine. We were also pleased to participate in the interactive dialogue with the Special Rapporteur on racism, highlighting the Administration's commitment to racial

justice.

Side Events:

- The United States led three side events: one on conflict-related sexual violence (CRSV) across different regions; one on the protection of ethnic and religious minority groups in Afghanistan; and one on FOAA.
- The United States also participated in several other side events that focused on SOGI, the human rights situation in Belarus, countering antisemitism, and an event to launch a study on CRSV in Ukraine, among others.

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On July 12, 2022, the United States provided points of clarification on resolutions adopted at the 50th regular session of the Human Rights Council. The statement is available at https://geneva.usmission.gov/2022/07/12/points-of-clarification-on-resolutions-adopted-at-the-50th-human-rights-council/.

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During this 50th regular session of the UN Human Rights Council (HRC), the United States co-sponsored 14 resolutions, including the resolutions on Sexual Orientation and Gender Identity, Freedom of Peaceful Assembly and of Association, Freedom of Expression and Opinion, Peaceful Protest, Elimination of All Forms of Discrimination Against Women and Girls, Violence Against Women and Girls, Internally Displaced Persons, the Independence and Impartiality of the Judiciary, Afghanistan, Eritrea, Sudan, Syria, Belarus, and Libya. Many of these resolutions passed by consensus, which we joined, including: Independence and Impartiality of the Judiciary; Internally Displaced Persons; Casualty Recording; Violence Against Women and Girls; The Social Forum; Climate Change; Freedom of Opinion and Expression; The Regulation of Civilian Acquisition, Possession and Use of Firearms; Access to Medicines; Elimination of Female Genital Mutilation; Peaceful Protests; Freedom of Peaceful Assembly and of Association; Elimination of All Forms of Discrimination Against Women and Girls; Libya; Sudan; the situation of Rohingya Muslims from Burma; and the Situation of Human Rights of Women and Girls in Afghanistan. All other texts we co-sponsored were adopted by vote.

We take this opportunity to provide important points of clarification with respect to resolutions adopted by the Human Rights Council at its 50th regular session that the United States co-sponsored or for which the United States otherwise joined consensus.

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. 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. It is the prerogative of each State to decide which treaties to join. 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. With respect to language referring to global issues affecting or impacting all human rights, we understand such statements in the context of reaffirming that human rights and fundamental freedoms are universal, indivisible, interrelated, interdependent, and mutually reinforcing. We do not understand such language to necessarily imply specific impacts on the enjoyment of individual human 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 continues to reject the argument advanced by some delegations that criticism of States' human rights records constitutes impermissible interference in their domestic affairs. Professed concerns about sovereignty cannot be used as a shield to prevent scrutiny from the Council, and States have a responsibility to promote respect for human rights.

While the United States strongly supports the use of measures to prevent or protect individuals from acts of violence committed by non-State actors, we note that international human rights law generally does not obligate States to take such measures. Likewise, the United States strongly supports the condemnation of female genital mutilation and gender-based violence, torture, 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 our understanding of international law.

We note that co-sponsorship of, or otherwise joining consensus on, 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 (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 affect the interpretation of 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 provided under the ICESCR, including by suggesting that specific steps are required of States Parties to achieve progressively the full realization of those right. The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts. Further, to the extent resolutions refer to the right to water and sanitation or to the right to food, we understand these rights to be derived from the right to an adequate standard of living. Similarly, we understand references to the right to housing, as recognized in the ICESCR, to refer to the right as a component of the right to an adequate standard of living.

Human Rights Based Approach: There is no internationally agreed upon understanding of the term "human rights-based approach." To the extent the term is used in resolutions, the United States reiterates that such uses do not create obligations under international human rights law or other international commitments, including with respect to particular actions States may take in fulfilling their obligations.

Measures Restricting Human Rights: 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 do not read references in resolutions to specific principles, including proportionality and legitimacy, to mean that States have an obligation under international law to apply or act in accordance with those principles.

Justice and Accountability: The United States strongly supports calls for justice and accountability for perpetrators of 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. We do not necessarily understand the characterization of certain acts or situations using

international criminal law terms of art to mean that, as a matter of law, such terms are applicable to any specific act or situation.

Privacy: Given differences in views as to the meaning and scope of privacy as a human right, the United States does not support use of the term "right to privacy." To the extent this term is used in resolutions that we support, we read it as specifically referencing the right not to be subjected to arbitrary or unlawful interference with one's privacy as set forth in Article 17 of the ICCPR. We further note our understanding that expressions of concern regarding interference with anonymity and encryption tools specifically refer to situations where such interference is arbitrary or unlawful.

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.

Death Penalty: As Article 6 of the International Covenant on Civil and Political Rights provides, States may only use the death penalty for the most serious crimes. We understand references in these resolutions to concerns about the use of the death penalty to be limited to contexts where the penalty is imposed on individuals solely for exercising their human rights and fundamental freedoms or where the imposition is otherwise in violation of obligations States owe under the ICCPR.

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.

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 should not be understood to imply that such actors bear obligations under international human rights law. Nevertheless, the United States remains committed to promoting accountability for human rights abuses by non-state actors.

Sanctions: The United States does not accept that sanctions are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play a valuable role in discouraging human rights violations and abuses, promoting accountability, and addressing threats to international peace and security.

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.

Quotas/Temporary Special Measures for Women and Girls: With respect to quotas, affirmative action measures, temporary special measures, and other measures intended to achieve parity for women and girls, 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 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 and promote and provide equal access to opportunities.

The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 50. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; and preparing for the 51st Session of the HRC.

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d. 51st Session

On October 17, 2022, the State Department issued a fact sheet summarizing key outcomes of the 51st regular session of the HRC. The fact sheet follows and is available at https://www.state.gov/outcomes-of-the-51st-session-of-the-un-human-rights-council/.

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Concluding our first year back on the Human Rights Council, the United States leveraged its leadership position – working with allies, partners, and civil society – to have the Council reflect and reinforce the universal values, aspirations, and norms that have underpinned the UN system since its founding over 75 years ago. At the 51st session of the HRC, the United States defended, protected, and advanced respect for human rights and fundamental freedoms. This session also marked the first time the Human Rights Council has ever considered a resolution or decision on the domestic human rights situation in a country that is a permanent member of the UN Security Council, let alone two permanent Security Council members. Our statements and positions underscored the Biden-Harris Administration's commitment to promoting the universality of human rights, including by addressing discrimination, inequity, and inequality in all its forms.

This session, the United States advanced human rights priorities, including:

Establishing Independent Review of the Deteriorating Human Rights Situation in Russia: The United States cosponsored a resolution, led by 26 EU member states and cosponsored by over 40 countries, to create a Special Rapporteur on Russia's domestic human rights situation. The Russian government's domestic repression creates a dire human rights situation for everyone in Russia and facilitates disinformation that enables Russia's war of aggression against Ukraine. The resolution expresses grave concern regarding the deteriorating human rights situation in Russia – including severe restrictions on freedoms of expression and peaceful assembly – and establishes a Special Rapporteur to ensure independent review.

Calling for HRC Debate on Xinjiang: The United States and over 35 cosponsors tabled a decision to discuss the Office of the High Commissioner for Human Rights' (OHCHR) assessment of the human rights situation in Xinjiang at HRC 52 in March 2023. This is the first time since the Council's founding that a member pursued formal action to address the human rights situation in the PRC. The decision was defeated by a narrow margin but underscored concerns about the serious human rights concerns raised in the OHCHR's recent independent assessment. This decision's defeat is a loss for the millions of victims from Xinjiang whose experiences deserve a discussion by the Council. Despite this, we will continue our efforts to address the human rights situation in Xinjiang as well as other human rights issues in the PRC.

Strengthening the Mandate of the Special Rapporteur on Afghanistan: The United States cosponsored this resolution and collaborated with EU member states and other likeminded partners to renew and strengthen the capacity of the Special Rapporteur on the situation in Afghanistan, to include documentation, preservation, and reporting of abuses, particularly affecting women, girls, and minorities.

Supporting the International Commission of Human Rights Experts on Ethiopia: The United States cosponsored the resolution to ensure continued Council attention on the human rights situation in Ethiopia and to renew the mandate of the international commission of human rights experts on Ethiopia created last year. We continue to press the Government of Ethiopia to cooperate with this commission and allow its members unhindered access to conduct their work. Any lasting solution to the conflict must involve comprehensive and inclusive transitional justice for victims and accountability for those responsible for human rights abuses and violations.

Promoting Reconciliation and Addressing Corruption and Impunity in Sri Lanka: As a member of the core group, the United States cosponsored the resolution for continued Council engagement with the Government of Sri Lanka during this time of economic crisis, including supporting the need for accountability for past abuses and those committed during the recent political turmoil as well as monitoring and reporting on the situation in the country. The human rights of all Sri Lankans must be upheld. Strengthening protection and respect of human rights goes hand-in-hand with political and economic reform.

Continuing to Shine Light on Ongoing Violations and Abuses in Syria: As a member of the core group, the United States joined the Council in once again calling international attention to the ongoing abuses and violations in Syria, primarily those committed by the Assad regime. The Council called on the regime to release all of those arbitrarily detained; end torture and other cruel, inhuman, or degrading treatment; and provide answers for the missing. We welcome UN Secretary General Guterres's August 30 report on missing persons in Syria and are committed to working with partners to seek justice and address the issue of the missing.

Renewing the Mandate of the UN Fact-Finding Mission on Venezuela: The United States cosponsored the resolution to renew the mandate of the Fact-Finding Mission on

Venezuela, which plays a vital role in the international community's efforts to hold the Maduro regime accountable for human rights abuses in Venezuela.

Indigenous Issues: The United States co-sponsored two resolutions on the rights of indigenous peoples. The first resolution renewed the mandate of the Special Rapporteur on the rights of Indigenous Peoples and a second resolution outlined substantive considerations on human rights and Indigenous Peoples.

Contemporary Forms of Slavery: The United States cosponsored the resolution to renew the mandate of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences.

Advancing Racial Equity and Justice and Combating Antisemitism: The United States delivered national statements supporting the work of the Permanent Forum on People of African Descent and the International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement, as well as a statement reiterating our steadfast commitment to countering racial discrimination and injustice, wherever it occurs. We also signed onto a joint statement led by Austria, Slovakia, and the Czech Republic on combating antisemitism and countering online hate speech.

Cosponsored Resolutions: The United States cosponsored 23 resolutions, including the resolutions on Arbitrary Detention, Cyberbullying, World Programme for Human Rights Education, Physical and Mental Health, Older Persons, Universal Periodic Review, Youth and Human Rights, National Human Rights Institutions, Local Government and Human Rights, Neurotechnology, Promoting International Cooperations to Support National Mechanisms, the Role of Good Governance in the Promotion and Protection of Human Rights, Transitional Justice, and the Role of Prevention in the Promotion and Protection of Human Rights, as well as the human rights situations in Afghanistan, Burundi, Ethiopia, Somalia, Sri Lanka, Syria, Russia, and Venezuela.

Joint Statements: The United States signed onto joint statements regarding several human rights situations, including a statement on Crimea which condemned Russia's continued occupation and the unjustified full-scale war against Ukraine, a statement expressing deep concern about the rising levels of violence in Haiti, a statement condemning the violent protests in Iran and calling for an end to the discrimination against women, a statement calling attention to the deteriorating human rights situation in Nicaragua; and a statement calling for independent and impartial monitoring and reporting on the situation in Yemen. The United States also joined statements on the Responsibility to Protect; Special Procedures, including promotion of Standing Invitations to all Special Procedures, the Elimination of Sexual Harassment, Antisemitism; Russia's Filtration Operations and Forced Deportations of Ukrainian Civilians; and Technology and Peace.

Side Events:

- The United States co-hosted, along with Canada, Czechia, Lithuania, and the United Kingdom, a side event on Tibet entitled "Human Rights Implications of the Dalai Lama's Succession." The speakers emphasized U.S. support for members of the Tibetan community's religious freedom and called out PRC authorities for their repression against the Tibetan community. The event served to reinforce U.S. government support for the ability of the Tibetan community to choose their own religious leader and to shed a light on broader PRC human rights concerns.
- The United States also participated in side events focused on women's rights in Afghanistan, accountability for violations in Ukraine, human rights violations and

militarization in Crimea, transnational repression, and environmental human rights defenders.

Across resolutions, national and joint statements, side events, and interactive dialogues, the United States advanced efforts to increase equity and inclusion, including regarding women and girls in all their diversity, internally displaced persons, LGBTQI+ persons, persons with disabilities, indigenous persons, members of ethnic and religious minority groups, and members of other marginalized and vulnerable groups.

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On October 18, 2022, the United States provided points of clarification on resolutions adopted at the 51st regular session of the Human Rights Council. The statement is available at https://geneva.usmission.gov/2022/10/18/points-of-clarification-on-resolutions-adopted-at-the-51st-human-rights-council/ and follows.

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During this 51st regular session of the UN Human Rights Council (HRC), the United States co-sponsored 25 resolutions, on Arbitrary Detention, Cyberbullying, World Programme for Human Rights Education, Physical and Mental Health, Older Persons, Universal Periodic Review, Youth and Human Rights, National Human Rights Institutions, Local Government and Human Rights, Neurotechnology, Promoting International Cooperation to Support National Mechanisms, the Role of Good Governance in the Promotion and Protection of Human Rights, Transitional Justice, Human Rights and Indigenous Peoples, mandate of the Special Rapporteur on the Rights of Indigenous Peoples, mandate of the Special Rapporteur on Contemporary forms of Slavery, and the Role of Prevention in the Promotion and Protection of Human Rights, as well as the human rights situations in Afghanistan, Burundi, Ethiopia, Sri Lanka, Syria, Russia, and Venezuela, and Assistance to Somalia in the Field of Human Rights. The United States joined consensus on resolutions on conscientious objections to military service, safety of journalists, new and emerging technologies in the military domain, safe drinking water and sanitation, terrorism and human rights, and enhancement of technical cooperation and capacity building, and providing for technical assistance and capacity building in the Republic of the Marshall Islands, Democratic Republic of the Congo, the Central African Republic, and Yemen.

We take this opportunity to provide important points of clarification with respect to resolutions adopted by the Human Rights Council at its 51st regular session that the United States co-sponsored or for which the United States otherwise joined consensus.

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. 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. It is the

prerogative of each State to decide which treaties to join. 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. With respect to language referring to global issues affecting or impacting all human rights, we understand such statements in the context of reaffirming that human rights and fundamental freedoms are universal, indivisible, interrelated, interdependent, and mutually reinforcing. We do not understand such language to necessarily imply specific impacts on the enjoyment of individual human 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 continues to reject the argument advanced by some delegations that criticism of States' human rights records constitutes impermissible interference in their domestic affairs. Professed concerns about sovereignty cannot be used as a shield to prevent scrutiny from the Council, and States have a responsibility to promote respect for human rights.

While the United States strongly supports the use of measures to prevent or protect individuals from acts of violence committed by non-State actors, we note that international human rights law generally does not obligate States to take such measures. Likewise, the United States strongly supports the condemnation of acts that can amount to human rights violations or abuses, but believes it is important for resolutions to accurately characterize these terms, consistent with our understanding of international law.

We note that co-sponsorship of, or otherwise joining consensus on, 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 (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 the Sustainable Development Goals therein. 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. The Agenda also does not affect the interpretation of 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 does not have an agreed international meaning.

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.

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 provided under the ICESCR, including by suggesting that specific steps are required of States Parties to achieve progressively the full realization of those right. The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts. Further, to the extent resolutions refer to the right to water and sanitation or to the right to food, we understand these rights to be derived from the right to an adequate standard of living. Similarly, we understand references to the right to housing, as recognized in the ICESCR, to refer to the right as a component of the right to an adequate standard of living.

Human Rights Based Approach: There is no internationally agreed upon understanding of the term "human rights-based approach." To the extent the term is used in resolutions, the United States reiterates that such uses do not create obligations under international human rights law or other international commitments, including with respect to particular actions States may take in fulfilling their obligations.

Measures Restricting Human Rights: 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 do not read references in resolutions to specific principles, including proportionality and legitimacy, to mean that States have an obligation under international law to apply or act in accordance with those principles.

Justice and Accountability: The United States strongly supports calls for justice and accountability for perpetrators of 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. We do not necessarily understand the characterization of certain acts or situations using international criminal law terms of art to mean that, as a matter of law, such terms are applicable to any specific act or situation.

Privacy: Given differences in views as to the meaning and scope of privacy as a human right, the United States does not support use of the term "right to privacy." To the extent this term is used in resolutions that we support, we read it as specifically referencing the right not to be subjected to arbitrary or unlawful interference with one's privacy as set forth in Article 17 of the ICCPR.

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.

Death Penalty: As Article 6 of the International Covenant on Civil and Political Rights provides, States may only use the death penalty for the most serious crimes. We understand references in these resolutions to concerns about the use of the death penalty to be limited to contexts where the penalty is imposed on individuals solely for exercising their human rights and fundamental freedoms or where the imposition is otherwise in violation of obligations States owe under the ICCPR.

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.

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 should not be understood to imply that such actors bear obligations under international human rights law. Nevertheless, the United States remains committed to promoting accountability for human rights abuses by non-state actors.

Environment and Human Rights: The United States believes that everyone should live in a healthy environment and that a healthy environment supports the well-being and dignity of people around the world and the enjoyment of all human rights. That said, a right to a clean, healthy, and sustainable environment has not yet been established in international law, and the adoption of nonbinding resolutions in multilateral fora does not change that fact. Moreover, such a right is not justiciable in U.S. courts.

Business and Human Rights: The United States strongly supports the United Nations Guiding Principles on Business and Human Rights (UNGPs). Even though private actors have no obligations regarding human rights under international human rights law, the United States recognizes that businesses have a responsibility to respect human rights, irrespective of whether a business entity has made specific commitments to do so.

Sanctions: The United States does not accept that sanctions are tantamount to violations of human rights. Among other legitimate purposes, targeted sanctions can play a valuable role in deterring human rights violations and abuses, promoting accountability, and addressing threats to international peace and security.

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.

The United States greatly appreciates the close collaboration we enjoyed with numerous allies, partners, and likeminded countries during HRC 51. We look forward to continuing the effort to make lasting progress on promoting respect for human rights around the world; advancing these efforts intersessionally; and preparing for the 52nd Session of the HRC.

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7. Country-specific Issues

a. Ethiopia

On October 7, 2022, the State Department released a statement welcoming the renewal of the mandate for the International Commission of Human Rights Experts ("ICHREE") on Ethiopia. The statement appears below and is available at https://www.state.gov/welcoming-renewal-of-the-mandate-for-the-international-commission-of-human-rights-experts-on-ethiopia/.

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The United States welcomes the renewal of the mandate of the International Commission of Human Rights Experts on Ethiopia (ICHREE) at the 51st Human Rights Council session. We view the ICHREE as an important complementary mechanism to Ethiopia's domestic accountability efforts. We continue to urge the Government of Ethiopia to grant the ICHREE unhindered access so it can be independent, effective, and transparent in discharging its mandate.

We are deeply troubled by ICHREE's September 19 report, which found reasonable grounds to believe that parties to the conflict committed serious violations and abuses of international human rights and humanitarian law, many of which may amount to war crimes, across northern Ethiopia between November 2020 and January 2022. The ICHREE's report reinforces our deep concerns about the resumption of fighting since August 24, which significantly elevates the risk of new human rights abuses by armed actors. We strongly urge an immediate cessation of hostilities and the start of AU-led peace talks.

The Ethiopian government and all involved in this conflict must commit to a comprehensive, inclusive, and transparent transitional justice process. As we have said from the

beginning, any solution to the crisis must include accountability for those responsible, and the ICHREE will have an essential role in supporting such efforts.

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b. China's policies in Xinjiang

On May 28, 2022, Secretary Blinken issued a statement of concern about the visit by the UN High Commissioner for Human Rights Michelle Bachelet and her team to the People's Republic of China (PRC). The statement follows and is available at https://www.state.gov/concerns-with-un-high-commissioner-for-human-rights-visit-to-the-peoples-republic-of-china/.

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The United States remains concerned about the UN High Commissioner for Human Rights Michelle Bachelet and her team's visit to the People's Republic of China (PRC) and PRC efforts to restrict and manipulate her visit. While we continue to raise our concerns about China's human rights abuses directly with Beijing and support others who do so, we are concerned the conditions Beijing authorities imposed on the visit did not enable a complete and independent assessment of the human rights environment in the PRC, including in Xinjiang, where genocide and crimes against humanity are ongoing.

We are further troubled by reports that residents of Xinjiang were warned not to complain or speak openly about conditions in the region, that no insight was provided into the whereabouts of hundreds of missing Uyghurs and conditions for over a million individuals in detention. The High Commissioner should have been allowed confidential meetings with family members of Uyghur and other ethnic minority diaspora communities in Xinjiang who are not in detention facilities but are forbidden from traveling out of the region. We also note that the High Commissioner was not allowed access to individuals who were part of the Xinjiang labor transfer program and have been sent to other provinces across China.

The United States remains deeply concerned about the human rights situation in the PRC, particularly in light of new reports that offer further proof of arbitrary detentions among the more than one million people detained in Xinjiang. Survivors and family members of detainees have described cruel treatment that shocks the conscience, including torture, forced sterilization, state-sponsored forced labor, sexual violence, and forced separation of children from their parents. We also urge the PRC to respect the human rights of Tibetans, those living in Hong Kong, and all others who seek to peacefully exercise their human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights. We again call on the PRC to immediately cease its atrocities in Xinjiang release those unjustly detained, account for those disappeared, and allow independent investigators unhindered access to Xinjiang, Tibet, and across China.

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On September 1, 2022, Secretary Blinken issued a statement following the release of the report of the UN Office of the High Commissioner for Human Rights on the human rights situation in Xinjiang. The statement follows and is available at https://geneva.usmission.gov/2022/09/01/statement-on-un-human-rights-office-report-on-xinjiang/.

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The August 31st report by the UN Office of the High Commissioner for Human Rights outlines in alarming details the human rights violations and abuses occurring in Xinjiang. It concludes that "the extent of arbitrary and discriminatory detention of members of the Uyghur and predominantly Muslim groups… may constitute international crimes, in particular crimes against humanity," and that "serious human rights violations have been committed" in Xinjiang.

The United States welcomes this important report, which describes authoritatively the appalling treatment and abuses of Uyghurs and members of other ethnic and religious minority groups by the government of the People's Republic of China (PRC).

This report deepens and reaffirms our grave concern regarding the ongoing genocide and crimes against humanity that PRC government authorities are perpetrating against Uyghurs, who are predominantly Muslim, and members of other ethnic and religious minority groups in Xinjiang.

We will continue to work closely with our partners, civil society, and the international community to seek justice and accountability for the many victims. We will continue to hold the PRC to account and call on the PRC to release those unjustly detained, account for those disappeared, and allow independent investigators full and unhindered access to Xinjiang, Tibet, and across the PRC.

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Ambassador Linda Thomas-Greenfield issued a statement on the release of the UN Office of the High Commissioner for Human Rights report on Xinjiang. The September 1, 2022 statement follows and is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield-on-the-release-of-the-un-office-of-the-high-commissioner-for-human-rights-report-on-xinjiang/.

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Last night, the United Nations Office of the High Commissioner for Human Rights released its long-anticipated report on the human rights situation in Xinjiang. The report confirms the atrocities and human rights violations the People's Republic of China (PRC) is perpetrating against Uyghurs and members of other ethnic and religious minority groups in Xinjiang.

The Universal Declaration of Human Rights begins with the word "universal" for a reason. It speaks not just to nation-states but also to human beings. Yet, as this report documents,

the PRC, a UN Member State and permanent member of the UN Security Council, continues to violate the human rights of Uyghurs and members of other religious and ethnic minority groups in Xinjiang.

The United States, in concert with our allies and partners, will continue to demand an end to the PRC's genocide and crimes against humanity against Uyghurs and other religious and ethnic minority groups in Xinjiang. It is critical that the full Human Rights Council membership have an opportunity to formally discuss the findings of this report as soon as possible and that the perpetrators of these atrocities are held accountable.

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On October 31, 2022, the United States delivered a joint statement on behalf of 50 countries in the UN General Assembly Third Committee 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/joint-statement-on-behalf-of-50-countries-in-the-un-general-assembly-third-committee-on-the-human-rights-situation-in-xinjiang-china/. The joint statement of Albania, Andorra, Australia, Austria, Belgium, Belize, Bulgaria, Canada, Czech Republic, Croatia, Denmark, Estonia, Eswatini, Finland, France, Germany, Guatemala, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Marshall Islands, Monaco, Montenegro, Nauru, Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Somalia, Spain, Sweden, Switzerland, Türkiye, Ukraine, the United Kingdom, and the United States follows.

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We are gravely concerned about the human rights situation in the People's Republic of China, especially the ongoing human rights violations of Uyghurs and other predominantly Muslim minorities in Xinjiang.

The release of the recent UN Office of the High Commissioner for Human Rights (OHCHR) Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China, corroborates these concerns in an impartial and objective manner. The assessment finds that the scale of the arbitrary and discriminatory detention of Uyghurs and other predominantly Muslim minorities in Xinjiang "may constitute international crimes, in particular crimes against humanity".

As an independent, authoritative assessment that relies extensively on China's own records, it makes an important contribution to the existing evidence of serious and systematic human rights violations in China. This includes evidence of large-scale arbitrary detention and systematic use of invasive surveillance on the basis of religion and ethnicity; severe and undue restrictions to legitimate cultural and religious practices, identity and expression, including reports of destruction of mosques, shrines and cemeteries; torture, ill-treatment and sexual and gender-based violence, including forced abortion and sterilization; enforced disappearances and family separations; and forced labor. Such severe and systematic violations of human rights cannot be justified on the basis of counterterrorism.

In view of the gravity of the OHCHR assessment, we are concerned that China has so far refused to discuss its findings. In that context, we urge the Government of China to uphold its international human rights obligations and to fully implement the recommendations of the OHCHR assessment. This includes taking prompt steps to release all individuals arbitrarily deprived of their liberty in Xinjiang, and to urgently clarify the fate and whereabouts of missing family members and facilitate safe contact and reunion.

We believe that addressing human rights violations, engaging in meaningful dialogue, and working together as partners are foundational to creating more inclusive societies where all can fully enjoy their human rights. We encourage all to adopt this approach.

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c. Russia

On March 3, 2022, the State Department issued a press statement announcing that the United States and 44 other countries invoked the Organization for Security and Co-operation in Europe ("OSCE") Moscow Mechanism to review reported abuses by Russia. The statement is available at https://www.state.gov/moscow-mechanism-invoked-by-45-osce-states-to-review-reported-abuses-by-russia/, and includes the following.

> This action will establish an expert mission to address our grave concerns regarding the humanitarian and human rights impacts on the people of Ukraine caused by Russia's further invasion with the support of Belarus. We have seen the troubling media reports of human rights abuses and violations of humanitarian law by Russia's forces, including the mounting number of civilian casualties and extensive damage to civilian infrastructure. The OSCE expert mission will work impartially to establish the facts and circumstances surrounding possible contraventions of OSCE commitments and violations and abuses of international human rights law and international humanitarian law by Russia's forces. The expert mission will prepare a report that will be shared with all OSCE participating States and relevant accountability mechanisms, including national, regional, and international courts and tribunals. The United States and our partners will hold Russia and its forces accountable for all human rights abuses, violations of international humanitarian law, war crimes, and crimes against humanity they commit in Ukraine.

On March 21, 2022, Poland delivered a cross-regional joint statement on human rights and fundamental freedoms in Russia on behalf of a group of over 50 states including the United States at the Human Rights Council's 49th regular session. The joint statement is available at https://geneva.usmission.gov/2022/03/21/item-4-hrc-49/ and excerpted below.

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We, the signatories to this statement, are concerned about the dramatically deteriorating situation of human rights and fundamental freedoms in the Russian Federation over the past 12 months. This has particularly manifested in recent days in the context of Russia's brutal, unprovoked, and unjustified aggression against Ukraine.

In 2021, during the 46th session of this Council, 45 states expressed their concern about the human rights situation in Russia. Sadly, developments in the intervening period prove that these concerns were well-founded. We are concerned about the steps Russia has taken to suppress a growing number of dissenting journalists and independent media outlets; arbitrary arrests of dissident activists, trials seeking eliminate political opponents; and profound restrictions on the exercise of freedom of expression, freedom of association, and the right of peaceful assembly. Particularly concerning is a continuous use by the authorities of repressive laws on 'undesirable' organizations, under the pretext of fighting extremism and terrorism, or allegations against individuals of acting as "foreign agents" to suppress civil society, media, and political opposition. We express great alarm at recently adopted Russian legislation that would punish those who contradict the Russian government's false narratives about its war against Ukraine with up to 15 years imprisonment.

Most recently, we are concerned by attempts made by Russian authorities to silence all critical voices, including those of Russian citizens protesting Russia's invasion of Ukraine. We are appalled by the unjust detentions of more than 13,000 individuals who exercised their right of peaceful assembly during nationwide protests and by unnecessary and excessive use of force by police during the after the arrests. Likewise, we are shocked by growing restrictions placed by Russian authorities on access to reliable and credible information, including demands to remove content on the war in Ukraine from the internet; censorship of media outlets and blocking of social media platforms.

These new restrictions are the latest part of a long-standing campaign by Russian authorities to shrink the space for freedom of opinion and expression more broadly. Just one example of this campaign occurred on February 28, when the Russian Supreme Court upheld a decision to forcibly close down Memorial International, one of the oldest, best-known and most distinguished Russian NGOs, whose activists have been at the forefront of defending human rights and seeking historical truth and reconciliation in post-Soviet Russia. This plunges the future for all NGOs in Russia into uncertainty.

We also reiterate our concerns once again about the continued arbitrary detention of political prisoners, particularly in the case of Alexei Navalny. We are monitoring Mr Navalny's latest court hearing closely and repeat our calls for him to be released without delay.

The human rights situation looks set to continue to deteriorate at an increasingly sharp rate in the coming months, even compared to the past year. We join numerous international organizations in their calls for Russia to immediately release all those it has arbitrarily detained for participation in peaceful anti-war demonstrations, end all sweeping restrictions on independent media, and allow the people of Russia to have free access to information on Russia's continuing war in Ukraine. We urge the Russian authorities to respect human rights and fundamental freedoms, including the right of peaceful assembly, and to freedom of opinion and expression.

We will continue to monitor the situation in the Russian Federation.

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On April 13, 2022, the OSCE Moscow Mechanism's mission of experts issued a report entitled, "Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022." The report found violations of international humanitarian law by Russian forces. The report is available at https://www.osce.org/odihr/515868.

On June 3, 2022, the United States and 44 other countries invoked the Organization for Security and Cooperation in Europe (OSCE) Moscow Mechanism a second time to investigate reports of human rights abuses and international humanitarian law violations by Russia in Ukraine. The State Department press release follows and is available at https://www.state.gov/invocation-of-the-osce-moscow-mechanism-to-investigate-mounting-reports-of-human-rights-abuses-and-international-humanitarian-law-violations-by-russia-in-ukraine/.

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With Ukraine's assent, the United States and 44 other countries have invoked the OSCE Moscow Mechanism a second time since the start of Russia's further invasion of Ukraine to investigate reports of human rights abuses and violations of international humanitarian law by Russian forces in Ukraine. This action will establish an expert mission to build upon the first Moscow Mechanism report, released April 13. That report focused on grave concerns regarding the humanitarian and human rights situation in Ukraine caused by Russia's brutal and unprovoked war, with the support of Belarus. That report found "clear patterns of international humanitarian law violations by Russian forces" and evidence of direct targeting of civilians, attacks on medical facilities, rape, executions, looting, and forced deportation of civilians to Russia.

The second expert mission will continue and update the first mission's impartial work to establish facts and circumstances surrounding possible contraventions of OSCE commitments and abuses and violations of human rights and international humanitarian law in Ukraine. The expert mission will prepare a new report that will be shared with all OSCE participating States and relevant accountability mechanisms, including national, regional, and international courts and tribunals, as appropriate. The United States and our partners will continue our efforts to hold Russia's forces accountable for all human rights abuses and violations of international humanitarian law, including war crimes, they commit in Ukraine.

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On July 14, 2022, the State Department announced the release of the OSCE's second expert mission report entitled, "Report on Violations of International

Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine." The press statement is available at https://www.state.gov/osce-releases-the-second-expert-mission-report-on-human-rights-abuses-and-international-humanitarian-law-violations-in-russias-war-against-ukraine/ and excerpted below. The report is available at https://www.osce.org/odihr/522616.

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With Ukraine's assent, the United States and 44 other countries invoked the OSCE Moscow Mechanism for a second time on June 2, establishing an expert mission to examine the further human rights abuses and humanitarian impacts of Russia's war of aggression in Ukraine. In the report released at today's OSCE Permanent Council meeting, the mission of experts found "clear patterns of serious violations of international humanitarian law attributable mostly to Russian armed forces." This is consistent with the findings in the first report, released April 13.

The current report, like its predecessor, also documents evidence of direct targeting of civilians, attacks on medical facilities, rape, torture, executions, looting, and forced transfer of civilians to Russia-controlled parts of Ukraine and forced deportations to Russia itself. It further identifies two new "alarming phenomena," namely the "establishment and use of so-called filtration centers" and the "tendency of the Russian Federation to bypass its international obligations by handing detained people over" to its proxies in eastern Ukraine to let them "engage in problematic practices, including the imposition of the death penalty."

Taken together, the two reports comprise the most comprehensive accounting of evidence to-date of Russia's human rights abuses, international humanitarian law violations, including potential war crimes, and other atrocities since President Putin launched his full-scale war against Ukraine on February 24. The United States and our partners will seek to hold accountable those responsible for all human rights abuses and violations of international humanitarian law, including war crimes, they commit in Ukraine.

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On July 28, 2022, the State Department issued a press statement on invocation of the OSCE Moscow Mechanism. The statement is available at https://www.state.gov/latest-invocation-of-the-osce-moscow-mechanism/ and excerpted below.

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The United States and 37 other countries invoked the OSCE Moscow Mechanism a third time since the start of Russia's full-scale invasion of Ukraine in February 2022. The first two invocations focused on Russia's conduct of the war and documented serious violations of international humanitarian law and abuses of human rights in Ukraine by Russia's forces. This most recent invocation will establish an expert mission to review the human rights situation within Russia itself.

The invocation responds to the recent actions by Russian authorities to restrict the exercise of freedoms of expression, peaceful assembly and association within Russia, as well as reports of torture and other mistreatment of Russian Federation citizens and others held in detention within Russia. The mission of experts will have a mandate to assess whether Russia is violating its OSCE Human Dimension commitments and how the Russian government's actions have affected civil society, media freedom, the rule of law, and the ability of democratic processes and institutions to function in Russia.

This mission will prepare a report to share with all OSCE participating States and the general public in September. The United States and our allies and partners will continue to hold the Russian government accountable for human rights violations and abuses.

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On September 23, 2022, Ambassador Michèle Taylor delivered a statement on Russia's human rights violations and abuses in Ukraine at an interactive dialogue with the HRC Commission of Inquiry on Ukraine at HRC 51. The statement is excerpted below and available at https://geneva.usmission.gov/2022/09/23/interactive-dialogue-with-the-commission-of-inquiry-on-ukraine-hrc51/.

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The commission's briefing shines a light on Russia's blatant and numerous human rights violations and abuses in its unprovoked war against Ukraine.

Russia's war, as President Biden told the General Assembly, "is about extinguishing Ukraine's right to exist as a state, plain and simple, and Ukraine's right to exist as a people."

The evidence of Russia's atrocities becomes more horrifying by the day, most recently with the uncovering of mass graves in Izyum where the bodies show signs of torture.

We urge the Commissioners to continue to examine the growing evidence of Russia's filtration operations, forced deportations, and disappearances.

Numerous sources indicate Russian authorities have interrogated, detained, and/or forcibly deported between 900,000 and 1.6 million Ukrainian citizens.

The Russian government is reportedly deporting children from Ukraine, separating them from their families, and abducting them from orphanages for adoption in Russia.

We call on Russia to end these actions immediately, release those detained, and allow individuals to return home promptly and safely.

The United States and our partners are committed to ensuring Ukraine can defend itself. We are also committed to accountability for Russia's war crimes and other abuses. We thank the COI for its work.

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d. Israel

On June 7, 2022, the State Department released a statement expressing concern about a report of the UN Human Rights Council's Commission of Inquiry on the situation in Israel, the West Bank, and Gaza. The statement follows and is available at https://www.state.gov/the-un-human-rights-councils-commission-of-inquiry-on-the-situation-in-israel-the-west-bank-and-gaza/.

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The United States is committed to advancing human rights in Israel, the West Bank, and Gaza. Israelis and Palestinians deserve equal measures of freedom, security, prosperity, and, importantly, dignity. Promoting human rights and fundamental freedoms is important in its own right and as a means of preserving and advancing the prospects of a negotiated two-state solution.

As we have stated repeatedly, we firmly oppose the open-ended and vaguely defined nature of the UN Human Rights Council's (HRC) Commission of Inquiry (COI) on the situation in Israel, the West Bank, and Gaza, which represents a one-sided, biased approach that does nothing to advance the prospects for peace. The report of the Commission, released today, does nothing to alleviate our concerns. While the United States believes the HRC plays a crucial role in promoting respect for human rights and fundamental freedoms globally, this COI and report do not advance this goal.

Israel is the only country subject to a standing agenda item at the HRC and has received disproportionate focus at the HRC compared to human rights situations elsewhere in the world. While no country is above scrutiny, the existence of this COI in its current form is a continuation of a longstanding pattern of unfairly singling out Israel. We reengaged with and later re-joined the HRC in part to be in a better position to address its flaws, including this one, and we will continue to seek reforms.

The United States remains deeply committed to helping achieve peace for both Israelis and Palestinians and will support actions in the UN that bring the parties together to advance prospects for peace.

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e. Burma

On July 7, 2022, Ambassador Michèle Taylor delivered the U.S. explanation of position on the adoption of a resolution on the Situation of Human Rights of Rohingya and Other Minorities in Myanmar at HRC 50. The statement is excerpted below and available at https://geneva.usmission.gov/2022/07/07/adoption-of-resolution-on-situation-of-human-rights-of-rohingya-muslims-and-other-minorities-in-myanmar-hrc50/.

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The United States stands with the people of Myanmar, and supports calls for the voluntary, dignified, safe, and sustainable return of Rohingya refugees, who are predominantly Muslim, to their country, but only when conditions are safe for such a return. Unfortunately, conditions in Myanmar are not currently safe, and we do not support the immediate commencement of returns to Myanmar, as this resolution calls for. Instead, we call upon the military regime, which seized power in a coup d'état, to cease violence and to restore the path to democracy, and for all relevant actors to immediately work towards creating, as quickly as possible, safe conditions for Rohingya to return to Myanmar. We also call for greater urgency to address the root causes of violence and discrimination resulting in the Rohingya refugee crisis.

We underscore that this resolution, like all HRC resolutions, is nonbinding and does not create rights or obligations under international law. It does not change the current state of conventional or customary international law or the body of international law applicable to any particular situation. The United States does not necessarily understand references to "conflict," "IHL," or international humanitarian law terms of art in this resolution to mean that, as a matter of law, an armed conflict exists in a particular country or to supplant a State's existing obligations under IHL.

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e. North Korea

On September 30, 2022, the State Department released a statement supporting human rights in North Korea. The statement follows and is available at https://www.state.gov/supporting-human-rights-in-north-korea/.

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As we reflect on North Korea Freedom Week, we recognize the courage of the North Korean defector and human rights community, which continues to speak on behalf of the millions of North Koreans suffering deplorable abuses and who are unable to advocate for themselves. Despite the regime's announcement that it has overcome COVID-19, its borders remain sealed, and the humanitarian situation remains dire. More than 100,000 individuals, including children, remain detained in the country's vast network of prison camps, while the regime diverts resources from the people and systematically uses forced labor to generate revenue in support of its unlawful weapons of mass destruction and ballistic missile programs.

For those who have escaped, many remain vulnerable to abuse and are subjected to transnational repression. We remain deeply concerned about the plight of North Korean asylum seekers. North Koreans who are forcibly repatriated are reportedly commonly subjected to

summary execution, torture, arbitrary detention, forced abortion, and other forms of gender-based violence.

The international community must act to hold accountable those responsible for these human rights abuses. The United States remains committed to shining a spotlight on the egregious human rights situation in the DPRK and working with allies and partners to promote accountability and increase the free flow of information into, out of, and within the DPRK.

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f. Iran

On November 24, 2022, the UN HRC held a special session addressing the human rights situation in Iran following the death of Mahsa Amini. A statement issued by Secretary Blinken about the special session follows and is available at https://www.state.gov/the-united-nations-human-rights-council-holds-special-session-on-iran/.

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Today's Special Session at the UN Human Rights Council addressed the deteriorating human rights situation in Iran, with a particular and appropriate focus on the regime's brutal acts of repression and violence against women and children, especially girls. Following the death of Mahsa Amini in the custody of Iran's so-called "morality police," thousands of brave Iranians have risked their lives and their liberty to protest the regime's long record of oppression and violence. The regime has responded with a ruthless crackdown on peaceful protestors, including the lethal response on November 19 in Mahabad, mass arrests including the preemptive detention of journalists, and use of the death sentence against peaceful protestors. The United States continues to support the people of Iran in the face of this brutal repression. We reiterate our call for the regime to immediately end its harsh crackdown and cease its violence against women and girls.

The UN Human Rights Council has a crucial role to play in drawing international attention to human rights crises such as the one in Iran, investigating them, and establishing accountability mechanisms to document and respond to the abuses committed. Today's session leaves no doubt that the HRC's membership recognizes the gravity of the situation in Iran, and the fact-finding mission established today will help ensure that those engaged in the ongoing violent suppression of Iranian people are identified and their actions documented.

It is also important that the international community work in partnership to ensure that Iran plays no role on UN or other international bodies charged with protecting and promoting human rights of women. As Vice President Harris recently announced, the United States is working with other nations to remove Iran from the UN Commission on the Status of Women.

We look forward to the day when all Iranians can enjoy the human rights and fundamental freedoms enshrined in the Universal Declaration of Human Rights. That day is long overdue.

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On December 9, 2022, the governments of the United States and Canada released a joint statement on the human rights situation in Iran following the death of Mahsa Amini. The statement follows and is available at https://www.state.gov/joint-statement-by-canada-and-united-states-on-the-human-rights-situation-in-iran/.

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Canada and the United States are united in condemning the Islamic Republic of Iran's brutal acts of violence against peaceful protestors and its ongoing repression of the Iranian people. We also condemn Iran's pervasive oppression and state-sponsored violence against women. While these are longstanding concerns, the Iranian authorities' intensification of violence against the Iranian people following the death of Mahsa "Zhina" Amini calls for consequential responses from all corners of the world.

Today, we have taken coordinated sanctions actions against Iranian officials connected to human rights abuses, including those committed as part of the ongoing brutal crackdown aimed at denying the Iranian people their human rights and fundamental freedoms. Our sanctions come as Iran's leadership continues to perpetrate violence against its people without relent. Security forces reportedly have killed hundreds of peaceful protestors, including dozens of children, and have arbitrarily detained thousands of Iranians in their effort to silence the people of Iran. We are gravely alarmed by recent reports that Iranian authorities are using sexual violence as a heinous means of protest suppression. Iranian courts have also now begun issuing harsh sentences to advocates and protestors ranging from lengthy prison sentences to the death penalty.

We are united in our support for the brave people of Iran. Together, we remain committed to finding more ways to impose costs on the perpetrators of human rights abuses against Iranians. Everyone in Iran should have the right to freedoms of expression and peaceful assembly, and the Iranian regime must end its use of violence against its own people simply for exercising those rights.

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B. DISCRIMINATION

1. Race

a. Statement by Ambassador Thomas-Greenfield on Black History Month

On February 1, 2022, Ambassador Linda Thomas-Greenfield delivered a statement on Black History Month. The statement follows and is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield-on-black-history-month/.

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Today begins a monthlong celebration of the contributions and achievements of Black Americans as well as an examination of parts of our nation's history too often overlooked. In delving into our history through the lens of historically marginalized communities, a richer and more nuanced sense of who we are as a people comes into focus. Americans from all backgrounds stand to benefit from this deepened understanding. We may discover new role models and gain new insights into where we fit into America's story today by having a clearer picture of the trajectory of our ancestors.

This has certainly been true for me. I often think about my mentor, Ambassador Edward Perkins, a fellow Louisiana native and diplomat who was already an icon in the State Department when I joined in 1982. He would go on to hold some of the country's most important diplomatic jobs. He was the first-ever Black American Ambassador to South Africa, during the height of apartheid. And he held other high-level posts, including Ambassador to Liberia, Director General of the Foreign Service, and the United States Ambassador to the United Nations. It's no coincidence that I later went on to hold three of those positions. Seeing him in those roles allowed me to see myself in them, too.

In the past year, the United States was instrumental in establishing the Permanent Forum on People of African Descent in the United Nations General Assembly. This forum acknowledges that, at long last, we are compelled to give voice to the dynamic challenges and aspirations of People of African Descent, not just in the United States, but around the world. This forum creates a new and inclusive space for all People of African Descent to come together and build a better future – a future grounded in our heritage and built upon the strong foundation laid by those in the African Diaspora who played an integral role in building this nation and so many others.

We must continue the work of uplifting the rich legacy of Black people globally and ending the scourge of racism and discrimination, which continues to infringe on the lives of Black people and our nation every day. The Biden-Harris Administration is committed to this work, and I look forward to continuing that work at the United Nations.

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b. European Commission against Racism and Intolerance

On February 23, 2022, the Committee of Ministers of the European Commission against Racism and Intolerance (ECRI) granted observer status to the United States. The U.S. appointed Clarence Lusane, from Howard University (Washington, DC) to serve as an observer in an individual capacity and to be independent and impartial. See ECRI press release available at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/united-states-of-america-granted-observer-status-in-ecri.

c. International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade

On March 29, 2022, Representative Barbara Lee, U.S. Congressional Delegate to the UN General Assembly, delivered the U.S. national statement at the UN General Assembly commemoration on the International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade. The statement is available at https://usun.usmission.gov/national-statement-at-the-unga-commemoration-on-the-international-day-of-remembrance-of-the-victims-of-slavery-and-the-transatlantic-slave-trade/ and excerpted below.

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Mr. President, I have the unique honor of addressing you on this important occasion as both a Member of Congress and one of this year's United States Congressional Delegates to the United Nations General Assembly. As we commemorate the abolition of slavery and the transatlantic slave trade, let us reflect on the profound words of self-emancipated enslaved person, abolitionist, orator, global luminary, and diplomat, Frederick Douglass. "Abolition of slavery," he said, "had been the deepest desire and great labor of my life." These words prompt our remembrance of the victims and descendants of slavery and the transatlantic slave trade.

The transatlantic slave trade forced millions of people from their homes, families, societies, and countries, and subjected them to exploitation and dehumanization, creating a global enterprise of unparalleled wealth for Western nations and fueling the global economy. Chattel slavery remains an immoral and indelible stain on the history of the United States, the Western hemisphere, and the collective chronicle of our inhumanity.

We acknowledge the myriad atrocities of slavery, and continue to grapple with the racial, ethnic, gender, economic, social, and political hierarchies it created. And yes, we must honor the victims of slavery by dismantling its institutional remnants, such as racism, discrimination, economic inequity, marginalization, and systematic underdevelopment.

The United States must address the multidimensional legacies of slavery through an unprecedented commitment to racial equity, justice, and inclusion within our borders and throughout our global affairs. We have demonstrated our commitment nationally through a government-wide approach to addressing systemic inequity. Today, the President of the United States, Joseph R. Biden, will sign the Emmett Till Antilynching Act of 2022, recently passed by the United States Congress. It has been over 120 years since Congress' first attempt to criminalize the horrendous act of lynching and yes, today, it will be finally made a federal hate crime.

Members of both House and Senate have supported legislation that acknowledges and address the remnants of our racialized past stemming from the institution of chattel slavery. Legislation like H. Con. Res. 19, urging the establishment of a United States Commission on Truth, Racial Healing, and Transformation; H.R. 40, a Commission to Study and Develop Reparation Proposals for African Americans; and H.R. 1280, the George Floyd Justice in

Policing Act are all examples of how Congress is grappling with the need for systemic change and redress.

And last year, President Biden signed into law, making Juneteenth – that's June 19th – a national holiday. It was on this day in 1865, that Union soldiers arrived in Texas to announce that Black people were free. Now, this was two-and-a-half years after the Emancipation Proclamation. This announcement was made in Galveston, Texas, which is the home of my grandfather and my great-grandmother.

Now on the global stage, we championed the establishment of the Permanent Forum on People of African Descent and supported the International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement. And I, personally, fought for our participation in the movement to establish the beautiful Permanent Memorial Honoring the Victims of Slavery and the Transatlantic Slave Trade right here in a prominent spot at the United Nations. And I was honored to witness the establishment of the International Decade for People of African Descent.

Despite these promising efforts, there is still so much work to do to achieve full equity in the United States and globally. And so, we must embrace this momentous occasion as a clarion and dynamic call to engage and to move forward.

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d. Committee on the Elimination of Racial Discrimination Meeting

On August 9, 2022, the State Department announced that Ambassador Michèle Taylor, U.S. Permanent Representative to the UN Human Rights Council, and Desirée Cormier Smith, the State Department's Special Representative for Racial Equity and Justice, would lead a delegation of more than 30 members to a meeting of the Committee on the Elimination of Racial Discrimination ("CERD") in Geneva, Switzerland on August 11-12, 2022. The delegation included participants from a dozen federal agencies, as well as Mayor of Atlanta Andre Dickens and representatives from the office of California's Attorney General. The media note is available at https://www.state.gov/u-s-delegation-to-the-committee-on-the-elimination-of-racial-discrimination/ and includes the following:

> The Biden-Harris administration is deeply committed to addressing the challenges of systemic racism both at home and abroad, including the structures, policies, laws, and practices that sustain racial injustices. The administration further believes that any pledge to advance human rights around the world must begin with a pledge to advance human rights at home.

On August 11, 2022, Ambassador Michèle Taylor delivered an opening statement at the U.S. presentation to the Committee on the Elimination of Racial Discrimination concerning the U.S. report on the Elimination of Racial Discrimination (CERD Report). The statement is available at

https://geneva.usmission.gov/2022/08/11/opening-statement-by-ambassador-michele-taylor-at-cerd-2022/ and excerpted below.

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Thank you, Madame Chairperson, and good afternoon to all. I am honored to lead the U.S. delegation in our presentation to this distinguished committee.

I have lived most of my adult life in Atlanta, Georgia, the cradle of the American civil rights movement. Atlanta was built on the violent, tragic history of slavery and racial discrimination, but it has also been shaped by the inspiring, hard-fought successes of a community of activists led by Dr. Martin Luther King, Jr. and extended by the leadership of succeeding generations.

We still have far to go in building a just and equal society in the United States. However the blueprint of the civil rights movement together with the recommendations we take from conversations, like the ones we had yesterday with civil society and will have here today and tomorrow, give me confidence that we have a way forward and hope for that potential.

Yesterday we held the 5th in a series of meetings with Civil Society. I was deeply moved by the honesty, strength, and vulnerability shared in the room. And inspired by my high-ranking colleagues who showed that, while some of us are experts on racial injustice, we still have much to learn; that what we really need first, in order to better serve the American people, is to listen. We are all committed to doing more of that through continued engagement with civil society.

As the daughter of a Holocaust survivor, I know personally that when anyone's rights are threatened, it affects all of us. I understand the generational trauma of children ripped from their parents. And I know that injustice anywhere is a threat to justice everywhere.

I am deeply committed to fighting discrimination and violence against members of vulnerable groups wherever they occur, and that commitment is a foundational pillar of the Biden-Harris administration.

The members of the delegation here in Geneva share this charge. They come from all corners of federal, state, and local government where they focus on a full range of issues, from health to the environment to the justice system, and certainly to issues of equity. Their presence reflects both how pervasive racial discrimination remains in our country and the firm commitment of the United States to a comprehensive, whole-of-government approach to combating it.

In addition to my co-head of delegation, Special Representative for Racial Equity and Justice, Desirée Cormier Smith, the inaugural holder of the position, I will also ask the following delegation members to provide brief comments during this opening presentation:

- First, recognizing that so much implementation of our CERD obligations happens at the local and state level, Mayor of Atlanta, the Honorable Andre Dickens and Special Assistant Attorney General of California Damon Brown will share their perspectives.
- Steven Hill will speak on behalf of the National Security Council at the White House.
- Johnathan Smith from the Department of Justice will then lay out some background on race in the U.S. justice system, followed by Peter Mina who will share the perspective of the Department of Homeland Security.

- Then, Ann Marie Bledsoe Downes will speak on behalf of the Department of the Interior, followed by Chitra Kumar from the Environmental Protection Agency, Jessica Marcella from the Department of Health and Human Services, Catherine Lhamon from the Department of Education, Demetria McCain from the Department of Housing and Urban Development, Lenita Jacobs-Simmons from the Department of Labor, and Raymond Peeler from the Equal Employment Opportunity Commission.

These members of our delegation are not only giving remarks but each of us will be available during the program to answer your questions with honesty and humility.

I want to emphasize that as a delegation we are committed to listening and to learning. Conversations around racial discrimination are often challenging and can be very emotionally charged. I am willing to sit with discomfort as I know that it is when we are uncomfortable that we are most able to make change.

I am proud to serve as the Permanent Representative of the United States to the UN Human Rights Council at a time when the U.S. is committed to actively addressing racial discrimination and to leading by the example of our willingness to critically examine our own challenges. The Biden-Harris Administration understands that any pledge to advance human rights around the world must begin with a pledge to advance human rights at home.

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Also on August 11, 2022, Special Representative Cormier Smith delivered an opening statement at the U.S. presentation to the CERD concerning the CERD report. The statement is available at https://geneva.usmission.gov/2022/08/11/opening-statement-by-special-representative-for-racial-equity-and-justice-at-cerd-2022/ and excerpted below.

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Madam Chair, distinguished members of the Committee, representatives of civil society, colleagues:

My name is Desirée Cormier Smith, and I serve as the U. S. Department of State's first Special Representative for Racial Equity and Justice. In my historic new role, it is my duty to ensure that U.S. foreign policy protects and advances the human rights of people belonging to marginalized racial and ethnic groups, including Indigenous communities, and to combat systemic racism, discrimination, and xenophobia around the world. I am here today because we acknowledge that our leadership on human rights issues, especially on issues of racial justice, must begin at home for us to be credible champions abroad.

The United States is unequivocally committed to addressing racial discrimination, inequity, and intolerance of all forms both within our own borders and globally. We strive to promote respect for the rights of individuals who are oppressed due to their race or ethnicity, and create a more just, inclusive, and equitable world where all people have opportunity to live up to their fullest potential.

The United States is a multi-racial, multi-ethnic, and multi-cultural democracy. Our beautiful and rich diversity is a source of strength and indeed great pride. To honor that

diversity, we strive to ensure that every American is protected against discrimination based on race, color, and national origin, along with other protected categories, as is codified under the U.S. Constitution as well as in federal, state, and local laws. However, we continue to grapple with the gap between our stated ideals and the lived realities for Black, Indigenous, Latinx, Asian and Pacific Islander, and other Americans of color. Racial inequity in our country manifests in a multitude of ways that alone and together impede the quality of life of Americans of color and negatively impacts the well-being of all Americans. It is important to also fully acknowledge the tragic and ugly parts of our history, including the displacement of Native Americans and the enslavement of Africans, and their lingering legacy as contributing factors to the current racial disparities and inequities we face today.

As President Biden often says, great nations do not shirk from their past. They come to terms with the mistakes they made in order to heal and do better. And that is exactly why, on his first day in office, President Biden signed a historic Executive Order on Advancing Racial Equity and Support for Underserved Communities that mandated a whole-of-government approach to identifying and remedying racial and other inequities in our own policies, programs, and assistance. In April, over 90 agencies across the U.S. federal government—including many represented here today—released Equity Action Plans that highlight concrete steps they have taken and will continue to take to advance equity in their respective missions. We are proud of our vibrant civil society, many of whom traveled from the United States to be here today to represent their communities and bear witness to our presentation, and I want to acknowledge and thank them for the critical role they play in making sure that we never lose sight of the fact that our work is urgent, dynamic, and ongoing.

President Biden acknowledges that we, the United States, are most credible when we lead not by the example of our power but by the power of our example. While we recognize the very real challenges we continue to face, I hope that our commitment to eliminating racial disparities and discrimination is clear. Indeed, we have a lot of work to do to make equality for all a reality, but I also want to recognize the progress we have made since the beginning of the Biden-Harris Administration. As Secretary Blinken has said, what makes America unique is its ability to acknowledge its imperfections and domestic challenges, including systemic racism, and work to overcome them.

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The August 11, 2022 opening statements by other U.S. delegation members at the U.S. presentation to the CERD concerning the CERD report are available at https://geneva.usmission.gov/2022/08/11/.

On August 12, 2022, Ambassador Michèle Taylor delivered a closing statement at the U.S. presentation to the CERD concerning the CERD report. The statement is available at https://geneva.usmission.gov/2022/08/12/ambassador-taylor-cerd2022/ and excerpted below.

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Madam Chairperson, distinguished members of the committee, representatives of civil society, and colleagues: thank you for the rich dialogue of these past two days on how the United States

is working to eliminate racial discrimination and how we can do better. Quite simply, we must do better.

It has been my honor to lead this delegation alongside my colleague Special Representative Desirée Cormier Smith.

The Biden-Harris administration, represented by many of us here, is deeply committed to the elimination of racial discrimination in the United States using all the levers at our disposal. These past few days have given us new ideas and new energy as we continue that work.

The United States takes our treaty obligations seriously and we deeply appreciate the many thoughtful contributions from this committee. You heard today many of the concrete ways we are meeting our obligations under the Convention, and our pledge to do more. Know also that our government agencies meet with one another regularly in interagency policy committee meetings including at the cabinet level, which are convened by the White House as an additional tool to implement the committee's recommendations.

One of the values that defines us as Americans is standing against hate and discrimination whenever and wherever they occur. But we are painfully aware that our history is colored by systemic and institutionalized racism. We hope the many positive initiatives you have heard here from throughout our federal government, and from our colleagues at the state and local levels doing so much of the work on the ground, are a testimony to our commitment to achieve a more perfect union based on a bedrock of equality and justice.

I spend my time as the U.S. permanent representative to the UN Human Rights Council in a room in this very building, just around the corner from here. In our sessions we address human rights challenges around the world. But it is work like that of the last few days that gives me the true authority to speak for my country. For as I said in my opening remarks, any pledge to advance human rights around the world must begin with a pledge to advance human rights at home. When the Biden-Harris administration says that human rights is at the center of our foreign policy, it is based in that fundamental truth. Because injustice anywhere is a threat to justice everywhere.

As I look back on the time this delegation has spent together here in Geneva, I think the most powerful memories for me will be from our time spent with Civil Society on Wednesday. Because without the opportunity to hear those most affected by what we are asked to implement here in this presentation speak passionately and transparently, we simply could not collectively understand the urgency in the same way. I want to reiterate our commitment that these critical dialogues are just beginning, and we encourage you to stay engaged. We see you. We hear you. And we will continue to stand with you.

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On August 12, 2022, Special Representative Cormier Smith delivered a closing statement at CERD 2022. The statement is available at https://geneva.usmission.gov/2022/08/12/closing-statement-by-desiree-cormier-smith-at-cerd-2022/, and excerpted below.

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Thank you for the opportunity to have this robust discussion about our progress implementing our obligations under the Convention to combat racial discrimination and the important road ahead to address ongoing challenges. We regret that we ran out of time today, but we share your vision that we need to continue to make strong, concerted efforts to eliminate the scourge of racial discrimination in our country.

As you have heard from my colleagues here, we are making progress at the Federal, State and local levels to address racial discrimination and inequity in the United States, but we recognize that we have so much more left to do. We commit to continuing coordinating between Federal agencies, as well as state, local, and Tribal governments to identify additional concrete policy actions we can take to implement our obligations under the Convention.

We are incredibly fortunate to have such a vibrant, robust, and diverse civil society representing a wide swath of Black, Indigenous, Latinx, and other communities of color here today. I am deeply grateful for the work they do every day to uplift their communities and break down institutional and structural barriers that prevent them from thriving, but it saddens me that they still have to do it. They are fighting for many of the same freedoms – the freedom to breath clean air, the freedom to raise their own children, the freedom to have their children grow up without the constant threat of violence, the freedom to practice their own cultures and traditions – that so many White Americans take for granted. This is the ugly, disgraceful, and enduring legacy of the enslavement of Africans and their descendants and the displacement of Indigenous peoples on which our country – and many around the world – were founded. As President Biden has said, "Advancing equity is not a one-year project – it is a generational commitment that will require sustained leadership and partnership with all communities." I hope that my colleagues and I have made clear our determination and enduring commitment to eliminating systemic racism against Black, Indigenous, Latinx, Asian American and Pacific Islander, and other communities of color not only because it is deeply personal for many of us, but because we all recognize that doing so will make our country and ALL Americans safer, healthier, more prosperous, and better off overall.

Thank you to the Committee for your leadership in pressing us all to do more. I also want to thank, once again, civil society for YOUR leadership and your enduring partnership; as I said earlier this week, you have pushed us hard – and we are better for it. I look forward to continuing our engagement with you because when we listen to you, we end up with more effective, more impactful policies – and that is precisely what we aim for.

We know the urgency of our work – I live it every day – and we will not let up; we will not back down. We cannot let ourselves, our children, or future generations down by failing to meet this moment.

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e. Third Committee

On November 4, 2022, Nicholas Hill, U.S. Deputy Representative to the Economic and Social Council, provided the U.S. explanation of vote on a Third Committee resolution by the Russian Federation on combatting the glorification of Nazism. The U.S. statement is available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-

resolution-by-the-russian-federation-on-combatting-the-glorification-of-nazism/, and excerpted below.

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The United States once again expresses concern and opposition to this resolution, a document most notable for its thinly veiled attempts to legitimize longstanding Russian disinformation narratives smearing neighboring nations under the cynical guise of halting Nazi glorification.

The United States is proud to have fought with our World War II allies, including the Soviet Union, and to have made decisive contributions to the victory over Nazi Germany in 1945. We categorically condemn the glorification of Nazism and all modern forms of violent extremism, antisemitism, racism, xenophobia, discrimination, and related intolerance.

That said, the United States continues to oppose the Russian Federation's use of the UN system to spread disinformation. This resolution is a cynical attempt at best by Russia to further its contemporary geopolitical aims by invoking the Holocaust and the Second World War to malign other countries. This is all the more egregious now, when Russia uses false accusations of Nazism to try to justify its unconscionable ongoing violence against the people of Ukraine.

The Russian Federation's resolution is not a serious effort to combat Nazism, antisemitism, racism, or xenophobia — all of which are abhorrent and unacceptable. Instead, this resolution is a shameful political ploy. It is a thinly veiled effort to justify Russia's war of aggression in Ukraine.

We fully support the amendments presented today, which re-introduced into this resolution the report by the Special Rapporteur on contemporary forms of racism. The report "Notes with alarm that the Russian Federation has sought to justify its territorial aggression against Ukraine on the purported basis of eliminating neo-Nazism and underlines that the pretextual use of neo-Nazism to justify territorial aggression seriously undermines genuine attempts to combat neo-Nazism." The evidence is clear and was reaffirmed by the amendments passing.

Despite the amendments passing, we continue to have serious concerns with this resolution's invocation of Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and Article 20 of the International Covenant on Civil and Political Rights to justify restrictions on freedom of expression.

We also take this opportunity to note our concerns regarding the process by which this resolution was run. The Russian Federation failed to provide any opportunity for Member States to engage meaningfully in negotiations on the draft text this year. It canceled two of the three informal negotiations and held only one meeting to take concerns on board, which it did not do. This resolution has had a long history of sham negotiations and pitiful attempts to appear to run a transparent process. Even with the restoration of the SR's report, the Russian Federation skirted procedure and did it from the floor this morning instead of through the L document.

For these reasons, the United States will continue to vote "No" on this resolution, as it has since 2005, and calls on other States to do the same.

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f. UN Forum on Minority Issues

On December 1, 2022, Human Rights Officer Patrick Elliot delivered the U.S. statement at the 15th session of the UN Forum on Minority Issues. The statement is available at https://geneva.usmission.gov/2022/12/01/u-s-statement-at-un-forum-on-minority-issues/, and excerpted below.

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The United States welcomes this opportunity to discuss how together we can advance the human rights of members of minority groups and marginalized communities around the world.

The United States welcomes the contributions of the Special Rapporteur on Minority Issues' report from his 2021 country visit to the United States to our own efforts to address the unique vulnerabilities faced by members of minority groups and marginalized communities. We appreciate your acknowledgement of positive steps we have taken to ensure respect for their human rights.

The United States encourages other countries to accept visits from your mandate, which we did as part of our there standing invitation to thematic Special Procedures mandate holders.

Our deep commitment to the advancement of the human rights of members of minority groups and marginalized communities is a key component of our domestic and foreign policy. We are working to address several issues you highlighted in your report.

The United States is advancing racial equity and support for underserved communities, expanding efforts to improve respect and tolerance for all, protecting the right to freedom of religion or belief, expanding access to voting, narrowing the racial wealth gap, protecting sacred lands for Indigenous peoples, and combatting hate-based violence. The United State is also improving quality of life outcomes, enhancing ongoing COVID-19 pandemic recovery initiatives, and promoting equal educational opportunity at all levels, including through large investments in the nation's historically black colleges and universities and minority-serving institutions.

Despite these positive steps, is more work to do to achieve equality for members of minority groups and marginalized communities. We look forward to ongoing dialogue and constructive engagement.

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2. Gender

a. Women, Peace, and Security

In July 2022, the United States released the second U.S. Women, Peace, and Security ("WPS") Congressional Report. The 2022 WPS Report is available at https://www.state.gov/us-women-peace-and-security-congressional-report-2022/. On July 18, 2022, the White House issued a fact sheet that highlights each agency's report

and is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/18/fact-sheet-us-government-women-peace-and-securityreport-to-congress/ and excerpted below.

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Department of State. The Department continued its focus on WPS implementation through monitoring, evaluation, and learning exercises and strengthened engagement with key partners, such as civil society leaders. During the Fiscal Year (FY) 2021 reporting period, the Department continued engagement with civil society, non-governmental organizations (NGOs), the private sector, and partner governments; increased its training of personnel on WPS; and increased use of gender analysis in projects and strategic frameworks by 25 percent compared to FY 2020. Additionally, Department programs, training, and funding for WPS increased from FY 2020 to FY 2021. During the reporting period, the Department invested approximately $110 million in assistance programming to advance WPS. The Department also integrated WPS principles into its internal processes, including 231 notice of funding requests (NOFOs) and requests for proposals (RFPs) requiring a gender analysis – up from only 12 reported in FY 2020. As part of the Department's ongoing internal review of its WPS data call and to streamline the report, the Department revised or removed some indicators for this reporting period (FY 2021).

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b. Fact-finding Mission to Investigate Iran

On November 24, 2022, the Human Rights Council adopted resolution S35/1, establishing the Independent International Fact-Finding Mission on the Islamic Republic of Iran. Its mandate includes the investigation of alleged human rights violations in Iran related to the peaceful protests that began on September 16, 2022, especially with respect to women and children. The resolution, U.N. Doc. A/HRC/RES/S-35/1, is available at https://undocs.org/A/HRC/RES/S-35/1. See also OHCHR press release available at https://www.ohchr.org/en/news/2022/11/human-rights-council-establishes-fact-finding-mission-investigate-alleged-human-rights.

c. Commission on the Status of Women

On December 14, 2022, the UN Economic and Social Council ("ECOSOC") voted to remove Iran from the UN's Commission on the Status of Women. Secretary Blinken issued a press statement available at https://www.state.gov/removal-of-iran-from-the-un-commission-on-the-status-of-women/ and excerpted below.

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Today's vote by the UN Economic and Social Council (ECOSOC) to remove Iran from the UN's Commission on the Status of Women sends an unmistakable message of support from around the world to the brave people of Iran, and in particular to Iranian women and girls, who remain undaunted despite the brutality and violence perpetrated against them by the Iranian regime.

The protests across Iran, triggered by the tragic death of Mahsa Amini while in the custody of the so called "morality police," reveal an Iranian population craving the universal human rights to which every person worldwide is entitled.

In response to these demonstrations, the regime has unsuccessfully attempted to suppress Iranian voices by killing hundreds of peaceful protestors, including dozens of children, and arbitrarily detaining thousands. Iranian courts have issued harsh sentences to protestors, including the death penalty, following sham trials.

The United States is proud to have worked with ECOSOC partners to remove Iran from the Commission on the Status of Women, a body whose values and mission the regime makes a mockery of. The United States reiterates our unwavering support for the people of Iran.

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On December 8, 2022, the State Department published as a media note the joint statement on gender-based online harassment and abuse and on standing with the women and girls of Iran, co-signed by the Governments of the United States of America, Australia, Canada, Chile, Iceland, New Zealand, Republic of Korea, Sweden, and the United Kingdom. The joint statement is excerpted below and available at https://www.state.gov/joint-statement-through-the-global-partnership-for-action-on-gender-based-online-harassment-and-abuse-on-standing-with-the-women-and-girls-of-iran/.

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The undersigned Foreign Ministers for country members of the Global Partnership for Action on Gender-Based Online Harassment and Abuse call attention to the extreme violence faced by the courageous Iranian women and girls who are leading sustained nationwide protests over the tragic death of 22-year-old Mahsa (Zhina) Amini. Since then, Iranian authorities have continued and even escalated their brutal suppression of protestors, including through their use of technology-facilitated gender-based violence. Women and girls have faced targeted online harassment and abuse by Iranian authorities, their apparatuses, and institutions as they demand respect for their human rights and fundamental freedoms. We condemn this ongoing violent crackdown on protestors, including on digital platforms and through Internet restrictions.

The people of Iran rely on social media and other digital tools to communicate and broadcast their messages to the world—always, and particularly during the ongoing violence perpetrated by Iranian authorities. The women and girls of Iran bravely use these essential tools,

even as Iranian authorities and their supporters misuse and abuse the same technologies against them, propagating coordinated online harassment, abuse, and disinformation campaigns designed to discredit them and silence their protests. This use of violence against women and girls in public life, which manifests both online and offline and is exacerbated by the scale, speed, and reach of technology platforms, is a deliberate tactic leveraged by illiberal actors around the world seeking to halt democratic movements and shore up their own political power. Technology-facilitated gender-based violence threatens the lives, safety, and livelihoods of survivors and their families, especially as online and offline violence are often mutually reinforcing.
We invite the international community to join us in urgently working with technology companies to do everything in their power to enable women and girls' access to information online, particularly their full and effective use of online platforms. This includes implementing practical and proactive measures to combat the abuse of their platforms to threaten, harass, and silence Iranian women and girls by surging resources for Persian (Farsi) language content moderation and other Iranian languages, applying policies on harassment and abusive content in a timely and consistent manner, and providing resources and transparent reporting options for those experiencing online harassment and abuse. The members of the Global Partnership for Action on Gender-Based Online Harassment and Abuse stand in solidarity with Iranian women and girls and will continue to look for ways to support women globally in exercising their rights freely and safely, online and offline.

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d. Statements on Afghanistan

On December 20, 2022, the United States condemned the Taliban's decision to ban women from universities, keep secondary schools closed to girls, and impose other restrictions on women and girls in Afghanistan. Secretary Blinken's press statement is available at https://www.state.gov/standing-with-afghanistans-women-and-girls/ and includes the following:

> The Taliban cannot expect to be a legitimate member of the international community until they respect the rights of all in Afghanistan. This decision will come with consequences for the Taliban.
>
> No other country in the world bars women and girls from receiving an education. The Taliban's repressive edicts have resulted in inexcusable restrictions on Afghan women and girls, including on their access to schools. Moreover, the Taliban's latest announcement means that women and girls will continue to face enormous difficulties seeking employment to feed their families. Afghanistan is already losing more than $1 billion per year in contributions that women could be making to the economy. Now the Taliban have sentenced the Afghan people to these losses and more. No country can thrive when half of its population is held back.

On December 21, 2022, the State Department published as a media note the joint statement on the occasion of the Taliban's decision to ban women from universities, co-signed by the Governments of Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Switzerland, and the United Kingdom, and the High Representative of the European Union. The joint statement follows and is available at https://www.state.gov/joint-statement-on-statement-from-foreign-ministers-on-taliban-decision-to-ban-women-from-universities/.

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The Foreign Ministers of Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Switzerland, the United Kingdom, and the United States and the High Representative of the European Union strongly condemn the Taliban's recent decisions to ban women from universities, to continue to bar girls from secondary schools, and to impose other harsh restrictions on the ability of women and girls in Afghanistan to exercise their human rights and fundamental freedoms.

The Taliban's oppressive measures against Afghan girls and women have been relentless and systemic. Over the last 16 months, the Taliban have issued no fewer than 16 decrees and edicts that, among other things, constrain women's mobility, remove women from places of work, require head-to-toe coverings for women, ban women from using public spaces such as parks and gyms and leave widows and women-headed households in dire circumstances by the requirement of male guardianship. These policies make clear the Taliban's disregard for the human rights and fundamental freedoms of the people of Afghanistan.

Afghan women's ingenuity and dynamism are needed urgently to help relieve profound and staggering economic and humanitarian needs. A stable, economically viable, and peaceful Afghanistan is only attainable and sustainable if all Afghans, including women and girls, can fully, equally, and meaningfully participate in and contribute to the country's future and development.

We stand with all Afghans in their demand to exercise their human rights consistent with Afghanistan's obligations under international law. With these moves, the Taliban are further isolating themselves from the Afghan population and the international community. We urge the Taliban to immediately abandon the new oppressive measures with respect to university education for women and girls and to, without delay, reverse the existing decision to prohibit girls' access to secondary school.

Taliban policies designed to erase women from public life will have consequences for how our countries engage with the Taliban. Our foremost concern will continue to be the welfare, rights, and freedoms of the people of Afghanistan.

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e. Women's Health

On February 2, 2022, President Biden issued a fact sheet on The Biden Administration's Commitment to Global Health. The fact sheet is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/02/fact-sheet-the-biden-administrations-commitment-to-global-health/ and excerpted below.

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Over the last year, the Biden-Harris Administration has renewed the U.S. leadership in global health, and taken decisive steps to advance global health priorities, including:

- Supporting and strengthening the WHO. Among his first acts in office one year ago, President Biden declared the United States would reengage with the World Health Organization (WHO), highlighting our nation's commitment to advancing multilateral cooperation in a time of international health crisis. Last week, the United States once again demonstrated that commitment, by leading a successful decision at the WHO Executive Board meeting to strengthen the International Health Regulations (2005). This strengthening will enhance the world's ability to prevent, detect, and rapidly respond to infectious disease outbreaks in the future. Beyond COVID-19, the United States is collaborating with global partners through WHO on a wide range of global health challenges such as childhood immunization, nutrition, polio eradication, strengthening the global health workforce to achieve universal health coverage, and tackling the threat that climate change poses to health. These and other issues remain critical priorities, especially in the wake of COVID-19, and demonstrate the importance of strong, equitable health systems that serve those most at risk.
- Leading the global COVID-19 response. Under President Biden's leadership, the United States has committed to donate 1.2 billion doses of safe and effective vaccine to the world, more than any other nation. To date, we have shipped over 400 million of those vaccines to 112 countries around the world, all for free, with no strings attached or promises extracted. We were the first nation to purchase doses solely for the purpose of donation, with the historic purchase of 1 billion doses of Pfizer vaccine. We were the first nation to step out of the queue for Moderna vaccines, allowing the African Union quicker access to tens of millions of doses. We were the first to broker access to doses for individuals in humanitarian crises. And now, we are leading the push to turn vaccines into vaccinations, with the creation of the Global Vaccine Initiative. To date, the United States is providing nearly $16 billion for life-saving health, economic, and humanitarian COVID-19 assistance to our partners to fight this virus and its impacts. These funds are delivering shots in arms, lifesaving supplies to hospitals, and support that reaches the most vulnerable communities.
- Advancing sexual and reproductive health and rights. One of President Biden's first actions was issuing a Presidential Memorandum on Protecting Women's Health at Home and Abroad, which revoked the expanded Mexico City Policy and directed agencies to resume funding to the United Nations Population Fund (UNFPA) in support of its essential work to prevent maternal deaths, expand access to voluntary family planning,

and prevent and respond to gender-based violence around the world. The Administration continues to advance sexual and reproductive health and rights (SRHR) for all in the face of continued threats. The White House Gender Policy Council released the first-ever National Strategy on Gender Equity and Equality, which emphasizes the core role of advancing SRHR to achieve gender equality. As the largest bilateral donor to family planning, the United States also leads globally by advancing SRHR in multilateral fora and with bilateral partners. As we address the indirect impacts of the COVID-19 pandemic on health systems and vulnerable populations, the United States has supported increased access to SRHR services, particularly in emergency contexts.

- Continued global leadership on addressing HIV/AIDS, malaria, and tuberculosis. Last week, the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) celebrated its nineteen-year anniversary. Since its inception and with bilateral support, the U.S. Government has invested $100 billion to transform the global AIDS response. PEPFAR has saved more than 21 million lives, prevented millions of HIV infections, and helped countries build a strong foundation to prevent, detect, and respond to other health threats, including COVID-19. Across 55 countries, PEPFAR invests over $1 billion annually in local health systems strengthening to respond to HIV. At the end of FY21, PEPFAR supported 63.4 million people with HIV testing services, and 18.96 million people with antiretroviral treatment. With $250 million in funding through the American Rescue Plan Act, PEPFAR has continued to advance HIV gains and supported the global COVID-19 response. The U.S. President's Malaria Initiative invested $770 million in 2020 to forge forward in the fight against malaria, despite the COVID-19 pandemic, reaching almost 60 million people with malaria medicine and protecting more than 7.5 million pregnant women with preventive treatment for malaria. Through the most recent five-year U.S. Government Global TB Strategy, U.S. government investments led to the treatment of 15.7 million people with TB, starting 438,000 individuals with drug resistant TB on second-line drug therapy, and accomplished a treatment success rate of almost 90 percent.
- Building health security capacities. The United States continues to work with partners across the globe, including 19 intensive support partner countries, to provide assistance to better prevent, detect, and respond to infectious disease threats and to meet the target of the multilateral Global Health Security Agenda. The need for these capacities has never been more clear, and robust interagency efforts helped address numerous outbreaks including Ebola, Anthrax, Influenza, Rabies, Polio, Cholera, and more. The U.S. Government's global health security programs also pivoted to support critical COVID-19 response activities.
- Sustaining commitments in maternal and child health. The United States' sustained commitment, financial investment, and adaptability has ensured that critical health services continue reaching women, children, and families. In 2020, the United States helped more than 92 million women and children access essential—and often lifesaving—care. The U.S. Government's investments towards polio eradication have also helped ensure over 400 million children are vaccinated against polio each year; last year was a significant milestone as Africa was declared wild polio free.

In the coming year, the Administration will take the following steps to continue to advance global health priorities:

- Continue supporting and strengthening the World Health Organization. The United States looks forward to rejoining the WHO Executive Board in May 2022, and will launch a Strategic Dialogue with WHO to ensure our mutual priorities are fully aligned. The United States will continue to work closely with WHO and partners around the world, to ensure that the prevention of sexual exploitation and abuse, and support for victims and survivors, remain priority issues.
- Accelerate global COVID-19 response efforts. The U.S. Government will continue to roll out the Initiative for Global Vaccine Access (Global VAX) to accelerate global efforts to get COVID-19 shots into arms and enhance international coordination. This whole of government effort will bolster cold chain supply and logistics, service delivery, vaccine confidence and demand, human resources, data and analytics, local planning, and vaccine safety and effectiveness. The United States has committed more than $1.6 billion in funding to help get shots into arms around the world.
- Advance health security and pandemic preparedness. The United States will continue to advance health security and pandemic preparedness abroad, including through strengthening WHO, working with partners towards targeted IHR amendments and a new pandemic instrument, building country capacities towards the Global Health Security Agenda target, strengthening sustained financing including establishing a new financial intermediary fund at the World Bank, building back better biosafety and biosecurity norms and mitigating biotechnological risks, innovating our science and technological capabilities to shorten the cycle for development of safe, effect, and affordable vaccines, therapeutics, and diagnostics, and more.
- Continue investments to strengthen health systems. The United States will continue to advance the newly launched Vision for Health System Strengthening and will work to align global partners toward shared commitments for the health workforce. The United States has committed to supporting and protecting health workers, and affirmed support for WHO's Gender Equal Health and Care Workforce Initiative, which aim to address gender inequities and inequalities health workers face globally. The United States will continue to invest resources and provide assistance to strengthen countries' disease surveillance and laboratory detection capacities, continue to lead efforts to eradicate polio, and also strengthen immunization systems and vaccine delivery to ensure a world where people live healthier, safer lives.
- Continue championing and expanding sexual and reproductive health and rights. In addition to maintaining strong financial support, the United States will continue to collaborate with allies and partners through multilateral, bilateral and civil society partnerships to expand progress and leadership to advance sexual and reproductive health and rights. Federal agencies are developing SRHR implementation plans and the National Security Council will continue to elevate and expand SRHR as a core component of our global health policy.
- Continue the fight against HIV/AIDS, malaria, and tuberculosis. This year, President Biden will host the Global Fund's Seventh Replenishment Conference, advancing global efforts to address HIV/AIDS, malaria, and tuberculosis, alongside the U.S. government's programs. PEPFAR is saving lives and curbing new HIV infections while supporting the health systems infrastructure in countries that continue to serve as a backbone of the COVID-19 response. PEPFAR's assets can be further leveraged to support the COVID-19 response, while protecting and expanding HIV services and serving the most

vulnerable populations around the world. PMI is reshaping its fight against malaria, focusing on reaching the unreached, further building community health systems, and increasing the impact of community health workers as part of its new "End Malaria Faster" Strategy. Current investments are building countries' capacities to respond to both tuberculosis and COVID-19 with support for bi-directional testing approaches for both diseases, joint contact investigations and community screenings, stigma reduction and community empowerment, and expanding infection prevention and control measures—providing vital platforms to address both diseases and respond to future airborne pandemics.

- Continue demonstrating strong global leadership on nutrition. At the 2021 Tokyo Nutrition for Growth Summit, the United States announced a financial commitment of up to $11 billion over three years to combat global malnutrition. The United States also launched the Global Nutrition Coordination Plan, which will guide the collaborative work of seven U.S. government agencies engaged in scaling up proven approaches to better nutrition.

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On February 6, 2022, the State Department released a statement by Secretary Blinken on the observance of the International Day of Zero Tolerance for Female Genital Mutilation. The statement is excerpted below and available at https://www.state.gov/observance-of-the-international-day-of-zero-tolerance-for-female-genital-mutilation/.

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The United States joins the international community in observing the International Day of Zero Tolerance for Female Genital Mutilation and recommits to ending this grave human rights abuse. The United States recognizes that gender equality and girls' empowerment are not achievable without prioritizing gender-based violence (GBV) prevention and response. For millions of girls around the world, this means we must act to eliminate female genital mutilation/cutting (FGM/C).

While girls today are one-third less likely to be subjected to FGM/C compared to three decades ago, the United Nations estimates that progress needs to be at least 10 times faster to meet the global target of FGM/C elimination by 2030. Efforts to eliminate FGM/C are more pressing than ever as the COVID-19 pandemic has increased girls' risk of being subjected to the practice.

The United States is committed to preventing and responding to all forms of GBV, including FGM/C. The U.S. National Strategy on Gender Equity and Equality highlights the elimination of GBV as a core strategic priority and calls for efforts to advance legislation that outlaws FGM/C and ensures access to comprehensive services for survivors. This year, we will release the first-ever U.S. National Action Plan to End GBV and an update to the 2016 U.S. Strategy to Prevent and Respond to GBV Globally, which will drive our comprehensive response

to GBV at home and around the world. In the global context, the United States was proud to co-host the annual FGM/C Donor Working Group meeting with the UNFPA-UNICEF Joint Programme on the Elimination of FGM in December 2021. Domestically, we continue to implement the Strengthening the Opposition to Female Genital Mutilation Act (STOP FGM Act), signed into law in January 2021, which increased the statutory maximum term of imprisonment for violating the law from five to 10 years and ensures that domestic violations of FGM/C can be prosecuted in federal court.

The human rights of women and girls – including the right to live free from violence and to have the opportunity to realize their full potential – must be protected and upheld. The United States stands firm in its longstanding commitment to ending this egregious human rights abuse and in supporting survivors and those at-risk of FGM/C, both at home and around the world, to ensure that no girl or woman is ever left behind.

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f. Sexual and Gender-based Violence

On September 2, 2022, Ambassador Jeffrey DeLaurentis, Senior Advisor for Special Political Affairs, delivered the U.S. statement on the adoption of the first-ever UN General Assembly resolution on Survivors of Sexual Violence. The statement is excerpted below and available at https://usun.usmission.gov/statement-at-the-adoption-of-the-first-ever-un-general-assembly-resolution-on-survivors-of-sexual-violence/.

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This is a historic moment for the General Assembly as it marks the first time that survivors of sexual violence are recognized in a stand-alone resolution. In 2016, President Obama signed the Survivors' Bill of Rights. This law demonstrated America's commitment to promoting accountability for human rights abuses. This resolution is a reflection of the global commitment to this issue. We know we must do more to eliminate sexual violence across the globe, but this landmark resolution takes us one step closer to this goal.

We continue to support efforts to ensure that survivors of sexual and gender-based violence have access to survivor-centered justice. This includes the meaningful representation of women in all their diversity as criminal justice practitioners, the training of law enforcement and justice sector personnel in handling gender-based violence cases in a trauma-informed manner, appropriate survivor and witness protection and support, as well as access to health services, including access to sexual and reproductive health and rights.

In cosponsoring this resolution, the United States does not recognize any change to the current state of conventional or customary international law. The resolution does not create rights or obligations under international law, nor do we read it to imply that states must join or implement obligations under international instruments to which they are not a party.

The United States strongly supports the use of measures to prevent or protect individuals from acts of violence committed by non-State actors. The United States notes, however, that generally only States have obligations under international human rights law and, therefore, the capacity to commit violations of human rights. References in this resolution to human rights "obligations" in connection with non-State actors, or "violations" of human rights by such actors should not be understood to imply that such actors bear obligations under international human rights law.

We emphasize the need to do more to eliminate sexual violence wherever it occurs and expand services and deliver justice to survivors of all forms of sexual and gender-based violence, particularly those facing multiple and intersecting forms of discrimination.

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On November 10, 2022, Sofija Korac, Advisor to the Third Committee provided the U.S. explanation of vote on a Third Committee resolution on the Elimination of Violence Against Women and Girls. The U.S. statement is available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-the-elimination-of-violence-against-women-and-girls/ and excerpted below.

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The United States wishes to extend special thanks to France and The Netherlands for facilitating this critically important text on the elimination of violence against women and girls. This year's text's focus on the root causes of violence is particularly critical in an era where we have seen increased rates of sexual and gender-based violence, particularly for women and girls facing multiple and intersecting forms of discrimination. At its core, sexual and gender-based violence (SGBV) deprives an individual of the enjoyment of their full human rights and fundamental freedoms. It represents a fundamental imbalance in the power structure of our societies and has deleterious effects on international peace, stability, sustainable development, economic growth, health, safety, and security.

We applaud this resolution's focus on looking at women and girls in their diversity and those facing multiple and intersecting forms of discrimination. For example, women and girls with disabilities face disproportionately high levels of sexual and gender-based violence, including intimate partner violence, including by caregivers. To this end, we also welcome this resolution's references to SRHR, an important element and language that has been longstanding in this resolution and particularly important for women and girls who experience SGBV and IPV.

The United States, again, wants to sincerely thank both the delegations of France and The Netherlands for their transparent, inclusive and open process, which spanned over more than 20 hours of negotiations. The cofacilitators not only heard delegations in the room but engaged extensively in bilateral and small group discussions. To this end, the United States is deeply disappointed that the Russian Federation has called this resolution to a vote. Eliminating violence

against all women and girls should be an issue that unites, not divides, this committee. We, therefore, call on all delegations to vote "yes" on this resolution.

And finally, on the language as orally revised, the United States strongly supports the right to freedom of expression and thus believes that State measures taken in relation to this resolution should be consistent specifically with respect to their obligations regarding the right to freedom of expression under international human rights law. With regards to education, we refer you to our statement giving in the committee this morning.

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Sofija Korac also delivered the U.S. explanation of vote on nine amendments to a Third Committee resolution on the Elimination of Violence Against Women and Girls on November 10, 2022. The U.S. statement is below and is available at https://usun.usmission.gov/explanation-of-vote-on-nine-amendments-to-a-third-committee-resolution-on-the-elimination-of-violence-against-women-and-girls/.

> The United States wants to sincerely thank both the delegations of France and The Netherlands for their transparent, inclusive and open process, which spanned over more than 20 hours of negotiations. The co-facilitators not only heard delegations in the room but engaged extensively in bilateral and small group discussions. To this end, the United States is very disappointed that some delegations decided to table nine amendments on issues that were thoroughly discussed throughout the negotiations process — issues based largely on agreed language and elements that are critical to the core of this resolution. The facilitators tabled a final text that reflected a fair balance of views in the room while also advancing the text on issues that are relevant to addressing the root causes of eliminating violence against all women and girls. These amendments are not in the spirit of good faith and attempt to undermine an otherwise transparent process. The United States will be voting against all of these amendments and ask that all other delegations vote "no" as well.

On November 28, 2022, President Biden issued a "Memorandum on Promoting Accountability for Conflict-Related Sexual Violence," 87 Fed. Reg. 74,485 (Dec. 6, 2022). The Presidential Memorandum is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/28/memorandum-on-promoting-accountability-for-conflict-related-sexual-violence/. The White House released a statement available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/28/presidential-memorandum-to-promote-accountability-for-conflict-related-sexual-violence/.

On November 30, 2022, the State Department released a fact sheet highlighting the U.S. government's commitment to preventing and responding to conflict-related sexual violence. The fact sheet is included below and available at https://www.state.gov/highlighting-the-u-s-governments-commitment-to-preventing-and-responding-to-conflict-related-sexual-violence/.

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The United States is committed to preventing and responding to all forms of gender-based violence globally, including conflict-related sexual violence. The forthcoming update to the *U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally* recommits us to these efforts. After taking part in the United Kingdom's inaugural Global Summit to End Sexual Violence in Conflict in 2014, the United States will reinvigorate its global commitments through its participation in the Preventing Sexual Violence in Conflict Initiative (PSVI) International Conference, November 28-29, 2022, during the annual 16 Days of Activism Against Gender-Based Violence. This conference will showcase progress made over the last 10 years since the launch of PSVI and secure commitments to action from the international community. Jennifer Klein, Assistant to the President and Director of the White House Gender Policy Council, will deliver high-level remarks on behalf of the United States and highlight U.S. commitments to prevent and respond to conflict-related sexual violence, which include:

- Issuing a Presidential Memorandum on Promoting Accountability for Conflict-Related Sexual Violence, which will commit the U.S. government to fully exercising existing authorities to promote justice and accountability for acts of conflict-related sexual violence; devoting the necessary resources for reporting on conflict-related sexual violence incidents and training on gender-based violence issues; and broadening engagement with partners to encourage establishment and use of their own tools to promote justice and accountability.
- Prioritizing gender-based violence prevention and response, including through the expansion of the United States' flagship *Safe from the Start* initiative that ensures gender-based violence prevention and response is prioritized, integrated, and coordinated across humanitarian responses from the outset of crises, and continued investment in the Voices Against Violence Initiative, which provides access to services, protection, and justice to survivors of extreme forms of gender-based violence.
- Committing an additional $400,000 to the United State's annual contribution of $1.75 million to the Office of the UN Special Representative to the Secretary General (SRSG) on Sexual Violence in Conflict, supporting the SRSG's work to promote justice and accountability, foster national ownership and leadership for a sustainable, survivor-centered response, and address the root causes of conflict-related sexual violence.
- Supporting civil society efforts, through a $10 million investment, to investigate and document conflict-related sexual violence in line with the Murad Code in the pursuit of truth and justice for victims and survivors, and accountability for crimes involving violations and abuses of human rights and violations of international humanitarian law, and committing an additional $2 million for survivor-centered, trauma-informed approaches to fostering survivor resilience during and after conflict.
- Incorporating a gender perspective across U.S. foreign policy, including through implementation of the U.S. National Strategy on Gender Equity and Equality; U.S. Strategy on Women, Peace, and Security; U.S. Strategy to Prevent Conflict and Promote Stability; U.S. Strategy to Prevent and Respond to Gender-Based Violence Globally; and U.S. Strategy to Anticipate, Prevent and Respond to Atrocities. The forthcoming update to the *S. Strategy to Prevent and Respond to Gender-Based Violence*

Globally incorporates gender-based violence risks, prevention, and response as part of U.S. national security and human rights efforts to promote peace, security, and democracy around the world. The Department will release this Global GBV Strategy in December.

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g. Dobbs v. Jackson Women's Health Organization

On June 24, 2022, Ambassador Linda Thomas-Greenfield delivered a statement on the Supreme Court ruling in *Dobbs v. Jackson Women's Health Organization*, 597 U. S. ____, 142 S. Ct. 2228 (2022). The statement is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield-on-supreme-court-ruling-in-dobbs-v-jackson-womens-health-organization/ and included below.

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Today, the Supreme Court has taken away the established, fundamental, Constitutional right to abortion from millions of Americans. This is a cruel, dark, and dangerous decision.

Over the course of my lifetime, our country has sought to bend the long arc of history towards justice, especially when it comes to the rights of women and girls, in all their diversity. I have personally experienced how much it means to have your rights recognized. And I have learned that we must fight for our rights – that we can never take them for granted.

What makes this decision so heartbreaking is that Americans had a clear and unequivocal Constitutional right stripped away. Roe v. Wade not only protected the right to privacy, it also reaffirmed basic principles of gender equality – that all women have the power to control their own destinies and make intensely personal choices free from interference from politicians.

I have traveled the globe advocating for women's rights. Now, this decision renders my own country an outlier among developed nations in the world.

But as President Biden said, the fight is not over. Let me be clear: the Biden Administration remains committed to protecting and advancing the rights of women and girls around the world, including at the UN and in our foreign assistance. We will keep defending the rights of women and girls both at home and abroad. And we will keep supporting sexual and reproductive health and rights, providing assistance for global health, advancing gender equity and equality, and putting women's empowerment at the forefront of our agenda.

That is what President Biden has asked us to do, and that is what we will continue to do with vigor and pride.

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h. Gender-Based Online Harassment

On June 8, 2022, the Governments of Canada, Chile, and the United States released a joint statement regarding the Global Partnership for Action on Gender-Based Online Harassment and Abuse. The statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-governments-of-canada-chile-and-the-united-states-regarding-the-global-partnership-for-action-on-gender-based-online-harassment-and-abuse/ and excerpted below.

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Today, June 8, 2022, at the Summit of the Americas, the undersigned foreign ministers of new and existing Western Hemisphere country members of the Global Partnership for Action on Gender-Based Online Abuse and Harassment commit to jointly addressing technology-facilitated gender-based violence, with an initial mission to deliver concrete results by the end of 2022.

Reinforcing our shared commitments to advancing equal status of women and girls as a precondition of strengthening our democracies, the Governments of Canada and Chile will join the United States as members of the Global Partnership for Action on Gender-Based Online Harassment and Abuse. First announced at the 2021 President Biden's Leaders' Summit for Democracy, the Global Partnership brings together a core set of partner countries to jointly commit to a Year of Action—in consultation with government partners, international organizations, academics, civil society, and the private sector—to improve the response to technology-facilitated gender-based violence and promote effective prevention strategies. Current members of the Global Partnership for Action on Gender-Based Online Harassment and Abuse are Australia, Denmark, New Zealand, Republic of South Korea, Sweden, the UK, and the US.

Gender-based online harassment and abuse is a human rights abuse and serves as a barrier to the full and meaningful participation of women and girls, in all their diversity, in political, public and private life. Gender-based online harassment and abuse includes a wide range of acts that are amplified or enabled by social-media and technology platforms to control, attack, and silence women and girls, particularly those who have a disability, and/or identify as LGBTQI+ or as a member of a racial, ethnic, or religious minority. The Global Partnership welcomes Canada and Chile to join existing partners to build a sustainable, resilient, and equitable future by supporting strong and inclusive democracies.

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3. Sexual Orientation and Gender Identity

On April 28, 2022, the State Department released the first annual interagency report on the implementation of the Presidential Memorandum on Advancing the Human Rights of LGBTQI+ Persons Around the World. The report is available at

https://www.state.gov/lgbtqi-human-rights/. See also *Digest 2021* at 217-18 for a discussion of the Presidential Memorandum.

The State Department held a special briefing on April 28, 2022, with Jessica Stern, the U.S. Special Envoy to Advance the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer and Intersex ("LGBTQI+") Persons, unveiling the report. The briefing transcript is available at https://www.state.gov/briefing-with-special-envoy-to-advance-the-human-rights-of-lgbtqi-persons-jessica-stern-on-the-first-annual-interagency-report-on-implementation-of-the-presidential-memorandum-on-advancing-the-human/, and excerpted below.

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…[I]n his first weeks in office, President Biden signed a Presidential Memorandum entitled, quote, "Advancing the Human Rights of LGBTQI+ Persons Around the World." This memorandum makes clear that promoting and protecting the human rights of LGBTQI+ persons is a U.S. foreign policy priority.

And today, I'm really happy to talk to you about the first interagency report, outlining how the U.S. Government has worked collectively towards fulfilling the memorandum's goals.

This is a historic first for the United States. The report outlines how U.S. Government agencies engaged abroad are working to become more LGBTQI+-inclusive. And it shows that many individual actions across the U.S. Government, taken together as a whole, create institutional change and improve the daily lives of LGBTQI+ persons. The report highlights the progress that is possible when we actively reach out to other governments, multilateral institutions, and civil society.

This work is essential, because LGBTQI+ persons face violence, stigma, lack of access to basic services, and, in approximately 70 countries, criminalization of their status or behavior. And in many places, LGBTQI+ persons are targeted as a way of undermining democracy itself.

Through determined diplomacy and targeted foreign assistance, the United States is combating the criminalization of LGBTQI+ status or conduct, promoting protection of vulnerable LGBTQI+ refugees and asylum seekers, responding to human rights abuses committed against LGBTQI+ persons, strengthening relationships with like-minded governments, engaging international organizations on the human rights of LGBTQI+ persons, and working to rescind policies inconsistent with our nation's values.

So that being said, I want to highlight several successes, starting with the Department of State, which set a historic precedent as the first federal government agency to offer the X gender marker on an identity document by providing, as of April 11th, the X gender marker as an option on U.S. passport applications. The X signifies unspecified or another gender identity.

The Department of State also launched a flagship program as part of the Biden administration's Presidential Initiative for Democracy Renewal – the Global LGBTQI+ Inclusive Democracy and Empowerment Initiative, also known as GLIDE, that seeks to ensure democracies are inclusive of LGBTQI+ persons, representative of their communities and families, and responsive to their needs and concerns. The new initiative builds on the track record of success under the Global Equality Fund, which has provided over $100 million in

financial support to protect and promote the human rights of LGBTQI+ persons in more than 100 countries since its inception.

The Department of State also led the successful expansion of a United Nations resolution on elections to include sexual orientation and gender identity, becoming only the second resolution in the history of the General Assembly to do so and the very first via consensus.

From the Department of State, I want to move on to the Peace Corps, where approximately 60 percent of Peace Corps posts reported implementing specific LGBTQI+ equity practices within their operations, like hosting LGBTQI+ human rights organizations to inform in-country strategy and volunteer placement.

From there, we move on to the Department of Health and Human Services, which now ensures that its Notice of Funding Award Guidance includes clear guidance to support nondiscrimination.

And then on to USAID, which reinstated a reporting mechanism to track overall foreign assistance which advances LGBTQI+ human rights.

And next onto the Department of Treasury, which is pursuing how to win shareholder support to promote strengthened safeguard protections for LGBTQI+ persons and how to foster stronger multilateral development bank implementation of existing safeguard policies for LGBTQI+ persons.

And then my last example for you comes from the Department of Homeland Security, which issued revised guidance to recognize informal same-sex marriages for the purposes of obtaining refugee or asylee status, even if they are not officially recognized by officials in countries of origin.

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On June 15, 2022, President Biden issued new a new Executive Order 14075, entitled, "Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals." 87 Fed. Reg. 37,189 (Jun. 21, 2022). The White House released a fact sheet available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/. Section 3, excerpted below, of the order directs the Secretary of State, in collaboration with the Secretary of the Treasury, the Secretary of HHS, and the Administrator of the United States Agency for International Development, to develop an action plan to promote an end to the use of conversion therapy around the world.

> In developing the action plan, the Secretary of State shall consider the use of United States foreign assistance programs and the United States voice and vote in multilateral development banks and international development institutions of which the United States is a shareholder or donor to take appropriate steps to prevent the use of so-called conversion therapy, as well as to help ensure that United States foreign assistance programs do not use foreign assistance funds for so-called conversion therapy. To further critical data collection, the Secretary of State shall instruct all United States Embassies and Missions worldwide to

> submit additional information on the practice and incidence of so-called conversion therapy as part of the Country Reports on Human Rights Practices.

C. CHILDREN

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, as amended, the State Department's 2022 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, police, or other security forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit or use child soldiers," as defined in the CSPA. Those so identified in the 2022 report are the governments of Afghanistan, Burma, Central African Republic, the Democratic Republic of the Congo, Iran, Mali, Russia, Somalia, South Sudan, Syria, Venezuela, and Yemen.

The CSPA list is included in the TIP report, available at https://www.state.gov/reports/2022-trafficking-in-persons-report/. For additional discussion of the TIP report and related issues, see Chapter 3.B.4. Absent further action by the President, the foreign governments included on the CSPA list 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 3, 2022, 87 Fed. Reg. 61,943 (Oct. 12, 2022), 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 the Central African Republic and the Democratic Republic of the Congo; 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; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to 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 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 and, with respect to Russia, solely for direct commercial sales in connection with the International Space Station; and…

D. SELF-DETERMINATION

On March 25, 2022, Ambassador Michèle Taylor delivered a joint statement on the Vienna Declaration and Program of Action on behalf of over 70 countries at the 49th

regular session of the UN Human Rights Council. The statement is excerpted below and available at https://geneva.usmission.gov/2022/03/25/joint-statement-on-the-vienna-declaration-and-program-of-action/.

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When the Vienna Declaration and Programme of Action was adopted in 1993, it was a time of great change. As the world order that had guided our relations for half a century was undergoing profound transformation, the Members of the United Nations realized the importance of reaffirming their commitment to the purposes and principles reflected in the Universal Declaration of Human Rights, the Human Rights Covenants, the Geneva Conventions, the United Nations Charter, and the UN Declaration on Friendly Relations.

The UN Charter sets forth the purposes of the United Nations and the principles by which its Member States shall act. Article 2(4) states that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.

The UN Declaration on Friendly Relations, adopted by consensus at the General Assembly, expounds the principle of sovereign equality of States. This principle includes six elements: "States are judicially equal; each State enjoys the rights inherent in full sovereignty; each State has the duty to respect the personality of other States; the territorial integrity and political independence of the State are inviolable; each State has the right freely to choose and develop its political, social, economic and cultural systems; and each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

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On October 14, 2022, Ambassador Jeffrey DeLaurentis, Special Advisor for Special Political Affairs delivered remarks at the United Nations General Assembly Fourth Committee Joint General Debate on Decolonization Items. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-the-united-nations-general-assembly-fourth-committee-joint-general-debate-on-decolonization-items/.

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The 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. The United States recognizes the challenges American Samoa, Guam, and the U.S. Virgin Islands face due to their size, isolated locations, and limited natural resources. The United States also recognizes the impact on indigenous peoples and residents resulting from years of slavery, colonialism, and

wars followed by conflict and social adjustment, including during the period of U.S. administration and the development of internal self-government.

We acknowledge these adversities, and are committed to advancing shared progress. The United States federal government has close partnerships with local governments in American Samoa, Guam, and the U.S. Virgin Islands. The people of American Samoa, Guam, and the U.S. Virgin Island are an integral part of American society. Washington, in collaboration with the territorial governments, works collectively to promote political, social, and economic development in the Territories. The strong relationship between the Territories and the rest of the nation was demonstrated by the inclusion of the Territories in the same Federal pandemic relief, recovery, and Build Back Better Act programs provided to all 50 U.S. States. That innate sense of inclusion has also been consistent in the rollout and implementation of the Bipartisan Infrastructure Law and the Inflation Reduction Act, which will provide unprecedented resources for both infrastructure investment and climate change adaptation.

Under the Biden-Harris Administration's policies aimed at recognizing and seeking pathways to greater remediation of racial and ethnic injustice, the United States has acknowledged forthrightly the existence of past and present Federal actions and institutionalized practices that, in some cases and circumstances, have not been consistent with the protection of equal rights and opportunities for Americans in the Territories' diverse communities.

The U.S. recognizes its obligations under Article 73(e) of the Charter to promote self-determination for the peoples of American Samoa, Guam, and the U.S. Virgin Islands. Although they have the status of Non-Self-Governing Territories, the Territories are locally self-governing under Federal and local law establishing democratic political institutions and strong private sector led economies. They are governed by residents of their communities who are freely elected by their residents to establish their priorities, to decide how their resources are shared and expended, and to determine their path to ensure an honoring of their identity and to foster the relationships necessary to nurture it.

American Samoa, Guam, and the U.S. Virgin Islands also enjoy political representation at the Federal level. Elected representatives from each territory to the U.S. House of Representatives serve on several important committees where they participate in debates on national legislation essential to the progress and sustainability. The governors of these Territories are regularly invited to Senate and House committees of jurisdiction to report on the status of the Territories and to advocate for Federal policy changes and initiatives. The Interagency Group on Insular Areas cochaired by the Secretary of the Interior and the White House Director for Intergovernmental Affairs annually hosts the governors and U.S. representatives from each territory at a senior plenary session where they have the audience of representatives of the Administration and where they may register their priorities and concerns with the execution of Federal policies and initiatives.

The United States will continue to support American Samoa, Guam, and the U.S. Virgin Islands in their collective and individual endeavors to improve the quality of life of their peoples.

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On December 15, 2022, the Biden Administration released a statement of administration policy in support of the passage of H.R. 8393, Puerto Rico Status Act, "which would provide Puerto Ricans with a fair and binding democratic process to address the political status of Puerto Rico." The statement is available at

https://www.whitehouse.gov/wp-content/uploads/2022/12/HR8393-SAP.pdf and includes the following.

> For far too long, the residents of Puerto Rico—over 3 million U.S. citizens—have been deprived of the opportunity to determine their own political future and have not received the full rights and benefits of their citizenship because they reside in a U.S. territory. H.R. 8393 would take a historic step towards righting this wrong by establishing a process to ascertain the will of the voters of Puerto Rico regarding three constitutional options for non-territorial status: Statehood, Independence, and Sovereignty in Free Association with the United States.

E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Food Security

On May 19, 2022, Secretary Blinken delivered a statement at the UN Security Council on food insecurity and conflict. The statement is available at https://www.state.gov/secretary-antony-j-blinken-at-the-unsc-meeting-on-food-insecurity-and-conflict/ and excerpted below.

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We do meet at a moment of unprecedented global hunger, fueled, as we've heard, by climate change, by COVID-19, and made even worse by conflict.

Indeed, conflicts around the world are increasingly driving this crisis. According to the Food and Agriculture Organization and the World Food Program, the number of people affected by food insecurity due to conflict rose from about 100 million people in 2020, to 139 million or so people in 2021, to an estimated 161 million people in 2022. The World Bank believes that Russia's war in Ukraine could add another 40 million people to this total.

Yesterday, we had ministers from more than 30 countries come together here at the United Nations to address the drivers of – and advance solutions to – global food insecurity, including by meeting the urgent need for food, for fertilizer, humanitarian financing, investing more in the resilience of agriculture and vulnerable populations. For our part, the United States announced another $215 million in emergency food assistance to add to our $2.3 billion in humanitarian food aid since February. I want to thank all of the countries that stepped up, and I want to encourage others to join us.

In 2018, this council adopted Resolution 2417, which condemned the use of starvation of civilians as a tool of war, and noted that such a use may constitute a war crime.

Yet, in the years since that resolution, the problem has only grown worse. The Russian Federation's flagrant disregard of this resolution is just the latest example of a government using the hunger of civilians to try to advance its objectives. It's also another example of how Russia is violating the rules-based international order that is integral to the shared security and

prosperity of all UN member states – an order this council, and in particular its permanent members, have a responsibility to uphold, to defend, and to strengthen.

In this council, a few members have repeatedly used language lamenting the suffering caused by this war and calling on "all sides" to bring it to a stop. Let's not use diplomatic speak to obfuscate what are simple facts: The decision to wage this war is the Kremlin's, and the Kremlin's alone. If Russia stopped fighting tomorrow, the war would end. If Ukraine stopped fighting, there would be no more Ukraine.

Russia's unprovoked war of aggression has halted maritime trade in large swaths of the Black Sea. It's made the region unsafe for navigation, trapping Ukrainian agricultural exports, as we've heard, jeopardizing global food supplies.

Since February 24th, Russian naval operations have demonstrated the intent to control access to the northwestern Black Sea, the Sea of Azov, to block Ukrainian ports. Our assessment is that this is a deliberate effort, evidenced through a series of actions taken by the Russian Government.

On the first day of the invasion, Russia issued an official warning to all members that significant areas of the Black Sea were closed to commercial traffic, essentially shutting them down to shipping.

Since then, the Russian military has repeatedly blocked safe passage to and from Ukraine by closing the Kerch Strait, tightening its control over the Sea of Azov, stationing warships off Ukrainian ports. And Russia has struck Ukrainian ports multiple times.

These and other actions have effectively cut off all commercial naval traffic in and around the port of Odessa.

The Russian Federation has mirrored these attacks on land, repeatedly attacking Ukrainian civilian infrastructure that is critical to the production and transport of food, such as water, power, rail lines; destroying Ukrainian grain storage facilities; stealing stocks of food in the parts of Ukraine that it illegally occupies.

The consequences of these actions have been devastating: The food supply for millions of Ukrainians – and millions more around the world – has quite literally been held hostage by the Russian military.

The World Food Program recently estimated that a third of all Ukrainians are facing food insecurity, with children, pregnant women, the elderly at heightened risk of malnutrition.

In besieged cities like Mariupol, Russian forces have repeatedly blocked the delivery of food and other lifesaving aid to tens of thousands of trapped civilians. A mother who recently escaped from the city talked about the agony of watching her six-year-old daughter suffer the daily pang of hunger and being powerless to do anything about it. "I just sobbed," she said, "screaming into a pillow when no one could see." She and her children eventually escaped. Countless thousands of others are still trapped.

The Russian Government seems to believe that using food as a weapon will help accomplish what its invasion has not: to break the spirit of the Ukrainian people.

Still, Ukrainians are going to great lengths to feed their own people and to feed the world. Farmers in Ukraine continue to risk their lives to produce wheat and other crops. Many have returned to fields that are filled with mines. They wear bulletproof vests and helmets as they harvest.

And as we've heard already – powerfully – this morning, it's not only Ukrainians who are suffering.

As a result of the Russian Government's actions, some 20 million tons of grain sit unused in Ukrainian silos as global food supplies dwindle, prices skyrocket, causing more around the world to experience food insecurity.

This includes countries already under enormous duress – the secretary-general alluded to a number of them – like Lebanon, which usually gets 80 percent of its wheat imports from Ukraine; Somalia, already on the brink of a famine even before Russian tanks rolled into Ukraine and which must now deal with rising wheat and flour costs.

The Russian Federation claims falsely that the international community's sanctions are to blame for worsening the global food crisis.

Sanctions aren't blocking Black Sea ports, trapping ships filled with food, and destroying Ukrainian roads and railways; Russia is.

Sanctions are not emptying Ukrainian grain silos and stealing Ukrainian farm equipment; Russia is.

Sanctions aren't preventing Russia from exporting food and fertilizer; the sanctions imposed by the United States and many other countries deliberately include carveouts for food, for fertilizer, and seeds from Russia, and we're working with countries every day to ensure that they understand that sanctions do not prevent the flow of these items.

No, the decision to weaponize food is Moscow's and Moscow's alone.

Don't take my word for it. Even Dmitry Medvedev, the deputy chairman of Russia's security council, former Russian president, recently said that Russia's agricultural products were, and I quote, its "quiet weapon," end quote. He then added, and I quote, "Quiet but ominous," end quote.

This council has a unique responsibility to address the current crisis, which constitutes a serious threat to international peace and security.

That starts by strongly and unequivocally calling the Kremlin out for its atrocities in Ukraine, and for worsening the global food crisis through an unprovoked war of aggression.

More concretely, members of the council – and, for that matter, every UN member state – should press Russia to stop actions that are making the food crisis in Ukraine and around the globe worse than it already was.

Stop blockading the ports in the Black Sea and the Sea of Azov.

Allow for the free flow of ships and trains and trucks carrying food out of Ukraine.

Stop preventing food and other lifesaving supplies from reaching civilians in besieged Ukrainian towns and cities.

Stop threatening to withhold food and fertilizer exports from countries that criticize your war of aggression.

All of this is essential to save lives in Ukraine and to save lives around the world.

The Russian Federation is not the only government or organization to exploit food insecurity for its own cynical ends.

In South Sudan, armed groups and warring parties have for years blocked humanitarian assistance to civilians. Experts estimate that up to 7 million people will face crisis levels of food insecurity in the country in this year.

In Syria, with the Kremlin's ongoing support, the Assad regime has besieged communities like Eastern Ghouta, and caused the widespread starvation of its own people. It also routinely obstructs the cross-border delivery of lifesaving humanitarian aid, robbing and even attacking United Nations convoys, as we've discussed repeatedly in this council.

This council must consistently call out governments and armed groups when they use similar tactics, like attacking the means of food production and distribution, blocking humanitarian aid from reaching those in need, besieging civilian populations.

The United Nations was created with the aim of advancing human rights and preventing atrocities, including, including the atrocity of using starvation as a weapon against civilians, like during the Siege of Leningrad by the Nazis, during which an estimated 1 million Russians lost their lives, including many who starved to death. Among the victims was the 1-year-old brother of President Putin; or during the Holodomor, during which millions of Ukrainians died of hunger due to a Soviet campaign of forced collectivization and terror.

It is on us to prevent this history from repeating itself, to make sure that the past is not prologue. It's simple: The lives of millions of people depend upon it.

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On September 21, 2022, the State Department announced in a media note, available at https://www.state.gov/the-united-states-publishes-food-security-action-report-in-response-to-global-food-insecurity/, the release of a "Food Security Action Report." The report is available at https://www.state.gov/food-security-action-report/. The media note includes the following:

> Today, on the margins of 77th meeting of the UN General Assembly, the White House announced **the United States' latest support** to strengthen the international response to increased global food insecurity caused by climate change, the supply chain disruptions caused by the pandemic, and armed conflicts, including Russia's unprovoked war against Ukraine.
>
> Alongside UN members endorsing the Global Food Security Declaration and the May 2022 **Global Food Security Roadmap**, the United States calls on all governments, non-governmental organizations, and other stakeholders to continue to identify concrete financial, in-kind, or policy contributions that enhance global food security.
>
> Today, in support of these efforts, the United States released a "Food Security Action Report," which details actions that the U.S. government has taken since February in support of the actions specified within the Roadmap. The United States encourages the international community to join in taking stock of the 2022 global food security response. By voluntarily self-reporting progress in support of the seven actions called for in the Roadmap, the international community may identify additional needs for cooperation on international food security. By working together, we can increase global food security during this crisis.

On November 10, 2022, U.S. Counselor for Economic and Social Affairs Edward Heartney provided the U.S. explanation of position on a resolution on the right to food. The statement is excerpted below and is available at https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-right-to-food/.

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This resolution rightfully acknowledges the hardships millions are facing and calls on States to support the emergency humanitarian appeals of the UN. Although we will not block consensus, we are disappointed that the resolution contains problematic language that is not focused on human rights. As a result, we are dissociating from preambular paragraph 13 and operative paragraph 24.

With regard to preambular paragraph 13, sanctions are an important tool for responding to malign activity and addressing threats to peace and security. In cases where the United States has applied sanctions, we have done so with specific objectives in mind. They are a legitimate way to achieve foreign policy, national security, and other national and international objectives; the United States is not alone in this view or in this practice.

With regard to references to armed conflicts, it must be emphasized that Russia's unjustified and unprovoked war in Ukraine is disrupting global food and fertilizer markets, driving cost increases, and pushed approximately 70 million people into acute food insecurity this year.

Trade language negotiated or adopted by the General Assembly and the Economic and Social Council has no relevance for U.S. trade policy, obligations or commitments, or for the agenda at the World Trade Organization, including discussions or negotiations in that forum. This includes calls to adopt approaches that may undermine incentives for innovation, such as technology transfer, that is not both voluntary and on mutually agreed terms.

We are concerned with the concept of "food sovereignty" in operative paragraph 24; it could support unjustified restrictive import or export measures which increase market volatility and threaten food security, sustainability, and income growth. We cannot ignore varying local contexts and the vital role global trade plays in promoting food security. Improved access to local, regional, and global markets helps ensure food flows to people who need it most.

The United States does not concur with any reading of this resolution or related documents that suggest that States have particular extraterritorial obligations arising from a right to food. The U.S. position with respect to the ICESCR is addressed further in our general statement, to be posted online at the conclusion of this session. So, these are very important issues. We are supporting this resolution, but we do have these reservations.

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On November 14, 2022, Secretary Blinken, the High Representative of the European Union Josep Borrell, and the Foreign Secretary of the United Kingdom James Cleverly released a joint statement on global food security. The State Department media note including the joint statement is available at https://www.state.gov/joint-statement-on-global-food-security/. The text follows:

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The world faces acute food and nutrition challenges. Conflict, climate change and the lasting impacts of COVID-19 are having devastating effects on local and global food systems and the people who rely on them. Russia's unprovoked aggression against Ukraine has significantly worsened these challenges and vulnerabilities.

The European Union, the United States of America and the United Kingdom, alongside other G7 members and our international partners, are at the forefront of global efforts to address food insecurity that is affecting millions of vulnerable people in developing countries, whilst also driving up living costs in our own countries.

We have always been clear that the target of our sanctions is Russia's war machine and not the food or fertiliser sectors. To that end, we have provided clarity to industry and partners. This includes the UK's publication of a General Licence as well as the U.S. General Licence 6B ; and updated and detailed EU guidance . These provisions make clear that banks, insurers, shippers, and other actors can continue to bring Russian food and fertilizer to the world.

We call on our global partners, and on the actors, industries and services involved in agricultural trade, to take note of these provisions; to act in accordance with them; to bring Ukrainian and Russian food and fertilizer to meet acute demand; and to continue to advance the accessibility of food to all.

We reiterate our call on all countries to demonstrate their support for the Black Sea Grain Initiative. We call on the parties to the Initiative to extend its term and scale up its operations to meet the evident demand. And we reiterate our support for other efforts by the United Nations to facilitate access to food and fertiliser in global markets.

Overall, we are united in our commitment and resolve to address food insecurity. We are working to meet humanitarian needs, keep food and fertilisers moving, provide emergency funding, improve resilience, and to accelerate the transition to sustainable food systems to withstand future challenges. We are taking action alongside partners to mobilise the international community, including through the UN-led Global Crisis Response Group (GCRG) on Food, Energy and Finance, the G7 Global Alliance for Food Security (GAFS), the Roadmap – Call to Action and the EU-led Solidarity Lanes.

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On November 23, 2022, Jason Lawrence, the U.S. Advisor to the Second Committee, provided a statement on a UN General Assembly Second Committee resolution on "Agriculture Development, Food Security, and Nutrition," which is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-agriculture-development-food-security-and-nutrition/.

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The United States is pleased to join consensus on this resolution.

The world is facing a food insecurity crisis, and our priorities are clear: We must get emergency food aid to the people who need it, and we must strengthen global food systems. At the same time, we must also help countries develop the capacity to produce their own food so we can prevent new crises and build resilience to further shocks. Since February, the United States has provided more than $10.5 billion to combat hunger and strengthen food security worldwide. I'm proud to say that we're consistently the largest donor to the World Food Program, providing more than half of all contributions. But the current crisis is one that no individual country or even group of countries can solve alone.

At the outset of 2022, conflicts, COVID-19, and the effects of the climate crisis had already driven more than 190 million people into acute food insecurity. According to the World Food Program, President Putin's brutal war of aggression in Ukraine may add an additional 70 million people to this statistic. Russia's actions, which include weaponizing food in its war against Ukraine and dramatically reducing grain and food production and exports, have exacerbated these trends and resulted in a dramatic additional rise in global food insecurity. We are disappointed that this resolution does not recognize Russia as one of the major drivers of global food insecurity, decreased agriculture production, and declines in nutrition. We once again demand Russia cease hostilities, withdraw its troops from the entire territory of Ukraine and respect the sovereignty and territorial integrity of Ukraine within its internationally recognized borders. This action is essential to achieving the SDGs and ending global hunger.

We also would like to underscore our position that trade language, negotiated or adopted by the General Assembly and the Economic and Social Council or under their auspices, has no relevance for U.S. trade policy, for our trade obligations or commitments, or for the agenda at the World Trade Organization, including discussions or negotiations in that forum. While the UN and WTO share common interests, they have different roles, rules, and memberships. Similarly, this includes calls to adopt approaches that may undermine incentives for innovation, such as technology transfer that is not both voluntary and on mutually agreed terms.

We refer you to our general statement, delivered on November 21, which further addresses our position regarding the characterizations of trade, the WTO, and the transfer of technology, and our joint explanation of position which addresses the Russian Federation's war on Ukraine and its impact on agriculture development, food security, and nutrition.

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2. HRC Resolution on Inequalities in COVID-19 Recovery

On April 1, 2022, Ambassador Michèle Taylor provided the explanation of vote at HRC 49 on Promoting and Protecting Economic, Social and Cultural Rights Within the Context of Addressing Inequalities in the Recovery from the COVID-19 Pandemic. The statement is excerpted below and available at https://geneva.usmission.gov/2022/04/01/explanation-of-vote-inequalities-covid-19-recovery-hrc-49/.

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Mr. President, the United States engaged constructively on this resolution to support and achieve consensus. Unfortunately, our core concerns remain.

Among these are profound questions regarding the meaning of "inequalities," a term that appears in the resolution 20 times. The Core Group failed to define "inequalities" throughout the seven informal negotiation sessions and numerous bilateral consultations. Equality is relevant in the human rights context insofar as it is addressed in human rights treaties such as the Convention on the Elimination of All Forms of Racial Discrimination, and it would not have been difficult to make that clear in the text. Unfortunately, we believe the absence of definition is an attempt to redefine our shared understanding of human rights law so that states are held to different standards for upholding their human rights obligations dependent on their levels of economic development. This notion is antithetical to the foundational principle of universal human rights.

At its core, this resolution is also an attempt to interfere with the independence and operational parameters of the Office of the High Commissioner for Human Rights. OHCHR is charged with promoting and protecting the effective enjoyment by all individuals of all civil, cultural, economic, political, and social rights, but this resolution seeks to divert OHCHR's focus from the promotion of human rights to addressing economic differences between states. The series of requirements this resolution seeks to establish does not empower OHCHR to better address economic, social, and cultural rights within the Council. Instead, the resolution adds several layers of bureaucracy that undermine the Office's autonomy and independence.

To be clear, the concept of equality is within the High Commissioner's mandate as it is defined in international human rights law by human rights treaties. We are confident that OHCHR will understand that the inequalities addressed in this resolution are those addressed in relevant human rights treaties – not a broader notion of addressing economic differences between states that would go beyond the Office's mandate.

As U.S. Secretary of State Blinken emphasized during High Level Week, the United States is committed to better addressing Economic, Social, and Cultural rights in the Human Rights Council. Our Administration is equally committed to helping the world recover from COVID-19, having contributed over half a billion vaccine donations – more than any other country. Unfortunately, this resolution's primary focus is neither on ESC rights nor Covid recovery, and it is regrettable that this resolution fell short of advancing both issues in a transparent way.

For these reasons, the United States is calling a vote on this resolution. We will vote no and urge fellow members to join us in doing so.

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F. LABOR

On February 10, 2022, the State Department issued a media note welcoming the release of a report by the International Labour Organization ("ILO") relating to the practices of employment discrimination against racial and religious minorities in Xinjiang. The media

note is excerpted below and available at https://www.state.gov/on-the-release-of-the-international-labor-organizations-committee-of-experts-report/.

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The Department of State welcomes the issuance today of a report by a committee of the International Labor Organization (ILO) calling on the government of the People's Republic of China (PRC) to review, repeal, and revise its laws and practices of employment discrimination against racial and religious minorities in Xinjiang.

This report, produced by the ILO's Committee of Experts on the Application of Conventions and Recommendations, expresses deep concern regarding the PRC's policies and calls on the PRC government to take specific steps toward eliminating racial and religious discrimination in employment and occupation, and to amend national and regional policies utilizing vocational training and rehabilitation centers for "political re-education" based on administrative detention.

China joined the ILO in 1919 as one of the founding member states. The United States calls on the PRC to take the steps requested by the Committee of Experts. We also reiterate our call for the PRC to end its genocide and crimes against humanity perpetrated against the predominantly Muslim Uyghurs and members of other ethnic and religious minority groups in Xinjiang, as well as its use of these groups for forced labor in Xinjiang and beyond. The State Department is committed to working with our international partners and allies to end forced labor and strengthen international action against the ongoing genocide and crimes against humanity in Xinjiang.

The Committee's report can be found here – **https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_836653.pdf**.

For more information on forced labor in the PRC's Xinjiang Region, please see the linked July 2021 Fact Sheet on the topic: **https://www.state.gov/forced-labor-in-chinas-xinjiang-region/**

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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/.

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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 June 21, 2022, Secretary Blinken released a statement marking the date that U.S. Customs and Border Protection ("CBP") would begin the implementation of provisions of the Uyghur Forced Labor Prevention Act ("UFLPA") prohibiting imports made by forced labor into the United States. The UFLPA was signed into law by President Biden on December 23, 2021. Pub. L. No. 117-78, 135 Stat. 1525 (2021). See *Digest 2021* at 225-26. Secretary Blinken's press statement is available at https://www.state.gov/implementation-of-the-uyghur-forced-labor-prevention-act/ and includes the following:

> The State Department is committed to working with Congress and our interagency partners to continue combating forced labor in Xinjiang and strengthen international coordination against this egregious violation of human rights. Addressing forced labor and other human rights abuses in the People's Republic of China (PRC) and around the world is a priority for President Biden and this Administration. We have taken concrete measures to promote accountability in Xinjiang, including visa restrictions, financial sanctions under Global Magnitsky, export controls, Withhold Release Orders and import restrictions, as well as the release of a multi-agency business advisory on Xinjiang to help U.S. companies avoid commerce that facilitates or benefits from human rights abuses, including forced labor. Together with our interagency partners, we will continue to engage companies to remind them of U.S. legal obligations

which prohibit importing goods to the United States that are made with forced labor.

We are rallying our allies and partners to make global supply chains free from the use of forced labor, to speak out against atrocities in Xinjiang, and to join us in calling on the government of the PRC to immediately end atrocities and human rights abuses, including forced labor.

For more information on implementation of the Act, see: **https://www.dhs.gov/uflpa**.

On September 15, 2022, Ambassador Michèle Taylor delivered the U.S. statement on the report of the Special Rapporteur on contemporary forms of slavery at the 51st session of the Human Rights Council. The statement is available at https://geneva.usmission.gov/2022/09/15/interactive-dialogue-on-the-report-of-the-special-rapporteur-on-contemporary-forms-of-slavery-hrc51/ and includes the following:

Special Rapporteur Obokata, thank you for highlighting the vulnerabilities of persons belonging to minority communities. We also appreciate your focus on the fact that slavery and human trafficking disproportionately affect women and girls in all their diversity.

The United States is committed to cooperating with governments, the private sector, and civil society to build a more effective strategy to tackle human trafficking at home and abroad.

Governments, including my own, must foster inclusion in order to address the systemic discrimination and racism that make justice systems inaccessible to trafficking victims who belong to minority and marginalized communities.

We must also work with civil society and the private sector to proactively identify victims and survivors and provide them with robust protection and services.

The international community must work together to combat all contemporary forms of slavery. The United States is particularly concerned about the appalling abuses documented in the High Commissioner's recent independent report on the human rights situation in Xinjiang, including state-sponsored forced labor of Muslim Uyghurs and members of other religious and ethnic minorities. We must hold accountable those states that violate or abuse the human rights of members of ethnic, religious, and linguistic minority groups.

For discussion of the Xinjiang-related visa restrictions, see Chapter 16.

G. TORTURE AND EXTRAJUDICIAL KILLING

1. International Day in Support of Victims of Torture

On June 26, 2022, Secretary Blinken issued a statement in support of the International Day in Support of Victims of Torture. That statement is available at https://www.state.gov/international-day-in-support-of-victims-of-torture-2/ and includes the following:

> Today, we solemnly observe the International Day in Support of Victims of Torture, and in so doing, the United States reaffirms our condemnation of torture no matter where or by whom it is perpetrated. Torture is not only an unacceptable violation of human rights; it is a crime under international and U.S. law. As we condemn this horrific crime, we also affirm the humanity of torture survivors around the world and note our respect for their dignity.
>
> The United States is one of 173 states that are parties to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which entered into force in 1987. Yet despite this near universal condemnation, torture and other violations of human rights are still perpetrated around the world, often against political opponents, members of marginalized populations, prisoners of war and other detainees, human rights defenders, and those who voice opinions that certain governments do not like. So long as any person anywhere suffers from torture, our pursuit of accountability will continue, as will our support for torture survivors.

2. Execution of Burma's Pro-Democracy Leaders

On July 25, 2022, Secretary Blinken released a statement condemning the execution of pro-democracy activists and elected leaders Ko Jimmy, Phyo Zeya Thaw, Hla Myo Aung, and Aung Thura Zaw. The press statement is available at https://www.state.gov/execution-of-burmas-pro-democracy-leaders/. The statement follows.

> The United States condemns in the strongest terms the Burma military regime's executions of pro-democracy activists and elected leaders Ko Jimmy, Phyo Zeya Thaw, Hla Myo Aung, and Aung Thura Zaw for the exercise of their fundamental freedoms. These reprehensible acts of violence further exemplify the regime's complete disregard for human rights and the rule of law. Since the February 2021 coup, the regime has perpetuated violence against its own people, killing more than 2,100, displacing more than 700,000, and detaining thousands of innocent people, including members of civil society and journalists.
>
> The regime's sham trials and these executions are blatant attempts to extinguish democracy; these actions will never suppress the spirit of the brave people of Burma. The United States joins the people of Burma in their pursuit of

freedom and democracy and calls on the regime to respect the democratic aspirations of the people who have shown they do not want to live one more day under the tyranny of military rule.

On July 28, 2022, 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 issued a joint statement condemning the executions of Ko Jimmy, Phyo Zeya Thaw, Hla Myo Aung, and Aung Thura Zaw by the Myanmar military junta. The statement is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-the-myanmar-military-juntas-executions/. The 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, strongly condemn the four executions by the military junta in Myanmar.

These executions, the first in Myanmar in over thirty years, and the absence of fair trials show the junta's contempt for the unwavering democratic aspirations of the people of Myanmar. Those executed were prominent members of the democratic opposition – democracy activist Kyaw Min Yu (known as "Ko Jimmy"), former Member of Parliament Phyo Zeyar Thaw, as well as Aung Thura Zaw and Hla Myo Aung. Our thoughts are with the families of the four victims and with those of the many others who have been killed, arrested or tortured in Myanmar since the military illegitimately took over power in February 2021.

We continue to condemn in the strongest terms the military coup in Myanmar and express deep concern about the political, economic, social, humanitarian and human rights situation in the country.

We call on the military regime to immediately end the use of violence, to refrain from further arbitrary executions, to free all political prisoners and those arbitrarily detained and to return the country to a democratic path. We continue to support efforts by ASEAN, and call for the military to meaningfully implement all aspects of the ASEAN Five Point Consensus. This includes an inclusive process of dialogue with a broad range of democratic opposition. We also continue to support efforts by the United Nations, and encourage effective coordination between the ASEAN Special Envoy and the Special Envoy of the United Nations Secretary-General on Myanmar.

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3. Death of Mahsa Amini in Custody of Iran's Morality Police

At a September 23, 2022 White House press briefing, Press Secretary Karine Jean-Pierre providing the following remarks on the death of Mahsa Amini while in the custody of Iran's morality police. The press briefing is available at

https://www.whitehouse.gov/briefing-room/press-briefings/2022/09/23/press-briefing-by-press-secretary-karine-jean-pierre-september-23-2022/.

> MS. JEAN-PIERRE: So, Mahsa Amini's death after injuries, as you all know, sustained while in police custody after — for wearing an "improper" hijab is an appalling and egregious affront to human rights. Our thoughts are with Mahsa's family and loved ones.
>
> And as President Biden clearly stated at UNGA — he spoke to this: "We need…" — and this is quote — "We need…" — "We stand with the brave citizens and brave women of Iran who right now are demonstrating to secure their basic rights." End quote.
>
> Women in Iran should have the right to wear what they want, free from violence or harassment. Iran must end its use of violence against women for exercising their fundamental freedoms.
>
> There must be accountability for Mahsa's death. Again, you mentioned the sanctions; that was announced by the Department of Treasury just yesterday. And Treasury also designated seven senior Iranian security officials as well, including Iran's Minister of Intelligence, for their roles in the suppression and killing of peaceful protesters since 2019.
>
> And so, we will continue to use all available tools at our disposal to make sure that we pursue accountability.

4. Resolution on Extrajudicial, Summary, or Arbitrary Executions

On November 11, 2022, Sofija Korac, advisor to the Third Committee, delivered the U.S. explanation of vote on Extrajudicial, Summary, or Arbitrary Executions in the UN Third Committee. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-extrajudicial-summary-or-arbitrary-executions/.

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The United States extends its thanks to Finland, on behalf of the Nordic countries, for facilitating this important text on extrajudicial, summary, or arbitrary executions and especially for the many hours they spent both inside and outside the negotiating room.

In particular, we welcome the strengthening or retention of references to linkages between arbitrary deprivation of life and systemic discrimination, such as gender-based and racial discrimination, and the disproportionate targeting of Indigenous women and girls; women and girls with disabilities; and those targeted for their sexual orientation or gender identity. We also welcome the language on new technologies and the link to persons with disabilities.

While the resolution addresses a number of important issues, the United States continues to have concerns regarding the language related to the use of force and the application of

international humanitarian law in addition to other legal concerns. Further clarification of those concerns will be articulated in the U.S. General Statement, available on the website of the U.S. Mission to the UN and submitted for the record to the UN.

The United States regrets that this resolution has once again been put to a vote. This is an issue that should enjoy consensus in this committee. The United States will once again vote "yes" on this resolution and encourages all others to do so.

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Also on November 11, 2022, Sofija Korac, Advisor to the Third Committee delivered the U.S. explanation of vote on an amendment to a Third Committee resolution on Extrajudicial, Summary, or Arbitrary Executions. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-an-amendment-to-a-third-committee-resolution-on-extrajudicial-summary-or-arbitrary-executions/.

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The United States wants to specially thank Finland for conducting a thorough and transparent process, including spending many hours not just in the negotiation room but also engaging delegations bilaterally to address their concerns. We therefore regret the last-minute amendment presented by Egypt, particularly in light of the very hard work by the facilitator. The United States believes no one should be subjected to extrajudicial, summary, or arbitrary executions. As the paragraph in OP7b states, "Killings of all persons must be investigated, including because of their sexual orientation or gender identity. As has been reported, individuals belonging to the listed minorities in OP7b experience widespread intimidation, harassment, and violence, including killings, including on the basis of sexual orientation and gender identity. Deleting this reference is deleting longstanding agreed language for more than 10 years, language that also enjoys consensus in other resolutions in this committee. For a body charged with protecting and promoting human rights, removing one group from this listing would be deeply troubling. For these reasons, the United States will once again vote "no" on this amendment and will urge others to do the same.

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H. BUSINESS AND HUMAN RIGHTS

On October 24, 2022, the United States issued a general statement at the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which was posted to the U.S. Mission Geneva website at https://geneva.usmission.gov/2022/11/18/us-general-statement-from-oct-24-oeigwg/ and excerpted below.

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This year marks the second year that the United States is participating in these Working Group meetings. While our concerns with the draft text and process around its development remain, we affirm that we share the convictions of this Group that more must be done to build upon the UN Guiding Principles on Business and Human Rights (UNGPs), including in relation to critical areas such as climate change and increased support and protections for human rights defenders.

The UNGPs created a common understanding of the duties of governments and responsibilities of businesses through the three-pillar framework. They have led to over 50 States having developed or being in the process of developing National Action Plans, including our own, which we are currently updating, and many have adopted laws to strengthen accountability, including on due diligence and supply chain transparency. Meanwhile, businesses are increasingly integrating human rights considerations into their policies and practices. Governments and businesses have also made progress in strengthening access to remedy, which is a key concern of the treaty process, for example, by developing operational-level grievance mechanisms and remediation processes.

Despite these achievements, serious issues remain. Just last month, international NGO Global Witness in its annual report recorded that in 2021 alone, 200 land and environmental defenders were killed; of these, a significant proportion were engaging on issues related to business activity. There is a need for a stronger international structure to protect individuals like these who do such important work and to hold those who harm them to account. We understand the motivation behind members of this Group to create a legally binding instrument that will address challenges such as these but continue to believe that a less prescriptive approach that obtains the buy-in of relevant governments and other key stakeholders is the better option. We want to work with the Group to identify a collaborative path forward to advance business and human rights.

We appreciate the Chair circulating new proposals to find constructive paths forward. As we are still studying them, we may not be in a position to engage on all aspects of the proposals in great depth. That said, we appreciate that they consider, more than prior drafts, the diversity of legal systems and appear to provide increased flexibility for implementation. This is a promising step in the right direction of developing a workable text. However, we note with concern that they remain prescriptive and retain elements such as overly broad jurisdictional provisions, unclear liability provisions, and potential criminalization of an ill-defined range of human rights abuses that will make it difficult for many States to sign on to or implement the treaty.

The United States has not been alone in our concerns regarding the draft treaty. Many stakeholders, including a considerable percentage of States that are home to the world's largest transnational corporations, have pursued only limited participation in these negotiations. Yet, we appreciate Ecuador's recent efforts to incorporate a broader range of viewpoints in the treaty process.

As underscored in a Joint Statement led by the United States and signed by 49 states in June 2021, "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." We are concerned that an important opportunity to advance business and human rights will be lost if the instrument produced by this Group does not follow such an approach.

For an instrument to gain the broad acceptance needed to be truly impactful, it must incorporate the viewpoints of a diverse group of States, including States that domicile significant numbers of transnational corporations, civil society, and businesses. For this reason, we continue to believe that a less prescriptive approach, more akin to a framework agreement, that builds upon the UNGPs and is developed in collaboration with, and ultimately reflect principles broadly supported by diverse stakeholders provides the best way forward. More prescriptive elements could be addressed through optional protocols to such an instrument.

We wish to reassure all parties present that we are here this week to engage constructively and to negotiate in good faith, with the shared aim of increasing corporate accountability and access to remedy for human rights abuses. We look forward to negotiations this week and engaging across stakeholder groups to discuss a way forward on this effort, as an inclusive, multi-stakeholder approach is imperative to further advancing the UNGPs. Thank you.

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The United States delivered interventions during the State-led negotiations of the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. A compilation of statements delivered by States, including the U.S. interventions, is available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/igwg-8th-compilation-state-statements.pdf.

I. INDIGENOUS ISSUES

On May 16, 2022, the Trilateral Working Group on violence against indigenous women and girls (the governments of Canada, Mexico, and the United States) released a joint statement on following the 21st session of the UN Permanent Forum for Indigenous Issues, which was held from April 25th to May 6th, 2022. The statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-trilateral-working-group-on-violence-against-indigenous-women-and-girls-following-the-21st-session-of-un-permanent-forum-for-indigenous-issues/ and excerpted below.

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We recognize that Indigenous women, young women, and girls in all their diversity, and two-spirit and gender-diverse individuals face disproportionately high rates of gender-based violence. This violence is a multidimensional phenomenon that is predicated on histories of abuse and perpetuated by ongoing discrimination and racism, including multiple and intersecting forms of discrimination. The violence includes, but is not limited to, murders, sexual assault, trafficking,

and intimate-partner violence. Too often, the disappearance or murder of Indigenous women, young women, and girls in all their diversity and two-spirit and gender-diverse individuals is not met with swift, effective, and culturally relevant action, including the lack of processes in Indigenous languages, by government institutions to investigate and resolve these cases. Much work needs to be done to enhance intervention, access to justice, and to strengthen prevention efforts.

Statistics Canada indicates that 56 percent of Indigenous women in Canada have experienced physical assault while 46 percent have experienced sexual assault. According to the latest National Survey on the Dynamics of Household Relationships (ENDIREH), carried out in 2016 by the National Institute of Geography and Statistics in Mexico, it is estimated that 59 percent of Indigenous women have experienced some type of violence (emotional, physical, sexual, economic, patrimonial or labor discrimination) throughout their lives. According to the U.S. National Institute of Justice, 84 percent of Native American women in the United States have experienced physical, sexual, or psychological violence in their lifetime, often at the hands of non-Native perpetrators. Emerging data from UN Women shows that impacts of the COVID-19 pandemic have intensified gender-based violence globally.

We know this is not a problem limited to our three countries or our region, and we welcome cooperation from other governments, civil-society organizations, and other entities in the elimination of all forms of discrimination and gender-based violence perpetrated against Indigenous women and girls in diverse communities.

First established as an outcome of the June 2016 North American Leaders' Summit, the Trilateral Working Group on Violence Against Indigenous Women and Girls (Trilateral Working Group) is an initiative to reaffirm and to advance our respective national and regional commitments to prevent and respond to gender-based violence impacting Indigenous peoples in North America through increased access to justice and services, with an intersectional, gender-responsive, human rights and culturally-responsive approaches.

In July 2022, the governments of Canada, Mexico, and the United States will convene the fourth meeting of the Trilateral Working Group, hosted by the United States. This dialogue, which will include the participation of Indigenous women experts, leaders, and advocates, will address the multi-faceted aspects, including root causes that increase vulnerability to gender-based violence, access to justice and enhanced accountability, and increased resources for survivors.

The themes of the 4th Trilateral Working Group meeting will be:

Strengthening access to justice, culturally appropriate approaches to safety and healing, and addressing the crisis of missing and murdered Indigenous women, young women, and girls in all their diversity and two-spirit and gender-diverse individuals, including trafficking in persons;

Advancing Indigenous women's leadership and representation at all levels; and

Addressing the root causes of gender-based violence against Indigenous women, girls and two-spirit and gender-diverse individuals, including economic security and food insecurity related to the climate crisis.

The Members of the Permanent Forum on Indigenous Issues issued recommendations in 2018 urging the Canada, Mexico, and the United States, to organize an international expert group meeting by 2021 on the issue of ongoing violence against Indigenous women and girls in the region, including trafficking, as well as the continuing crisis of missing and murdered Indigenous women, girls and two-spirit and gender-diverse individuals.

At the North American Leaders' Summit on November 18, President Biden, President Lopez Obrador, and Prime Minister Trudeau committed to convene a meeting of Indigenous women leaders as part of the Trilateral Working Group on Violence Against Indigenous Women and Girls. To this end, in November 2021, we convened Indigenous women leaders from across the three countries of North America for a virtual engagement to center their expertise and recommendations on addressing these issues. The themes identified for the upcoming 4th Trilateral Working Group arose directly from this convening. We welcome opportunities in the future to engage with international experts from other regions following this next meeting of the Trilateral Working Group.

We recognize that ending violence against Indigenous women and girls requires a holistic, multidimensional, and multi-sectoral approach. We reiterate our unwavering commitment as our three countries continue working together, in partnership with Indigenous peoples from our three countries, to eliminate this epidemic of gender-based violence and attain our goals of safety, security, well-being, and empowerment for all members of Indigenous communities.

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On July 15, 2022, the governments of Canada, Mexico, and the United States released a statement after the fourth convening of the Trilateral Working Group on Violence against Indigenous Women and Girls. The statement is available as a State Department media note at https://www.state.gov/joint-readout-of-the-fourth-convening-of-the-trilateral-working-group-on-violence-against-indigenous-women-girls/ and excerpted below.

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The White House was pleased to host the fourth convening of the Trilateral Working Group on Violence against Indigenous Women and Girls, in collaboration with the governments of Mexico and Canada. The convening, with participation both in-person and virtually, included senior government officials from the United States, Mexico, and Canada, as well as Indigenous women leaders from all three countries. Secretary Deb Haaland, U.S. Department of the Interior, provided opening remarks as the head of the U.S. delegation, followed by The Honorable Marc Miller, Minister of Crown-Indigenous Relations and head of the Canadian Delegation, and Dr. Cristopher Ballinas Valdes, Director General for Human Rights and Democracy at the Ministry for Foreign Affairs, head of the Mexican Delegation. Closing remarks were provided by Saúl Vicente Vázquez, Director for International Affairs at the National Institute of Indigenous Peoples in Mexico, The Honorable Minister Marc Miller for Canada, and Deputy Attorney General Lisa Monaco for the United States.

Yesterday's meeting covered three themes identified by Indigenous women leaders from Canada, Mexico, and the United States:

- **Strengthening Access to Justice:** This includes discussion of culturally and linguistically-specific approaches to justice and healing to address gender-based violence, trafficking in persons, and missing and murdered Indigenous women, young

women, and girls in all their diversity, including Two-Spirit and gender-diverse individuals.

- **Addressing Root Causes of Gender-Based Violence:** Comprehensively addressing root causes of gender-based violence, including a focus on economic security and climate change and its attendant effects, including food insecurity.
- **Advancing Indigenous Women's Leadership:** Reducing barriers and creating equitable and safe spaces to advance the leadership and representation of Indigenous women, young women, Two-Spirit and gender-diverse individuals in all levels of government (Tribal, national, state, and local government) and in civil society.

Government officials listened to recommendations from Indigenous experts and advocates on each of these topics and discussed commitments and initiatives from the three governments to advance prevention efforts, increase support for survivors, and enhance regional coordination to better address root causes that increase vulnerability to all forms of gender-based violence. This effort builds on our three countries' **shared commitment** to continue to work together, in partnership with Indigenous peoples, in particular with Indigenous women, to advance these goals.

Background:

First established as an outcome of the June 2016 North American Leaders' Summit, the Trilateral Working Group is an initiative to reaffirm and advance our respective national and regional commitments to:

- Exchange information about policies, programs, and promising practices to prevent and respond to gender-based violence impacting Indigenous women, young women and girls, including Two-Spirit and gender-diverse individuals in North America through increased access to justice and services, with a human rights, survivor-centered, and culturally-responsive approach;
- Enhance cooperation to address crimes of gender-based violence including human trafficking, within or outside of their communities and across our borders;
- Enhance prevention efforts and the responses of our justice, health, education, and child welfare systems to gender-based violence in Indigenous communities;
- Facilitate meaningful engagement with Indigenous women, young women and girls, Two-Spirit and gender-diverse individuals, acknowledging their agency and supporting their participation in listening sessions and knowledge exchange on key issues impacting their communities; and
- Address the need for improved data collection and research to better understand the extent of gender-based violence, including sexual violence, human trafficking, missing and murdered Indigenous peoples, femicide, and other forms of violence, in Indigenous communities and identify opportunities to improve prevention and response efforts.

The first convening of the Trilateral Working Group was hosted by the United States in **2016**. The Trilateral Working Group subsequently held convening's in Canada in **2017**, and in Mexico in **2018**. The United Nations Permanent Forum on Indigenous Issues in 2019 recognized the Trilateral Working Group as an important initiative, recommending Canada, Mexico, and the United States maintain our enduring commitment to tackling ongoing issues of violence against Indigenous women, young women and girls, Two-Spirit and gender-diverse individuals in the region, including trafficking and the continuing crisis of missing and murdered Indigenous people. At the **Generation Equality Forum** in June of 2021, the Biden-Harris Administration

made a commitment to relaunch this regional collaboration and host the fourth Trilateral Working Group on Violence Against Indigenous Women and Girls in collaboration with the governments of Mexico and Canada. This initiative was further supported by the United States, Mexico, and Canada during the November 2021 **IX North American Leaders Summit**. In **November 2021**, the White House hosted a virtual engagement that convened Indigenous women leaders from Canada, Mexico, and the United States to gather their recommendations for priority themes to discuss at the Fourth convening of the Trilateral Working Group.

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The United States cosponsored the resolution adopted by the Human Rights Council (HRC) entitled, "Human rights and indigenous peoples" at its 51st regular session on October 6, 2022. U.N. Doc. A/HRC/RES/51/18 available at https://undocs.org/A/HRC/RES/51/18. The United States also cosponsored the resolution adopted at HRC 51 entitled, "Human rights and indigenous peoples: mandate of the Special Rapporteur on the rights of indigenous peoples," which renewed the mandate of the special rapporteur. U.N. Doc. A/HRC/RES/51/16 available at https://undocs.org/A/HRC/RES/51/16.

On November 30, 2022, 17 federal agencies, coordinated through the White House Council on Native American Affairs (WHCNAA) and in consultation with Tribal Nations, released a new best-practices report to integrate Tribal treaty and reserved rights into agency decision-making processes. The report is available at https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf. The November 30, 2022 White House Fact Sheet announces the best-practices report and other new actions to support Indian Country and Native communities, which is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/.

The United States also cosponsored the resolution adopted by the UN General Assembly on December 15, 2022 on the report of the Rights of Indigenous Peoples, containing one draft resolution of the same name. See U.N. Doc. A/77/460 available at https://undocs.org/A/77/460.

J. FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY

1. General

On January 26, 2022, Philip Riblet, Legal Adviser, U.S. Mission Geneva delivered a keynote address at a discussion on guidelines for lawyers in support of peaceful assemblies. The address is available at https://geneva.usmission.gov/2022/01/26/discussion-guidelines-for-lawyers-in-support-of-peaceful-assemblies/, and excerpted below.

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The Guidelines released by the Special Rapporteur provide a set of meaningful, practical principles and recommendations for lawyers working to promote the rights of peaceful assembly and to freedom of association. These Guidelines are especially timely against the backdrop of peaceful protests in recent years on a range of issues, from racial injustice to elections. I'd like to set the stage for our discussion by asking you to join me in taking a step back and exploring why these Guidelines are so important in the human rights landscape and our work here in Geneva.

The Guidelines can have a significant human rights impact due to the nature of the right of peaceful assembly. The individual rights protected under human rights treaties constitute a cohesive whole, a range of protections to which individuals are entitled. What ultimately matters most is the implementation of those obligations by states, so we strive to identify ways to enhance that implementation. Respecting exercise of the right of peaceful assembly is a critical implementation enhancer. In other words, respect for the right of peaceful assembly promotes the protection of other human rights.

Of course, individuals may engage in peaceful assembly for any number of reasons. But one purpose may be to protest what they view as a government's failure to uphold its human rights obligations. An individual with, for example, a right to the highest attainable standard of physical and mental health, or a right to form trade unions, might exercise the right of peaceful assembly and protest a government's policies if those rights are threatened. Peaceful protest can serve an accountability function, applying pressure on governments to change rights-violating behavior, and thereby improving implementation by states of human rights obligations.

Despite this crucial role – or indeed perhaps because of it – this right and others like it are under significant pressure in the world today. While the nature of peaceful assembly or association is that it involves multiple individuals, peaceful assembly is still a right that belongs to individuals. Individuals choose to associate with other individuals and assemble, but the right does not belong to the group – it belongs to the individual. It is a fundamental principle of human rights law that rights belong to the individual, and this is based upon the dignity that each of us has as an individual human being.

That fundamental premise of human rights belonging to individuals is under threat, including here in Geneva. There are some who are presenting an alternative vision of human rights that is unrecognizable to human rights experts. In this alternative vision, the protection of individual human rights is subordinated to the government's promotion of social harmony and economic development for the country as a whole. The Human Rights Council is seen as a forum for promoting cooperation among governments and avoiding awkward conversations about things happening within the territory of a country. This alternative vision is of course antithetical to human rights, and the U.S. Mission spends a lot of our time pushing back against it.

At any given time, the views expressed by individuals in a peaceful assembly will seem inconvenient, threatening, or simply annoying to some other individuals, often including individuals in the government. In a healthy society, individuals air their grievances and express their views. It is in our nature to communicate with others to express our views, and to organize with others. Democracy is messy. People disagree. Society is not harmonious, because all individuals have unique life experience shaping

their views and what they expect from their government and their fellow human beings. A government that inappropriately constrains that expression fosters an unhealthy society. There is a reason why the allowable restrictions on peaceful assembly are narrow and specific in the International Covenant on Civil and Political Rights.

It is the government's responsibility to preserve space for disagreement, and it is the lawyer's job to make sure the government preserves that space. Lawyers are the ones who help enable the exercise of the right of peaceful assembly – a right that, when exercised, enhances the implementation of other human rights.

We are having this event today because it is the International Day of the Endangered Lawyer. There is a reason human rights lawyers are endangered – because they are making an impact that is inconvenient for people in positions of power. If the work human rights lawyers are doing did not have an impact, no one would care or be inconvenienced by it – we would all just carry on as we were. The fact that human rights lawyers are under threat itself demonstrates their effectiveness and the importance of their work.

The Special Rapporteur has provided, based on widespread consultation, a set of useful, practical guidelines for lawyers defending the right of peaceful assembly. We will hear more about the Guidelines during the panel discussion. In examining the Guidelines, we should be sure to keep in mind why the work human rights lawyers do in defending peaceful assembly is so important to the protection of human rights more broadly.

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On June 17, 2022, Attorney-Adviser Anna Melamud delivered the U.S. statement at the interactive dialogue with Clément Nyaletsossi Voule, Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association. The statement is available at https://geneva.usmission.gov/2022/06/17/special-rapporteur-on-the-rights-to-freedom-of-peaceful-assembly-and-of-association-hrc50/, and excerpted below.

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These freedoms empower people to speak up and organize in order to influence government policies. This strengthens societal stability, transparency, and accountability. Globally, government repression of these freedoms often has the chilling effect of activists being forced into silence.

In Russia, Putin's war of aggression against Ukraine goes hand in hand with his brutal repression at home. Since February, more than 15,000 Russian citizens have been arbitrarily detained for peacefully expressing their opposition to the war.

In Belarus, after two years of an unprecedented violent crackdown against the pro-democracy movement, authorities in Minsk have detained tens of thousands of peaceful protesters. The regime holds over 1,200 political prisoners and has forcibly exiled thousands more.

And in Cuba, the government's response to last year's historic peaceful protests resulted in more than 1,300 detentions and over 500 known convictions in unjust trials.

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2. Iran

On October 20, 2022, the State Department published as a media note the joint statement on internet shutdowns in Iran following protests over the killing of Mahsa Amini, co-signed by the Freedom Online Coalition. The joint statement follows and is available at https://www.state.gov/joint-statement-on-internet-shutdowns-in-iran/.

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We, the members of the Freedom Online Coalition, are deeply alarmed by and strongly condemn the measures undertaken by Iran to restrict access to the Internet following the nationwide protests over the tragic killing of Mahsa Amini. In furtherance of what has become a longstanding pattern of censorship, the Iranian government has to a large scale shut down the Internet yet again for most of its 84 million citizens nationwide by cutting off mobile data; disrupting popular social media platforms; throttling Internet service; and blocking individual users, encrypted DNS services, text messages, and access entirely.

Millions of Iranians rely on these and other tools to connect with each other and to the outside world. By blocking, filtering, or shutting down these services, the Iranian government is suppressing the right of peaceful assembly and freedoms of association and expression; eroding civic space; reinforcing a continued climate of economic uncertainty; disrupting access to healthcare, emergency services, and financial services; preventing payments for salaries, utilities, and education; and limiting the ability of journalists, human rights defenders, and others to report on and document human rights violations or abuses that are taking place during Internet shutdowns, or communications disruptions.

We emphatically call on the Government of Iran to immediately lift restrictions intended to disrupt or prevent their citizens from accessing and disseminating information online and from communicating safely and securely. Moving forward, we also call on Iranian authorities to refrain from imposing partial or complete Internet shutdowns and blocking or filtering of services and to respect Iran's international human rights obligations, including under articles 19, 21 and 22 of the International Covenant on Civil and Political Rights.

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3. Nicaragua

On September 13, 2022, the United States joined a statement by the core group on the human rights situation in Nicaragua as read by the Ecuador at the 51th session of the Human Rights Council interactive dialogue on the UN High Commissioner's comprehensive report on the situation of human rights in Nicaragua (as requested by U.N. Doc. A/HRC/RES/49/3 and is available at

https://undocs.org/A/HRC/RES/49/3). The statement is available at https://geneva.usmission.gov/2022/09/13/joint-statement-by-the-core-group-on-the-human-rights-situation-in-nicaragua-51st-session-hrc/, and excerpted below.

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We thank the High Commissioner and her Office for her new comprehensive report, which showcases the self-isolation of the authorities of Nicaragua from cooperation with human rights mechanisms. This attitude constitutes more evidence of the lack of responsibility and accountability from Nicaragua's international human rights obligations, resulting in the continued and progressive deterioration of human rights in the country.

Nicaragua has continued to suppress the rights to freedoms of peaceful assembly and association, and of religion; this year alone, it has cancelled the legal personality of 1112 human rights, development and other organizations, professional associations, including medical associations, and others. Twelve universities have also had their legal personality cancelled, impacting the right to education. The enjoyment of the freedom of opinion and expression also worsened, with more journalists being forced into exile, and by the recent closure of 12 radio and television media outlets of the Catholic Church, especially in Matagalpa.

Without delay Nicaragua should reinstitute the national dialogue. Furthermore, in view of the upcoming November municipal elections, it is particularly concerning that recommendations by the OHCHR to reform Nicaragua's electoral body have not been undertaken.

We once again urge the authorities of Nicaragua to collaborate openly with human rights mechanisms, restore civic space, release all political prisoners, guarantee judicial independence, end politically motivated detentions and the repression of independent media, as well as of minorities, cooperate with the OHCHR, and implement its recommendations.

We reiterate our commitment to and solidarity with the Nicaraguan people and call on this Council to continue to take concrete measures to promote and protect their human rights.

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K. FREEDOM OF EXPRESSION

1. Joint Statements

On February 8, 2022, the State Department issued, as a media note available at https://www.state.gov/media-freedom-coalition-statement-on-closure-of-media-

outlets-in-hong-kong/, the Media Freedom Coalition's statement on the closure of media outlets in Hong Kong. The governments of Australia, Austria, Canada, Czech Republic, Estonia, Finland, Germany, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Slovakia, Slovenia, 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 deep concern at the Hong Kong and mainland Chinese authorities' attacks on freedom of the press and their suppression of independent local media in Hong Kong.

Recent developments include the raid of Stand News offices, the arrests of its staff, and the subsequent self-closure of Citizen News, stemming from concern over the safety of its staff. Since the enactment of the National Security Law in June 2020, authorities have targeted and suppressed independent media in the Hong Kong Special Administrative Region. This has eroded the protected rights and freedoms set out in the Basic Law and undermines China's obligations under the Sino-British Joint Declaration. This has also caused the near-complete disappearance of local independent media outlets in Hong Kong. These ongoing actions further undermine confidence in Hong Kong's international reputation through the suppression of human rights, freedom of speech and free flow and exchange of opinions and information.

A stable and prosperous Hong Kong in which human rights and fundamental freedoms are protected should be in everybody's interest. We urge Hong Kong and mainland Chinese authorities to respect freedom of the press and freedom of speech in Hong Kong, in line with the Basic Law and China's obligations under the Sino-British Joint Declaration.

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On May 3, 2022, the Media Freedom Coalition issued a joint statement on World Press Freedom Day, which is excerpted below and available at https://mediafreedomcoalition.org/statements/2022/statement-by-media-freedom-coalition-on-world-press-freedom-day/. The United States joined with 47 other States in signing the joint statement.

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Today, we, members of the Media Freedom Coalition, honour the courage of all journalists and media workers, especially those who report from conflict and warzones, on corruption and on government and corporate abuses, both online and offline.

The right to freedom of expression as exercised by journalists and media is fundamental to the protection and promotion of democracy, all human rights and freedoms and the rule of law. Free, independent, and pluralistic media both online and offline is crucial for a democratic society to make informed decisions, hold governments, institutions and individuals accountable

and hear a diversity of opinions. Being able to work in safety allows journalists to fulfill their crucial role of being a source of objective and unbiased information.

As the world responds to various conflicts around the globe, a free press and its ability to access means of reporting, including digital methods, have never been more important. Media workers on the frontlines play a critical role in reporting and documenting the realities and impacts of conflict and corruption, as well as war crimes, crimes against humanity, genocide, and human rights violations and abuses, as they are often the first witnesses to history.

Many states continue to suppress and censor the media; they also arrest, intimidate, harass and kill journalists and media workers whose vital contributions allow the world to glimpse the situation on the ground and to take action based on the information these brave individuals have provided. Women journalists are particularly at risk of marginalization and are targeted disproportionally by harassment and violence. In many cases, states also do not investigate threats of killing, violence and attacks against journalists and media workers, which emboldens the perpetrators of crimes and has a further chilling effect on society, as well as on the exercise of freedom of expression.

Coupled with the physical danger that journalists and other media workers face, global changes in media business models have placed independent journalism institutions into a financially precarious state, causing what some observers have called a "media extinction event" with the shuttering of media outlets around the world that deliver vital informational services to their communities. This concerning trend threatens to deny persons across the globe access to information and hobble their ability to hold powerful actors to account. This is having a disproportionate impact on persons belonging to marginalized groups due to the intersecting discrimination they face.

Today and every day, we call on states to end repression of the media and media workers. We call on states to cease efforts to hinder reporting through legislation that limits access to the Internet, that threatens incarceration for reporting the truth and that allows strategic lawsuits against public participation (SLAPP) to harass and intimidate media organizations and workers.

We call on governments, private sector actors, and individuals to come together to develop viable solutions to strengthen critical institutions of journalism and support a resilient and viable independent media sector.

The Media Freedom Coalition, calls on all countries to counter threats to media freedom and take actions at a national level and the international level to ensure the right to freedom of expression is upheld – including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art or through any other media of choice.

We recall that the annual UNESCO World Press Freedom Day Global Conference is currently taking place in Punta del Este, Uruguay, under the theme Journalism Under Digital Siege while highlighting that it provides an opportunity to develop concrete recommendations to address new challenges connected with the digital era.

We applaud those governments that have taken decisive steps to strengthen the protection of media freedom.

We remain united and committed to promoting media freedom and standing against any efforts to undermine it.

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On June 24, 2022, the United States joined a statement on the situation of human rights in Russia as read by the European Union at the 50th session of the Human Rights Council interactive dialogue with the Special Rapporteur on Freedom of Opinion and Expression. The statement is available at https://geneva.usmission.gov/2022/06/24/joint-statement-on-the-situation-of-human-rights-in-russia-hrc50/ and excerpted below.

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We are deeply concerned about the substantial deterioration of the situation of human rights, democracy and the rule of law in the Russian Federation and we echo the worries expressed by the High Commissioner for Human Rights in her annual update.

Over recent years, we have seen significant crackdowns and broad restrictions by Russian authorities of the rights to freedom of opinion and expression, freedom of association, freedom of peaceful assembly, as well as freedom of religion or belief. The shrinking civic space has prevented and discouraged Russians from actively participating in public life. Recently, especially since the Russia's illegal invasion of Ukraine, repressions and attacks against dissenting Russian civil society representatives and organisations, human rights defenders, members of the political opposition and critical voices, independent media and journalists, researchers, and other individuals exercising their human rights and fundamental freedoms have significantly increased. The increasing repression is a significant enabling factor of Russia's aggression abroad.

We condemn the forcible dispersal of peaceful protests and mass arbitrary arrests and detentions of protestors, such as those speaking out against Russia's unprovoked, unjustified and illegal war of aggression against Ukraine. We condemn censorship and the forced closure of independent media, advocacy groups and civil society organisations, such as internationally well-known and respected International Memorial and the Human Rights Center "Memorial". We deplore the disinformation campaign fabricated and fuelled by the Russian authorities concerning their war of aggression against Ukraine and the consequences thereof. We are seriously concerned about increasingly repressive legislation, including laws targeting so-called "foreign agents" and "undesirable organisations". We continue to call on Russian authorities to cease their brutal crackdown against members of the political opposition and their supporters and anti-corruption activists, exemplified by the ongoing mistreatment and politically motivated imprisonment of Alexei Navalny, the ongoing politically motivated trial against Andrei Pivovarov under the law on "undesirable organisations", and the ongoing prosecution of opposition activist Vladimir Kara-Murza and many others who are now charged for allegedly spreading false information under Russia's new repressive laws.

Furthermore, we denounce the ongoing serious violations of human rights in the Chechen Republic, including extrajudicial executions, enforced disappearances, and attacks on media and human rights defenders, in an environment of impunity.

We also deplore the discriminatory laws and policies against LGBTI persons as well as persons belonging to religious minorities, such as Jehovah's Witnesses, in Russia.

Mr. President,

People in Russia, as individuals in any country, deserve their human rights and fundamental freedoms to be respected, protected and fulfilled and to benefit from this Council's attention, including through increased scrutiny.

We call on the Russian Federation to abide by its international obligations and ensure the full enjoyment of human rights and fundamental freedoms for everyone in Russia. We also call on Russia to cooperate with international human rights mechanisms, such as the OHCHR and the Special Procedures of this Council.

We encourage the High Commissioner for Human Rights to report to the Human Rights Council on the human rights situation in Russia.

We stand in full solidarity with the people in Russia and encourage everyone to stand up for all those who continue to strive for their human rights and fundamental freedoms as the foundation for their future, often at great personal risk.

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On July 4, 2022, the Media Freedom Coalition issued a joint statement on Venezuela, which is excerpted below and available at https://mediafreedomcoalition.org/statements/2022/media-freedom-coalition-statement-on-venezuela/. The United States joined with Australia, Canada, Chile, the Czech Republic, Estonia, France, Germany, Greece, Iceland, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, the Netherlands, New Zealand, Slovakia, Slovenia, Sweden, Ukraine, the United Kingdom in signing the joint statement.

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The undersigned members of the Media Freedom Coalition express their deep concern over the lack of media freedom in Venezuela. Of particular concern are the repressive measures employed by the Maduro regime, including the harassment and persecution of journalists, media workers and independent media outlets,
censorship, Internet shutdowns, property seizures and the general silencing of critics. This comes in addition to the considerable difficulties and restrictions that are faced by non-governmental organizations working on analysis and reporting of issues within Venezuela.

In recent years, the Maduro regime has restricted media freedom by harassing and persecuting dissenting voices, particularly those of journalists and media workers. Independent journalists in Venezuela operate within a highly restrictive regulatory and legal environment, and risk arrest and physical violence. These difficulties also extend to non-governmental organizations working on analysis and reporting of current events within Venezuela. To avoid persecution or undesired consequences, including arbitrary detentions, many journalists and news media resort to self-censorship.

The Maduro regime has also orchestrated the acquisition of media trusts to secure friendly editorial perspectives and propagate state-sponsored policies, messages and ideology. State-owned media outlets provide almost exclusively favourable coverage tothe regime, to the detriment of any dissenting voices. Media outlets that criticize or challenge the Maduro regime risk facing legal consequences, including the cancellation of their licences and the seizure of

equipment or property. As a result, Venezuela has lost its once-vibrant newspaper sector and the Maduro regime controls the domestic narrative.

Restrictive measures are evident in the digital space in Venezuela, where the Maduro regime uses targeted content blocking against critics. The blocking or filtering of services affects the free flow of information as well as freedom of expression, further eroding media freedom and civic space. This is of particular concern, given that means of digital information and communications have never been more important and that most independent news outlets in Venezuela can now only operate online. The regime also allocates significant resources to disseminate its own messaging and drown out voices that challenge its narrative.

The right to freedom of expression as exercised by journalists is fundamental to the protection and promotion of democracy, all human rights and the rule of law. Free, independent and pluralistic media both online and offline is crucial for a democratic society to make informed decisions, hold authorities, institutions and individuals accountable and hear a diversity of opinions. Being able to work in safety allows

journalists to fulfill their crucial role of being a source of objective and unbiased information.

We commend the courage of all journalists and media workers in Venezuela who, both online and offline, report on attacks to democratic institutions and on human rights violations and abuses, as well as on corruption in Venezuela. Journalists need a safe environment in which to do their work.

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2. U.S. Statements

On May 3, 2022, Secretary Blinken offered remarks at the State Department's Washington Foreign Press Center to mark World Press Freedom Day. The remarks are excerpted below and available at https://www.state.gov/briefings-foreign-press-centers/world-press-freedom-day-2022-state-of-world-press-freedom.

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The United States has a vital stake in promoting the right to freedom of expression, including a free press, at home and also around the world. The free flow of information, ideas, opinions, including dissenting ones, is essential to inclusive and tolerant societies.

A vibrant independent press is a cornerstone for any healthy democracy. At its core is the idea that information is a public good, crucial to everything we do, to every decision that we make. And often we trust the press with providing that information. It's what helps citizens understand the events, the forces that are shaping their lives. It allows people to engage meaningfully in the political and civic spheres of their communities, their nations, and the world.

A free press is one of the most effective tools that we have for advancing human rights. Whether it's documenting unjust working conditions, corrupt or failing public services, discrimination against women and marginalized groups, abuse of security forces, accurate reporting shines a bright light on the parts of our societies that need fixing, that need to be

illuminated. That brings pressure to change, to form, as we say in the United States, a more perfect union.

Having said that, we meet a time when the exercise of freedom of expression, including freedom of the press, faces profound threats. Some of these are old; some are new. Threats that we, the United States Government, Department of State, all of us as citizens have an abiding interest in confronting, and doing so head on.

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On September 22, 2022, the United States joined the International Partnership for Information and Democracy. The signing statement is available as a State Department media note at https://www.state.gov/signing-statement-for-the-international-partnership-for-information-and-democracy/ and follows.

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We applaud the International Partnership for Information and Democracy's emphasis on respecting human rights and the rule of law, including the protection of freedom of expression. The United States recognizes the importance of protecting the freedom of individuals to seek, receive, and impart information through media of their choice. Further, given the immense variation in the character, purpose, and size of the many online service providers around the world, the United States recognizes that their policies will naturally vary across platforms. As a participant in the Partnership, the United States will act consistently with our domestic legal framework, including the Constitutional protections for speech and association under the First Amendment and from unreasonable searches under the Fourth Amendment. We note that our joining the Partnership does not constitute an endorsement of the Declaration on Information and Democracy.

We will continue to collaborate with other governments and online service providers on a voluntary basis to support their efforts to counter disinformation online while respecting human rights and fundamental freedoms. We note the responsibility of technology companies to respect human rights, including freedom of expression, and the importance of transparency and equal treatment with regard to the application of their terms of service. We equally note the critical role of civil society in their engagement on these efforts.

We welcome the important momentum that the International Partnership for Information and Democracy has generated and look forward to continuing our work with government, technology sector partners, civil society, and other relevant stakeholders to mitigate the exploitation of the Internet while ensuring it remains open, free, global, interoperable, reliable, and secure.

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L. FREEDOM OF RELIGION OR BELIEF

1. U.S. Annual Report

Secretary Blinken and Ambassador at Large for International Religious Freedom Rashad Hussain addressed the press on the release of the 2021 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 June 2, 2022. Secretary Blinken's remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-and-ambassador-at-large-for-international-religious-freedom-rashad-hussain-on-the-2021-report-on-international-religious-freedom/. The report is available at https://www.state.gov/reports/2021-report-on-international-religious-freedom/.

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Today, the State Department is releasing the **2021 International Religious Freedom Report**. This report offers a thorough, fact-based review of the state of religious freedom in nearly 200 countries and territories around the world. We produce this document every year since 1998, starting under the leadership of then Secretary Albright, whose life and legacy we continue to celebrate.

Back then, the Office of International Religious Freedom, which leads this annual process of drafting the report, was the only government entity in the world charged with monitoring and defending international religious freedom. Now, more than two decades later, we have more than 35 governments and multilateral organizations that have created offices that are dedicated to this goal.

And I'd like to thank the office for its efforts again this year under the leadership of Ambassador Rashad Hussain. This team has done remarkable work, and I very much appreciate the efforts.

I also want to thank the hundreds of State Department officials around the world who gather information, conduct the fact-finding that's actually at the heart of this report. And all of us – all of us – are indebted to civil society, faith leaders, religious organizations, human rights groups, journalists, and others who share their perspectives and analysis, and who do the critical work of promoting religious freedom every day in every part of the world.

When Secretary Albright first introduced this report, she noted that from our earliest days, Americans had believed, and I quote, "that nations are stronger, and the lives of their people richer, when citizens have the freedom to choose, proclaim, and exercise their religious identity."

Indeed, religious freedom is the first freedom enshrined in our Constitution's Bill of Rights. It's been recognized by nations around the world as a human right, including in the Universal Declaration of Human Rights.

Respect for religious freedom isn't only one of the deepest held values and a fundamental right. It's also, from my perspective, a vital foreign policy priority. Here's why. We know that when the fundamental right of each person to practice their faith or to choose not to observe a

faith is respected, people can make their fullest contributions to their community's successes; entire societies are better off.

On the other hand, when governments deny this right, it ignites tension, it sows division, it often leads to instability and conflict.

This year's report includes several countries where we see notable progress, thanks to the work of governments, civil society organizations, and citizens. For example, last year the Kingdom of Morocco launched an initiative to renovate Jewish heritage sites like synagogues and cemeteries, and to include Jewish history in the Moroccan public school curriculum.

In Taiwan, authorities are making it easier to report employers who refuse to give their workers a weekly rest day in order to attend religious services.

In Timor-Leste, the new president, Ramos-Horta, recently pledged to defend the rights of all citizens regardless of religious background.

And in Iraq, national leaders welcomed Pope Francis for the first ever papal visit to the country, where he conducted Christian and interfaith ceremonies in Baghdad, in Mosul, and in the Iraqi Kurdish region.

One local leader from the city of Nasiriyah, Sheikh Haider al-Dubaisi, later reflected on the Pope's visit, and he said, and I quote, "He came even though he could barely walk. He sent a message not only to Iraqis, but to the whole world, that Islam and other religions can sit together peacefully."

Sitting together peacefully. Ultimately, this report is about spreading that kind of progress to more parts of the world.

Unfortunately, the report also shows that we have more work to do. In many parts of the world, governments are failing to respect their citizens' basic rights. Some governments continue to use blasphemy and apostacy laws, which banned defamation and renunciation of religion, to police the language of religious minorities. Others curtail expressions of religious belief like restrictions on religious attire.

And all societies, including our own and across Europe, must do more to combat rising forms of hate, including anti-Semitism and anti-Muslim sentiment.

To highlight a few examples, in March, based on extensive legal review of the evidence, I made the determination that Burma's military committed genocide and crimes against humanity with the intent to destroy predominantly Muslim Rohingya in 2017 – intent that was evidenced by, among other things, attacks on mosques, the use of religious and ethnic slurs, the desecration of Korans, among, again, many other actions.

In Eritrea, only four religious groups are permitted to practice their faith freely, while members of other religious minority groups have been detained, arrested, forced to renounce their faith as a precondition for their release.

In Saudi Arabia, we recognize the important recent moves to increase interfaith dialogue and religious tolerance. However, publicly practicing any faith other than Islam remains illegal, and the government continues to discriminate against members of religious minority communities.

China continues its genocide and repression of predominately Muslim Uyghurs and other religious minority groups. Since April 2017, more than 1 million Uyghurs, ethnic Kazakhs, Kyrgyz and others have been detained in internment camps in Xinjiang. The PRC continues to harass adherents of other religions that it deems out of line with Chinese Community Party doctrine, including by destroying Buddhist, Christian, Islamic, and Taoist houses of worship and

by erecting barriers to employment and housing for Christians, Muslims, Tibetan Buddhists, and Falun Gong practitioners.

In Afghanistan, conditions for religious freedom have deteriorated dramatically under the Taliban, particularly as they crack down on the basic rights of women and girls to get an education, to work, to engage in society, often under the banner of religion. Meanwhile, ISIS-K is conducting increasingly violent attacks against religious minorities, particularly Shia Hazaras.

In Pakistan, at least 16 individuals accused of blasphemy were sentenced to death by Pakistani courts in 2021, though none of these sentences has yet to be carried out.

Beyond these countries, the report documents how religious freedom and the rights of religious minorities are under threat in communities around the world.

For example, in India, the world's largest democracy and home to a great diversity of faiths, we've seen rising attacks on people and places of worship; in Vietnam, where authorities harass members of unregistered religious communities; in Nigeria, where several state governments are using antidefamation and blasphemy laws to punish people for expressing their beliefs.

The United States will continue to stand up for religious freedom around the world. We'll keep working alongside other governments, multilateral organizations, civil society to do so, including next month at the United Kingdom's Ministerial to Advance Religious Freedom.

At its core, our work is about ensuring that all people have the freedom to pursue the spiritual tradition that most adds meaning to their time on Earth. It's about giving people the chance to express themselves freely, which is part of being their fullest selves. That's the progress. That's the progress that this report hopes to help create.

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2. Designations under the International Religious Freedom Act

On November 30, 2022, the Department of State published the designations of Burma, China, Eritrea, Iran, the Democratic People's Republic of Korea, Nicaragua, Pakistan, Russia, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern ("CPCs") under the IRF Act. 87 Fed. Reg. 80,247 (Dec. 29, 2022). The "Countries of Particular Concern" were so designated for having engaged in or tolerated "particularly severe violations of religious freedom," *id*., which the Act defines as "systematic, ongoing, egregious violations of religious freedom." 22 U.S.C. § 6402(13). The Department designated Algeria, the Central African Republic, Comoros, and Vietnam as Special Watch List ("SWL") countries for having governments that have engaged in or tolerated "severe violations of religious freedom." 87 Fed. Reg. 80,247 (Dec. 29, 2022). 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-Sahel (formerly known as ISIS-Greater Sahara), ISIS-West Africa, Jamaat Nasr al-Islam wal Muslimin, the Taliban, and Wagner Group based on its actions in the Central African Republic 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 December 2, 2022, 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-2/.

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Around the world, governments and non-state actors harass, threaten, jail, and even kill individuals on account of their beliefs. In some instances, they stifle individuals' freedom of religion or belief to exploit opportunities for political gain. These actions sow division, undermine economic security, and threaten political stability and peace. The United States will not stand by in the face of these abuses.

Today, I am announcing designations against Burma, the People's Republic of China, Cuba, Eritrea, Iran, Nicaragua, the DPRK, Pakistan, Russia, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern under the International Religious Freedom Act of 1998 for having engaged in or tolerated particularly severe violations of religious freedom. I am also placing Algeria, the Central African Republic, Comoros, and Vietnam on the Special Watch List for engaging in or tolerating severe violations of religious freedom. Finally, I am designating al-Shabab, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS-Greater Sahara, ISIS-West Africa, Jama'at Nusrat al-Islam wal-Muslimin, the Taliban, and the Wagner Group based on its actions in the Central African Republic as Entities of Particular Concern.

Our announcement of these designations is in keeping with our values and interests to protect national security and to advance human rights around the globe. Countries that effectively safeguard this and other human rights are more peaceful, stable, prosperous and more reliable partners of the United States than those that do not.

We will continue to carefully monitor the status of freedom of religion or belief in every country around the world and advocate for those facing religious persecution or discrimination. We will also regularly engage countries about our concerns regarding limitations on freedom of religion or belief, regardless of whether those countries have been designated. We welcome the opportunity to meet with all governments to address laws and practices that do not meet international standards and commitments, and to outline concrete steps in a pathway to removal from these lists.

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M. JUDICIAL PROCEDURE AND RELATED ISSUES

1. Arbitrary Detention in State-to-State Relations

On February 15, 2022, Secretary Blinken issued a press statement on the first anniversary of the Declaration Against the Use of Arbitrary Detention in State-to-State

Relations. The statement follows and is available at https://www.state.gov/first-anniversary-of-the-declaration-against-arbitrary-detention-in-state-to-state-relations/.

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One year ago, the United States joined like-minded nations in sending an unambiguous message that the arbitrarily [sic] detention of foreign nationals is unacceptable and governments who engage in this practice must cease immediately.

The United States continues to call on the international community to collectively respond and press for the release of all those who are arbitrarily detained around the world. We commend Canada for its leadership in the fight against the practice of imprisoning individuals for diplomatic leverage. The Declaration Against Arbitrary Detention in State-to-State Relations now has 68 endorsements from nations around the world, and we urge others to support this initiative grounded in the rule of law and respect for human rights.

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2. Enforced Disappearance

On August 30, 2022, Secretary Blinken issued a press statement on the International Day of the Victims of Enforced Disappearances. The statement follows and is available at https://www.state.gov/international-day-of-the-victims-of-enforced-disappearances-2/.

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On the International Day of the Victims of Enforced Disappearances, the United States stands united with all those affected by the crime of enforced disappearance. This practice is an egregious violation of human rights prohibited under international law, yet continues to be used to silence dissent and attack civil society.

Every year, ordinary people fall victim to enforced disappearance and vanish without a trace after being arrested, detained, or abducted by government officials or those acting with their tacit assent. Those responsible often refuse to acknowledge the occurrence of disappearances or may even excuse them as part of counter-terrorism activities. Authoritarian regimes and their proxies try to instill fear and maintain control by disappearing human rights advocates, political activists, environmental defenders, journalists, and other vulnerable groups such as children and persons with disabilities.

The United States renews its commitment to addressing enforced disappearance and calls on governments around the world to put an end to this practice, hold those responsible to account, reveal the whereabouts or fate of loved ones who have been disappeared, and respect the human rights and fundamental freedoms of all persons.

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3. Administration of Justice

On November 14, 2022, Anthony Bestafka-Cruz, Adviser to the Third Committee, delivered the U.S. explanation of position on a Third Committee resolution on the administration of justice. The statement is available at https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-administration-of-justice/ and excerpted below.

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Reaffirming the importance of ensuring respect for the rule of law and human rights in the administration of justice, the United States joins consensus on this year's resolution. While we appreciate efforts to address our concerns, we wish to highlight a few important issues with the text.

First, we are concerned that the resolution calls upon States to comply with or implement obligations under treaties to which the United States is not subject, and which are not imposed by customary international law, including the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child. We also note that we do not accept certain recommendations made in the Global Study on Children Deprived of Liberty.

Second, the United States understands that General Assembly resolutions do not change the current state of conventional or customary international law.

Third, the resolution refers to "principles of necessity and proportionality" when depriving any person of their liberty. The United States understands and agrees that discretionary decisions to deprive individuals of liberty should be reasonable, necessary, and appropriate to the individual circumstances. However, such considerations are not universally recognized or reflected in international law, nor are they relevant to a determination of lawfulness or arbitrariness within the domestic legal framework of every State; instead, international law has left such matters to the discretion of competent courts or administrative authorities within individual States. We interpret the provisions referring to "necessity and proportionality" as recommendations rather than as a reflection of international principles or obligations under international law.

Fourth, the assertion that States should consider establishing an independent mechanism to monitor places of detention, including by making unannounced visits, is inconsistent with U.S. policies and practices that already ensure acceptable standards. The UN Standard Minimum Rules for the Treatment of Prisoners, or "the Mandela Rules," call for external and independent monitoring of prisons to include monitoring bodies that may or may not be governmental (the preferred approach in the United States). These bodies achieve accountability so long as they are independent of the prison administration, and other external bureaucracies are unnecessary.

Fifth, we are disappointed that important references to gender were removed or watered down in negotiations. The U.S. is committed to promoting gender equity and fairness in justice systems.

Finally, we note that the age of criminal responsibility varies in individual states of the United States, and that some states establish responsibility at younger ages for the most serious crimes.

We addressed U.S. concerns with rights related to COVID language, language relating to the rights of the child, and with the applicability of international law, in a separate general statement.

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N. OTHER ISSUES

1. Privacy

On April 28, 2022, the White House launched the Declaration for the Future of the Internet with more than 50 partners from around the world. The declaration is a political commitment to launch a vision for the Internet and digital technologies, including, protecting human rights and fundamental freedoms of all people and the protection of privacy. The declaration is available at https://www.state.gov/declaration-for-the-future-of-the-internet. The White House Fact sheet on the declaration is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-united-states-and-60-global-partners-launch-declaration-for-the-future-of-the-internet/.

On September 16, 2022, Ambassador Michèle Taylor delivered the U.S. statement at the 51st session of the HRC at an interactive dialogue on the OHCHR report on privacy. The U.S. statement is excerpted below and is available in full at https://geneva.usmission.gov/2022/09/16/interactive-dialogue-on-ohchr-report-on-privacy-hrc51/.

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The United States recognizes the role surveillance technologies can play in helping to protect public safety and national security.

At the same time, we share concerns about the improper use of certain technologies in a manner inconsistent with international human rights law.

This is especially acute with respect to the proliferation of commercial "spyware," which certain governments have purchased on the commercial market and use for unlawful or abusive purposes.

In many cases, policies and safeguards in certain countries have not kept pace with the rapid proliferation of these technologies. Important information regarding the companies that license these "spyware" tools – about their customers, compliance regimes, and business practices – is often hidden from view.

Meanwhile, many governments inappropriately deploy these tools in unlawful and arbitrary ways to target journalists, activists, opposition leaders, members of marginalized communities, and others.

We reiterate the importance of protecting human rights, including those related to privacy, online and offline and we are grateful to OHCHR for keeping pace with this rapidly evolving issue.

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On November 4, 2022, Sofija Korac, U.S. Adviser to the Third Committee, delivered the U.S. explanation of position on a Third Committee resolution on the right to privacy on the digital age. The statement is available at https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-right-to-privacy-in-the-digital-age/ and included below.

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The United States appreciates the efforts of Germany and Brazil on this resolution. We join consensus today because it reaffirms crucial privacy rights, as well as their importance for the exercise of the rights to freedoms of opinion, expression, peaceful assembly, and association. These rights, as set forth in the International Covenant on Civil and Political Rights (ICCPR) and protected under the U.S. Constitution and U.S. laws, are pillars of democracy in the United States and globally.

The United States stands firm in its commitment to the promotion and protection of Human Rights Defenders (HRDs). In particular, we recognize that the threats HRDs face are multifaceted and complex, often taking place online and offline. We look forward to continued engagement with partners on addressing the unlawful and arbitrary use of surveillance technologies to target and censor HRDs, journalists, and other members of civil society.

We understand this resolution to be consistent with longstanding U.S. views regarding the ICCPR and interpret it accordingly. In this regard, we reiterate that the appropriate standard under Article 17 of the ICCPR as to whether a State's interference with privacy is impermissible is whether it is unlawful or arbitrary; we welcome the resolution's reference to this standard. While the resolution references the principles of necessity and proportionality, we note that Article 17 does not impose such a standard and Parties to the Covenant are not obligated to take such principles into account in implementing their obligations under Article 17.

We hope that further work on this topic, including the work of the Special Rapporteur, can touch on other areas relating to privacy rights, including the misuse of surveillance technologies to track perceived critics and enable political repression.

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2. Purported Right to Clean, Healthy, and Sustainable Environment

On July 28, 2022, with 161 votes in favor, including a yes vote from the United States, the UN General Assembly adopted a resolution recognizing the right to a clean, healthy,

and sustainable environment as a human right. U.N. Doc. A/RES/76/300 available at https://undocs.org/A/RES/76/300. 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 clean, healthy, and sustainable environment', either as an independent right or as a right derived from existing rights.'" See *Digest 2021* at 171, 193, and 233. In voting yes on the resolution, the United States did not recognize any change in the current state of conventional or customary international law, and the resolution has no bearing on the formation of international law.

U.S. Counselor for Economic and Social Affairs, Edward Heartney, delivered the U.S. explanation of position on July 28, 2022, which is available at https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/ and excerpted below.

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The United States has long recognized the relationship between human rights and environmental protection, and advancing environmental justice. We have a history of promoting environmental protection and believe that every person should live in a healthy environment. We also believe that a healthy environment supports the well-being and dignity of people around the world and the full enjoyment of all human rights. We support this resolution as it sets forth these moral and political aspirations. We do regret the loss of important human rights language throughout the process, including non-controversial accepted language on human rights defenders.

Together we must protect the environment, address the climate crisis, stop attacks on environmental defenders around the world and promote accountability for human rights violations and abuses affecting those defenders. This is a priority for the United States, as well as so many of our partners around the globe, and this has led us to vote YES on this resolution.

The United States supports the development of a right to a clean, healthy, and sustainable environment in a manner that is consistent with international human rights law.

It is important to establish a common understanding of the right so that States have clarity as to its scope, as there is not yet a shared view of the basis for the right or of its scope. The United States looks forward to working with other States to exchange views to further develop understanding in this regard. However, a right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law. And, in voting "YES" on this resolution the United States does not recognize any change in the current state of conventional or customary international law. We note our concerns with operative paragraph 3 of this resolution, which creates confusion about such a right by conflating the contents of multilateral environmental agreements with human rights law and mischaracterizing aspects of the implementation of multilateral environmental agreements.

We hope this resolution will galvanize further action to protect the environment and to protect the human rights of all individuals affected by environmental degradation.

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The U.S. published a more fulsome explanation on the USUN website at https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/ and included in full below.

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AS SUBMITTED FOR THE RECORD [FULL TEXT]

The United States has long recognized the relationship between human rights and a clean, healthy and sustainable environment and that environmental degradation can negatively affect the enjoyment of human rights. We also emphasize that states must respect their human rights obligations, including when taking actions that have an environmental impact, and that they must protect the fundamental freedoms of environmental and human rights defenders.

The United States works tirelessly at home and internationally with our partners to address the climate crisis, including by taking ambitious action to keep a 1.5 degrees Celsius limit on average temperature rise within reach and to support vulnerable communities to increase their resilience and adapt to the impacts of climate change. We are also collaborating actively with other UN Member state governments to prepare for the negotiation of an instrument to address plastic pollution, a major source of pollution globally. As one of our efforts to conserve biodiversity, the United States has set a goal to conserve 30 percent of U.S. land and water by 2030. We encourage other countries to adopt equally ambitious national goals and to set ambitious targets for biodiversity conservation and sustainable management of ecosystems as part of the Post-2020 Global Biodiversity Framework currently being negotiated under the Convention on Biodiversity. We reiterate our long-standing commitment to achieving environmental justice for vulnerable and underserved communities across the United States, and advocating for environmental justice at the national and sub-national levels with foreign partners.

In that context, the United States supports this resolution, which expresses the aspirations of those around the world seeking a clean and healthy environment for all. Taking into account our history and current efforts of environmental protection and our belief that every person should enjoy the benefits of a healthy environment, the United States supports the development of a right to a clean, healthy, and sustainable environment in a manner that is consistent with international human rights law and international environmental law.

We note that adoption of an UNGA resolution on the recognition of a human right is not legally binding or a statement of current international law. International law has yet to establish a right to a clean, healthy, and sustainable environment as a matter of customary international law, nor does treaty law provide for such a right. As such, there is no legal relationship between a right as recognized under this resolution and existing international law. And, in voting "YES" on this resolution the United States does not recognize any change in the current state of conventional or customary international law. There is not yet a shared understanding of what the basis for the right would be and/or what its scope would entail. For our part, the United States looks forward to working with other states to exchange views to further develop understanding in this regard.

We also note concerns with operative paragraph 3 of this resolution, which creates confusion about such a right by conflating the contents of multilateral environmental agreements with human rights law. We do not agree with any suggestion that multilateral environmental

agreements are implemented "under the principles of international environmental law" or have any bearing on any State's international legal obligations. There is no single set of principles under which multilateral environmental agreements operate, and such agreements are each implemented in accordance with their own provisions and are applicable only to those States that have joined them. We emphasize that development and enforcement of strong domestic environmental laws and policies is what leads to a healthy environment.

U.S. support for the resolution's statements regarding a right to a clean, healthy and sustainable environment does not establish or support legally binding requirements on the United States or a private right of action under U.S. law. Already, the United States has sought to achieve the aims set out in this resolution through domestic laws and policies in accordance with the U.S. Constitution and U.S. law, such as the Clean Water Act, the Justice40 Initiative on federal investments in climate and clean energy, the establishment of White House-level environmental justice councils, and Executive Orders addressing environmental justice. We hope this resolution will galvanize further action to protect the environment and to protect the human rights of all individuals affected by environmental degradation.

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3. Marshall Islands Nuclear Legacy

On October 7, 2022, the United States submitted a long-form explanation of position on Human Rights Council resolution 51/35, Technical assistance and capacity-building to address the human rights implications of the nuclear legacy in the Marshall Islands, (U.N. Doc. A/HRC/RES/51/35, available at https://undocs.org/A/HRC/RES/51/35) which was posted to the website of U.S. Mission Geneva at https://geneva.usmission.gov/2022/10/07/us-explanation-of-position-on-the-marshall-islands-nuclear-legacy-resolution/ and follows.

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The United States thanks the Republic of the Marshall Islands for its decades of friendship and for the constructive spirit the core group has brought to the negotiations of their text on technical assistance and capacity building. The United States is grateful to the people of the Marshall Islands for their enduring friendship. The American people remember well the history of nuclear testing in the Marshall Islands, and I want to specifically acknowledge the hardships the people of the Marshall Islands experienced.

I hope you understand that we nevertheless respectfully wish to state our position on the following points.

We believe the critical issues are comprehensively addressed in other relevant conventions, bodies, and positions within the United Nations.

Fundamentally, we note that the technical expertise regarding many of the issues raised rests with entities such as the UN Scientific Committee on the Effects of Atomic Radiation (UNSCEAR). As such, we do not believe the HRC or OHCHR are the

appropriate bodies to opine or provide technical assistance on these matters, but they are free to seek expert advice and opinions from other bodies.

Consequently, we question this resolution's substantial budgetary implications. This resolution imposes significant costs that we believe merit careful review and scrutiny given the large demands already placed on OHCHR, and the limited ability of member states to provide increasing amounts of resources to enable OHCHR to perform the substantial amount of work that we have given it. For this reason, we request OHCHR and the relevant offices to conduct a review of the costs associated with this mandate at the earliest opportunity.

We further note that aspects of this resolution concern matters that have been settled bilaterally through binding international agreements.

The United States acknowledges the negative effects of the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between 1946 and 1958, and has accepted, and acted on, our responsibility to the people of the Marshall Islands.

The governments of the Republic of the Marshall Islands and the United States of America signed a Compact of Free Association, together with its related agreements, on June 25, 1983. The Compact was approved by a plebiscite in the Marshall Islands in 1983 and, subsequently, by the U.S. Congress in 1985 (P.L. 99-239) and entered into force in 1986. Section 177 of the Compact of Free Association concerns "loss or damage to property and person of the citizens of the Marshall Islands, . . . resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958." Section 177 of the Compact of Free Association provided that the Government of the United States and the Government of the Marshall Islands "shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise." The Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (Section 177 Agreement) entered into force simultaneous with the Compact of Free Association.

Article X(1) of the Section 177 Agreement, entitled "Full Settlement of All Claims," provides: "This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions."

The Section 177 Agreement recognizes that, within the northern atolls, some islands would be more habitable than others. In the Agreement, the Government of the Marshall Islands has taken responsibility for controlling the use of areas in the Marshall Islands affected by the nuclear program.

Even prior to the Compact and its related agreements, the United States provided significant assistance to address the nuclear legacy during the Trusteeship period, starting

immediately after the tests when the unanticipated consequences occurred. This included direct cleanup, rehabilitation, resettlement, and compensation. The United States provided about $250 million for the effects of nuclear weapons testing prior to the entry into force of the Compact of Free Association and the 177 Agreement, and in addition to the compensation agreed to in those agreements. In addition, since then and pursuant to the Section 177 Agreement, the U.S. government has provided more than $600 million to the affected communities. Adjusting for inflation, this is more than $1 billion in current dollars. This includes direct financial settlement of nuclear claims, resettlement funds, rehabilitation of affected atolls, and radiation related health care costs.

We understand that with respect to any rights of the people of the Marshall Islands referenced in this resolution, the obligation to protect those rights rests with the RMI. After RMI's independence as a sovereign country, it became the RMI's responsibility to implement its own human rights obligations. The Compact recognized the "common desire" of the RMI and U.S. government "to terminate the Trusteeship and establish [a] new government-to-government" relationship "in accordance with a new political status" and affirmed " that their governments and their relationships as Governments are founded upon respect for human rights and fundamental freedoms for all…." The Preamble to the Section 177 Settlement Agreement states that the Government of the United States and the Government of the Marshall Islands agree to the terms of the Agreement, inter alia, "[i]n fulfillment of the provisions of Section 177 of the Compact relating to the nuclear testing program" and "[i]n recognition of the authority and responsibility of the Government of the Marshall Islands to provide medical and health care to all of the people of the Marshall Islands." The RMI also expressly agreed in Article VII of the Section 177 Agreement that the RMI "shall have and exercise responsibility for controlling the utilization of areas in the Marshall Islands affected by the Nuclear Testing Program." Thus, the RMI expressly assumed responsibility for the use, control, and access of its lands. The United States disassociates from consensus on OPs 9 and 11, accordingly, and registers our concerns with respect to OPs 1 and 2.

With respect to OP 11, the United States believes that the use of the terms "nuclear justice" and "transitional justice" are inappropriate. They appear to suggest that justice has been lacking. This completely disregards the Section 177 Agreement, which constitutes a full and final settlement of all claims relating to the nuclear testing program. As a result, not only was justice not lacking, but the United States of America provided compensation in an amount that was agreed to by the Republic of the Marshall Islands.

The resolution makes a number of factual, causal, and legal assertions that are inaccurate or unsubstantiated, including with regard to asserted relationships between non-communicable diseases and nuclear radiation and contamination and the impact of nuclear testing on the enjoyment of human rights. For this reason, we disassociate from consensus on PPs 13 and 14 **[1]**; disassociate on this additional basis from OP 9; register our concerns with respect to OPs 1 and 2; and reiterate our disagreement with the assertions and conclusions from previous Special Rapporteurs as described in PPs 11 and 12. **[2]**

Separately, the United States has long opposed references to the ICCPR Art. 6 right to life in the context of environmental or social or public health conditions that affect quality of human life or that may be viewed as contributing to or causing

death. The United States understands Article 6 to refer to the arbitrary deprivation of life (such as extrajudicial killings or summary executions) by state actors, and not the loss of life as a consequence of natural or social phenomena. Thus, the references to "right to life" in PPs 13 and 18 **[3]**are inappropriate, and the United States disassociates from consensus on these two paragraphs.

Finally, the United States notes that nothing in this resolution purports to create justiciable rights or provide any basis for judicial, arbitral, or other dispute resolution jurisdiction.

The United States continues to support the Marshall Islands by providing radiation-related health care services and continued monitoring and environmental assessments on the affected atolls.

Once again, I thank our colleagues from the Republic of the Marshall Islands for their collaboration and cooperation. It has truly been a pleasure working with you on many shared priorities here at the Human Rights Council over the course of this year. Your presence in this room will be missed.

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[1] In its oral explanation of vote, the United States referred to PPs 12 and 13. These PPs became PPs 13 and 14 in the final version.
[2] In its oral explanation of vote, the United States referred to PPs 10 and 11. These PPs became PPs 11 and 12 in the final version.
[3] In its oral explanation of vote, the United States referred to PPs 12 and 17. This PPs became PPs 13 and 18 in the final version.

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4. Purported Right to Development

On November 10, 2022, Dylan Lang, U.S. Adviser to the Third Committee, delivered the U.S. explanation of vote at a Third Committee resolution on the right to development resolution. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-the-right-to-development/.

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The United States is firmly committed to the promotion and advancement of global development efforts, including the full implementation of the Sustainable Development Goals. 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 the United States supports equitable access to safe, effective, affordable and quality essential medicines and vaccines for addressing COVID-19 in a manner that promotes and provides incentives for innovations. Additionally, the United States recognizes the role extensive immunization against COVID-19 plays as a global public good; we do not recognize the medicines and vaccines themselves as being global public goods.

We underscore our position that trade language, negotiated or adopted by the General Assembly and the Economic and Social Council or under their auspices, has no relevance for U.S. trade policy, for our trade obligations or commitments, or for the agenda at the World Trade Organization, including discussions or negotiations in that forum. While the UN and WTO share common interests, they have different roles, rules, and memberships. Similarly, this includes calls to adopt approaches that may undermine incentives for innovation, such as technology transfer that is not both voluntary and on mutually agreed terms.

For these reasons, we request a vote, and we will vote against this resolution.

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5. Extreme Poverty

On November 14, 2022, Adviser to the Third Committee Dylan Lang provided the U.S. explanation of position on a UN General Assembly Third Committee resolution on human rights and extreme poverty. The statement is available at

https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-human-rights-and-extreme-poverty/ and excerpted below.

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We are disappointed by the lack of language explaining how conflict can lead to extreme poverty. Ongoing conflicts are currently disrupting access by vulnerable populations to daily needs such as food, causing severe energy shortages, and preventing people from working, all of which deprive people of their livelihoods and can result in extreme poverty. As Secretary General Guterres said, Russia's unprovoked war on Ukraine could throw up to 1.7 billion people — over one-fifth of humanity — into poverty, destitution, and hunger on a scale not seen in decades.

We disagree with the assertion in PP25 that extreme poverty may amount to a threat to the right to life. Article 6 of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life by State actors. 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.

As we noted when we joined consensus on previous resolutions on extreme poverty at the UN General Assembly, we believe the Guiding Principles on extreme poverty and human rights, as referenced in this current resolution, articulate useful guidelines for consideration by States in the formulation and implementation of poverty reduction and eradication programs. However, the United States would like to recall that the principles were adopted "as a useful tool for States" to consider in the formulation of poverty reduction and eradication strategies as appropriate. Therefore, not all aspects of the principles may be appropriate for implementation in all circumstances under the domestic laws of States. We also emphasize that the Guiding Principles include interpretations of human rights law with which we disagree.

Furthermore, while we agree that poverty, inequalities, and exclusions may be harmful to human dignity and the enjoyment of human rights by individuals experiencing such issues, we do not believe such conditions in and of themselves necessarily constitute violations of State obligations under international human rights law.

We again underscore that this resolution, and many of the outcome documents referenced therein, including the 2030 Agenda and the Addis Ababa Action Agenda, are non-binding documents that do not create rights or obligations under international law. We have outlined our specific concerns about the 2030 Agenda for Sustainable Development separately.

We underscore our position that trade language, negotiated or adopted by the General Assembly and Economic and Social Council, has no relevance for U.S. trade policy, obligations, or commitments, or for the agenda at the WTO, including discussions or negotiations in that forum.

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, in distinction to human rights, is not recognized as a universal right held and enjoyed by individuals.

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Cross References

Indication of Gender on U.S. Passports, **Ch. 1.A.2**
L'Association des Americains Accidentels v. State ("AAA I"), **Ch. 1.A.4**
Special Immigrant Visa program, **Ch. 1.B.3.c**
Asylum, Refugee, and Migrant Issues, **Ch. 1.C**
Extradition case: Ali Yousif Ahmed Al-Nouri *(Raising the Convention Against Torture),* **Ch. 3.A.2**
Terrorism and human rights, **Ch. 3.B.2.a**
Trafficking in Persons, **Ch. 3.B.4.a**
International Criminal Court cases, **Ch. 3.C.1**
Accountability in Ukraine, **Ch. 3.C.4.a**
Nestlé /Cargill *litigation (Alien Tort Statute),* **Ch. 5.B**
UN resolutions related to Russia's aggression against Ukraine, **Ch. 7.A.5**
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ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
OAS on human rights in Russia, **Ch. 7.D.1**
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Inter-American Commission on Human Rights ("IACHR"), **Ch. 7.D.4**
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Forced Diversion of Ryanair Flight to Minsk, **Ch. 11.A.2**
USMCA rapid response labor mechanism, **Ch. 11.D.2**
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Statement on the UN Convention to Combat Desertification, **Ch. 12.A.2**
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Afghanistan, **Ch. 17.B.2**
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Responsibility to Protect, **Ch. 17.C.2**
Atrocities in Burma, **Ch. 17.C.3**
Atrocities in Northern Ethiopia, **Ch. 17.C.4**
Atrocities in Ukraine, **Ch. 17.C.5**
International humanitarian law, **Ch. 18.A.6**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. General

a. President Biden's Address to the General Assembly

On September 21, 2022, President Biden delivered remarks before the 77th session of the UN General Assembly. His remarks are excerpted below and available at https://geneva.usmission.gov/2022/09/22/remarks-by-president-biden-before-the-77th-session-of-the-united-nations-general-assembly/.

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Mr. President, Mr. Secretary-General, my fellow leaders, in the last year, our world has experienced great upheaval: a growing crisis in food insecurity; record heat, floods, and droughts; COVID-19; inflation; and a brutal, needless war — a war chosen by one man, to be very blunt.

Let us speak plainly. A permanent member of the United Nations Security Council invaded its neighbor, attempted to erase a sovereign state from the map.

Russia has shamelessly violated the core tenets of the United Nations Charter — no more important than the clear prohibition against countries taking the territory of their neighbor by force.

Again, just today, President Putin has made overt nuclear threats against Europe and a reckless disregard for the responsibilities of the non-proliferation regime.

Now Russia is calling — calling up more soldiers to join the fight. And the Kremlin is organizing a sham referenda to try to annex parts of Ukraine, an extremely significant violation of the U.N. Charter.

This world should see these outrageous acts for what they are. Putin claims he had to act because Russia was threatened. But no one threatened Russia, and no one other than Russia sought conflict.

In fact, we warned it was coming. And with many of you, we worked to try to avert it.

Putin's own words make his true purpose unmistakable. Just before he invaded, Putin asserted — and I quote — Ukraine was "created by Russia" and never had, quote, "real statehood."

And now we see attacks on schools, railway stations, hospitals, wa- — on centers of Ukrainian history and culture.

In the past, even more horrifying evidence of Russia's atrocity and war crimes: mass graves uncovered in Izyum; bodies, according to those that excavated those bodies, showing signs of torture.

This war is about extinguishing Ukraine's right to exist as a state, plain and simple, and Ukraine's right to exist as a people. Whoever you are, wherever you live, whatever you believe, that should not — that should make your blood run cold.

That's why 141 nations in the General Assembly came together to unequivocally condemn Russia's war against Ukraine. The United States has marshaled massive levels of security assistance and humanitarian aid and direct economic support for Ukraine — more than $25 billion to date.

Our allies and partners around the world have stepped up as well. And today, more than 40 countries represented in here have contributed billions of their own money and equipment to help Ukraine defend itself.

The United States is also working closely with our allies and partners to impose costs on Russia, to deter attacks against NATO territory, to hold Russia accountable for the atrocities and war crimes.

Because if nations can pursue their imperial ambitions without consequences, then we put at risk everything this very institution stands for. Everything.

Every victory won on the battlefield belongs to the courageous Ukrainian soldiers. But this past year, the world was tested as well, and we did not hesitate.

We chose liberty. We chose sovereignty. We chose principles to which every party to the United Nations Charter is beholding. We stood with Ukraine.

Like you, the United States wants this war to end on just terms, on terms we all signed up for: that you cannot seize a nation's territory by force. The only country standing in the way of that is Russia.

So, we — each of us in this body who is determined to uphold the principles and beliefs we pledge to defend as members of the United Nations — must be clear, firm, and unwavering in our resolve.

Ukraine has the same rights that belong to every sovereign nation. We will stand in solidarity with Ukraine. We will stand in solidarity against Russia's aggression. Period.

Now, it's no secret that in the contest between democracy and autocracy, the United States — and I, as President — champion a vision for our world that is grounded in the values of democracy.

The United States is determined to defend and strengthen democracy at home and around the world. Because I believe democracy remains humanity's greatest instrument to address the challenges of our time.

We're working with the G7 and likeminded countries to prove democracies can deliver

for their citizens but also deliver for the rest of the world as well.

But as we meet today, the U.N. Charter — the U.N. Charter's very basis of a stable and just rule-based order is under attack by those who wish to tear it down or distort it for their own political advantage.

And the United Nations Charter was not only signed by democracies of the world, it was negotiated among citizens of dozens of nations with vastly different histories and ideologies, united in their commitment to work for peace.

As President Truman said in 1945, the U.N. Charter — and I quote — is "proof that nations, like men, can state their differences, can face them, and then can find common ground on which to stand." End of quote.

That common ground was so straightforward, so basic that, today, 193 of you — 193 member states — have willingly embraced its principles. And standing up for those principles for the U.N. Charter is the job of every responsible member state.

I reject the use of violence and war to conquer nations or expand borders through bloodshed.

To stand against global politics of fear and coercion; to defend the sovereign rights of smaller nations as equal to those of larger ones; to embrace basic principles like freedom of navigation, respect for international law, and arms control — no matter what else we may disagree on, that is the common ground upon which we must stand.

If you're still committed to a strong foundation for the good of every nation around the world, then the United States wants to work with you.

I also believe the time has come for this institution to become more inclusive so that it can better respond to the needs of today's world.

Members of the U.N. Security Council, including the United States, should consistently uphold and defend the U.N. Charter and refrain — refrain from the use of the veto, except in rare, extraordinary situations, to ensure that the Council remains credible and effective.

That is also why the United States supports increasing the number of both permanent and non-permanent representatives of the Council. This includes permanent seats for those nations we've long supported and permanent seats for countries in Africa, Latin America, and the Caribbean.

The United States is committed to this vital work. In every region, we pursued new, constructive ways to work with partners to advance shared interests, from elevating the Quad in the Indo-Pacific; to signing the Los Angeles Declaration of Migration and Protection at the Summit of the Americas; to joining a historic meeting of nine Arab leaders to work toward a more peaceful, integrated Middle East; to hosting the U.S.-Africa Leaders' Summit in — this December.

As I said last year, the United States is opening an era of relentless diplomacy to address the challenges that matter most to people's lives — all people's lives: tackling the climate crisis, as the previous spoker [sic] — speaker spoke to; strengthening global health security; feeding the world — feeding the world.

We made that priority. And one year later, we're keeping that promise.

From the day I came to office, we've led with a bold climate agenda. We rejoined the Paris Agreement, convened major climate summits, helped deliver critical agreements on COP26. And we helped get two thirds of the world GDP on track to limit warming to 1.5 degrees Celsius.

And now I've signed a historic piece of legislation here in the United States that includes

the biggest, most important climate commitment we have ever made in the history of our country: $369 billion toward climate change. That includes tens of billions in new investments in offshore wind and solar, doubling down on zero emission vehicles, increasing energy efficiency, supporting clean manufacturing.

Our Department of Energy estimates that this new law will reduce U.S. emissions by one gigaton a year by 2030 while unleashing a new era of clean-energy-powered economic growth.

Our investments will also help reduce the cost of developing clean energy technologies worldwide, not just the United States. This is a global gamechanger — and none too soon. We don't have much time.

We all know we're already living in a climate crisis. No one seems to doubt it after this past year. We meet — we meet — much of Pas- — as we meet, much of Pakistan is still underwater; it needs help. Meanwhile, the Horn of Africa faces unprecedented drought.

Families are facing impossible choices, choosing which child to feed and wondering whether they'll survive.

This is the human cost of climate change. And it's growing, not lessening.

So, as I announced last year, to meet our global responsibility, my administration is working with our Congress to deliver more than $11 billion a year to international climate finance to help lower-income countries implement their climate goals and ensure a just energy transition.

The key part of that will be our PEPFAR [PREPARE] plan, which will help half a billion people, and especially vulnerable countries, adapt to the impacts of climate change and build resilience.

This need is enormous. So let this be the moment we find within ourselves the will to turn back the tide of climate demastation [sic] — devastation and unlock a resilient, sustainable, clean energy economy to preserve our planet.

On global health, we've delivered more than 620 million doses of COVID-19 vaccine to 116 countries around the world, with more available to help meet countries' needs — all free of charge, no strings attached.

And we're working closely with the G20 and other countries. And the United States helped lead the change to establish a groundbreaking new Fund for Pandemic Prevention, Preparedness, and Response at the World Bank.

At the same time, we've continued to advance the ball on enduring global health challenges.

Later today, I'll host the Seventh Replenishment Conference for the Global Fund to Fight AIDS, Tuberculosis, and Malaria. With bipartisan support in our Congress, I have pledged to contribute up to $6 billion to that effort.

So I look forward to welcoming a historic round of pledges at the conference resulting in one of the largest global health fundraisers ever held in all of history.

We're also taking on the food crisis head on. With as many as 193 million people around the world experiencing acute — acute food insecurity — a jump of 40 million in a year — today I'm announcing another $2.9 billion in U.S. support for lifesaving humanitarian and food security assistance for this year alone.

Russia, in the meantime, is pumping out lies, trying to pin the blame for the crisis — the food crisis — onto sanctions imposed by many in the world for the aggression against Ukraine.

So let me be perfectly clear about something: Our sanctions explicitly allow — explicitly allow Russia the ability to export food and fertilizer. No limitation. It's Russia's war that is

worsening food insecurity, and only Russia can end it.

I'm grateful for the work here at the U.N. — including your leadership, Mr. Secretary-General — establishing a mechanism to export grain from Black Sea ports in Ukraine that Russia had blocked for months, and we need to make sure it's extended.

We believe strongly in the need to feed the world. That's why the United States is the world's largest supporter of the World Food Programme, with more than 40 percent of its budget.

We're leading support — we're leading support of the UNICEF efforts to feed children around the world.

And to take on the larger challenge of food insecurity, the United States introduced a Call to Action: a roadmap eliminating global food insecurity — to eliminating global food insecurity that more than 100 nation member states have already supported.

In June, the G7 announced more than $4.5 billion to strengthen food security around the world.

Through USAID's Feed the Future initiative, the United States is scaling up innovative ways to get drought- and heat-resistant seeds into the hands of farmers who need them, while distributing fertilizer and improving fertilizer efficiency so that farmers can grow more while using less.

And we're calling on all countries to refrain from banning food exports or hoarding grain while so many people are suffering. Because in every country in the world, no matter what else divides us, if parents cannot feed their children, nothing — nothing else matters if parents cannot feed their children.

As we look to the future, we're working with our partners to update and create rules of the road for new challenges we face in the 21st century.

We launched the Trade and Technology Council with the European Union to ensure that key technologies — key technologies are developed and governed in the way that benefits everyone.

With our partner countries and through the U.N., we're supporting and strengthening the norms of responsibility — responsible state behavior in cyberspace and working to hold accountable those who use cyberattacks to threaten international peace and security.

With partners in the Americas, Africa, Europe, and the Middle East, and the Indo-Pacific, we're working to build a new economic ecosystem while — where every nation — every nation gets a fair shot and economic growth is resilient, sustainable, and shared.

That's why the United States has championed a global minimum tax. And we will work to see it implemented so major corporations pay their fair share everywhere — everywhere.

It's also been the idea behind the Indo-Pacific Economic Framework, which the United States launched this year with 13 other Indo-Pacific economies. We're working with our partners in ASEAN and the Pacific Islands to support a vision for a critical Indo-Pacific region that is free and open, connected and prosperous, secure and resilient.

Together with partners around the world, we're working to ser- — secure resilient supply chains that protect everyone from coercion or domination and ensure that no country can use energy as a weapon.

And as Russia's war rolls [sic] — riles the global economy, we're also calling on major global creditors, including the non-Paris Club countries, to transparently negotiate debt forgiveness for lower-income countries to forestall broader economic and political crises around the world.

Instead of infrastructure projects that generate huge and large debt without delivering on the promised advantages, let's meet the enormous infrastructure needs around the world with transparent investments — high-standard projects that protect the rights of workers and the environment — keyed to the needs of the communities they serve, not to the contributor.

That's why the United States, together with fellow G7 partners, launched a Partnership for Global Infrastructure and Investment. We intend to collectively mobilize $600 billion in investment through this partnership by 2027.

Dozens of projects are already underway: industrial-scale vaccine manufacturing in Senegal, transformative solar projects in Angola, first-of-its-kind small modular nuclear power plant in Romania.

These are investments that are going to deliver returns not just for those countries, but for everyone. The United States will work with every nation, including our competitors, to solve global problems like climate change. Climate diplomacy is not a favor to the United States or any other nation, and walking away hurts the entire world.

Let me be direct about the competition between the United States and China. As we manage shifting geopolitical trends, the United States will conduct itself as a reasonable leader. We do not seek conflict. We do not seek a Cold War. We do not ask any nation to choose between the United States or any other partner.

But the United States will be unabashed in promoting our vision of a free, open, secure, and prosperous world and what we have to offer communities of nations: investments that are designed not to foster dependency, but to alleviate burdens and help nations become self-sufficient; partnerships not to create political obligation, but because we know our own success — each of our success is increased when other nations succeed as well.

When individuals have the chance to live in dignity and develop their talents, everyone benefits. Critical to that is living up to the highest goals of this institution: increasing peace and security for everyone, everywhere.

The United States will not waver in our unrelenting determination to counter and thwart the continuing terrorist threats to our world. And we will lead with our diplomacy to strive for peaceful resolution of conflicts.

We seek to uphold peace and stability across the Taiwan Straits.

We remain committed to our One China policy, which has helped prevent conflict for four decades. And we continue to oppose unilateral changes in the status quo by either side.

We support an African Union-led peace process to end the fight in Ethiopia and restore security for all its people.

In Venezuela, where years of the political oppression have driven more than 6 million people from that country, we urge a Venezuelan-led dialogue and a return to free and fair elections.

We continue to stand with our neighbor in Haiti as it faces political-fueled gang violence and an enormous human crisis.

And we call on the world to do the same. We have more to do.

We'll continue to back the U.N.-mediated truce in Yemen, which has delivered precious months of peace to people that have suffered years of war.

And we will continue to advocate for lasting negotiating peace between the Jewish and democratic state of Israel and the Palestinian people. The United States is committed to Israel's security, full stop. And a negotiated two-state solution remains, in our view, the best way to ensure Israel's security and prosperity for the future and give the Palestinians the state which —

to which they are entitled — both sides to fully respect the equal rights of their citizens; both people enjoying equal measure of freedom and dignity.

Let me also urge every nation to recommit to strengthening the nuclear non-proliferation regime through diplomacy. No matter what else is happening in the world, the United States is ready to pursue critical arms control measures. A nuclear war cannot be won and must never be fought.

The five permanent members of the Security Council just reaffirmed that commitment in January. But today, we're seeing disturbing trends. Russia shunned the Non-Proliferati- — -Proliferation ideals embraced by every other nation at the 10th NPT Review Conference.

And again, today, as I said, they're making irresponsible nuclear threats to use nuclear weapons. China is conducting an unprecedented, concerning nuclear buildup without any transparency.

Despite our efforts to begin serious and sustained diplomacy, the Democratic People's Republic of Korea continues to blatantly violate U.N. sanctions.

And while the United States is prepared for a mutual return to the Joint Comprehensive Plan of Action if Iran steps up to its obligations, the United States is clear: We will not allow Iran to acquire a nuclear weapon.

I continue to believe that diplomacy is the best way to achieve this outcome. The nonproliferation regime is one of the greatest successes of this institution. We cannot let the world now slide backwards, nor can we turn a blind eye to the erosion of human rights.

Perhaps singular among this body's achievements stands the Universal Declaration of Human Rights, which is the standard by which our forebears challenged us to measure ourselves.

They made clear in 1948: Human rights are the basis for all that we seek to achieve. And yet today, in 2022, fundamental freedoms are at risk in every part of our world, from the violations of — in Xinjiang detailed in recent reports by the Office of U.N. — U.S. — reports detailing by the U.S. [U.N.] High Commissioner, to the horrible abuses against pro-democracy activists and ethnic minorities by the military regime in Burma, to the increased repression of women and girls by the Taliban in Afghanistan.

And today, we stand with the brave citizens and the brave women of Iran who right now are demonstrating to secure their basic rights.

But here's what I know: The future will be won by those countries that unleash the full potential of their populations, where women and girls can exercise equal rights, including basic reproductive rights, and contribute fully to building a stronger economies and more resilient societies; where religious and ethnic minorities can live their lives without harassment and contribute to the fabric of their communities; where the LGBTQ+ community individuals live and love freely without being targeted with violence; where citizens can question and criticize their leaders without fear of reprisal.

The United States will always promote human rights and the values enshrined in the U.N. Charter in our own country and around the world.

Let me end with this: This institution, guided by the U.N. Charter and the Universal Declaration of Human Rights, is at its core an act of dauntless hope.

Let me say that again: It's an act of dauntless hope.

Think about the vision of those first delegates who undertook a seemingly impossible task while the world was still smoldering.

Think about how divided the people of the world must have felt with the fresh grief of millions dead, the genocidal horrors of the Holocaust exposed.

They had every right to believe only the worst of humanity. Instead, they reached for what was best in all of us, and they strove to build something better: enduring peace; comity among nations; equal rights for every member of the human family; cooperation for the advancement of all humankind.

My fellow leaders, the challenges we face today are great indeed, but our capacity is greater. Our commitment must be greater still.

So let's stand together to again declare the unmistakable resolve that nations of the world are united still, that we stand for the values of the U.N. Charter, that we still believe by working together we can bend the arc of history toward a freer and more just world for all our children, although none of us have fully achieved it.

We're not passive witnesses to history; we are the authors of history.

We can do this — we have to do it — for ourselves and for our future, for humankind.

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b. Multilateralism at the UN Security Council

Ambassador Linda Thomas-Greenfield delivered remarks at a UN Security Council briefing on reformed multilateralism on December 14, 2022. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-briefing-on-reformed-multilateralism/.

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What does it mean for a 77-year-old institution to be fit for purpose? What is, ultimately, the purpose of the United Nations? In 1945, when delegates from around the world met in San Francisco, President Truman outlined that purpose in his opening remarks. "This conference," he said, "will devote its energies and its labors exclusively to the single problem of setting up the essential organization to keep the peace."

To keep the peace. That was our original purpose.

Of course, we have not always succeeded. Wars have still started, including one by a permanent member of the Security Council this past year. Deadlock has often prevented progress. Human suffering has persisted. But at the same time, we have also seen enormous success in realizing the original vision of the UN Charter. A vision that expanded beyond maintaining peace and security to include human rights, the rule of law, and development.

Together, we have curtailed nuclear proliferation. Together, we adopted the Universal Declaration of Human Rights. Together, we sent UN peacekeepers to stop mass atrocities, and we forged truces and permanent peace agreements through negotiation and mediation. Together, we have lifted over a billion people out of poverty, and provided humanitarian aid on a scale that no single country could contribute alone.

These are remarkable accomplishments. But with the state of the world today, they cannot leave us satisfied. We have to contain climate change, eliminate the COVID-19 pandemic, and end the global hunger crisis. We have to defend human rights. Improve

humanitarian efforts. Address persistent pandemics*. Prevent the next pandemic. And, most important of all, defend the UN Charter and hold those who seek to undermine it accountable.

To do this, the United States believes we can and must advance an affirmative agenda for the future of the United Nations. Our hope is to build consensus around a future we collectively seek. A future where we all uphold the UN Charter. A future where we solve the consequential global challenges of our time, like food security, global health threats, extreme poverty, sustainable development, and conflict mediation. A future where we safeguard our shared and interconnected resources. A future where we champion universal respect for human rights.

To see this future, we need to strengthen the United Nations. So, the United States is pursuing a UN modernization agenda consistent with this vision, one that includes Security Council reform. That is why, during a visit to the UN's birthplace in San Francisco, I laid out our six clear principles of responsible behavior for Security Council members, including our commitment to refrain from the use of the veto except in rare and extraordinary circumstances.

These are standards we are setting for ourselves – and that we welcome all of you to hold us to. It's why we were proud to co-sponsor an initiative by a group of forward-leaning countries, spearheaded by Liechtenstein, that requires the General Assembly to convene a meeting after any veto has been cast.

And it is why, at this year's General Assembly, President Biden announced that the United States supports Security Council expansion in both permanent and non-permanent categories, including permanent membership for Africa, and for Latin America and the Caribbean.

The Security Council should reflect our global realities today, not the global realities from 77 years ago. But given how difficult Security Council reform will be to reach, we must be flexible in our approach to change. As President Kőrösi said during last month's General Assembly debate on this topic, Security Council reform can only be achieved if major groups and member states are willing to make compromises from their long-held positions.

As you know, I have begun a series of wide-ranging consultations with Member States, regional blocs, and reform groups to discuss both expansion proposals and other ways to make the Council more effective, transparent, and inclusive. We are open to creative ideas and to credible, sensible, and politically viable paths forward. This is a listening tour to hear ideas – from all members, as it is critical that everyone sees themselves in the process.

I'm looking forward to continuing these engagements, including through the Intergovernmental Negotiations process. I'm thankful to the incoming IGN co-chairs, Kuwait and Slovakia, for answering the collective UN membership's call for change, and I look forward to working together in the months ahead.

Of course, the United Nations is not only the Security Council. Far from it. And just as the Council needs to be updated for our modern era, so too must we reform and reinvigorate the UN system more broadly. We need to develop a more robust and responsive global health security architecture to prevent and respond to future pandemics. We need to make the UN development system more coherent and accountable. We need to make the UN humanitarian system more responsive, effective and efficient, to meet the extraordinary humanitarian needs brought on by conflict, displacement, migration, and a rapidly changing climate.

The Secretary-General's initiative, Our Common Agenda, is a welcome vehicle for this conversation. Thank you, Secretary-General. We believe it can serve as a foundation for this important discussion and the work ahead.

This next year, let us commit to doing this work. Let us build a new consensus, one that will propel us toward the Secretary-General's Summit for the Future with both a renewed commitment to the Charter and a shared vision for a stronger UN system. Let us build a United Nations for our children, and their children, for them to be proud of – one that fosters a more peaceful, more open, more prosperous world for us all.

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2. Taiwan at the UN

On May 18, 2022, the State Department issued a press statement by Secretary Blinken supporting Taiwan's invitation to the World Health Assembly as an observer. The statement is available at https://www.state.gov/taiwan-as-an-observer-in-the-world-health-assembly/ and excerpted below.

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Today's unprecedented health threats demand close international cooperation. The World Health Assembly (WHA) is the decision-making body of the World Health Organization (WHO), and its annual meeting is an opportunity to drive cooperation towards ending the acute phase of the COVID-19 pandemic and advancing global health and global health security. We strongly advocate for the WHO to invite Taiwan to participate as an observer and lend its expertise to the solution-seeking discussions at the 75th WHA this May.

Inviting Taiwan to attend the WHA as an observer would exemplify the WHO's commitment to an inclusive approach to international health cooperation and "health for all." Taiwan is a highly capable, engaged, and responsible member of the global health community, and it has been invited to participate as an observer in previous WHA meetings. Taiwan and its distinct capabilities and approaches – including its significant public health expertise, democratic governance, resilience to COVID-19, and robust economy – offer considerable value to inform the WHA's deliberations. There is no reasonable justification to exclude its participation, which will benefit the world. As we continue to fight COVID-19 and other emerging health threats, Taiwan's isolation from the preeminent global health forum is unwarranted and undermines inclusive global public health cooperation.

Viruses do not respect borders, and no one is safe until everyone around the world is safe from such threats. The United States will continue to partner with the WHO to demonstrate global, inclusive leadership in making the world healthier and better able to prevent, detect, prepare for, and respond to health emergencies.

We will continue to support Taiwan's membership in international organizations where statehood is not a requirement and encourage Taiwan's meaningful participation in organizations where its membership is not possible, in line with our One China policy, which is guided by the Taiwan Relations Act, the three U.S.-China Joint Communiques, and the Six Assurances.

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On October 28, 2022, the Department of State met with Taiwan counterparts for the semi-annual US-Taiwan Working Group on International Organizations, as part of the State Department's effort to support Taiwan's meaningful participation in international organizations. See the State Department media note, available at https://www.state.gov/u-s-taiwan-working-group-meeting-on-international-organizations/, follows.

> [T]he American Institute in Taiwan (AIT) and the Taipei Economic and Cultural Representative Office in the United States (TECRO) convened high-level representatives of the U.S. Department of State and the Taiwan Ministry of Foreign Affairs for consultations in Washington on expanding Taiwan's participation at the United Nations and in other international fora. This discussion focused especially on evaluating this past year's efforts at the World Health Assembly (WHA) in May and International Civil Aviation Organization (ICAO) Assembly in September, and supporting Taiwan's meaningful participation in non-UN international and regional organizations as well as in multilateral initiatives.
>
> Participants exchanged views on addressing global issues, such as global public health, civil aviation safety, climate change, the environment, telecommunications, intellectual property, economic cooperation, and freedom of religion or belief. U.S. participants applauded Taiwan's contributions to the international community and reiterated the U.S. commitment to Taiwan's meaningful participation in international fora, in accordance with long-standing U.S. policy. All participants agreed on the need to strengthen our engagement with likeminded partners in Geneva, Montreal, New York, Taipei, Washington, and elsewhere to increase awareness of Taiwan's positive contributions to the international community.

3. Rule of Law

On October 7, 2022, Attorney Adviser Elizabeth Grosso delivered the U.S. statement at the 77th General Assembly Sixth Committee meeting on the rule of law at the national and international level. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-84-rule-of-law-at-the-national-and-international-levels/.

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We appreciate the Secretary-General's report on strengthening and coordinating United Nations rule of law activities. We fully agree with the Secretary-General's conclusion that "challenges to the rule of law remain on almost every front." Both the UN and its Member States must rise to the challenge of protecting the rule of law at both the national and international levels.

We were pleased to see the excellent work of the UN in the rule of law space documented in this report, in numerous countries. We particularly appreciate the UN's efforts as it applies to access to justice for, and discrimination against, women and girls. We also note the UN's work in increasing accountability for terrorism and for other serious crimes, including corruption.

The UN cannot bear this burden alone. It is up to Member States to protect and enhance the rule of law in their own jurisdictions, and to support other States and civil society organizations seeking to do the same. The United States takes great effort to maintain and protect the rule of law in our own country. The United States also actively supports rule of law initiatives across the globe. A rule of law program administered by the State Department, for example, provided training for 5,700 judges, provided legal aid or victim's assistance to almost 60,000 individuals from low income or marginalized communities, and trained and supported over 20,000 human rights defenders, all between 2017 and 2021. The United States Agency for International Development, USAID, recently circulated for external comment its draft Rule of Law Policy. This policy, the final version of which is forthcoming, outlines an ambitious vision for the support of rule of law as a critical component of USAID's humanitarian and development mission. These projects are only a portion of the recent U.S. activity to support the rule of law.

Early on in the pandemic, the United States understood the critical link between COVID and rule of law. Societies that respect and defend human rights, fundamental freedoms, democratic institutions, and the rule of law are best equipped to respond transparently and effectively to crises. As early as July 2020, the United States released a statement outlining principles in support of democracy, good governance, and human rights in the global response to the COVID-19 pandemic. Those principles continue to guide the U.S. COVID response, including among other principles that governments must remain accountable to their obligations and commitments to respect human rights, must respect freedom of expression, and must provide equal access to medical care and social services regardless of gender, religion or belief, race, ethnicity, sexual orientation, or ability.

The United States is supportive of the UN's efforts to promote the international rule of law. A centerpiece of the international rule of law is the UN Charter. As President Biden said in the General Assembly Hall a few weeks ago during the General Debate: "the U.N. Charter's very basis of a stable and just rule-based order is under attack by those who wish to tear it down or distort it for their own political advantage."

The United States also takes note of the UN's efforts on international criminal justice. The United States has a deep and historic commitment to justice and accountability for the worst crimes known to humanity. The international rule of law means that no individual and no nation is above it. The United States is therefore supporting a range of international investigations into atrocities in Ukraine. This includes those conducted by the International Criminal Court, the United Nations, and the Organization for Security and Cooperation in Europe. The United States welcomes the opening of the investigation by the ICC into atrocity crimes committed in Ukraine. As a court of last resort, the ICC has a critical role to play in the international system of justice.

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4. Universal Postal Union

See Chapter 4 for accession and approval of Universal Postal Union treaties.

4. Administration of Justice

On October 11, 2022, Attorney Advisor Elizabeth Grosso delivered a statement for the United States at the General Assembly Sixth Committee meeting on administration of justice at the UN. The statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-149-administration-of-justice/.

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I'd like to begin by thanking the Secretary-General, the Internal Justice Council, and the Office of the United Nations Ombudsperson and Mediation Services for their reports. These are an invaluable resource for member states on this agenda item, which includes many detailed issues for our consideration. The United States also expresses our continued appreciation to all of the staff (and non-staff) involved in the administration of justice at the UN. Their efforts make the UN a better place to work and ensure that it embodies its values inside and out; values like fairness and inclusion, as well as excellence.

We appreciate the continued progress made over the reporting period on some of the key reforms that the Sixth Committee has advocated in recent years. In the formal system of dispute resolution, we are pleased to see the continued productivity of the UN Dispute Tribunal (UNDT) and UN Appeals Tribunal (UNAT). The UNDT was again able to significantly decrease its backlog, and particularly the number of cases pending for more than 400 days. This success was enabled both by the hard work of tribunal staff, and by the valuable flexibility that the model of half-time judges, and remote work has provided, allowing leadership to dynamically assign judges to the geographic areas of greatest need. We hope that both the UNDT and UNAT can continue to build on this momentum to surmount the lingering challenge of case backlogs.

We welcome the updated case management system that goes hand in hand with the publicly available case tracking dashboard as well as the highly anticipated launch of the new caselaw portal and electronic digest of all tribunal judgments. These are resources that lawyers in this room have long requested, and will be a valuable tool for litigants and the public. Transparency of the system is critically important so that UN staff, their representatives, and the General Assembly can better understand how the tribunals are carrying out administrative justice.

Equally critical is the informal system of dispute resolution that seeks to prevent and resolve staff conflicts before they mature into formal disputes. We continue to appreciate the work of the Office of the UN Ombudsperson and Mediation Services, and hope that awareness and utilization of mediation continues to grow. The Management Evaluation Unit and Office of Staff Legal Assistance (OSLA) have also continued important work in helping to resolve requests before they reached the litigation stage, which is a crucial part of maintaining efficiency and effectiveness of the entire system.

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5. Ukraine

On February 25, 2022, Ambassador Linda Thomas-Greenfield delivered the U.S. explanation of vote on a UN Security Council resolution condemning Russia's aggression against Ukraine. The explanation is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-by-ambassador-thomas-greenfield-before-a-vote-on-a-un-security-council-resolution-condemning-russias-aggression-against-ukraine/. The United States co-sponsored the resolution, which was authored by Albania. Russia vetoed the resolution. China, India, and the United Arab Emirates abstained. U.N. Doc. S/2022/155, available at https://undocs.org/S/2022/155.

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Colleagues, we are here today because of Russia's unprovoked, unjustified, unconscionable war on Ukraine. Let us never forget that this is a war of choice. Russia's choice. Russia chose to invade its neighbor. Russia chose to inflict untold suffering – on the Ukrainian people and on its own citizens. Russia chose to violate Ukraine's sovereignty. To violate international law. To violate the UN Charter.

Now, all across Ukraine people are fleeing for their lives. Residents of Kyiv and Kharkiv have left their homes with only the belongings they could stuff in their backpacks to make shelter in subway stations – which have now become bomb shelters. We've seen reports of attacks on kindergartens and orphanages. Babies – newborn babies in an intensive care unit – have been evacuated into makeshift bomb shelters, too. We have seen heart wrenching images of fathers sobbing as they say goodbye to their young children as they send their families away to safety while they stay behind to defend their country.

In Kyiv today, thousands of people crushed into a local train station, with mothers passing their children over the crowd, begging for people to help to get their babies onto trains and to safety. According to the UN High Commissioner for Refugees, more than 50,000 people have fled Ukraine in less than 48 hours. We've also seen everyday Russians bravely speak out and demonstrate in cities across Russia against President Putin's decision to plunge them into a war with their neighbor. They do not want to sacrifice Russian lives for Putin's ambition.

This body – charged with maintaining international peace and security – was created to prevent exactly this kind of aggression from ever happening again. Russia's latest attack on our most fundamental principles is so bold, so brazen, that it threatens our international system as we know it. We have a solemn obligation to not look away. We believe, to our core, that the noble intentions of this institution should still have a place in solving 21st century problems and shielding our children and our grandchildren from the horrors of war. The horrors of war are exactly what our Ukrainian brothers and sisters are experiencing today. The people of Ukraine will soon need food, and water, and shelter, and medical aid. They will face displacement and lose everything they have worked to build.

For these reasons, we and Albania – in consultation with our allies and partners – have proposed this draft resolution holding Russia to account for its aggression against Ukraine. This resolution condemns Russia's aggression. It reaffirms the sovereignty, independence, unity, and territorial integrity of Ukraine. And it demands the Russian Federation to immediately –

immediately – completely and unconditionally withdraw its forces. It also calls for the facilitation of rapid, safe, and unhindered humanitarian assistance to those in need in Ukraine, and the protection of civilians – including those who are humanitarian personnel.

Today, we are taking a principled stand against Russia's aggression in this Council, but many of us are taking actions in our capitals to defend international law, including the UN Charter, and to impose severe consequences on Russia for its invasion of Ukraine. In coordination with our allies and partners, we are imposing severe and immediate economic costs on Russia. These measures include sweeping financial sanctions that will have an immediate impact on its economy and export controls that will cut off Russia's access to vital technological inputs, atrophy its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. In addition, as was just announced, President Biden will be sanctioning President Putin himself, along with Foreign Minister Lavrov and members of Russia's national security team. These actions are meant to complement the important work we are doing in the Security Council – and the resolution we have put forward today.

History will judge us for our actions – or lack thereof. And so long as we have a Security Council, I believe we ought to strive to ensure it lives up to the highest purposes – to prevent conflict and avert unnecessary war. Russia has already subverted that mission, but at a minimum – at the very minimum – the rest of us have an obligation to object and to stand up for the UN Charter.

To those who say "all parties" are culpable, I say that is a clear cop out. One country – one country – is invading another. Russia is the aggressor here. There is no middle ground. Any doubters? I say look at the kindergarten that was bombed this morning. Take a hard look. To those who say there is a "special history" between Russia and Ukraine that somehow excuses the war? I say we should all think carefully who that label might apply to next.

And as I said on Monday night, President Putin asserted that Russia has a rightful claim to all territories from the Russian Empire. And just a few hours ago, Russia threatened Finland and Sweden with "military and political repercussions." Responsible Member States do not invade their neighbors. They do not commit violence against their neighbors just because they have the ability to do so. That is the entire purpose of our international system. That is, fundamentally, the point of the Security Council and the United Nations.

So, colleagues, this is a simple vote today. Let me put it plainly: Vote yes if you believe in upholding the UN Charter. Vote yes if you support Ukraine's – or any state's – right to sovereignty and territorial integrity. Vote yes if you believe Russia should be held to account for its actions. Vote no, or abstain, if you do not uphold the Charter, and align yourselves with the aggressive and unprovoked actions of Russia. Just as Russia had a choice, so do you.

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On February 27, 2022, Ambassador Linda Thomas-Greenfield delivered the U.S. explanation of vote on a UN Security Council resolution calling for a UN General Assembly special session on Russia's invasion of Ukraine following Russia's veto of UN Security Council resolution S/2022/155. The explanation is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-by-ambassador-thomas-greenfield-on-a-unsc-resolution-calling-for-a-unga-emergency-special-session-on-russias-invasion-of-ukraine/. The UN Security Council adopted the resolution. See U.N. Doc. S/RES/2623, available at https://undocs.org/S/RES/2623(2022).

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Colleagues, on Friday night we stood together outside this chamber to declare that the Russian veto would not stop us from holding Russia accountable for invading a sovereign state – a state that dared to be a democracy. Russia vetoed Friday's resolution. But as I have said before, Russia cannot veto our voices. Russia cannot veto the Ukrainian people. And Russia cannot veto the UN Charter. Russia cannot, and will not, veto accountability.

Now, the Security Council has taken an important step forward toward that accountability. For the first time in decades, it has called for an Emergency Special Session in the General Assembly. The Council members who supported this resolution recognize that this is no ordinary moment. We need to take extraordinary actions to meet this threat to our international system and do everything we can to help Ukraine and its people.

Just this morning, President Putin put Russia's nuclear forces on high alert, even though he is invading a country with no nuclear weapons and is under no threat from NATO, a defensive alliance that will not fight in Ukraine. This is another escalatory and unnecessary step that threatens us all. We urge Russia to tone down its dangerous rhetoric regarding nuclear weapons.

These are issues that affect all Member States. And now, in the General Assembly, they can all make their voices heard on Russia's war of choice. We will then vote on a resolution that will hold Russia to account for its indefensible actions and for its violations of the UN Charter.

As we speak, rockets continue to rain down on Kyiv and across Ukraine. Tanks are tearing through cities. Russia readies still more brutal weaponry – bombs that flatten cities and indiscriminately target civilians – for an unjustifiable assault, fabricated out of lies and the rewriting of history. Russia also propagates outrageous lies about Ukraine's conduct in its own defense.

We are alarmed by the mounting reports of civilian casualties, videos of Russian forces moving exceptionally lethal weaponry into Ukraine, and the widespread destruction of civilian facilities like residences, schools, and hospitals. To the Russian officers and soldiers, I say: The world is watching. Photographic and video evidence is mounting, and you will be held to account for your actions. We will not let atrocities slide.

Those of us here – safely sitting in this hallowed hall – have a moral responsibility to respond to Russia's desecration of human life. That means humanitarian aid – like thermal blankets USAID has already airlifted to tens of thousands of Ukrainians in need and the recently-announced $54 million in additional humanitarian assistance that will reach hundreds of thousands more. That means military support – including the additional $350 million of security assistance the United States is shipping to Ukraine. And it means holding the sole aggressor – Russia – accountable for its actions.

That will take some courage from some fellow Member States, and I know that. I would like to stress for the inspiration, I would ask you to look to the Ukrainian people. They have shown strength, courage, and resilience in the face of Russian guns and soldiers and bombs and rockets. They also maintain the courage to sit down and talk. We welcome their continued willingness to participate in peace talks.

On Friday night, darkness descended on Kyiv. Missiles attacked a sheltering city. But the next morning, Ukrainians woke up to a new citizen – a baby girl born to a mother in a bomb shelter. The baby's name is Mia. Photos of her tiny hand, gripping her mother as they hid underground, have inspired the world.

Let us have the courage of Mia's mother. Let us have the courage of the Ukrainian people, standing bravely to defend their democracy, their way of life, and their futures. Let us show them that they are not alone. That the world stands behind them. That the United Nations has a purpose. That the additional bravery of the protesters in Russia is not in vain. Let us do everything – everything – we can to help the people of Ukraine as they stand up for themselves, for their sovereign country, and for their children.

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The eleventh emergency special session of the UN General Assembly, addressing the Russian invasion of Ukraine, opened on February 28, 2022 and convened several times in 2022. In this emergency special session, the General Assembly adopted five resolutions in 2022, which are discussed, *infra*, in this subsection of the *Digest*.[*]

On March 2, 2022, the UN General Assembly adopted resolution ES-11/1 entitled "Aggression against Ukraine" at a meeting of the eleventh emergency special session. The resolution condemned Russia's "special military operation" in Ukraine and reaffirmed that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." See U.N. Doc. A/RES/ES-11/1, available at https://undocs.org/A/RES/ES-11/1.

On March 24, 2022, the UN General Assembly adopted resolution ES-11/2 entitled "Humanitarian consequences of the aggression against Ukraine" at a meeting of the eleventh emergency special session. The resolution deplored the "dire humanitarian consequences of the hostilities" by Russia. See U.N. Doc. A/RES/ES-11/2, available at https://undocs.org/A/RES/ES-11/2.

On April 7, 2022, the UN General Assembly adopted resolution ES-11/3 entitled "Suspension of the rights of membership of the Russian Federation in the Human Rights Council" at a meeting of the eleventh emergency special session, which called for Russia to be suspended from the Human Rights Council. See U.N. Doc. A/RES/ES-11/3, available at https://undocs.org/A/RES/ES-11/3.

On October 12, 2022, the UN General Assembly adopted resolution ES-11/4 entitled "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations" at a meeting of the eleventh emergency special session. The resolution condemned Russia's "illegal so-called referendums" within Ukraine's recognized borders and its subsequent attempt to annex the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine. See U.N. Doc. A/RES/ES-11/4, available at https://undocs.org/A/RES/ES-11/4.

[*] Editor's note: On February 23, 2023, the UN General Assembly adopted a sixth resolution on Russia's invasion of Ukraine. See U.N. Doc. A/RES/ES-11/6, "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine," available at https://undocs.org/A/RES/ES-11/6.

On November 14, 2022, the UN General Assembly adopted resolution ES-11/5 entitled "Furtherance of remedy and reparation for aggression against Ukraine" at a meeting of the eleventh emergency special session. The General Assembly recommended the creation of an international register of damage caused by Russia in or against Ukraine and the establishment of an international reparation mechanism. See U.N. Doc. A/RES/ES-11/5, available at https://undocs.org/A/RES/ES-11/5.

6. Committees of the UN

a. Charter Committee

On November 3, 2022, Attorney Adviser Elizabeth Grosso delivered remarks at the 77th Session of the General Assembly Sixth Committee on the report of the Special Committee on the Charter of the United Nations ("Charter Committee") and on strengthening the role of the organization. The remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-77th-general-assembly-sixth-committee-on-agenda-item-83-report-on-the-un-charter-and-strengthening-the-role-of-the-organization/.

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We welcome this opportunity to provide a few observations about the work of the Special Committee on the UN Charter this year.

We participated with interest in the annual thematic debate on the peaceful settlement of disputes, which this year focused on judicial settlement. We focused our remarks on the vital role of the International Court of Justice, and the diversity of means that exist for bringing disputes before the Court. We look forward to future exchanges of state practices on other peaceful methods of dispute settlement.

We also appreciated the annual briefing on sanctions. The United States emphasizes that targeted sanctions adopted by the Security Council in accordance with the UN Charter remain an important instrument for the maintenance of international peace and security. We continue to support further discussion on options to strengthen their implementation. While sanctions implemented outside of UN auspices are not the focus of this Committee's work, we wish to also make clear our view that those sanctions are also a legitimate means to achieve foreign policy, security, and other important objectives.

With respect to proposals of new subjects for consideration by the Special Committee, we continue to welcome new proposals that are practical, non-political, and do not duplicate efforts elsewhere in the United Nations. However, we urge member states to avoid using the Special Committee as a forum for the airing of bilateral concerns, or to pursue topics more appropriately raised in other fora.

We also urge those wishing to reinvigorate the Special Committee to withdraw proposals that have languished on its agenda and to give serious consideration to biennial meetings or shortened sessions, given the heavy demands on meeting resources at the UN. We hope the Special Committee will take further steps to improve its efficiency and productivity, and to make the best use of scarce Secretariat resources.

We also take this opportunity to thank the Codification Division of the Office of Legal Affairs for their hard work on the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council, which are valuable resources on the practice of the United Nations organs.

Finally, we must mention our disappointment that a substantive report of the deliberations of the Special Committee this year could not be adopted due to one delegation's demand to omit any description of the numerous statements made condemning the invasion of Ukraine as a violation of the UN Charter. While member states often disagree on the difficult subjects raised in the Special Committee, each of those divergent positions should be indicated in the report, as has been in the case in previous reports. One party should not be permitted to demand that a position stated by a group of delegations clearly within the scope of the Committee be erased entirely as if it never happened. We trust that at its next session, the Special Committee will return to its well-established tradition of respectfully recording delegations' diverse views for the benefit of the public and the historical record.

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b. Committee on Relations with the Host Country

On November 7, 2022, Attorney Adviser Elizabeth Grosso addressed the UN General Assembly Sixth Committee on the report of the Committee on Relations with the Host Country. The remarks are excerpted below and available at https://usun.usmission.gov/statement-at-the-77th-general-assembly-sixth-committee-agenda-item-167-report-of-the-committee-on-relations-with-the-host-country/.

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The United States takes great pride in serving as the host country of the United Nations Headquarters. We are dedicated to fulfilling our obligations under the Headquarters Agreement and strive to be welcoming and supportive hosts to all Permanent Missions and Observer Offices to the UN in New York.

We would like to thank the Mayor's Office of International Affairs, the Governor's Office, and all the public servants in New York who have worked to keep the UN community safe this year and to provide them necessary services. We are pleased that the General Assembly has returned fully to meeting in-person for its 77th session. Those who attended High Level Week can attest to the tremendous resources and attention that this City devotes to supporting the UN.

The United States Mission's Host Country Section works countless hours to assist your missions with an array of issues ranging from routine administrative questions to emergency situations. If your mission has any concerns or questions, we urge you to contact the Host Country Section right away. The sooner we know of an issue, the more quickly we can help address it.

Our leadership has also engaged throughout this year with the members of the Host Country Committee, representatives of interested states, and with the UN's Office of Legal Affairs to address concerns. We continuously work to improve processes, respond efficiently to questions, and resolve outstanding issues. The impact of our efforts is evident, particularly on visa issuances.

Over the past two years, we have streamlined procedures, devoted more resources to visa processing, and improved processing times, despite major hurdles, including continued backlogs of visa applications around the world as a lingering result of the Covid-19 pandemic.

At this fall's General Assembly, we issued the vast majority of requested visas on time, including approximately 95 percent of visas requested by the Russian Federation, a significant number given difficult challenges we face as a result of Russia's actions and decisions. Ambassador Thomas-Greenfield explained these concerns in two letters to the Secretary General this year, shared with all member states.

To ensure timely issuance, we encourage all Member States to continue to apply for visas well in advance of their intended travel, include all requested application information, and share with us in advance if you have concerns about a particular visa, especially when it comes to last minute travel. We must also remind member states to refrain from applying for diplomatic visas to engage in unauthorized activities that are unrelated to UN business. Abuse of UN visas is an affront to the UN and undermines its critical work.

On other topics some delegations have raised today, I refer you to the summaries of U.S. statements included in the full report of the Host Country Committee.

Most importantly, I want to stress that the United States Mission and senior officials in the U.S. government continue to be in active dialogue with the United Nations' Office of Legal Affairs. Given the constructive dialogue with OLA, consistent responses by the US Mission to concerns raised by member states, and the strength of the Host Country Committee to resolve issues, calls for more formal dispute resolution are inappropriate, unjustified, and counterproductive.

The United States is pleased that the Host Country Committee has once again adopted by consensus the recommendations and conclusions that appear at the end of its report. This was accomplished through intensive negotiations among the Members of the Committee. We hope that the Sixth Committee will continue to follow its prior practice, which is to fold the recommendations of the Host Country Committee into its own resolution, and to adopt that resolution by consensus.

Chair, we would like to particularly thank the Legal Counsel, Under Secretary General for Legal Affairs, Miguel de Serpa Soares, the Deputy Legal Counsel, Assistant Secretary General for Legal Affairs Stephen Mathias, and the Secretary of the Committee, Surya Sinha, for their valuable support of the Host Country Committee. We would also like to thank the Chair of the Committee, Ambassador Andreas Hadjichrysanthou of Cyprus, and Legal Adviser Haris Chrysostomou, for their continued work leading the Committee throughout the year and facilitating the completion of the Committee report.

The United States is honored to have the privilege of hosting the United Nations in this great city of New York. We do not take our responsibilities lightly. We know that in this capacity, as Host Country to this essential international organization, we have a special responsibility to each and every person in this room, to each and every delegate in the Halls of the United Nations, and to all of the international civil servants at the United Nations.

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7. Criminal Accountability of United Nations Officials

On May 24, 2022, the Department of Justice ("DOJ") announced that Karim Elkorany, a U.S. national and former UN translator in Iraq pled guilty to one count of making false statements to special agents of the FBI, and one count of assault of an internationally protected person. See DOJ press release available at https://www.justice.gov/usao-sdny/pr/former-united-nations-employee-pleads-guilty-assault-and-false-statements-charges.

On October 6, 2022, Attorney Adviser Elizabeth Grosso delivered remarks at a meeting of the UN General Assembly Sixth Committee on criminal accountability of United Nations officials and experts on mission. The statement, which included remarks on the Karim Elkorany case, is available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-79-criminal-accountability-of-united-nations-officials-and-experts-on-mission/ and excerpted below.

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We are grateful to the officials and experts on mission who perform the essential work of the United Nations around the world.

We appreciate the high standards of integrity with which the vast majority of these officials and experts conduct their work. The United States reiterates its firmly held belief that, on the rare occasion when UN officials and experts on mission commit crimes, they should be held to account.

The United States thanks Secretary-General Guterres for his most recent reports on this issue, as well as the relevant UN agencies that contributed to them. These reports assist the United Nations and its Member States to remain vigilant in protecting the credibility of the United Nations in carrying out its work. We welcome UNOPS revisions to its Internal Audit and Investigations Charter, including the appointment of an outside oversight office in certain instances of credible allegations of conflicts of interests and misconduct. We also welcome WFP's production of more detailed internal procedures for referrals to national authorities when an investigation reveals credible evidence of criminal activity, and UNIDO's updates to its policies and procedures concerning national referrals. We also look forward to updates on the revisions of the UN's mandatory trainings, including with respect to sexual exploitation and abuse, and the development of a reinforcement training package, including for use in pre-deployment trainings conducted by contributing countries of uniformed personnel. We request that all UN programmes, specialized agencies, and related organizations continue to examine the issues addressed in the reports and revise internal rules and procedures, with the goal of greater accountability for criminal conduct, and sexual exploitation or abuse committed by UN officials and experts.

The United States notes the credible allegations of criminal conduct involving field personnel included in the reports. We welcome the United Nations' cooperation with Member

States, and the continued implementation by the UN Office of Legal Affairs of the General Assembly's request for more follow up with Member States to which referrals of criminal allegations have been made when no response has been received. Such referrals, or complaints made directly to national authorities, will only be meaningful when Member States can and do take action on them.

In this regard, we previously brought to the Committee's attention that the United States Department of Justice had charged Karim Elkorany, a U.S. national and former UN employee, with sexual assault, including against a fellow UN employee, while serving with the Organization on a UN mission in Iraq. In May 2022, Elkorany pled guilty to one count of sexual assault, while admitting to 19 other criminal acts, including at least 13 other sexual assaults. Elkorany is scheduled to be sentenced later this month. While we are pleased that Elkorany is being held accountable, more is needed from the UN and Member States. In particular, we need to investigate how Elkorany was able to commit so many assaults over an extended period of time while working for the UN, we need to establish measures to protect against cases like this, and we need to maintain clear accountability mechanisms that address not only the perpetrator's actions, but also management failures. The safety of both UN employees and UN beneficiaries depends on it.

We urge continued vigilance to prevent and respond to allegations of criminal conduct across the UN System, and look forward to continued engagement in this Committee and with the Secretariat on this important issue.

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On October 26, 2022, the U.S. government announced in a media note the establishment of principles on protection from sexual exploitation abuse and sexual harassment when engaging with the UN and other International Organizations. The media note is excerpted below and available at https://www.state.gov/u-s-government-engagement-principles-on-protection-from-sexual-exploitation-abuse-and-sexual-harassment-within-international-organizations/.

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The United States government has established principles for use by all federal agencies engaging with the United Nations and other International Organizations on the prevention and response to incidents of sexual exploitation and abuse and sexual harassment (SEAH). These principles reflect our commitment to increase U.S. engagement in a clear and consistent manner on SEAH issues, to promote accountability and transparency in response to SEAH incidents, and to ensure U.S. taxpayer resources are used in an effective and transparent manner.

These principles have six key components:

Zero Tolerance

The United States will continue to promote the full implementation of policies of zero tolerance for sexual exploitation and abuse and sexual harassment, including zero tolerance for inaction in response to allegations, across the United Nations and other International Organizations. This includes support for policies that prioritize prevention and mitigation

efforts, monitor the effectiveness of such efforts, ensure safe access to confidential SEAH reporting mechanisms and appropriate survivor support, and embed survivor-centered principles across all actions in response to reported allegations – including investigations. The United States recognizes that an absence of reporting does not mean incidents are not being perpetrated, nor does it indicate that zero tolerance policies are being fully implemented.

A Survivor-centered Approach

The United States expects all allegations or incidents of sexual exploitation and abuse and sexual harassment to be reviewed and addressed, while respecting principles of due process. In its engagement with the United Nations and other International Organizations, the United States will continue to advocate for the use of survivor-centered principles and standards – an approach that recognizes and empowers survivors as individuals with agency and unique needs, safeguarding their dignity and wellbeing.

Prevention and Risk Mitigation

The United States will work with the United Nations and other International Organizations to institutionalize prevention and mitigation measures that go beyond basic awareness-raising, training, capacity-building or dissemination of codes of conduct, and include a commitment to promote adequate funding, dedicated technical staff, and meaningful risk analysis and mitigation. The United States will hold the United Nations and other International Organizations to the highest standard, including from the onset of a crisis, conflict or emergency, to mitigate against such risk, especially with highly vulnerable populations.

Accountability and Transparency

The United States expects the leadership of the United Nations and other International Organizations to take meaningful action to support accountability and transparency through, among others, the following: the conduct of timely and survivor-centered investigations; response efforts driven by the needs, experiences, and resiliencies of those most at risk of SEAH; clear reporting and response systems, including to inform Member States of allegations or incidents; and accountability measures, including termination of employment or involvement of law enforcement, as needed.

Organizational Culture Change

The United States will work to advocate for the development by the United Nations and other International Organizations of evidence-based metrics and standards of practice in the implementation of zero tolerance policies, promote holistic approaches, empower women and girls, and reinforce leadership and organizational accountability. Policies, statements, and training are essential, but alone are insufficient to produce lasting positive change. Systems-level change requires a shift in organizational culture, behavior, and the underlying processes and mechanisms to deliver assistance and promote internal accountability.

Empowerment of Local Communities

The United States will prioritize, in partnership with the leadership of the United Nations and other International Organizations, the critical importance of locally-led efforts, particularly those led by women and girls, who, when meaningfully supported and engaged, can inform the measures that may mitigate risks and promote safer foreign assistance programming.

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On October 27, 2022, DOJ announced the sentencing of former UN employee Karim Elkorany to 15 years in prison. The DOJ press release is available at

https://www.justice.gov/usao-sdny/pr/former-united-nations-employee-sentenced-15-years-prison-drugging-and-sexually.

On November 8, 2022, Ambassador Chris Lu, U.S. Representative for UN Management and Reform, delivered a statement following the sentencing of Karim Elkorany. The statement follows and is available at https://usun.usmission.gov/statement-by-ambassador-chris-lu-u-s-representative-for-un-management-and-reform-following-the-sentencing-of-karim-elkorany/.

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On October 27, 2022, the U.S. District Court for the Southern District of New York sentenced Karim Elkorany, a former United Nations employee, to 15 years in prison for the drugging and sexual assault of one victim and making false statements to cover up another sexual assault. As part of the federal investigation, Mr. Elkorany admitted that he had drugged and/or sexually assaulted 17 additional victims between 2002 and 2016. Mr. Elkorany was also employed by a State Department contractor in 2012 and by a State Department grantee in 2010-2011.

The Department of State takes accountability for misconduct very seriously and seeks to ensure a culture that empowers all personnel to contribute to advancing our national security objectives. The Department is committed to fostering a work environment free of the threat of sexual assault, holding accountable employees who commit such actions, and sensitively and effectively responding to individuals who have been sexually assaulted. Consistent with Department policies, we have referred this matter to the Office of Inspector General for review to ensure a culture of accountability. Mr. Elkorany also has been suspended from U.S. government-wide procurement and non-procurement transactions.

We also call on the United Nations to undertake a similar review that includes a comprehensive examination of the handling of any sexual exploitation and abuse or sexual harassment (SEAH) allegations against Mr. Elkorany during his employment with the United Nations. The investigation should examine whether officials were aware of Mr. Elkorany's misconduct and failed to take appropriate action, including ensuring the availability and accessibility of assistance to survivors.

In line with the Principles on Protection from Sexual Exploitation and Abuse and Sexual Harassment for U.S. Government Engagement with International Organizations, the United States is committed to preventing and responding to sexual exploitation and abuse and sexual harassment in the UN system. We strongly support the United Nations' zero tolerance policy and the Secretary-General's efforts to strengthen its implementation. Protection from SEAH is the responsibility of leadership and managers at every level who have a duty to take action in response to allegations of SEAH and ensure implementation of governance policies and delivery of services in a manner that respects the rights and dignity of all personnel and communities served by our institutions.

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B. INTERNATIONAL COURT OF JUSTICE

1. General

Richard Visek, Acting Legal Adviser of the Department of State, delivered remarks at a UN General Assembly debate on a report of the International Court of Justice ("ICJ") on October 27, 2022. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-a-report-of-the-international-court-of-justice/.

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Thank you, Mr. President, and thank you, President Donoghue, for your informative report today and for your leadership as President of the Court.

We also would like to again express our condolences on the loss of Judge Antônio Augusto Cançado Trindade. Judge Trindade's contributions and service to the International Court of Justice, and to international law more broadly, will be greatly missed.

During the reporting period, the International Court of Justice has addressed some of the most important questions in international law, ably managing a growing caseload even in the midst of a pandemic.

Looking to the Court's future, it is thanks to the work of President Donoghue, the other judges of the Court and the Court's staff, that the International Court of Justice continues to be rightly recognized as standing 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, in particular through the peaceful settlement of disputes. Those core principles are being especially tested in these times when the Russian Federation, a permanent member of the Security Council, is engaging in a war of aggression, in violation of another Member State's sovereignty, territorial integrity, and independence.

We note in this regard the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia). The United States continues to call on the Russian Federation to comply with the Court's March 16 order on provisional measures and suspend its military operations in and against Ukraine.

The Court has a vital role to play in the maintenance of international peace and security.

And again, we extend our appreciation to the Court and its staff for their service to the international community, promotion of the rule of law, and for continually stressing the need for all States to act in conformity with their obligations under international law, whether in times of peace or war.

We conclude by noting that there have only been five female judges elected to the International Court of Justice in the Court's history. We hope that all UN Member States will work to address this disparity going forward.

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2. International Court of Justice Elections

On August 23, 2022, Secretary Blinken announced that the U.S. National Group to the Permanent Court of Arbitration intended to nominate Professor Sarah Cleveland, an esteemed scholar of international law with extensive experience in multilateral settings, for election to the ICJ in 2023. The ICJ elections will take place in November 2023 to elect five of 15 judges on the court. Secretary Blinken's press statement is excerpted below and available at https://www.state.gov/the-nomination-of-professor-sarah-cleveland-for-the-international-court-of-justice/.

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The United States deeply values the work of the International Court of Justice. As the principal judicial organ of the United Nations, the International Court of Justice plays a vital role in the peaceful settlement of disputes and promotion of the rule of law. The United States continues to recognize the Court's contributions to the maintenance of international peace and security, and more generally to the realization of the Purposes and Principles of the United Nations.

A dedicated scholar of international law, Professor Cleveland possesses the knowledge, experience, integrity, commitment to the rule of law, and vision to help guide the Court in its important work in the years ahead. She is an outstanding choice for this key position. We ask other UN Member States to vote for Professor Cleveland in 2023.

Professor Cleveland has a long and distinguished career in the service of international law, including as a professor of international law, as the Counselor on International Law in the Department of State's Office of the Legal Adviser (2009-2011), and as Vice Chair and member of the UN Human Rights Committee (2015-2018). She currently holds the Louis Henkin Chair in Human and Constitutional Rights at Columbia University Law School in New York, where she has been a member of the faculty since 2007. Professor Cleveland also served as the U.S. observer member and member on the European Commission for Democracy Through Law (Venice Commission) of the Council of Europe (2010-2019), and she is presently a member of the Ad Hoc Conciliation Commission for Qatar v. United Arab Emirates in the Committee on the Elimination of Racial Discrimination. She has been a visiting professor of international law at the University Panthéon-Assas (Paris II) and Sciences-Po University in Paris, France, as well as at universities in Italy, Switzerland, and the United Kingdom. She has published widely on international law subjects and has been involved in international law litigation in the United States and before the Inter-American Court of Human Rights. She continues to serve as a member of my Advisory Committee on International Law, as a Council Member of the International Bar Association's Human Rights Institute, and as a Commissioner for the International Commission of Jurists.

Professor Cleveland earned a Bachelor's Degree with honors at Brown University; a Master's Degree at Oxford University, where she studied as a Rhodes Scholar; and a J.D. at Yale University Law School. She clerked for Judge Louis F. Oberdorfer on the United States District Court for the District of Columbia and for Justice Harry A. Blackmun on the United States Supreme Court.

Professor Cleveland has our full support, and we hope the International Court of Justice will be able to benefit from her expertise and experience.

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3. Ukraine's Allegations of Genocide against Russia

On February 26, 2022, Ukraine filed an application at the ICJ to initiate proceedings against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide. The application instituting proceedings is available at https://www.icj-cij.org/case/182/institution-proceedings.

The March 1, 2022 State Department press statement, excerpted below, is available at https://www.state.gov/ukraines-filing-against-russia-at-the-international-court-of-justice/.

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Ukraine seeks to address Russia's groundless claims that genocide has occurred in the Luhansk and Donetsk oblasts of Ukraine and establish that Russia has no lawful basis to take military action on the basis of those false claims. Ukraine has also requested the ICJ exercise its authority to indicate provisional measures to preserve Ukraine's rights and limit the ongoing and irreparable harm to the Ukrainian people as well as Ukraine's sovereignty and territorial integrity within its internationally recognized borders.

As the principal judicial organ of the United Nations, the ICJ has a vital role to play in the peaceful settlement of disputes. Ukraine also requested the Court call upon Russia to halt immediately all military actions in Ukraine pending the Court's review. Today, in response to that request, the Court called on the Russian Federation to act in a manner that would allow any provisional measures ordered by the Court to have an actual impact. This is another clear indication that Russia must cease its military activities in Ukraine.

Considering the gravity of the crisis in Ukraine that has resulted from Russia's unprovoked invasion, we trust the Court is taking into consideration the dire circumstances and rapidly unfolding events and hope that it will act with utmost urgency on Ukraine's request for provisional measures.

Each day that Russia is unconstrained in its aggression is a day that brings more violence, suffering, death, and destruction in Ukraine. The United States stands with the people of Ukraine.

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On March 16, 2022, the ICJ issued a ruling against the Russian Federation under the Convention on the Prevention and Punishment of the Crime of Genocide, ordering Russia to immediately suspend the military operations it commenced in February 2022 in Ukraine. The March 16, 2022 order of the Court is available at https://www.icj-cij.org/case/182/orders.

Also on March 16, 2022, the State Department issued a press statement, which is excerpted below, is available at https://www.state.gov/welcoming-the-international-court-of-justices-order-directing-the-russian-federation-to-immediately-suspend-military-operations-in-ukraine/.

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The ruling clearly and unequivocally ordered Russia to immediately suspend the military operations Russia commenced last month and further directed Russia to ensure that anyone subject to its direction, including military or irregular armed units, take no steps in furtherance of such military operations.

The Court – which plays a vital role in the peaceful settlement of disputes under the UN Charter – stressed the need for States to act in conformity with their obligations under international law, including the laws of war. And the Court expressed deep concern about the extreme vulnerability of the civilian population of Ukraine, the numerous civilian deaths and injuries that have resulted from the Kremlin's actions, and the significant material damage, including the destruction of buildings and infrastructure. The Court further noted its profound concern with the Russian government's use of force and emphasized the Court's acute awareness of "the extent of the human tragedy that is taking place in Ukraine" as well as the "continuing loss of life and human suffering." The Court also observed that it did not possess any evidence substantiating Russia's claims that genocide had been committed by Ukraine in the Donbas region.

We welcome the Court's order and call on the Russian Federation to comply with the order, immediately cease its military operations in Ukraine, and to establish unhindered humanitarian access in Ukraine.

The United States will continue to act with our allies and partners in support of Ukraine.

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On September 7, 2022, the United States filed a Declaration of Intervention pursuant to Article 63 of the Statute of the International Court of Justice. The Declaration included a letter from Secretary Blinken appointing Richard C. Visek, Acting Legal Adviser of the U.S. Department of State, as Agent for the U.S. and Emily Kimball, Legal Counselor of the Embassy of the United States of America, as Deputy Agent. The declaration is available at https://www.icj-cij.org/case/182/intervention.

4. Certain Iranian Assets

As discussed in *Digest 2019* at 212-13 and *Digest 2018* at 227-34, the United States appeared before the International Court of Justice ("ICJ") in the case, *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), in which Iran challenges measures adopted by the United States to allow the entry and enforcement of judgments against Iran in favor of U.S. victims of Iran-sponsored terrorism. On February 13, 2019, the Court found that it did not have jurisdiction over Iran's claims to the

extent that they were based on an alleged failure by the United States to accord it and its agencies and instrumentalities sovereign immunity. A hearing on the merits of Iran's remaining claims was held between September 19-23, 2022. Iran presented its opening arguments to the Court on Monday, September 19, the United States presented its opening arguments on Wednesday, September 21, and the parties presented their respective rebuttal arguments on Thursday, September 22, and Friday, September 23. In its submissions, the United States demonstrated the unfounded nature of the narrow set of Iranian claims that remain at issue in the case. The records of all oral proceedings in the case are available at https://www.icj-cij.org/case/164/oral-proceedings.[**]

5. Advisory Opinion on the Occupied Palestinian Territories

On November 10, 2022, Richard Mills, Deputy U.S. Representative to the United Nations delivered the following remarks, noting the position of the United States on the proposal of the UN General Assembly to request an advisory opinion from the ICJ. Remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-the-un-general-assemblys-fourth-committee-meeting-on-israeli-practices-and-settlement-activities/.

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The United States firmly believes that Israelis and Palestinians deserve equal measures of freedom, dignity, security, and prosperity. A negotiated two-state solution remains the best way to ensure Israel's security and prosperity for the future and fulfill the Palestinians' desire for a state of their own. However, there are no shortcuts to statehood, which will only be achieved through direct negotiations between the parties.

The United States continues to oppose the annual submission of the biased resolutions against Israel which we are here to discuss. We reject measures that are not constructive and that seek to delegitimize Israel. The failure to acknowledge the shared history of the Haram al-Sharif, Temple Mount, in these resolutions demonstrates they are intended only to denigrate and not to help achieve peace.

As such, the United States is deeply concerned with some of the language in the "Israeli Practices" resolution. Notably, the new language on a request for an advisory opinion from the International Court of Justice – language that is highly problematic. We believe such an effort is counterproductive and will only take the parties further away from the objective we all share of a negotiated two-state solution. Moreover, this language was inserted late in negotiations into a semi-annual resolution of the Fourth Committee. This did not allow for sufficient consultation and is not the appropriate process for this type of request.

[**] Editor's note: On March 30, 2023, the ICJ delivered its judgment rejecting the majority of Iran's case. See *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* available at https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf.

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On December 30, 2022, the UN General Assembly adopted a resolution on "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem" that included a decision to request an advisory opinion of the ICJ relating to the Israeli and Palestinian conflict. See U.N. Doc. A/RES/77/247, available at https://www.un.org/unispal/document/res-77-247/ and excerpted below.

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18. *Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions, considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

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C. INTERNATIONAL LAW COMMISSION

1. Work of the ILC's 73rd Session

On October 25, 2022, Acting Legal Adviser Richard Visek delivered the U.S. statement at the 77th session of the General Assembly Sixth Committee meeting on the Report of the International Law Commission ("ILC") on its 73rd Session regarding "Cluster 1" issues. That statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-77-report-of-the-international-law-commission-on-the-work-of-its-seventy-third-session-cl/.

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The United States remains strongly supportive of the work of the International Law Commission. Over time, the ILC has provided products for this Committee's consideration that both codify international law and represent progressive development of international law. Some of these products have proved useful to the international community in determining the content of international law. Others have resulted in multilateral treaties. Along these lines, it is our earnest hope that a decision is taken so that the ILC's draft articles on the prevention and punishment of crimes against humanity will be closely considered by an ad hoc committee. The ad hoc committee will give all states the opportunity to discuss and hopefully resolve our concerns with the draft so that it can serve as the basis for negotiation of a convention. As we have previously stated, a convention on crimes against humanity would fill an important gap in the international legal framework – one that is critical now more than ever.

As this was the final session of the quinquennium, before turning to the topics on our agenda for today, I would like to take a moment to thank the members of the Commission for their service to the international community and dedication to international law. We are aware that the members devote considerable time and effort to the intensive work of the Commission, which no doubt comes with some personal sacrifice. The United States would like to express its appreciation to Professor Sean Murphy for his 11 years of distinguished service on the Commission, including as Special Rapporteur for the crimes against humanity draft articles.

Jus Cogens

Turning to the draft conclusions on peremptory norms of international law (jus cogens), we express our appreciation to the Special Rapporteur, Professor Tladi. This topic concerns an overarching category of international law, which underscores the need to secure broad support from States as to the content of these conclusions. The United States and others submitted extensive comments on these draft conclusions prior to their adoption by the Commission, noting a range of objections and concerns. We recognize that the Commission has addressed some of those concerns, including with respect to the adjusted placement of what is now draft conclusion 2 and with significant edits to draft conclusion 21 on recommended procedures. We also note the additional explanations included in the commentary to draft conclusion 16 that make clear that states cannot unilaterally invoke jus cogens to avoid binding Security Council resolutions, and that "it is highly unlikely that a Security Council resolution would, on its face, be in conflict with a" norm of jus cogens.

The United States nonetheless continues to disagree with several of the draft conclusions. We refer the Sixth Committee to our written comments and past statements in this Committee. Rather than reiterate those comments here, I will highlight our remaining concerns with five of the draft conclusions.

First, with respect to draft conclusion 7, which is arguably one of the most important elements of this project, we continue to disagree that acceptance by "the international community of States as a whole" – the correct standard – can be redefined as "acceptance and recognition by a very large and representative majority of States." We have previously indicated our concern with the "very large majority" framing and the addition of "representative" seems to introduce further uncertainty as to the requisite nature or degree of acceptance.

Second, we do not agree with draft conclusion 8, paragraph 2, that resolutions adopted by an international organization can necessarily be evidence of acceptance and recognition. As reflected in the Commission's draft articles on customary international law, the relevant evidence is the "conduct of States in connection with" such resolutions. A State's support for a resolution could reflect only political support; one would still need to look to that State's individual conduct or expression of views to determine the extent to which that resolution reflects that State's recognition or acceptance of a legal principle.

Next, I would like to return to draft conclusion 16 and the treatment of UN Security Council resolutions. Notwithstanding the useful clarifications in the commentary, we continue to disagree–given Articles 25 and 103 of the UN Charter–that a Security Council resolution can be rendered void due to a conflict with jus cogens.

Fourth, the provisions of draft conclusion 19 on consequences of jus cogens breaches on non-breaching states do not reflect customary international law. It is therefore inappropriate to suggest in this document, which will not be negotiated as a treaty, that such provisions are mandatory through use of the word "shall."

Finally, we continue to disagree with the inclusion and content of the non-exhaustive list in the Annex following draft conclusion 23. As we have previously noted in written comments to the ILC and in interventions in the Sixth Committee, this list is both over-inclusive – including norms that may be customary international law but are not peremptory – and underinclusive, omitting such peremptory norms as the prohibition of piracy. Moreover, it is difficult to see the practical value of including this list, as the ILC itself did not follow the methodology it lays out in the draft conclusions when compiling the list. And although the commentary acknowledges that point, we are concerned that the list may be given undue weight by judges and practitioners who will review only the conclusions and annex, and not the lengthy commentary.

We recognize the challenge facing the ILC for this project, having to consider the often strongly divergent views of various States. As that divergence of State views remains on critical parts of this project, we support inclusion of references to the views of States in the resolution addressing the jus cogens conclusions.

Protection of the environment in relation to armed conflicts

Turning to the second topic finalized this past summer, the draft principles on protection of the environment in relation to armed conflicts, the United States would first like to express its appreciation to the Commission for its work on this important issue. We extend our thanks to the Special Rapporteur, Marja Lehto, as well as her predecessor, Marie Jacobsson, for their efforts in drafting reports that recognize the complexity of these issues.

The United States is deeply committed to the protection of the environment and compliance with international humanitarian law. The U.S. military has a robust program to implement the law of war during military operations, including those rules and principles that provide protection to the natural environment. Our military also has adopted a number of policies and practices to protect the environment in relation to military operations and activities. We note the Commission's adoption, on second reading, of the entire set of draft principles and we are appreciative that it has considered our previous comments on them. However, the United States continues to have concerns about the draft principles and their accompanying commentaries. We would like to emphasize three areas of concern.

First, the United States continues to have concerns about the intended legal status of the draft principles. A number of them remain phrased in mandatory terms that purport to dictate what states "shall" or "must" do, even though those principles do not codify existing

international law. This is not appropriate particularly where draft principles are aimed at progressive development rather than codification of the law in a document that will not be considered for a treaty agreed to by States.

In this regard, we note that Draft Principle 5 was modified from the first reading and now appears to assert a new substantive legal obligation. While we appreciate the goals of this draft principle, the basis for asserting this as a mandatory rule of international law is not evident.

Second, while the United States appreciates the recognition in the commentaries that international humanitarian law is the lex specialis applicable to armed conflict, some of the draft principles assert rules that conflict with that law. For example, Draft Principles 8 and 14 appear to suggest prioritization of the protection of the environment over IHL rules concerning efforts to protect human life and alleviate human suffering during armed conflict, or to provide relief to persons displaced by armed conflict. This would not only conflict with existing international law, but would fail to reflect the humanitarian purpose of IHL. IHL, as reflected by the term "humanitarian," is an anthropocentric body of law, which prescribes duties, rights, and liabilities for human beings and prioritizes the protection of human life. Attempts to apply IHL to the environment that deviate from this traditional focus could conflict with existing IHL requirements or diminish existing IHL protections for civilians, detainees, or other persons protected by IHL.

Third, we note that the draft principles include two recommendations on due diligence and liability of business enterprises. The draft principles do not address any other non-State actor such as insurgencies, militias, criminal organizations, and individuals, who have obligations under international humanitarian law. It is unclear to us why the Commission has singled out corporations for special attention given the several other categories of non-State actors, many of whom may have a more direct role in the conduct of armed conflict.

New Projects

Before concluding, let me offer a few words on the newest projects added to the ILC's programme of work. The United States supports all three new projects added to the programme, namely on piracy, settlement of disputes to which international organizations are party, and subsidiary means for the determination of international law.

In previous statements, the United States has outlined our concerns with the ILC's working methods, including lack of clarity between codification and progressive development, and confusion about how the Commission chooses the format of its work products, both of which impact how the ILC's work products are developed by the ILC and are to be understood by the broader community. I will not repeat those concerns today, but welcome indications from the ILC that it will begin to address them.

The United States remains, as ever, supportive of the work of the International Law Commission, and congratulates its members as it begins the new quinquennium**.**

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On October 28, 2022, Attorney Adviser David Bigge delivered the U.S. statement at the UN General Assembly Sixth Committee meeting on the Report of the ILC on its 73rd Session regarding "Cluster 2" issues. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-77-report-of-the-international-law-commission-on-the-work-of-its-73rd-session-cluster-two/.

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…The United States is pleased to address both topics in this cluster, immunity of State officials from foreign criminal jurisdiction, and the ILC working group's efforts on sea-level rise in relation to international law.

Immunities of State Officials from Foreign Criminal Jurisdiction

Turning first to 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 ILC.

As detailed in previous statements, the United States has longstanding concerns with these Draft Articles that remain unaddressed. We will not raise them all again here, but highlight once again that we do not agree that Draft Article 7 is supported by consistent State practice and opinio juris and therefore does not reflect customary international law. We also reiterate our belief that the Commission should work by consensus to best weigh the implicated, serious issues and account for State practice.

Despite the concerns that the United States and others have articulated over the years, the Commission adopted the Draft Articles at the first reading this summer. We look forward to the opportunity to submit detailed written comments on this draft. The United States hopes that the Commission will reflect further on the concerns raised by the United States and others in previous statements before the Sixth Committee and in our future written submissions. If the articles are left unrevised, it will be important for the commentary to reflect where such articles reflect a proposal for the progressive development of the law rather than codification. Further, if various of the draft articles continue not to reflect customary international law and diverge from the expressed views of States, the possibility that the Commission's long efforts will result in draft articles adopted by States as an international convention is greatly reduced. We urge the Commission to reconsider the draft articles in this light, both in substance and in format.

Sea-level Rise in relation to International Law

With respect to the topic of sea-level rise in relation to international law, the United States would first like to note that it has announced a new policy on sea-level rise and maritime zones. Under this policy, which recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise, the United States will work with other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change.

Turning to the ILC's more recent work on this topic, the United States appreciates the Commission's efforts with respect to issues related to statehood. These matters are of vital concern to States that are most at risk from sea level rise. The issues that the Study Group has identified in its work so far raise complex legal questions related to foundational aspects of international law. Given the lack of applicable State practice in relevant areas, it is difficult to draw definitive conclusions on how international law will develop. The United States looks forward to working with other countries to address legal issues of statehood as they arise.

The United States also welcomes the Commission's consideration of protection of persons affected by sea level rise. One area that the United States has been focused on in this regard is climate-related migration. Last October, the White House released its Report on the

Impact of Climate Change on Migration. To better address issues of protection in the context of climate change, the United States is considering ways to strengthen the application of existing protection frameworks, adjust U.S. protection mechanisms to better accommodate people fleeing the impacts of climate change, and evaluate the need for additional domestic legal protections for those who have no alternative but to migrate.

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On November 2, 2022, Attorney Adviser David Bigge delivered the U.S. statement on the Report of the ILC on its 73rd Session regarding "Cluster 3" issues. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-77-report-of-the-international-law-commission-on-the-work-of-73rd-session-cluster-three/.

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…The United States is pleased to address both topics in this cluster, State succession in respect of State responsibility, and general principles of law.

State Succession in respect of State Responsibility

On the succession of States in respect of State responsibility, we warmly thank Mr. Pavel Šturma, the Special Rapporteur, for his thoughtful contributions on this topic.

At the outset, the United States applauds the ILC's decision to move toward draft guidelines on this topic. Guidelines such as this can assist in the progressive development of international law. The exercise of developing guidelines can also allow for the collection of State practice on the topic—where it might exist—without creating new rules and responsibilities.

In particular, the United States is pleased to see that more prescriptive text, such as the words "shall be," has been replaced by "is" or "should" in the draft guidelines. As previously noted in our submission for Cluster One, the United States remains concerned that certain ILC work products that are not intended to be treaties, like the draft principles on the environment in relation to armed conflict, nonetheless couch proposals for the progressive development of international law in binding terms like "shall" and "must."

With respect to the draft guidelines that were provisionally adopted in the last session, the United States agrees with the principle that the guidelines, where possible, should track the 2001 draft articles on State responsibility. Similarly, using formulations that track multilateral conventions where possible is also encouraged, as in draft guideline 14's utilization of the definition of "dissolution of a State" in terms used by article 18 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

The United States looks forward to further reviewing the draft guidelines at the conclusion of the work on first reading.

General Principles of Law

I turn now to the topic "General Principles of Law." The United States joins others in thanking ILC Special Rapporteur Marcelo Vazquez-Bermudez for his clear exposition of the topic and thoughtful, well-researched work. We have three points with respect to this topic.

First, we would like to address transposition of a general principle of law derived from national legal systems. Draft conclusion 6 allows for transposition when the principle is "compatible" with the international legal system. While the United States believes a determination of compatibility is necessary, we are not persuaded that it is sufficient. As the United States stressed last year, a critical element that should be maintained is a role for recognition by States that a rule has transposed to the international plane. We do not agree that State recognition can be deemed "implicit" if a domestic rule is compatible with international law.

As for compatibility on its own terms, we are persuaded that a conflict-based model is best; that is, there should be a determination that the proposed general principle is not in conflict with relevant existing rules of international law. A conflicts analysis is appropriate given the high bar that should exist for the finding and application of a new general principle, commensurate with the application of any new rule of customary international law. A conflict-based model is also consistent with draft conclusion 12, which incorporates the lex specialis principle.

Second, we would like to address draft conclusion 7, governing general principles of law formed within the international legal system. The United States thanks the Special Rapporteur for the caution applied to draft conclusion 7. However, we are not persuaded thus far that general principles as referenced in Article 38(1)(c) of the Statute of the International Court of Justice are formed on the international plane alone. The U.S. view in this regard is supported by the negotiating history of the Statute. Moreover, the lack of sufficient State practice, jurisprudence, or teachings to support the existence of this second category of general principles makes it difficult to determine a methodology for their identification. Draft conclusion 7 also proposes a means for determining international law binding on States in a way that falls short of the sovereign consent expressly required for treaties and inherent in the development of customary international law. Keeping in mind that under Article 38(1) there is no hierarchy between treaties, customary international law, and general principles as sources of binding law, it is critical that the state consent required to find a general principle is on par with that required for treaties and customary international law, even if it is not identical.

For example, referring to the Sempra v. Argentina decision, the Third Report on this topic notes how the tribunal applied a general principle of international law to find a "legitimate expectations" protection within the content of the applicable treaty's fair and equitable treatment standard. That standard was intended by both parties to that treaty to be limited to the minimum standard of treatment under customary international law. However, rather than examining State practice and opinio juris, the tribunal in the Sempra case interpreted the provision based on a handful of other investment tribunals that had recognized the same protection – in other words, the tribunal performed its analysis relying on subsidiary means. Far from being a good example to show how general principles of law are formed, this arbitral award instead may instead serve as a cautionary tale of the risks of too loose a standard for identifying a principle of law. A number of states have made clear their view that "legitimate expectations" are not included in the minimum standard of treatment under customary international law, and yet by the analysis proposed here, it would nonetheless be accepted as a binding "general principle," with no evidence that either treaty party had that intention or belief.

In summary, there is real risk that enshrining requirements through a foggier general principles analysis could make it easier for parties to determine that certain principles bind States without first obtaining the necessary consent.

Our third point provides a procedural proposal for the particular sub-topic addressed in draft conclusion 7. Given the differing views on the question of whether general principles may be formed within the international legal system, even within the ILC itself, the better course of action may be to include a "without prejudice" article, so that the issue can be addressed in the future if state practice were ever to support it more conclusively. We also recommend avoiding using the term "general principles" for this subtopic, and instead refer to this topic using the term "principles formed within the international legal system." Such a separate topic might be appropriate for international criminal procedures, for example, or other sui generis topics.

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2. Draft Articles on Crimes Against Humanity

The United States also provided remarks on the ILC draft articles on the prevention and punishment of crimes against humanity. Julian Simcock, Deputy Legal Adviser at the US Mission to the United Nations, delivered the U.S. statement at a UN General Assembly Sixth Committee meeting on the topic of crimes against humanity on October 10, 2022. The statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-83-crimes-against-humanity/.

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More than 75 years after the Nuremberg trials, there continues to be a significant and concerning gap in the international legal framework for addressing atrocity crimes – specifically, the absence of a dedicated multilateral treaty on the prevention and punishment of crimes against humanity. This stands in stark contrast to genocide and war crimes, the prevention and punishment of which are the subject of widely ratified multilateral treaties. Unfortunately, the need for a convention on the prevention and punishment of crimes against humanity has not waned in the decades since Nuremberg. On the contrary, events have only reinforced its importance.

Recognizing our long history of supporting justice for victims and accountability for those responsible for crimes against humanity, the United States strongly believes that States should address this hole in the international legal framework. Thanks to the tremendous efforts of the Special Rapporteur, Sean Murphy, to whom we are deeply grateful, the Commission's final draft articles on the prevention and punishment of crimes against humanity provide an important opportunity for States to do just that. That is why, in our view, it is critical that States seize this moment and establish a structured mechanism to exchange substantive views on the draft articles.

We recognize that States have a range of views on the content of the final draft articles. The United States, for its part, is of the view that, notwithstanding their many merits, the draft articles can and should be modified in certain, key respects. However, we believe that States should seek to address any concerns with the content of the final draft articles through constructive engagement and meaningful dialogue. For that reason, the United States strongly

supports the establishment of an ad hoc committee with an appropriately robust mandate that reflects the importance of this project and the gravity of this subject.

We continue to 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 such a convention should be our shared goal. We cannot afford to let another year go by without meaningful progress towards achieving that goal.

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At a Sixth Committee meeting at the 77th session of the General Assembly on November 18, 2022, the representative of the Gambia on behalf of more than 77 countries, including the United States, introduced a draft resolution entitled "Crimes against humanity." U.N. Doc. A/C.6/77/L.4. The Committee adopted the resolution without a vote. See U.N. Doc. A/RES/77/249, available at https://undocs.org/A/RES/77/249. See Report of the Sixth Committee, available at https://undocs.org/A/77/416. Under the resolution, the Sixth Committee will reconvene for extraordinary sessions in April 2023 and 2024 solely to debate the crimes against humanity draft articles, with the opportunity for States to provide written comments by the end of 2023. In Fall 2024, during the 79th session of the General Assembly, the Sixth Committee will determine whether to move the draft articles to a convention.

D. ORGANIZATION OF AMERICAN STATES

1. Russia

On April 21, 2022, Secretary Blinken issued a press statement on the suspension of Russia's Permanent Observer status at the Organization of American States (OAS). The statement is excerpted below and available at https://www.state.gov/suspension-of-russias-permanent-observer-status-at-the-organization-of-american-states/.

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Today, the United States welcomes the adoption of a resolution at the Organization of American States (OAS) suspending Russia as a Permanent Observer to that institution. With the passage of this resolution, OAS member states demonstrated that we do not stand on the sidelines in the face of the Russian government's violations of international humanitarian law and human rights abuses. Our Hemisphere stands with Ukraine.

The Kremlin's inhumanity in its premeditated, unprovoked, unjust war against Ukraine is horrifically clear. Deaths and destruction mount daily. More than 10 million Ukrainian citizens and others have been uprooted by the Kremlin's coldblooded aggression. On a global scale, Putin's senseless war of choice has hurt economies and threatened the food security of the world's most vulnerable. As President Biden stated, "An overwhelming majority of nations

recognize that Putin is not only attacking Ukraine, he is attacking the very foundations of global peace and security."

The Russian government's brutal attack against Ukraine's territorial integrity and sovereignty demonstrates the Kremlin's utter contempt for the values of democracy and respect for human rights, values that form the bedrock of the Inter American system. We commend the governments of Antigua and Barbuda and Guatemala for leading the adoption of the resolution, and all the governments that supported it.

The OAS action today sends a clear message to the Kremlin. The overwhelming number of countries in the Americas called upon the Kremlin to end its unconscionable war of choice, withdraw its forces, and comply with international law.

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2. Nicaragua

On April 27, 2022, Bradley A. Fredan, Interim U.S. Permanent Representative to the OAS delivered remarks on the OAS office closure in Nicaragua. The remarks are excerpted below and available at https://usoas.usmission.gov/oas-office-closure-in-nicaragua/.

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Thank you Chair. The Ortega regime's forcible occupation of a diplomatic facility illustrates once again its utter contempt for the peaceful, rules-based order in the Americas, and for this Council.

As the Secretary General has pointed out, the regime's decision to send police armed with machine guns to shut down the small office representing this Organization in Managua violates basic norms concerning the inviolability of the facilities of international organizations.

This a stunning affront to the OAS as an institution and to each of our governments. We cannot simply shrug and look the other way. If we wish to preserve the ability of OAS staff to do their jobs in the field throughout the region, often under difficult conditions, we must condemn this action in the strongest terms and consider other, more concrete responses as well.

It is worth recalling that the Ortega-Murillo government itself insisted on the establishment of this office three years ago, in early 2019, when it was engaged in a second attempt at political dialogue with representatives of Nicaragua's democratic opposition. The office was intended to support the work of the Secretary General, as well as the Papal Nuncio, who both had been invited by the regime to accompany that dialogue.

Those talks resulted in agreements signed by representatives of the current Nicaraguan government to release political prisoners, restore civil liberties and negotiate improvements to the country's electoral framework.

Now, three years later, those commitments have long been abandoned by the regime. Most of the leaders who negotiated for the opposition are now imprisoned, condemned in secret trials for crimes they did not commit without the right to a proper legal defense.

Yesterday, the regime convicted one of its former Ambassadors to the OAS for the supposed crime of criticizing Ortega's rash decision last November to denounce the Charter. The regime has sought to demonize the work of OAS and has recently expelled the Papal Nuncio from Nicaragua — something I have never seen happen in any of our countries, ever.

So in a way it is no surprise that Ortega and Murillo have now seized the OAS office in Managua — an office that they never allowed to serve its intended purpose, which was to promote reconciliation. It is nonetheless essential that we treat this act as the institutional and legal abomination that it is. And see it in the broader context of the regime's now clear and longstanding rejection of the commitments our governments have made to democracy and the rule of law.

The Ortega regime has chosen to ignore the recommendations of this Council, defy its international commitments, and most importantly, to deny fundamental human rights to the Nicaraguan people.

While the Nicaraguan regime has told us it is leaving the OAS, it still remains subject to these obligations, and if we want those norms to mean something, we must not be afraid to apply them in egregious cases like this one.

Madame Chair, the OAS remains the most important multilateral organization in the Western Hemisphere and has a long, proud history of supporting the democratic advancement of all nations in the Americas. It is up to all of us to preserve that legacy, and to defend the organization when it comes under this kind of attack.

At the same time, it is also essential that the OAS and its member states remain engaged on the situation in Nicaragua, now more than ever, despite the regime's evident desire to flee, in order to stand up for the rights and wellbeing of the long-suffering Nicaraguan people. We must not abandon them in their hour of need.

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On August 12, 2022, Tom Lersten, Charge d'Affaires, a.i., U.S. Permanent Mission to the OAS delivered remarks on the OAS resolution condemning the Ortega regime in Nicaragua. The remarks are available at https://usoas.usmission.gov/oas-resolution-condemns-ortega-regime-in-nicaragua-2/ and excerpted below.

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The United States, joined by many governments represented here today, has spoken out repeatedly on the ongoing threats to human rights organizations that seek to document incidents and provide legal representation to political prisoners.

Madam Chair, we have also condemned the ongoing harassment and surveillance of human rights defenders and former political prisoners and their families who continue bravely to call for democratic transition in Nicaragua.

However, the Ortega-Murillo regime continues to show where its priorities lie –by silencing and stifling civil society, human rights defenders, educational and religious institutions, and organizations which benefit the community and the people of Nicaragua.

Let me be clear: the United States supports the people of Nicaragua seeking peaceful democratic change in their country with all diplomatic and economic tools at our disposal.

The United States condemns the sentencing of political prisoners and ongoing repression of universities, journalists, and civil society, including human rights defenders and religious actors. President Ortega and Vice President Murillo continue to demonstrate their aim of entrenching their family's authoritarian control over every aspect of life in Nicaragua. Targeted harassment and repression of Catholic Bishop Rolando Álvarez during the last two weeks is the latest example.

We have seen the brutal treatment of those unjustly detained, who only sought peaceful change through free and fair elections. These political prisoners have done nothing wrong. However, this regime – terrified of losing power – has tightened its grip and punished political opposition, independent media, students, business leaders, educators, religious actors and civil society.

We have heard yet again today of abuses against political prisoners, which includes excessive confinement, continuous interrogations, denial of medical care and access to reading materials, including sacred texts, inadequate food, and sleep deprivation. These abuses are egregious and unconscionable for all, but especially for the many older or ill prisoners.

We are also concerned that Nicaragua continues its negative trend on religious freedom, including escalating threats against Catholic clergy, a topic recently addressed in our Committee on Juridical and Political Affairs last week.

As President Biden noted on November 16, 2021, "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."

Madam Chair and colleagues, we remain concerned that these groups, associated with the government and government officials continue to harass, insult, and make death threats against Catholic clergy.

We also express concern for the continuing verbal harassment and inflammatory rhetoric directed at religious leaders from President Ortega and Vice President Murillo who have labeled priests and bishops, "terrorists in cassocks" and "coup-plotters," accused them of committing crimes, and threatened them with prosecution on trumped up accusations of inciting "hatred" against pro-government supporters. A week ago, Vice-President Murillo accused Catholic clergy of committing "crimes against spirituality."

We continue to believe that the OAS, the organization most firmly committed to the defense of democracy in the Western Hemisphere, must support the democratic aspirations of the Nicaraguan people.

With this in mind, we thank Canada and Chile – as well as the leadership of the delegation of Antigua and Barbuda – for championing efforts to develop today's Permanent Council resolution which addresses these concerns.

Madam Chair, this is why we also urge collective support to approve a strong OAS General Assembly resolution on Nicaragua.

To this end, the United States looks forward to working collaboratively with all of you on efforts in Lima to hold the Nicaraguan government accountable on its abuses. This merits ongoing attention here in this Council and at the upcoming General Assembly.

At the same time, we must continue to work with partners in the UN and EU to increase international pressure that will result in the transition to democratic government and respect for human rights the Nicaraguan people deserve.

Today is a key step in this effort, Madam Chair, and we thank all of the members of the OAS Working Group on Nicaragua for their commitment and engagement.

I reaffirm the U.S. commitment to work in partnership to secure a strong and broadly supported text in October.

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3. OAS General Assembly

On October 6, 2022, ahead of the 52nd Organization of American States General Assembly, the State Department issued a fact sheet entitled "Secretary Blinken Leads U.S. Delegation to the 52nd in Lima, Peru." The fact sheet is available at https://www.state.gov/secretary-blinken-leads-u-s-delegation-to-the-52nd-organization-of-american-states-general-assembly-in-lima-peru/.

Also, on October 6, 2022, Secretary Blinken delivered remarks at the OAS General Assembly First Plenary Session in Lima, Peru, which was held in person for the first time since 2019. The remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-at-oas-general-assembly-first-plenary-session/.

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Since the last time we met in person, I think it's fair to say that our hemisphere has faced no shortage of challenges. No region in the world has been harder hit by the pandemic or its economic consequences.

And then just as we were beginning to recover, we ran into new headwinds – rising food and energy costs, which have been worsened by President Putin's unprovoked and unjustified war on Ukraine.

What we've also experienced is that the consequences have fallen disproportionately on communities that have historically been marginalized or underserved. People of African descent, and other racial and ethnic minorities. Indigenous communities. Women and girls. People with disabilities. LGBTQI+ people.

The recent headwinds have been compounded by longstanding, pre-existing challenges across the region: a chronic lack of economic opportunity; an accelerating climate crisis; endemic corruption, all of which are driving people to leave their homes in unprecedented numbers, despite knowing the serious risks of the journey.

Citizens across our hemisphere are looking to their governments – to us – to help address these problems, to create the conditions, and give them the tools they need, to actually improve their lives. So it's one of the greatest tests that our nations face – indeed have faced since we came together in Lima to adopt the Inter-American Democratic Charter on that indelible September 11 day in 2001.

We believe strongly that we can meet this test if – if we come together to close two gaps between what our democracies promise and what they deliver.

First, we can address enduring inequities in access to opportunity, which have for too long prevented communities from reaching their full potential.

This social compact has been at the heart of the OAS since its conception. Under President Biden's leadership, we are committed to partnering with countries across the region to deliver solutions to challenges affecting all of our people – challenges that no country can solve alone.

In the Caribbean, where today, two-thirds of the people are experiencing food insecurity, we're partnering with CARICOM to combat hunger and malnutrition, but also giving farmers the tools they need to boost productivity and adapt to the growing effects of climate change, so that communities can actually feed their own people as well as others.

Together with partners, we're working to meet the commitment we made at the Summit of Americas in June to train and equip half a million local health care workers across the hemisphere, so that more people can get the quality care that they need in their own communities. This initiative in and of itself can help revolutionize access to health care and the quality of health care.

Through the efforts of Vice President Harris, we have raised $3.2 billion in investment commitments from more than 40 companies to promote broad-based economic opportunity in El Salvador and Guatemala and Honduras – from expanding access to rural broadband to helping create good-paying jobs in manufacturing to providing small, minority and women-owned businesses with access to credit.

Across these efforts and others, we focused on empowering communities that have experienced systematic marginalization over the years because it's the right thing to do. Because when all communities have equal access to development, all of society benefits. And because more equal democracies tend to be more stable and secure partners. That's the spirit of the Lima Declaration – "Together Against Inequality and Discrimination" – that we will collectively adopt tomorrow.

A few days ago in Colombia, I had the honor of formally committing the United States to be the first international accompanier of the Ethnic Chapter of the country's 2016 peace agreement.

This is a visionary document because it recognizes that a lasting peace cannot be achieved without making strides toward greater equity, justice, and inclusion for the country's Afro-Colombian and Indigenous communities who suffered disproportionately during the country's conflict.

Advancing equity is also crucial to building durable democracy – not just in Colombia, but across our hemisphere. Including the United States, where we have our own deep history of discrimination, which is still felt in our society. That's why President Biden has made the fight for equity and racial justice a priority for our administration – at home as well as around the world.

I have to tell you it's been one of my highest priorities at the State Department, because we know that the incredible diversity of our country is one of our greatest strengths, including in our foreign policy. It makes us stronger. It makes us smarter. It makes us more creative. It gives us the plurality of voices and views and visions that are vital to our own democratic experiment and to being a better partner to fellow democracies across the hemisphere. I appointed the Department's first chief diversity and inclusion officer to help drive progress

toward a more diverse institution that actually looks like the country it represents and, as well, our first Special Representative for Racial Equity and Justice, Desiree Cormier Smith, who is part of our delegation to the General Assembly to help us promote these efforts around the world.

So that's one big piece. The second is this: We believe that we have to recommit to delivering on the core principles of our OAS and Inter-American Democratic Charters. There are so many ways member states can help make real the commitments embodied in those charters.

We can unequivocally condemn the authoritarian regimes in our region and take collective steps to hold them accountable.

In Nicaragua, the Ortega-Murillo regime is shamelessly flouting virtually every principle of the OAS and Democratic Charters – arbitrarily locking up its political opponents, brutally cracking down on protestors, committing flagrant election fraud, attacking and imprisoning journalists and human rights defenders.

The Cuban regime continues to imprison hundreds of people unjustly detained in the July 11th, 2021 protests for the supposed crime of coming out into the streets to peacefully call on their government to meet their basic needs, and for demanding human rights. Some of those incarcerated are minors; others were sentenced to decades in prison just for speaking their minds.

Meanwhile, in Venezuela, the Maduro regime has repeatedly denied the Venezuelan people's right to pick their own leaders, caused a humanitarian catastrophe that's displaced more than 6 million Venezuelan refugees and migrants toward whom Venezuela's neighbors have shown extraordinary generosity. All OAS member states should be able to come together to support a negotiated solution that leads to free and fair elections in Venezuela in 2024.

We can further reaffirm our commitment to the OAS and Democratic Charters by defending their principles around the world, as our member states did when the OAS became one of the first multilateral bodies to condemn President Putin's brutal war on Ukraine and then subsequently suspended Russia's membership as a Permanent OAS Observer.

It's crucial that we stay united by condemning Russia's sham referenda as a violation of international law, and unequivocally rejecting any attempts to illegally annex Ukrainian territory. And I think the statement that member states signed on to today led by Guatemala demonstrates that. And we hope that countries will similarly support the UN General Assembly resolution that is expected to come up in the next week or so.

We can help our fellow democracies that are struggling most to meet their citizens' basic needs. That's why we co-sponsored the resolution before this General Assembly on Haiti, which supports solutions driven by Haiti's government, political parties, civil society, diaspora, and private sector to address the country's deteriorating security situation, to restore its democratic institutions, to foster conditions so the Haitian people can finally realize their full potential.

Finally, we can speak up when democratically-elected leaders in our region borrow from the playbook of autocrats to try to stay in power and erode checks and balances, like passing legislation that grants the government overly broad powers to crack down on the media and civil society, extending term limits; harassing, persecuting, or firing independent government officials like prosecutors and judges for doing their job. We're seeing more leaders taking these anti-democratic steps – often under the false justification that they enjoy popular support.

We will work to bring more partners into this effort: civil society organizations, the private sector, youth groups, and other parts of our governments, which is why the United States

is pleased new text – is pleased to present, excuse me, new text, for this assembly calling for more robust inter-parliamentary engagement on issues of common concern.

But I want to be very clear that this is not about picking sides between left and right or between liberal and conservative. It's about putting our shared commitment to democracy above loyalty to ideology or to party. It's about defending the rights and aspirations of people across our hemisphere. It's about standing up and giving meaning to the words that we all signed on to in the charters and indeed in the United Nations Charter and the Universal Declaration of Human Rights.

Ultimately, I'm confident that we will be able to meet this moment because while citizens may not be satisfied with the way their democracies are working, most still think it's the best way to tackle the everyday problems they face and actually improve their lives in tangible ways.

Citizens still believe. And if they believe and are willing to engage to be our partners across this hemisphere in improving democracies from within, then there is no challenge that we cannot overcome if we do it together. That's the spirit that the United States brings to our common enterprise and to this hemisphere that we share.

* * * *

4. 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. U.S. federal courts of appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. The OAS Charter does not suggest an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. As the American Declaration is a non-binding instrument and does not create legal rights or impose legal duties on member States of the OAS, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration.

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 2022, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings. A selection of significant U.S. activity in matters, cases, and other proceedings

before the IACHR and IACtHR in 2022 is discussed below. The United States also corresponded in other matters and cases not discussed herein.

a. Petition No. P-909-15: Michael Brown Jr. and Lesley McFadden

On March 18, 2022, the United States submitted its admissibility response to the petition filed on behalf of Michael Brown Jr. and Lesley McFadden (Petitioners) relating to the fatal shooting by Missouri police on August 9, 2014. Petitioners allege violations of the American Declaration. The U.S. acknowledged that Michael Brown Jr.'s death was tragic and helped spark important conversations about race and policing. But given domestic civil and criminal suits and remedial actions by the U.S. Department of Justice, the U.S. argued that the Commission does not have a basis to properly consider the petition. The U.S. response asserted that due to supervening information the petition should be archived under Article 42 of the Commission's Rules of Procedure and that in the alternative the petition is inadmissible under Articles 28, 31, and 34. Excerpts follow from the U.S. response (with footnotes omitted).

* * * *

First, Petitioners do not appear to have notified the Commission of the important supervening information that, on June 20, 2017, the parents of Michael Brown, Jr., Michael Brown, Sr. and Lesley McSpadden, reached a settlement in a wrongful death suit against the City of Ferguson. This civil suit, which was first filed in Missouri state court on April 23, 2015 and removed to federal court on May 26, 2015, alleges a number of causes of action that effectively mirror several of the allegations in the instant Petition (e.g., alleging that the city of Ferguson engaged in a pattern and practice "of unreasonable stops and detentions lacking reasonable suspicion and unconstitutional arrests lacking probable cause," "of the use of excessive force against African-Americans," and "of failing to properly supervise officers, of failing to conduct fair and impartial investigations and of failing to properly train officers"). The settlement agreement and ensuing dismissal of this case with prejudice in the district court show that Petitioners have now received adequate and effective remedies for the actions surrounding the death of Michael Brown, Jr. While these remedies will never ease the pain of his death, Petitioners freely and fully availed themselves of the remedies provided by the U.S. court system and voluntarily agreed to a settlement that resolved their legal complaints. Nothing in the principles established by the American Declaration or in the Rules would suggest that the Commission should intervene in a matter that has been voluntarily settled between a petitioner and governmental authorities that are accused of violating the petitioner's rights. Moreover, implicit in the requirement of exhaustion in Article 31 of the Rules is the incontrovertible principle that if a petitioner has received an effective remedy in the domestic system, then their claim is not admissible before the international forum. Therefore, this supervening information renders the Petition inadmissible and out of order consistent with Articles 31 and 34 of the Rules.

Additional supervening information concerning the St. Louis County criminal investigation also renders the Petition inadmissible and out of order. In July 2020, Wesley Bell, who was elected in 2018 to replace previous St. Louis County prosecutor Bob McCulloch,

announced that he had reopened the investigation into the death of Michael Brown, Jr. and conducted a five-month review of the evidence in the case. At the end of that review, his office came to the conclusion that it could not prove beyond a reasonable doubt that Officer Darren Wilson committed murder or manslaughter under Missouri law when he shot Michael Brown.

In a statement concerning the investigation, Bell wrote:

> This is one of the most difficult things I've had to do as an elected official. My heart breaks for Michael's father, Michael Brown Sr., and for his mother, Lesley McSpadden. I know this is not the result they have been looking for, and that their pain will continue forever.
>
> I also want to be clear that our investigation does not exonerate Darren Wilson. The question of whether we can prove a case at trial is different than clearing him of any and all wrongdoing. There are so many points at which Darren Wilson could have handled the situation differently, and if he had, Michael Brown might still be alive. But that is not the question before us; the only question is whether we can prove beyond a reasonable doubt that a crime occurred. The answer to that question is no, and I would violate my ethical duties if I nonetheless brought charges.

This supervening information is directly relevant to the claims in the Petition concerning whether there was an effective criminal investigation and renders those claims out of order and inadmissible.

Finally, the United States notes that there have been important developments in the Department of Justice's investigation into the Ferguson Police Department for an alleged pattern or practice of unlawful conduct that are relevant to Petitioners' "systematic pattern and practice" claims in the Petition. The Department of Justice's March 4, 2015 report concerning this investigation identified a pattern or practice of unlawful conduct within the Ferguson Police Department, including unreasonable force and discriminatory policing. The report made a series of immediate recommendations for the Ferguson Police Department and the Municipal Court focused on implementing community policing; increasing the tracking, review, and analysis of Ferguson Police Department's stop, search, ticketing, and arrest practices; increasing civilian involvement in police decision-making; revising use-of-force approaches, reporting, review, and response; and developing mechanisms to effectively respond to allegations of officer misconduct. Additionally, in March 2016, the Department of Justice reached a court-enforceable agreement with the City of Ferguson intended to remedy the patterns or practices identified in the Department of Justice's investigation. The Ferguson agreement requires significant reforms, including policy revisions; increased training, including training in bias-free policing and use of force; robust accountability systems; and enhanced data collection.

For all the aforementioned reasons, the United States submits that the Petition should be archived or, in the alternative, declared inadmissible. Furthermore, the United States notes that much of the Petition discusses systemic issues best addressed through thematic hearings—of which the Commission has already held several—and not appropriate for an individual petition. In such thematic hearings, the United States has underscored its commitment to eradicating bias and ensuring equal justice for all and has reported on important work in this area. Since the filing of this Petition, there have been myriad developments in this respect. For instance, the Department of Justice has opened 74 civil investigations into police departments between 1994 and 2021, and, as of January 2021, was enforcing 15 settlement agreements. And, from approximately 2017 to 2020, the Department of Justice charged more than 240 defendants,

including individual police officers, with willfully violating constitutionally protected rights (or conspiring to do so) while acting under the color of law, and obtained convictions of 200 defendants, including police officers, for these charges. These are but a few of the examples of the steps the United States has taken to eliminate bias in the criminal justice system. The United States has elevated advancing racial equity and justice as an immediate priority across all federal government agencies, policies, and programs. The Department of Justice is fully committed to establishing and promoting trust between law enforcement and the communities they are sworn to serve and protect across the United States.

* * * *

b. Petition No. P-1720-15: Rekia Boyd

On April 14, 2022, the United States submitted its admissibility response to the petition filed in the wake of the death of Rekia Boyd, who was fatally shot by an off-duty detective with the Chicago Police Department on March 21, 2012. The U.S. acknowledged Ms. Boyd's death as a tragedy and one that cannot be eased with monetary remedies. Nevertheless, in view of the Petitioners' settlement with the city of Chicago, and in view of other developments, the U.S. argued that the petition was not admissible. Additionally, the U.S. asserted in the alternative that the petition should be archived consistent with the Commission's Article 42 procedures.

***c. Petition No. P-2227-21:* Melissa Lucio**

On May 24, 2022, the United States submitted its admissibility response to the petition filed on behalf of Melissa Lucio, who is on death row in Texas. Petitioner alleges violations of the American Declaration relating to the conditions of detention. The U.S. response asserts that the matter is inadmissible because Petitioner did not exhaust domestic remedies available in the United States to redress the alleged violations before submitting the Petition, as required by Article 31 of the Commission's Rules of Procedure and Article 20(c) of the Statute of the Commission.

The U.S. Response noted that, as both the IACHR and IACtHR have made clear, it is necessary for individuals to pursue such domestic remedies before seeking redress in an international forum. The exhaustion of domestic remedies is embedded in the international legal system as a means of respecting State sovereignty. As noted in the U.S. Response, the Petitioner filed and was granted a writ of habeas corpus in Texas state court subsequent to her filing in the Commission. In view of that ongoing petition, including the potential for further appeal, the U.S. argued that the petition was inadmissible.

***d. Case No. 13.874*: Mark Allen Taylor**

On July 5, 2022, the United States filed its response on the merits to the petition brought on behalf of Mark Allen Taylor, alleging Taylor has been systematically forced to

undergo psychiatric treatment without consent. In its response, the U.S. requests that the Commission to revisit its admissibility decision and reconsider the questions of standing. In particular, the U.S. noted that the petitioner was filed by Dr. Janet Parker, who claimed to be his representative, but was not properly authorized to represent the Petitioner under Article 23 of the Commissions' Rules of Procedure. Excerpts follow from the U.S. response (with footnotes omitted).

* * * *

…The question of standing in this petition presents for the Commission a fundamental issue: should a person who is not representing the person who is the subject of a petition, but alleging violations of that alleged victim's human rights, be able to petition the Commission on that person's behalf, particularly where the case involves sensitive medical information and there has been no exhaustion of domestic remedies? The United States submits that a human rights petition should be based on demonstrable existence of a bona fide or legally cognizable relationship between the alleged human rights victim who is the subject of the petition and the petitioner-representative before the Commission, unless there are compelling circumstances that make the filing of the petition impossible for the alleged human rights victim. Only by carefully balancing these considerations can a body like the Commission best ensure the integrity, efficiency, and freedom from abuse of its petition-adjudication process.

While the United States recognizes that the Commission has taken a broad reading of the standing requirement under Article 23 of its Rules in past cases, this petition highlights the problems that arise from taking such an approach, which in practice creates an exception that swallows the rule.

First, because such persons are not legal representatives, there never could be exhaustion of domestic remedies prior to filing a petition with the Commission, as they would not have standing to do so under United States law. The exhaustion of domestic remedies requirement is embedded in the international legal system to respect State sovereignty and 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. 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," and the Commission has repeatedly made clear that petitioners have the duty to pursue available domestic remedies. Yet, the Commission's treatment of the exhaustion of domestic remedies in this matter is conclusory, confusing, and at odds with these principles. Despite formally identifying Dr. Parker rather than Mark Allen Taylor as the petitioner in this matter, the Commission's Admissibility Report then completely ignores the question of whether Dr. Parker has exhausted domestic remedies. Instead, the Commission states, in a conclusory fashion and without any underlying analysis, that "Mr. Taylor and his mother have been effectively denied adequate or any due process with regard to Mr. Taylor's situation of forced hospitalization/medication." Setting aside the fact that it is unclear how the record in this case supports such a statement, if Dr. Parker is indeed the petitioner in this matter, it is Dr. Parker who must demonstrate to the Commission with

concrete evidence that she has exhausted domestic remedies. To find otherwise would eviscerate the exhaustion requirement for any petitioner not directly representing the victim and could invite abuse of the Commission's procedures and undermine the respect that respondent governments have for the integrity of these proceedings.

Additionally, allowing any person or organization, regardless of whether they have been authorized to represent the victim, to bring a petition on the victim's behalf invites potential infringement of the victim's privacy interests. This is particularly evident in this case, where Dr. Parker has submitted a petition rife with personal information about the victim, including personal medical information, but devoid of clear authorization from either the victim or the victim's legal guardian to share such information with the Commission or the U.S. government. This begs the question of how the Commission protects the privacy interests of a victim who has not consented to the filing of the petition or the inclusion of highly private and sensitive information. Moreover, the Commission's practice in this respect places both the respondent government and the Commission at great disadvantage in addressing such a petition. That is because it is unclear how the respondent government would obtain permission to disclose privacy-protected information that the Commission would need to adequately consider the matter where the petitioner does not have a representational relationship with the victim and where the victim, guardian, or other legal representative has not otherwise consented to the release of such information. Thus, the Commission's approach here raises serious practical considerations of how to navigate privacy interests of victims who have not consented to the filing of the petition and fairness to all parties, as well as serious questions concerning any Commission findings in such cases.

In conclusion, the United States requests that the Commission consider the serious concerns raised herein and, in accordance with the Rules, close this matter. In the absence of a meaningful standing requirement, the Commission would become a forum for any person to raise human rights allegations, regardless of whether they have sufficient knowledge of the facts of the situation or access to the information needed to present an accurate case, or whether their actions before the Commission are undertaken with the consent, or reflective of the interests, of the alleged victim. Particularly in light of the limited resources of both the Commission and respondent governments, the United States urges the Commission to consider the adverse consequences, demonstrated by this petition, of taking an unfiltered reading of Article 23 and whether such an approach makes the best use of the limited resources of the Commission and respondent governments. This response is not intended to address any other issues regarding this Petition, and the United States reserves the right to file additional observations should the Commission choose, despite the legal issues and other concerns highlighted herein, to further consider it.

* * * *

e. Petition No. P-624-14: Onondaga Nation and the Haudenosaunee

On August 22, 2022, the United States submitted its admissibility response to the petition filed by the Onondaga Nation and the Haudenosaunee, alleging violations of the American Declaration, the American Convention, and other instruments, including the United Nations Declaration on the Rights of Indigenous People ("UNDRIP"). The U.S. response asserts that the petition is inadmissible and does not demonstrate a failure by

the U.S. to live up to its commitments under the American Declaration and that the Commission is not competent to review alleged violations under other international instruments. In addition, the U.S. argued that under the Commission's "Fourth Instance Formula," the petition must be dismissed as the Petitioners have fully adjudicated the matters raised in their petition in federal litigation that has spanned decades and now ask the Commission to reexamine these federal court determinations. Finally, the U.S. argued that petitioners had failed to state a claim under the American Declaration Excerpts follow from the U.S. response (with footnotes omitted).

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* * * *

1. The Commission's Competence is Limited

a. Claims Related to the Loss of Land Between 1788 and 1822 are Inadmissible because they are Outside the Commission's Competence *Ratione Temporis.*

To the extent that the Petition presents claims relating to the Onondaga Nation's loss of land between 1788 and 1822, the Commission lacks jurisdiction because these events do not fall within the Commission's competence *ratione temporis*. These events occurred before the adoption of the American Declaration and the establishment of the Commission. The principle that relevant instruments, in this case the American Declaration, cannot be applied retroactively is well-established in Inter-American and international jurisprudence and has been consistently applied by the Commission to reject the consideration of claims that predate the commitments set forth in the instrument. For instance, in *Isamu Carlos Shibayama et al. v. United States*, a petition that asked the Commission to consider alleged violations related to a World War II-era internment program, the Commission correctly concluded in its report on admissibility that these events were outside of its competence *ratione temporis*. Here, the loss of land between 1788 and 1822 predates the Commission's competence as to claims brought against the United States, which began in 1951. Thus, the Commission does not have the competence *rationae temporis* to review Petitioners' claims related to this loss of land.

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

Although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate their claims that international legal obligations have been violated. Such recourse to international instruments and authorities beyond the American Declaration reflects the reality that Petitioners' claims do not implicate provisions of the American Declaration, leaving them to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [('American Convention')] and other applicable instruments … ." Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to

the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list various instruments and bodies Petitioners rely on to articulate their claims. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioners' claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

c. The American Declaration does not Speak to Collective Rights and the Commission Lacks Competence to Extend its Review Beyond the American Declaration

Specifically, Petitioners' claims are not admissible because the American Declaration does not speak to collective rights and the Commission lacks competence to expand its review beyond the Declaration. The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's plain text. The articles cited in the Petition begin with the words "[e]very human being," "[a]ll persons," "[e]very person," or "[e]very accused person." All of the other rights, and all of the duties, similarly begin with language referring to individual persons. As such, these articles, on their face, do not set forth rights pertaining to collectives like the Onondaga Nation. Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States. *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP declaring collective rights of indigenous peoples. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been "born free and equal, in dignity and in rights, … endowed by nature with reason and conscience," and which are the rights recognized and protected by the American Declaration.

Furthermore, the UNDRIP consists of aspirational statements of political and moral commitment, and are not binding under international law. The instrument was not intended to create new international law, nor does it reflection States' existing obligations under conventional or customary international law. The United States supports the instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes. However U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights.

* * * *

3. Failure to State a Claim under the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration.

As a preliminary matter, the United States notes that Petitioners invoke the matter of *Mary and Carrie Dann* throughout their Petition. They assert that "the domestic legal processes available to the Onondaga Nation fail to meet the standard required by the Commission in the Dann case to protect indigenous peoples' rights to property, equality, and judicial protection." While the United States acknowledges the Commission's non-binding Merits Report and its recommendations in *Mary and Carrie Dann*, as previously stated, the United States does not

agree with the Report. Moreover, the United States notes that the facts in *Dann* are easily distinguishable and it does not support Petitioners' claims.

The Dann sisters were Western Shoshone Indians, occupying and using ranch lands in Nevada that had been patented to their father. Representatives of the Western Shoshone Indians presented a claim to the Indian Claims Commission (ICC), seeking compensation for their treaty lands that were wrongfully taken by the United States. The Dann sisters were denied participation in the claim. The ICC awarded damages to the Western Shoshone for the taking of their lands, including the lands used and occupied by the Dann sisters.

On the premise that the Western Shoshone damages award extinguished all Indian title to the lands at issue, including the Dann sisters' ranch, the United States deemed the Dann sisters to be trespassing, and initiated proceedings to impound their cattle. The Commission concluded that the Dann sisters were denied the opportunity to protect their interests in the proceedings before the ICC and Court of Claims. The Commission found that, by purporting to divest aboriginal people of their property rights to land on which they currently reside and which they currently use via procedures from which the aboriginal people were excluded, the judicial processes of the United States violated property right and equal treatment rights protected by the American Declaration.

In utter contrast, the Onondaga Nation brought suit in federal court on its own behalf, and litigated it fully. Moreover, the Onondaga Nation was seeking the court's declaration that the Onondaga Nation held title to millions of acres of land that the Onondaga Nation had not possessed for more than 150 years – unlike the Dann sisters, who sought to protect their right to continue occupying and using their own land. Because of the dissimilarity of facts, the Commission's ruling on the Dann sisters' petition provides no support for these Petitioners.

Furthermore, as detailed below, even apart from their misplaced reliance on *Dann*, Petitioners have failed to state facts that establish a violation of the American Declaration.

a. Article XXIII (Right to property)

Article XXIII of the American Declaration provides that "[e]very person has a right to own such private property as meets the essential needs of decent living and help to maintain the dignity of the individual and of the home." Petitioners allege that "[t]he Nation's historical, spiritual, and cultural relationship with its lands has been severed in violation of the law, but the federal court ruling applied to the Nation prevents it from obtaining redress of any kind through the U.S. judicial system." However, Article XXIII sets forth the rights of individuals and does not speak to collective rights. This fact is evidenced in the Article's plain text: "[e]very person," and "dignity of the individual." As such, Article XXIII, on its face, does not set forth a right pertaining to collectives like the Onondaga Nation, and thus Petitioners have failed to state a claim under Article XXIII of the American Declaration.

b. Article XVIII (Right to a fair trial)

Article XVIII of the American Declaration provides that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Petitioners fail to articulate any violation of their right to resort to courts in the United States, as they detail in the Petition how they brought suit in federal court and litigated it fully. Petitioners' Article XVIII claim, which appears to be an attempt to allege that the U.S. courts' application of *stare decisis* and preclusion constitutes a denial of the right to fair trial, clearly amounts to an invitation to sit in appellate review of the U.S. courts. The fact that Petitioners were unsuccessful cannot constitute

a denial of the right to resort to the courts. Article XVIII does not guarantee a successful outcome in litigation. Because Petitioners fail to state facts that establish a violation of the right to fair trial under the American Declaration and amounts to an invitation for the Commission to sit as a court of fourth instance, this claim is inadmissible.

c. Article II (Right to equality)

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." Petitioners assert that the formulation of laches "applied to dismiss the Onondaga Nation's land rights action represent a new body of law that closes the courts of the United States to claims of historic violations of indigenous land rights," and that "this new equitable defense has not been applied to the land rights claims of non-Indians." Petitioners also assert that "in no other area of federal law is the right to a remedy inversely related to the effect of the claim on the defendants." These assertions are unsound.

Laches is a well-established principle, the purpose of which is to "avoid inequity." Contrary to petitioners' assertions, laches has been invoked to support dismissal of historic land claims by non-Indians. Indeed, in his dissent in *Oneida II*, Justice Stevens identified such a precedent, *Wetzel v. Minnesota Ry. Transfer Co.,* that rebuts Petitioners' assertions. Additionally, in *Robins Island Preservation Fund, Inc. v. Southold Corp.*, the Second Circuit Court of Appeals invoked laches in support of its affirmance of the district court's dismissal of a historic land claim brought by non-Indians.

Contrary to Petitioners' assertions, weighing the effect of the claim on the defendant is fundamental to laches analysis in all areas of law. Laches is an equitable doctrine that "requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action. [but] mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." Thus a court's laches analysis requires a determination as to prejudicial effect of the plaintiff's claim on the defendant.

Petitioners have failed to show that the courts' application of laches to dismiss Onondaga Nation's claim seeking ownership of its 2.5 million acre aboriginal territory violated their right to equality.

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f. Case No. 14.328: Ward Churchill

On September 1, 2022, the United States filed its response on the merits to the petition brought on behalf of Ward Churchill, alleging violations of the American Declaration relating to Churchill's termination as a professor at a public university. In its response, the U.S. requests that the Commission to revisit its admissibility decision and reconsider the questions of standing. See *Digest 2019* at 262-63 for discussion of the U.S. admissibility response. That review is foreclosed under the Commission's "Fourth Instance Doctrine," and that the Petitioner failed to establish any violation of the American Declaration.

g. Request for Information No. MC-259-02: Detainees in the Guantanamo Military Base, Cuba

On September 16, 2022, the United States provided its response to a precautionary measures request for information filed on behalf of detainees in the Guantanamo Miliary Base, Cuba. The response provides updated information regarding U.S. ongoing efforts to close the Guantanamo Bay detention facility. Excerpts from the U.S. response follow.

* * * *

In previous submissions, we have explained the legal bases pursuant to U.S. and international law for the continuing detention of detainees at the Guantanamo Bay detention facility. Notwithstanding this continuing legal authority to detain, the United States remains committed, as a matter of policy, to reducing the number of detainees held at Guantanamo Bay and responsibly closing the detention facility there. The Biden-Harris Administration has underscored its reaffirmed commitment to close the Guantanamo Bay detention facility (Guantanamo). To that end, the Administration has engaged in a thorough review, involving all relevant departments and agencies, to develop an approach for responsibly reducing the detainee population and setting the conditions to close the facility. In the first twenty months of the Administration, four detainees have been repatriated to their home countries and an additional seventeen detainees have been determined eligible for transfer. In particular, since the December 2021 working meeting, the U.S. government effected the repatriation of 3 detainees—1 to Saudi Arabia, 1 to Algeria, and 1 to Afghanistan—8 additional detainees have been determined eligible for transfer, and 1 detainee was both sentenced and completed his sentence after having pleaded guilty before a military commission. Approximately 95 percent of those at one time held at the Guantanamo Bay facility have been repatriated or resettled. Currently, 36 detainees remain at Guantanamo: 20 have been determined eligible for transfer; 4 continue to be eligible for review by the Periodic Review Board (PRB); 9 are being prosecuted before a military commission; 1 has been convicted by military commission and is awaiting sentencing, 1 is serving a sentence; and 1 has recently completed his sentence.

The U.S. government is actively working to identify appropriate receiving countries and to transfer all eligible detainees. Once a transfer eligibility determination has been made, the Secretary of State, in consultation with the Secretary of Defense, is responsible for obtaining appropriate security and humane treatment assurances regarding any detainee to be transferred to another country based on a PRB eligibility determination. As Secretary of State Blinken emphasized last summer, the Department takes seriously the task of identifying countries that will respect the human rights of transferees. This includes consideration of the principle of non-refoulement. Under U.S. law, it is the policy of the United States "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." *See* Section 2242(a) of the Foreign Affairs Reform and Restructuring Act. Current U.S. law prohibits the use of funds to

transfer Guantanamo detainees to Yemen, Libya, Somalia, and Syria. In cases where the U.S. government cannot repatriate a detainee to his country of origin because of this restriction or refoulement concerns, the United States must engage in complex diplomatic efforts to identify and negotiate third-country resettlement. Given the sensitive nature of ongoing diplomatic discussions, we cannot detail transfer negotiations, but we assure the Commission that the highest levels of the United States government have engaged on Guantanamo transfers and the United States is actively and persistently working to effect transfers for eligible detainees.

Detainees who are not eligible for transfer and have not been charged before the military commissions are eligible for review by the PRB. The PRB is an administrative, interagency body established under Executive Order 13567 to determine whether detention of eligible Guantanamo detainees remains necessary to protect against a continuing significant threat to the security of the United States. Under the Biden-Harris Administration, the PRB expedited full reviews for detainees in 2021 and 2022.

Regarding the conditions of detention, the United States is fully committed to ensuring that persons detained at Guantanamo are treated humanely and held in accordance with applicable law. All U.S. military detention operations, including those at Guantanamo Bay, must comply with all applicable domestic laws and applicable international legal obligations, and the United States takes very seriously its responsibility to provide for the safe and humane treatment of detainees at Guantanamo Bay.

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detained individuals. JMG providers take seriously their duty to protect the physical and mental health of detained persons and approach their interactions with such persons in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging participation of detained persons in medical treatment and prevention. The healthcare provided to the detained persons at Guantanamo is comparable to that which U.S. military personnel receive while serving at Joint Task Force–Guantanamo. JMG providers administer care to all detainees at Guantanamo, including psychiatric services and care specific to a detainee's age group. Detainees are treated at dedicated medical facilities with an expert medical staff. The medical facilities are equipped with inpatient beds, a physical-therapy area, an audiology booth, optometry exam room, dental treatment suites, an operating room, pharmacy, radiology unit, and central sterilization. Navy Hospital Corpsmen visit each cellblock daily. Upon the request of any detainee for care, these Corpsmen can refer them to primary care providers in the JMG. In addition to providing routine medical care, more serious medical conditions can be treated at U.S. Naval Hospital Guantanamo, which provides care to U.S. military personnel at the base. Additional specialists are available from outside the base to provide care at Guantanamo for medical needs that exceed the capabilities of the U.S. Naval Hospital at Guantanamo.

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h. Case No. 14.544: Eastern Navajo Dine against Uranium Mining

On September 26, 2022, the United States filed its response on the merits to the petition brought on behalf of Eastern Navajo Dine against Uranium Mining, alleging violations of the American Declaration that could result from uranium mining. See

Digest 2019 at 257-61 for discussion of the U.S. admissibility response. The United States argued that Petitioners relied heavily on international instruments other than the American Declaration and that the Commission lacks the competence *rationae materiae* to entertain such claims. The U.S. response also reiterated its argument that the "Fourth Instance Doctrine" and a failure to exhaust domestic remedies precludes review of the claims at issue. Finally, the U.S. response noted that the allegations are speculative and without merit. Excerpts follow from the September 26 U.S. response (with footnotes omitted).

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VI. Petitioners' Claims are Without Merit

To the extent that Petitioners argue that the NRC license to HRI itself caused the United States to fail to live up to political commitments under Articles I, XI, XXIII, XVIIII, and XIII of the American Declaration, these claims are plainly without merit.

A. No Violation of Article I (Right to Life)

Article I states: "Every human being has the right to life, liberty, and the security of his person." Petitioners' characterization of the right to life is incredibly expansive and greatly exceeds the scope of Article I of the American Declaration. Because the plain language of this Article cannot support their claim, Petitioners attempt to import standards from the American Convention on Human Rights, the ADRIP, and several reports of the Commission. As discussed above, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States, so these other instruments cannot be applied to expand the scope of Article I of the American Declaration. Even setting that aside, however, Petitioners' expansive view of the right to life is without support. Petitioners feature selective and misleading excerpts from these sources and then claim in a conclusory manner that the right to life "has also been interpreted to include the right to a clean and healthy environment." However, as the United States recently stated in its Explanation of Position on the Right to a Clean, Healthy and Sustainable Environment Resolution at the United Nations General Assembly, "a right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law."

For these reasons and because of the hypothetical and speculative nature of the harms Petitioners allege, Petitioners fail to state a cognizable claim under Article I of the American Declaration.

B. No Violation of Article XI (Right to Health)

Article XI of the American Declaration provides that every person "has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." Petitioners have failed to establish facts that could support a claim of violation of this provision. Article XI of the American Declaration articulates the "right to the preservation of health" through specific means: "sanitary and social measures" relating to "food, clothing, housing and medical care." The right to the preservation of health through such measures under Article XI is further qualified "to the extent permitted by public and community resources."

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

The evaluation and balancing required by Article XI rests with the regulatory regime of the State and must be accorded great deference for the reasons so cogently expressed in *Fadeyeva v. Russia*, a European Court of Human Rights case that has been cited by the Commission. *Fadeyeva* emphasized in another context that "States have a wide margin of appreciation," that "the national authorities . . . are in principle better placed than an international court to evaluate local needs and conditions," and that it is not for such a court "to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere." The United States' 2019 Response detailed the extraordinary amount of study and resources that the NRC and other federal agencies dedicated to reviewing the license application at issue in this matter. This system may not be perfect, but its processes and results are entitled to the "wide margin of appreciation" demanded by *Fadeyeva*. Such deference to the expertise of domestic institutions is particularly mandated here, where the administrative process is so involved and complex. Petitioners thus fail to establish facts that could support a claim of a violation of Article XI of the Declaration.

C. No Violation of Article XXIII (Right to Property)

Article XXIII of the American Declaration states: "Every person has a right to own such private property as meets the essential needs of decent living and help to maintain the dignity of the individual and of the home."As stated in the United States' 2019 Response, the NRC license has not impacted private rights to property ownership. However, in their Supplemental Observations, Petitioners appear to reframe their right to property claim as a collective rights claim. Specifically, they allege for the first time that the United States failed to obtain "the Petitioners' and their communities' free, prior and informed consent for the proposed project" and that the United States failed to fulfill the "requirements" the Commission allegedly set forth in its Merits Report in *Indigenous Communities of the Lhaka Honhat (Our Land) v. Argentina*. These arguments are unavailing for several reasons.

First, to support this theory, Petitioners invoke the American Convention, Inter-American Court of Human Rights jurisprudence interpreting the Convention, and collective rights provisions of the UNDRIP and ADRIP. However, as previously discussed, the Commission must decline to review the Petition through the rubric of these instruments because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States and the American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives.

Second, Petitioners appear to allege deprivations suffered by the Navajo Nation as a whole with respect to the concept of free, prior and informed consent and the "requirements" of *Lhaka Honhat*. However, nowhere do Petitioners claim to be the official representatives of Navajo Nation or that they are empowered to raise collective claims on behalf of Navajo Nation. Thus, to the extent that they attempt to introduce claims on behalf of Navajo Nation in their Supplemental Observations, the Commission must decline to review such claims.

Third, Petitioners' characterization of and reliance on *Lhaka Honhat*, a case concerning indigenous communities in Salta, Argentina, is misplaced and misleading. That case interpreted the American Convention, to which the United States is not party, and involved facts that are distinguishable. Petitioners focus their argument on the claim in *Lhaka Honhat* that the State of Argentina had violated the right to property in connection with the carrying out of public works and granting of a concession for oil and gas exploration in indigenous ancestral territory. While *Lhaka Honhat* did involve such a claim, the case in fact centered on a claim of denial of effective title to ancestral territory, and Petitioners here ignore the fact that the public works and concession for oil and gas exploration at issue there occurred on the land to which the indigenous communities claimed title. In the instant case, in contrast, Petitioners are not alleging that the NRC expropriated or denied them title to the land subject to the license granted to HRI. Nevertheless, Petitioners attempt to apply what they misleadingly term "the requirements outlined in the *Lhaka Honhat* report," to include "compli[ance] with the expropriation requirements of the American Convention," although they allege no dispossession of property in connection with the NRC licensing procedure. Moreover, apart from the inapplicability of *Lhaka Honhat* to the case at hand, Petitioners overstate the authority of that report with respect to the United States, as a Commission report analyzing an instrument to which the United States is not party cannot establish "requirements" that the United States must fulfill. In short, Petitioners' reliance on *Lhaka Honhat* is misplaced. Finally, putting aside the aforementioned defects in Petitioners' attempted claims concerning free, prior and informed consent, the NRC's administrative processes not only provided notice of NRC's review of the application, but also included opportunities for participation. As described in the FEIS supporting issuance of the HRI license, NRC, in fact, invited the Navajo Nation to consult with the NRC as it developed the Environmental Impact Statement. As explained in the FEIS, the Navajo Nation originally declined, and although the Navajo Nation later petitioned the NRC to assist with the environmental review, at that point the review was close to completion and thus, the NRC denied the request. Despite not officially cooperating in drafting the FEIS, the Navajo Nation provided a considerable amount of information for the analyses contained in the FEIS. (FEIS, 6-1).

Moreover, under the National Historic Preservation Act, the NRC consulted with the Navajo Nation, as well as other Native American groups that have ties to the project area, including the Pueblos of Acoma, Laguna, and Zuni and the Hopi Tribe. (FEIS, 6-1). Although the Navajo Nation did not participate in the NRC's adjudicatory proceeding, the Navajo Nation filed an amicus brief in the case before the U.S. Court of Appeals for the Tenth Circuit alleging improper consultation. As the NRC explained in its brief to the Court, the record established in NRC's adjudicatory proceedings makes plain that NRC consulted with the Navajo Nation. While the primary topic of consultation with the Navajo Nation was compliance with the National Historic Preservation Act, nothing prevented the Navajo Nation from raising other issues related to the HRI license during this process. In sum, Petitioners' hypothetical and

speculative allegations concerning the impact of the NRC license on their private property do not constitute a violation of Article XXIII of the American Declaration.

D. No Violation of Article XIII (Right to Benefit of Culture)

Article XIII provides, in relevant part, that "[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries." Petitioners have not stated facts that tend to establish a violation of this provision of the American Declaration. They again try to invoke instruments beyond the American Declaration to frame their claim in terms of collective rights. However, as previously discussed, the Commission must decline to review the Petition through the rubric of the UNDRIP or ADRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States and the American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives.

Thus, Petitioners' hypothetical and speculative allegations concerning the impact of the NRC license on their right to benefit of culture do not constitute a violation of Article XIII of the American Declaration.

E. No Violation of Article XVIII (Right to Fair Trial)

Article XVIII states: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Petitioners for the first time in their Supplemental Observations allege a violation of the right to fair trial, alleging specifically that "the process the United States provided Petitioners was neither short nor simple, in violation of the standards of the American Declaration." Petitioners misconstrue the Commission's Report in *Ovelario Tames v. Brazil* as establishing such a standard. *Ovelario Tames* concerned a petition alleging, *inter alia*, a violation of the right to a fair trial in connection with the death of a Macuxi Indian at a police station one day after being arrested and assaulted by a police officer. In finding a violation of the right to a fair trial, the Commission emphasized extreme delays in the investigation and proceedings related to this death, noting that the "judicial proceeding on the death of Ovelario Tames remained in the preliminary stage for almost eight years after the date of the events, and it took more than four years just to post the summons to one of the accused." Petitioners make an unfounded leap in concluding on this basis of the Commission's statement there that the right to a fair trial incorporates a requirement that all proceedings, irrespective of the complexity of the subject matter, be short and simple. In a case such as this, which involves highly technical questions, such a requirement could be counterproductive, leading to arbitrary and thinly-reasoned decisions.

i. Hearing on Death Penalty and Death Row

On June 24, 2022, the United States participated in a public IACHR thematic hearing on "Follow-up on recommendations of 9 cases with published merits reports and 16 precautionary measures on death penalty and death row in the U.S. (Ex Officio)." Richard Burns, Chief of the Capital Case Section in the Department of Justice delivered remarks. The prepared remarks are excerpted below.

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As you know, the United States is governed by a federalist system: the U.S. Constitution grants states broad powers to regulate their own general welfare, including enactment and enforcement of criminal laws, public safety, and corrections. Thus, the individual states retain primary responsibility for defining and enforcing the criminal laws, including those relating to the death penalty. Currently, 27 U.S. states have the death penalty as a sentencing option; 23 do not. The federal government also has authority to prosecute some types of crimes, but its criminal jurisdiction is more limited than that of the states.

On July 1, 2021, Attorney General Garland issued a memorandum ordering a review of certain Department of Justice (DOJ) policies and procedures with regard to the Federal death penalty. The memorandum directs the Deputy Attorney General to lead a multi-pronged review of recent policy changes to DOJ's capital case policies and procedures. That review will include a review of the Addendum to the Federal Execution Protocol, adopted in 2019; a review to consider changes to DOJ regulations made in 2020 that expanded the permissible methods of execution and authorized the use of state facilities and personnel in Federal executions; and a review of recent changes to capital case provisions in DOJ's Justice Manual. The memorandum requires the reviews to include consultations with a wide range of stakeholders, including relevant DOJ components, other Federal and state agencies, medical experts, and experienced capital counsel, among others. No Federal executions will be scheduled while the reviews are pending.

I prosecute cases in the federal system, so I do not have expertise in the particular laws applicable in each of the states. However, the death penalty systems established by both the federal and state governments must comply with the United States Constitution, so I can address Constitutional requirements applicable to all capital cases.

To begin, the Constitution prohibits state or federal governments making a death sentence mandatory for any crime. It also flatly prohibits capital punishment for certain categories of defendants: those who are insane, intellectually disabled, or who commit the crime before the age of 18. For defendant's not in those categories, their constitutional rights begin well before trial. Defendants are entitled to receive notice of the charges, which includes notice that the accused person is facing the possibility of capital punishment. Once charged, the accused is entitled to representation by legal counsel at every critical stage of the prosecution; if the accused is indigent, counsel is appointed at the government's expense. Prosecutors are required to provide the accused with discovery of its evidence, including any information that is potentially exculpatory as to either guilt or sentencing. The accused is entitled to a public trial, at which he can confront the witnesses against him, present his own witnesses, and testify himself, though he cannot be compelled to testify should he choose to remain silent. He is entitled to be tried by a jury of his peers, and he can prevent a juror from being seated by exercising challenges to the juror's ability to be fair and impartial. The defendant is entitled to the assistance of experts at trial; if he cannot afford them, they will be provided at government expense. Such experts may cover issues such as DNA, fingerprints, ballistics testing, wrongful identification, mental health, medical examiner's reports, etc. The defendant is presumed to be innocent and can be found guilty only when the jury is unanimously convinced of guilt by proof beyond a reasonable doubt.

Even when a defendant is convicted of a murder, he or she is not legally eligible for capital punishment unless some additional factors – usually called aggravating factors – are also established. Examples of such aggravating factors are: the crime was committed after substantial planning and premeditation to cause death; that the killing was committed in an especially heinous, cruel or depraved manner; or that the defendant killed multiple victims or particularly vulnerable victims, such as children and the elderly. To meet Constitutional standards, death penalty systems (whether in the states or the federal government) must narrow the category of defendants who are eligible for the death penalty. That purpose is accomplished by the court holding a sentencing hearing, which mirrors the guilt/innocence phase of trial. The prosecution presents evidence relating to the alleged aggravating factors. The defendant is again entitled to confront witnesses and present his own witnesses and evidence in mitigation. The jury is required to consider any relevant evidence the defendant offers in mitigation relating to the circumstances of the offense and/or the character, record and background of the defendant. A defendant's mental health, for example, or his impoverished upbringing, often provide evidence in mitigation. The jury must determine, again unanimously and beyond a reasonable doubt, whether any alleged aggravating factor is established. Absent such a finding, the defendant cannot be sentenced to death. If the jury does find an aggravating factor established, it then considers all the evidence – both aggravating and mitigating – to determine whether to impose a death sentence or a lesser sentence.

If a death sentence is imposed at trial, the defendant is then entitled to a robust system of appeals. The United States' appellate process affords those convicted of capital offenses the highest level of internationally recognized protection. The U.S. appellate process provides avenues for both state and federal court review of every criminal conviction. In addition, federal habeas corpus procedures enable federal courts to review the substantive and procedural merits of every death penalty sentence imposed by state courts. Appellate review in the United States ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime. It is an individual's right to take full advantage of mandatory and discretionary appeals at the state and federal level, and it is not uncommon that many years pass before this extensive appeals process is completed.

Whether the case was prosecuted in a state court or federal, the defendant has the right to make a direct appeal, covering a wide range of potential legal issues that arose during the prosecution. If unsuccessful in his direct appeals, the defendant next has an opportunity to bring Constitution-based claims of error in the federal courts via habeas petitions. Habeas petitions very often assert that the defendant received ineffective assistance of counsel at trial, in violation of his Sixth Amendment rights. Such petitions begin at the federal district court level and can be appealed through the federal circuit courts and, ultimately, to the United States Supreme Court. If his habeas claim fails, the defendant may have opportunities to submit a subsequent habeas petition. Defendants can, additionally, go to the courts to challenge competency to be executed and the method of execution.

I have spoken thus far about general rules for capital cases imposed by the U.S. Constitution. I'd like to mention briefly some additional rights for defendants in the federal court system. By federal law, a defendant charged with a capital crime has the right to appointment of at least two attorneys, one of whom must be "learned in the law" of capital cases (18 USC 3005). There is a federal public defender system that provides counsel to indigent defendants at no cost and, within the federal defender organization there is a group of capital litigation specialists who provide training to counsel defending capital cases and, as needed, litigation assistance. The

federal defender groups also maintain a list of private sector attorneys with capital case expertise, who can be appointed to cases the federal defenders are not able to accept. Federal law also requires courts to instruct juries in capital cases that their decision on sentencing cannot be based on the defendant's or victim's race, color, religious beliefs, national origin; or sex; and requires the jurors to sign a certificate confirming they followed that instruction (18 USC 3593(f)). Federal law also entitles death-sentenced inmates to obtain post-conviction DNA testing of evidence (18 USC 3600).

In addition to the many constitutional and statutory rights afforded capital defendants, the federal government's recognition of the seriousness of these cases led it to establish a set of Justice Department policies governing the process by which the Department authorizes a case for capital prosecution (JM 9-10.000, et seq.). That process involves a multiple-layer review of every potential capital case, starting with the local U.S. Attorney's office that charges the case, running through a centralized review by a Justice Department committee in Washington, DC, and culminating in the Attorney General's personal decision whether to authorize a capital trial. During that review, irrelevant references to the defendant's or victim's race or ethnicity are removed from the material to minimize the risk that implicit bias may affect the decision. Additionally, the policy states that no final decision to seek a death sentence will be made without first giving the defense team a reasonable opportunity to present mitigating information for the Department's consideration. Even after a case is authorized for capital trial, the defense may request withdrawal of the authorization based on changed facts and circumstances and such requests are reviewed by the centralized committee in Washington and, as warranted, by the Attorney General.

I understand the Commission is concerned with the potential impact lengthy periods of confinement may have on inmates sentenced to death.

Courts in the United States have consistently rejected the argument that delay in execution can constitute cruel and unusual punishment under the U.S. Constitution. Long periods of detention on death row are often the result of a constitutionally-mandated, exhaustive appeal process. This process exists to ensure the protection of other human rights – including the right to a fair trial, the right to life, freedom from arbitrary arrest and imprisonment, and the right to due process of law. While detention on death row is likely physically and psychologically stressful for many capital prisoners, it is often lengthy because the United States provides numerous opportunities for further review to ensure that appropriate issues get adequate review by the court system.

Though I am no expert on confinement issues, I understand that in January 2016, the Justice Department announced the results of a review of use of restrictive housing in American prisons. The study concluded that there are occasions when correctional officials have no choice but to segregate inmates from the general population, typically when it is the only way to ensure the safety of inmates, staff, and the public. But as a matter of policy, the study noted that this practice **should be used rarely, applied fairly, and subjected to reasonable constraints.** The report includes a series of "Guiding Principles" for limiting the use of restrictive housing across the American criminal justice system, as well as specific policy changes that the Bureau of Prisons and other Justice Department components could undertake to implement these principles. Since the report was issued, the Bureau of Prisons has adopted the majority of the recommendations and continues to take steps to implement them and help ensure that inmates are housed in the least restrictive setting necessary to ensure their own safety and the safety of staff, other inmates, and the public. For example, the Bureau has a national policy designed to help

ensure standardized and appropriate treatment to inmates with mental illness. (See BOP Program Statement 5310.16, Treatment and Care of Inmates with Mental Illness (implemented May 1, 2014)). The policy objectives include, among other things, identifying inmates with mental illness through screening; extending support for inmates with mental illness beyond traditional professional services through creation of supportive communities, specialized staff training, inmate peer support programs, care coordination teams, and institutions with specialized mental health missions; enhancing continuity of care through a network of accessible treatment providers when inmates transfer between institutions or to the community; and reducing the proportion of inmates with mental illness in restrictive housing settings.

U.S. law also provides for Federal oversight of state or locally run correctional facilities. Under the Civil Rights of Institutionalized Persons Act, the Special Litigation Section of the Justice Department's Civil Rights Division can investigate complaints concerning conditions in state or locally operated prisons, jails, and correctional facilities. When a "pattern or practice" or systemic deprivation of constitutional rights exists, the Civil Rights Division has the authority to initiate civil action against state or local officials to remedy the unlawful conditions.

Inmates also have the right to file complaints about their conditions of confinement, on such matters as inadequate medical care or deprivation of life's necessities, such as shelter, heat, clothing, sanitation, etc., which are then adjudicated through an administrative review process. After exhausting their potential administrative remedies, federal law permits inmates to file their claims in court under Title 42 United States Code Section 1983, asserting deprivation of their federal rights, where they receive independent judicial review of their complaints.

I hope my statement today demonstrates how the United States, through its Constitution, laws and policies, strives to implement its capital punishment systems with full respect for the rights of defendants, from the time a case is charged through the time a sentence is carried out.

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j. Hearing on Precautionary Measures for Detainees in Guantanamo Bay

On October 28, 2022, the United States participated in a public thematic hearing on the "Precautionary Measures - Detainees in Guantánamo Bay with respect to the United States." U.S. officials from the U.S Mission to the Organization of American States and the Department of State's Office of the Legal Adviser delivered remarks. Thomas Hastings, the Interim Permanent Representative at the U.S Mission to the Organization of American States delivered introductory remarks, which are excerpted below.

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As a preliminary matter, I wish to address a few issues on the nature of this hearing:

First, we reiterate for the Commission that given the description of the hearing in the IACHR's communication and the breadth of the subject matter, the United States understands this to be a hearing of a general nature under Article 66 of the Commission's Rules of Procedure… We will share what we can today in this public venue.

Second, the United States also respectfully reiterates its longstanding view that although the Commission may make recommendations for precautionary measures, the Commission's governing instruments do not give it the authority to require that States adopt precautionary measures. As such, the United States construes the Commission's request for precautionary measures as a nonbinding recommendation.

And finally, the United States reiterates that the Commission's competence in reviewing the United States' human rights practices is limited to the nonbinding American Declaration of the Rights and Duties of Man, and does not extend to the application of treaties or other instruments.

Since 2002, the United States has engaged with the Inter-American Commission on Human Rights regarding our Guantanamo detention operations as part of our shared support for transparency and the rule of law in any activities that bear on a government's respect for human rights.

Before turning to my colleague from the Office of the Legal Adviser, I would like to underscore the United States' overall approach to the facility at Guantanamo.

First, the U.S. government has repeatedly reaffirmed its commitment to closing the detention facility at Guantanamo. To that end, the current administration has engaged in a thorough review, involving all relevant departments and agencies, to develop an approach for responsibly reducing the detainee population and setting the conditions to close the facility.

Second, I would also like to emphasize, as we have previously, that the United States is fully committed to ensuring that detainees are treated humanely and held in accordance with the law. All U.S. military detention operations conducted in connection with armed conflict, including at Guantanamo Bay, are carried out in accordance with international humanitarian law, including Common Article 3 of the Geneva Conventions, and all other applicable international and domestic laws.

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The remarks of Assistant Legal Adviser Jeffrey Kovar at the October 28, 2022 hearing are excerpted below.

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It has been over seven years since the Commission's last public hearing on this particular thematic issue, and the United States is pleased to be able to provide the Commission information regarding a number of positive developments. We will discuss each of these in more depth in just a moment.

But to summarize, since 2015, which was the time of the last hearing: The United States has transferred 85 detainees, consistent with our national security interests and with regard to humane treatment after transfer. In particular, this Administration has repatriated 4 detainees to Morocco, Saudi Arabia, Algeria, and Afghanistan.

…[C]urrently there are 36 detainees at Guantanamo, compared with 122 since…2015. There are 22 detainees who are currently approved for transfer, and the Department of State is

diligently working to identify suitable transfer locations and negotiate their transfer with foreign governments. We expect to have additional transfers in the near-future.

The Periodic Review Board, which we know of as the PRB, has continued and accelerated its work of assessing whether continued detention under the law of war of certain detainees is necessary to protect against a continuing significant threat to the security of the United States. Since the PRB began its work in October 2013, it has held full hearings and multiple file reviews for all eligible detainees. Under this Administration, the PRB expedited its schedule over the last two years, and in those eighteen months of the Administration, 16 detainees have been found transfer-eligible through the PRB process that were not previously determined to be eligible.

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Transfers

Approximately 95 percent of all individuals who have been held at the Guantanamo Bay facility since 2002 have been repatriated or resettled. Since the last hearing before the Commission on this issue, 85 detainees have been transferred from Guantanamo to various countries including: Ghana, Italy, Kuwait, Mauritania, Montenegro, Oman, Senegal, Serbia, the Kingdom of Saudi Arabia, the United Arab Emirates, Morocco, and Algeria.

As noted earlier, 36 detainees remain at Guantanamo, 22 of whom are determined eligible for transfer. The United States continues to pursue vigorously the safe and responsible transfer of all detainees designated for transfer, including through intensive diplomatic efforts, in order ultimately to close the Guantanamo Bay detention facility.

PRB Process and Transfer

Detainees at the Guantanamo Bay Detention Facility are held pursuant to a U.S. domestic statute called the 2001 Authorization for the Use of Military Force (AUMF), as informed by the laws of war. The 2001 AUMF authorizes detention of individuals who were part of, or substantially supported, al-Qaida or associated forces.

Under the law of war, a State may detain enemy belligerents, whether privileged or unprivileged, without charge or trial, to prevent their further participation in hostilities. In addition, many persons detained at Guantanamo have been charged in a military commission or have pursued habeas corpus proceedings in U.S. federal court through which they have challenged the lawfulness of their detentions, both of which I will address later.

All detainees for whom criminal charges have not been brought in a military commission, and who are continued detention under the law of war are eligible for review by the Periodic Review Board (PRB), an administrative, interagency body established under Executive Order 13567 to determine whether detention of eligible Guantanamo detainees remains necessary to protect against a continuing significant threat to the security of the United States. Under the Biden Administration, the PRB has expedited full reviews for detainees in 2021 and 2022.

A PRB determination that a detainee is transfer-eligible does not address the legality of continued detention. Nevertheless, once a transfer eligibility determination has been made for a detainee by the PRB and upheld by the Cabinet-level Review Committee, the United States seeks to locate a foreign country willing to repatriate or resettle that individual, and provide appropriate security and humane treatment assurances.

Consistent with the national security and foreign policy interests of the United States, the Department of State engages in diplomatic outreach to identify suitable transfer locations for

individuals at Guantanamo who are eligible for transfer. This outreach involves engaging foreign governments to request they receive a Guantanamo detainee; if a positive response is received, then more detailed follow-on discussion occurs regarding the potential transfer framework. These discussions with a potential receiving government include the negotiation of a suite of security assurances and humane treatment assurances.

As Secretary of State Blinken has emphasized, the Department takes seriously the task of identifying countries that will respect the human rights of transferees. This includes consideration of the principle of non-refoulement.

Under U.S. law and policy, the humane treatment of a detainee upon his transfer from Guantanamo is a critical factor for any transfer. Consistent with Executive Order 13567, once a detainee at Guantanamo is determined eligible for transfer through the PRB process, the Departments of State and Defense are responsible for "ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998." The Department of State, in consultation with the Department of Defense, is also responsible for obtaining appropriate security and humane treatment assurances regarding any detainee to be transferred to another country and evaluating humane treatment assurances, consistent with U.S. government detainee transfer policies. Further, under Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998, it is the policy of the United States "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."

Decisions with respect to Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the proposed receiving country, the individual's concerns, and any other concerns regarding humane treatment. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and the conditions in the countries concerned. In an instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

Humane Treatment of Detention Operations

The United States is fully committed to ensuring that persons detained at Guantanamo are treated humanely and held in accordance with applicable law. All U.S. military detention operations, including those at Guantanamo Bay, must comply with all applicable domestic laws and applicable international legal obligations, and the United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay.

In particular, the United States ensures that all detention operations at Guantanamo Bay comply with applicable domestic and international law, including humane treatment protections that are found in Common Article 3 of the Geneva Conventions of 1949 and the Convention Against Torture. Torture and other cruel, inhuman, or degrading treatment or punishment are categorically prohibited under U.S. domestic and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.

The Joint Medical Group at Guantanamo (JMG) is committed to providing appropriate and exemplary medical care to all detained individuals. JMG providers take seriously their duty

to protect the physical and mental health of detained persons and approach their interactions with such persons in a manner that encourages provider-patient trust and rapport and that is aimed at encouraging participation of detained persons in medical treatment and prevention. The healthcare provided to the detained persons at Guantanamo is comparable to that which U.S. military personnel receive while serving at Joint Task Force–Guantanamo.

Right to Challenge Legality of Detention

All detainees at Guantanamo have the right to challenge the lawfulness of their military detention in U.S. federal court through a petition for a writ of habeas corpus.

The detainees may submit written statements and provide live testimony at their hearings via video link. The United States has the burden in these cases to establish its legal authority to hold the detainees by a preponderance of the evidence.

Many of the detainees at Guantanamo today have challenged their detention in U.S. federal courts. All of the detainees at Guantanamo who have prevailed in habeas proceedings under orders that are no longer subject to appeal have either been repatriated or resettled or are in the process of being repatriated or resettled. To date, 33 detainees have received final U.S. federal court orders requiring their release and have been transferred from Guantanamo, including a detainee transferred in June of this year.

Military Commission Proceedings

Alongside our federal courts, military commissions are an appropriate venue for prosecuting Guantanamo detainees. The U.S. Government remains of the view that in our efforts to protect our national security, military commissions and federal courts can – depending on the circumstances of the specific prosecution – each provide tools that are both effective and legitimate.

All current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 and other applicable law, and are consistent with those in Additional Protocol II to the 1949 Geneva Conventions, as well.

These include: (1) The presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt; (2) the prohibition of the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment in military commission proceedings, except against a person accused of torture or such treatment as evidence that the statement was made; (3) latitude for the accused in selecting defense counsel; (4) in capital cases, the right of the accused to counsel "learned in applicable law relating to capital cases"; and (5) the right of the accused to pre-trial discovery. The 2009 Military Commissions Act also provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commission Review and to the U.S. Court of Appeals for the District of Columbia Circuit, which is a federal civilian court consisting of life-tenured judges, and ultimately to the United States Supreme Court.

Commission proceedings were delayed because of the COVID-19 pandemic, but court proceedings resumed in 2021 and remain ongoing.

On October 29, 2021, military commissions defendant Majid Khan was sentenced following a one-day hearing before a jury. Mr. Khan completed his sentence in March, and the U.S. government is vigorously working to identify and negotiate a third-country resettlement for him.

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k. Hearing on The Situation of Indigenous Peoples and Forced Displacement

On October 28, 2022, the United States participated in a public thematic hearing on the "The situation of indigenous peoples and forced displacement in the context of climate change in the United States." U.S. officials from the U.S Environmental Protection Agency's Office of International and Tribal Affairs ("OITA") delivered remarks. Rafael DeLeon, Principal Deputy Assistant Administrator, delivered remarks, which are excerpted below.

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EPA understands that Indigenous and Native American persons may be among the first to face the direct consequences of climate change owing to their special and close relationship with the environment and its resources.

EPA, along with the Department of Interior and our other federal partners are working across the government to address the impacts of climate change through a whole of government approach.

I will provide some examples later in my presentation of some of the work that the agency is doing, along with the Department of Interior and other federal partners, under the White House Council for Native American Affairs.

First, I want to highlight some of the Agency's engagement with our tribal partners in Louisiana and Alaska.

In Louisiana, EPA has been engaged in partnership with the Isle de Jean Charles Band of Biloxi-Chitimacha-Choctaw Tribe regarding their relocation efforts. This engagement included:

In FY 2019, EPA, through its Healthy Places for Healthy Peoples (HP2) program, engaged with communities of the Biloxi-Chitimacha-Choctaw Tribe to help them visualize an environmentally sustainable community design that prioritized access to healthy food and health care.

Working with local colleges and universities the partnership forged between OCR and CUPP resulted in significant and lasting health outcomes for communities of the Biloxi-Chitimacha-Choctaw Tribe.

The outcomes established through this partnership include: providing Master of Public Health students to assist Biloxi-Chitimacha-Choctaw Tribe in archiving public health materials, providing computer resources to Biloxi-Chitimacha-Choctaw Tribe students and community members, and providing the Biloxi-Chitimacha-Choctaw Tribe with other technical assistance as needed.

I now would like to speak briefly about some of the work that EPA is doing in Alaska.

On October 7, the White House released a renewed National Strategy for the Arctic Region.

The Strategy identifies focus areas that directly intersect with EPA's mission, namely Pillar 2 (of a four-part strategy) is focused on climate change and environmental protection: *The U.S. government aims to partner with Alaskan communities and the State of Alaska to build*

resilience to the impacts of climate change, while working to reduce emissions from the Arctic as part of broader global mitigation efforts, to improve scientific understanding, and to conserve Arctic ecosystems.

A key strategic priority is to address the climate crisis with urgency and new investments in sustainable development to improve livelihoods for Arctic residents, while conserving the environment.

Accordingly, EPA strives to engage with Tribal governments and organizations, including Alaska Native Villages, through existing programs that the Tribal governments and organizations are eligible to apply to, such as the Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program.

In addition, EPA continues to evaluate how our existing authorities and resources can be used to expand our efforts to address contaminated ANCSA lands

Congress has also included in the draft FY 23 budget two large earmarks ($7M for Alaska to do inventory work and $11M for grants to Native Villages/Corporations) for work related to ANCSA Contaminated Lands.

Second, I want to discuss several other EPA initiatives that can help our Tribal partners build resilience to climate change. EPA is striving to develop centers around the nation to provide technical assistance to Tribal Nations and indigenous communities, among others.

These centers will provide grant-writing assistance and other support to communities that may have not had past success applying for and managing federal funding, including support for accessing clean, affordable energy, for analyzing community environmental burdens, and more.

In addition, EPA, along with the Department of the Interior, co-chairs the White House Council on Native American Affairs Climate Change, Tribal Homelands, and Treaties Committee. Additionally, the EPA, along with the Department of the Interior and Department of State, co-chairs the International Indigenous Issues Committee.

Through EPA's work on the Climate Change, Tribal Homelands, and Treaties Committee, EPA is coordinating with multiple federal agencies to develop a year-long Climate Webinar Series, which we expect will kick off in January of 2023.

This series is designed to educate federal employees on tribal and indigenous climate change considerations.

We have heard from our tribal partners the importance of federal employees being educated on issues impacting them. This effort and other initiatives are designed to address the feedback we received.

Additionally, the subcommittee will also be developing a "federal resources," as a resource for tribal partners on the types of funding available from federal agencies to address climate change.

Additionally, EPA is using lessons learned in the domestic context on climate change and adaptation to inform the work being conducted as part of the International Indigenous Issues Committee under the White House Council on Native American Affairs.

EPA recognizes the importance of engaging with Tribal Nations and indigenous communities and aims to build on its existing engagements with Tribal partners.

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The remarks of Joaquin Gallegos, Special Assistant to the Assistant Secretary for Indian Affairs at the October 28, 2022 hearing are excerpted below.

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As the effects of climate change continue to intensify, Indigenous Peoples are facing distinct climate-related challenges that pose existential threats to their economies, infrastructure, livelihoods, food supply, and health.

Coastal Indigenous Peoples, especially in Alaska, are facing flooding, coastal erosion, permafrost subsidence, sea-level rise, storm surges, and extreme weather events.

Inland Indigenous Peoples, especially in the contiguous 48 states, are facing worsening drought, extreme heat, wildland fire, and flooding.

As Indigenous Peoples contend with climate impacts, they face difficult decisions about their future.

At the same time, the United States, through its special political and legal relationship with and trust responsibilities to Indian Tribes, Alaska Native Villages, and the Native Hawaiian Community, under the U.S. Constitution and federal law, seeks to strengthen climate resilience and adaptation; ocean and coastal management; community-driven relocation and protect-in-place activities.

The United States is demonstrating it takes its political and legal responsibilities to Indigenous Peoples seriously.

A critical part of that is engaging in robust, interactive, pre-decisional, informative, and transparent government-to-government consultation with Indigenous Peoples when planning actions with Tribal implications. It is the policy of the Department of the Interior to seek consensus with impacted Tribes.

We are at a critical juncture. A coordinated, all-of-government approach is needed to address this crisis.

First, the United States has affirmed its commitment to enhancing interagency coordination and collaboration to protect Tribal treaty and reserved rights and to fully implement the Federal government's treaty obligations.

With transformational funding and cross-sectional expertise, the United States, through the Interior Department, is actively supporting collaborative and community-led planning, relocation financing, infrastructure investments and replacement, expanding access to clean drinking water, and other forms of assistance to Indigenous Peoples.

Through the Bipartisan Infrastructure Law (BIL), the United States is providing $466 million to Indigenous Peoples through the Interior Department, including $216 million for climate resilience programs and $250 million to support water and health infrastructure.

BIL also includes a historic $2.5 billion investment to help fulfill settlements of Indian water rights claims and deliver long-promised water resources to Indigenous Peoples, certainty to all their non-Indigenous neighbors, and a solid foundation for future economic development for entire communities dependent on common water resources in the face of climate change.

Under the Inflation Reduction Act, the United States is taking the most aggressive action on climate and clean energy in American history, specifically providing $272.5 million for Indian Tribes and the Native Hawaiian Community to plan for and adapt to climate change,

mitigate drought, support fisheries, electrification, and shift to clean energy production and use.

This year, the Biden-Harris Administration also established a Community-Driven Relocation Working Group to address the need for Tribal relocation and managed retreat assistance, through which the federal government will develop a "blueprint" for relocation that other communities can use as they implement their communities' relocation.

The key to its success is that it is a "community-driven" process in which Tribal communities will lead the effort to develop plans that meet their communities' needs.

The United States recognizes that Indigenous Peoples' knowledge is needed to arrive at solutions to the climate crisis. We work with Indigenous Peoples to incorporate Indigenous traditional ecological knowledge into national efforts to address climate change and strengthen Tribal co-stewardship of public lands and waters.

The United States is also helping to bolster traditional Indigenous food systems, including by restoring bison herds, safeguarding subsistence rights, protecting the Porcupine Caribou Herd, which migrates between the United States and Canada, and reinforcing fisheries.

From climate adaptation and the promise of clean energy to legacy pollution clean-up and clean water infrastructure, the United States is making ground- breaking investments and strategizing in consultation with Indigenous Peoples to help ensure they no longer bear the brunt of the climate crisis.

The United States is ultimately committed to empowering Indigenous Peoples as they face unique threats from climate change. Thank you. I will now turn to my colleague from the Environmental Protection Agency.

RESPONSE-PERIOD POINTS

Indigenous Peoples may not have the resources or technical assistance required to face the changing climate.

2020 estimates show that over the next 50 years, $3.45 billion will be needed for Alaska Native Villages and $1.37 billion for Tribes in the contiguous 48 states to meet total community relocation needs.

Under BIL:

$130 million is provided for community relocation, $86 million is provided for Tribal climate resilience and adaptation projects, and $43.2 million will be available to spend annually for five years on similar projects.

And $250 million is being used to support construction, repair, improvement and maintenance of irrigation and power systems, safety of dams and public health and safety compliance issues at water sanitation systems.

The newly reconstituted White House Arctic Executive Steering Committee is reinvigorating its Community Resilience Work Group, which seeks to address the issues faced by at-risk communities, including on the Alaskan coast.

To help Indigenous Peoples to remain safe and secure in their homelands, the United States is supporting infrastructure development -- the basic physical and cultural structures and facilities needed for a functioning society. These infrastructure needs include:

Physical infrastructure such as:

Housing: construct/relocate homes, install new utility lines; design and structural engineering analysis.

Transportation: construct/relocate roads, bridges, boat landings, airports; town site design and engineering analysis.

Community services: construct/relocate buildings for healthcare, education, government, community centers, businesses; design and structural engineering analysis.

Utilities: construct/relocate resilient water and sanitation, energy (conventional, solar, wind, geothermal), broadband, power distribution; design and engineering analysis, operation and maintenance, training.

Equipment needs: heavy construction machinery, storage buildings, contractor housing, transportation routes.

Cultural infrastructure such as:

Community gathering points: construct/relocate cemeteries, access to landscapes/sacred sites essential to maintain community traditions and heritage, social cohesion, and spiritual practices.

Food sovereignty: construct/relocate access to harvesting, subsistence hunting and fishing, traditional foods, treaty resources, use of Indigenous Knowledge.

Environmental conditions such as:

Site decommissioning, cleanup, and reclamation; restoration for wetlands, dunes, riparian corridors, habitat, species conservation, hazardous materials cleanup, monitoring.

Disaster planning and recovery.

Mitigation (during relocation and at new site): coastal and riverine erosion protection, seawalls, berms/barriers; design and structural engineering analysis.

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Cross References

Statement at the UN Global Congress for Victims of Terrorism, **Ch. 3.2.a**
International Tribunals and Accountability Mechanisms, **Ch. 3.C**
Universal Postal Union, **Ch. 4.B.4**
UN 3C statements, **Ch. 6.A.5**
Human Rights Council ("HRC"), **Ch. 6.A.6**
Iran-United States Claims Tribunal, **Ch. 8.A**
UN Compensation Commission, **Ch. 8.D**
UN 6C statements on state responsibility, **Ch. 8.E**
Privileges and Immunities of International Organizations, **Ch. 10.D**
International Civil Aviation Organization ("ICAO"), **Ch. 11.A.3&4**
World Trade Organization ("WTO"), **Ch. 11.C**
Comments related to the International Law Commission's ("ILC") work on transboundary environmental issues, **Ch. 13.C.2.b&c**
The Global Health Response to the COVID-19 Pandemic, **Ch. 13.C.3**
UNCITRAL, **Ch. 15.A**
UN humanitarian sanctions carveout, **Ch. 16.A.1**
Iran, **Ch. 16.A.2**
North Korea, **Ch. 16.A.15.j**
Haiti, **Ch. 16.A.15.m**

CHAPTER 8

International Claims and State Responsibility

A. IRAN CLAIMS

On March 1, 2022, Iran filed a reply pleading in Case B/61 in the Iran-U.S. Claims Tribunal ("Tribunal") related to the remaining issues in this case pertaining to the impact of certain Treasury regulations. The Department is preparing a submission in response to Iran's reply. On October 24, 2022, Iran filed a motion in Case B/1 for bifurcation of the United States' counterclaim into liability and damages phases. On December 7, 2022, the United States filed a submission opposing Iran's motion. See *Digest 2021* at 327 for a discussion of Iran Claims.*

B. SUDAN CLAIMS

As discussed in *Digest 2021* at 327-28 and *Digest 2020* at 336-42, the United States and Sudan signed a claims settlement agreement in 2020, which 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. The Department continues to administer claims payments to eligible claimants under the agreement. Payments to claimants were ongoing at the end of 2022.

C. NEGOTIATIONS WITH CANADA PURSUANT TO THE 1977 TRANSIT PIPELINES TREATY

As discussed in *Digest 2021* at 328-29, the governments of Canada and the United States held the first negotiation session regarding actions in the State of Michigan relating to Line 5 under the transit pipelines treaty in December 2021. U.S.-Canada Agreement Concerning Transit Pipelines, Can.-U.S., Jan. 28, 1977, 28 U.S.T. 7449, 1086 U.N.T.S. 343, available at https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f8f8b&clang=_en. On November 7, 2022, Canada and the United States conducted the first round of

* Editor's note: The Tribunal granted Iran's bifurcation request in Case B/1 in 2023.

negotiations under the transit pipelines treaty concerning actions of the Bad River Band in Wisconsin relating to Line 5. Constructive discussions between the United States and Canada were ongoing at the end of 2022.

D. UNITED NATIONS COMPENSATION COMMISSION

The United Nations Compensation Commission (UNCC) was created in 1991 under Security Council resolution 687 (U.N. Doc. S/RES/687), available at https://www.un.org/depts/unmovic/documents/687.pdf, to process claims and pay compensation for losses, damage, and injury resulting directly from Iraq's invasion and occupation of Kuwait. See *Digest 1991* at 1099. In January 2022 payment was made to claimants on the last remaining claim.

On February 9, 2022, a special session of the Governing Council adopted decision 277 (U.N. Doc. S/AC.26/Dec.277), available at https://www.uncc.ch/sites/default/files/attachments/UNCC%20Decision%20277.pdf, declared that the Government of Iraq fulfilled its international obligations to compensate all claimants awarded compensation through the UNCC.

On February 22, 2022, the Governing Council presented the Final Report of the Governing Council on the work of the Compensation Commission (U.N. Doc. S/2022/104), available at https://uncc.ch/sites/default/files/attachments/documents/Final%20Report%20with%20letter.pdf, to the Security Council. Subsequently, the Security Council adopted resolution 2621 (U.N. Doc. S/RES/2621), available at http://unscr.com/en/resolutions/2621/, terminating the mandate of the UNCC and confirming the claims process was complete and final. On February 22, 2022, Ambassador Richard Mills delivered remarks at a United Nations Security Council briefing on the UN Compensation Commission, available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-un-compensation-commission/ and excerpted below.

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As it winds to a close, we can judge the UN Compensation Commission as a successful UN mechanism for post-conflict management, made possible by the Council's collective commitment to multilateralism and the maintenance of international peace and security. Acting under Chapter VII of the UN Charter, this Council came together to rectify the harms created by Saddam Hussein's unlawful invasion and occupation of Kuwait. It is with satisfaction that today we voted to adopt a resolution that ends those Chapter VII measures concerning Iraq's obligations to provide compensation for those harms.

The Governing Council, in guiding the work of the UNCC, adopted every single decision by consensus, demonstrating to all a commendable unity of purpose and a commitment to collaboration. This success certainly would not have been possible without the diligence and

effectiveness of the staff of the Commission over the last 30 years. Their professionalism built confidence in the compensation process and reaffirmed the ability of the UN to implement a complex program. We commend them for their work.

But, perhaps most of all, we are grateful to the Governments of Kuwait and Iraq for the role they have played in drawing to a close a sad chapter in history and charting a more positive and peaceful future for their region. We commend the Government of Kuwait for its commitment to the multilateral mechanism for resolving claims. The suspension of compensation payments due to the circumstances in Iraq associated with the rise of ISIS was a demonstration of Kuwait's trust in the UN to complete its work and of Kuwait's generosity toward its neighbor and the international community during a crisis.

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On February 25, 2022, the State Department released a press statement welcoming resolution 2621. The statement is available at https://www.state.gov/un-compensation-commission-claims/ and includes the following:

> The United States welcomes the recent United Nations Security Council resolution reaffirming that Iraq has fulfilled its international obligations to compensate all claimants awarded compensation through the UN Compensation Commission, which was established in 1991 as a result of Saddam Hussein's unlawful invasion and occupation of Kuwait. We salute the people of Iraq and Kuwait for this important milestone. The Iraq of today is one with close and friendly diplomatic relations with its Gulf neighbors, which is crucial to maintain stability in this important region.

On December 9, 2022, the Governing Council held the final session and the UNCC closed in accordance with Security Council resolution 2621.

E. STATE RESPONSIBILITY

1. Remarks on State Responsibility at the UN Sixth Committee

On October 13, 2022, Attorney Adviser David Bigge delivered remarks at a UN General Assembly Sixth Committee meeting on Agenda Item 74: Responsibility of States for Internationally Wrongful Acts. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-74-responsibility-of-states-for-internationally-wrongful-acts/.

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The draft articles on the responsibility of States for internationally wrongful acts, with commentaries, were adopted by the International Law Commission in 2001. Along with its recommendation to take note of the draft articles, the Commission recommended that the

General Assembly consider, at a later stage, the possibility of convening an international conference with a view to concluding a convention on the topic.

Over the years, it has become clear that the range of views expressed in meetings in the Sixth Committee and in its working group to date indicates that consensus is unlikely.

The U.S. position has been, and remains, that the articles are most valuable in their current draft form. The draft articles have provided useful guidance to States and other actors on the customary international law of state responsibility. The United States appreciates the ILC's efforts, as well as this Committee's thoughtful contributions to this body of work.

The United States remains particularly concerned that opening the draft articles to the debate necessary to arrive at a convention could lead to the redrafting, questioning, or undermining of well-accepted rules documented in the draft articles. On the other hand, and in part because certain articles go beyond existing customary international law, a negotiated convention may not enjoy widespread acceptance by States at this juncture. Those draft articles that are not necessarily accepted by all States may not be ready for negotiation. It would be better to allow the topics covered by those rules an opportunity to develop through further State practice, to ascertain whether the draft articles may gain broader acceptance and crystalize into customary international law or not. Rules developed through State practice are much more likely to gain widespread acceptance, as opposed to a convention negotiated under the pressure of a condensed timeframe.

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2. Remarks on Diplomatic Protection at the UN Sixth Committee

On November 3, 2022, Clarissa Chandoo, USA Sixth Committee Delegate, delivered remarks at a meeting of the UN General Assembly Sixth Committee on Agenda Item 79: Diplomatic Protection. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-79-diplomatic-protection/.

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As we stated in 2016 and 2019, the United States shares the view that where the draft articles on diplomatic protection reflect State practice, they represent a substantial contribution to the law on the topic and are thus valuable to States in their current form.

The United States has concerns, however, that certain draft articles are inconsistent with well-settled customary international law. For example, Draft Article 15 would require exhaustion of local remedies except where there is no "reasonably available" local remedy for effective redress, or the local remedies provide no "reasonable possibility" of such redress. We have opposed this standard as too lenient and have noted that the customary international law standard only excuses the exhaustion requirement where the local remedy is "obviously futile" or "manifestly ineffective." Other topics that do not necessarily reflect customary international law standards include continuous nationality, extinct corporations, the protection of shareholders, and recommended practice.

The United States maintains that any articles considered in a convention on diplomatic protection should reflect the well-established customary international law on this subject. Moreover, negotiation of a convention could undermine the Commission's substantial work to date by reopening topics on which States had agreed, raising the risk that a significant number of States might not ratify a convention.

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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.2**
ICJ, **Ch.7.B**
Foreign Sovereign Immunities Act, **Ch. 10.A**
Investor-State dispute resolution, **Ch. 11.B**
Saint-Gobain v. Venezuela *(Hague Service Convention),* **Ch. 15.C.1**
ZF Auto. US. V. Luxshare, Ltd. And AlixPartners v. *The Fund for Prot. of Inv. Rights in Foreign States (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

On September 7, 2022, Ambassador Richard Mills delivered remarks congratulating Somalia for the formation of its government at a UN Security Council briefing. The remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-somalia-8/ and excerpted below.

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Like others, the United States congratulates Somalia for the formation of its government. It looks forward to collaborating with the government in support of efforts to extend governance, security, and economic opportunities for the people of Somalia. We look forward to now seeing progress toward addressing Somalia's serious challenges, including reconciliation among the national government and federal member states, completing the review of the federal constitution, and achieving debt relief.

As demonstrated by the horrific attack on August 20, at the Hyatt Hotel in Mogadishu. The threat from al-Shabaab remains a paramount concern. The actions of the Somali security forces who responded to and ended the attack were commendable. We strongly condemn the attack and on behalf of the United States I would like to offer condolences to the victims' loved ones. The United States remains committed to supporting Somali-led efforts to defeat al-Shabaab.

We congratulate the Somali National Security Forces for their successful offensive to drive al-Shabaab from the Hiran region. It is now critical that sufficient security is supplied to allow governance and services to be rapidly extended to these liberated areas, particularly, as we heard, given al-Shabaab's efforts to destroy water wells and other critical infrastructure as they fled government forces.

We are committed to using available tools to fight terrorism, including providing direct support to the AU Transition Mission in Somalia and to Somalia's security forces, as well as utilizing the 751 Somalia sanctions regime to designate al-Shabaab operatives who continue to threaten peace and security in Somalia and throughout East Africa. We urge other member states to do the same.

As the single largest donor of humanitarian assistance to Somalia, the United States remains committed to respond to the unprecedented drought impacting over seven million who are facing food insecurity. The warning on Monday that a famine is projected next month is a sobering call to action for us all.

The Somali government deserves recognition for tackling this deepening crisis with the urgency required, but it is a challenge no one country can address alone. The international community must take concerted action, dedicating the necessary resources to prevent the growing loss of life and livelihoods. Such action should include efforts to bolster global food supply and strengthen food resiliency.

The United States government has provided more than $700 million in assistance to Somalia this year amid the unprecedented drought, which constitutes more than 70 percent of all the contributions received so far by the Humanitarian Response Plan of the UN for Somalia. We encourage other international partners to expand their contributions for humanitarian relief.

Somalia can further strengthen its economic well-being by fulfilling the conditions required for reaching completion point under the Heavily Indebted Poor Countries Initiative. We welcome the government's engagement with international financial institutions to ensure that process remains on track.

In conclusion, Madam President, the United States strongly supports the Somali people, and we remain committed to working together to advance democracy and mutual prosperity for both our countries.

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2. Sudan

On January 4, 2022, the Troika (Norway, the United Kingdom, and the United States) issued a statement regarding the resignation of Sudanese Prime Minister Hamdok in Sudan. The statement follows and is available, as a State Department media note, at https://www.state.gov/troika-and-eu-statement-on-the-resignation-of-sudanese-prime-minister-hamdok/.

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The Troika (Norway, the United Kingdom, and the United States) and the European Union underscore their continued support for the democratic aspirations of the Sudanese people. Abdallah Hamdok played a major role in leading Sudan's democratic and economic reforms. His resignation as Sudanese Prime Minister, two months after the military's unconstitutional seizure of power, reinforces the urgent need for all Sudanese leaders to recommit to the country's democratic transition and deliver on the Sudanese people's demands for freedom, peace, and justice.

No single Sudanese actor can accomplish this task on their own. While the Troika and the European Union will continue to support the democratic transition in Sudan, Sudanese stakeholders will need to work on the basis of the 2019 Constitutional Declaration on how to

overcome the nation's current political crisis, select new civilian leadership, and identify clear timelines and processes for the remaining transitional tasks – including establishing the legislative and judicial branches of government, creating accountability mechanisms, and laying the groundwork for elections.

Unilateral action to appoint a new Prime Minister and Cabinet would undermine those institutions' credibility and risks plunging the nation into conflict. To avoid this, we strongly urge stakeholders to commit to an immediate, Sudanese-led and internationally facilitated dialogue to address these and other transitional issues. Such a dialogue should be fully inclusive and representative of historically marginalized groups, include youth and women, and would help put the country back on the path to democracy.

The Troika and the European Union will not support a Prime Minister or government appointed without the involvement of a broad range of civilian stakeholders. We look forward to working with a government and a transitional parliament, which enjoy credibility with the Sudanese people and can lead the country to free and fair elections as a priority. This will be necessary to facilitate the Troika and the European Union's provision of economic assistance to Sudan. In the absence of progress, we would look to accelerate efforts to hold those actors impeding the democratic process accountable.

At this critical juncture, we continue to hold the military authorities responsible for human rights violations which are against current national legislation and international law. The right of the Sudanese people to assemble peacefully and express their demands needs to be protected. We expect the security services and other armed groups to refrain from using further violence against peaceful protestors and civilians across the country, especially in Darfur.

The killing of scores of Sudanese, sexual violence and the injuries of hundreds more by the security services and other armed groups since the October 25 military takeover is unacceptable. We reiterate the need for independent investigations into these deaths and associated violence, and call for the perpetrators to be held accountable. Attacks on hospitals, detentions of activists and journalists, and communication blackouts, must also stop. We once again call for all those unjustly detained to be released and for the State of Emergency to be lifted immediately.

Sudan's people have spoken as loudly and clearly as they did in 2019. They reject authoritarian rule and want the transition toward democracy to continue. Sudan's leaders must now show they are listening.

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On February 10, 2022, the Troika (Norway, the United Kingdom, and the United States) issued a statement regarding the detentions of political figures in Sudan. The statement follows and is available, as a State Department media note, at https://www.state.gov/troika-statement-on-detentions-of-political-figures-in-sudan/.

> The Troika (Norway, the United Kingdom, and the United States of America), Canada, Switzerland, and the European Union are alarmed by the February 9 arrests and detentions of several high-profile political figures. These troubling actions are part of a recent pattern of arrests and detentions of civil society activists, journalists, and humanitarian workers occurring throughout Sudan these last weeks. We condemn this harassment and intimidation on the part of

> Sudan's military authorities. This is wholly inconsistent with their stated commitment to participate constructively in a facilitated process to resolve Sudan's political crisis to return to a democratic transition.
>
> We call for an immediate end to such practices and for the immediate release of all those unjustly detained. We remind Sudan's military authorities of their obligations to respect the human rights and guarantee the safety of those detained or arrested and the need to ensure that due process is consistently followed in all cases. The lifting of the state of emergency, declared at the time of the October 25 military takeover would send a positive signal.

On March 29, 2022, Canada, France, Germany, Italy, the Kingdom of Saudi Arabia, the Netherlands, Norway, Spain, Sweden, United Arab Emirates, the United Kingdom, the United States of America, and the European Union as members of the Friends of Sudan issued a joint statement on the UNITAMS-AU-IGAD Facilitated Political Process. The statement is available as a State Department media note at https://www.state.gov/friends-of-sudan-joint-statement-on-the-unitams-au-igad-facilitated-political-process/ and below.

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Canada, France, Germany, Italy, the Kingdom of Saudi Arabia, the Netherlands, Norway, Spain, Sweden, United Arab Emirates, the United Kingdom, the United States of America, and the European Union as members of the Friends of Sudan reiterate our strong support for the combined efforts of the UN Integrated Transition Assistance Mission to Sudan (UNITAMS), the African Union (AU), and the Intergovernmental Authority on Development (IGAD) to facilitate a Sudanese-led political process with the aim of restoring a civilian-led transition to democracy. We applaud these actors' ongoing efforts to consult with a broad range of Sudanese stakeholders. We look forward to the imminent launch of the next phase of the talks with the aim of building consensus around the structure of credible, civilian-led institutions that will lead Sudan through a revived civilian-led transition period, culminating in free and fair democratic elections. The urgency cannot be overstated. We, therefore, urge constructive engagement of all stakeholders in this next phase and underscore the importance of ensuring women, as well as youth, and other historically marginalized groups enjoy full, effective, and meaningful participation and inclusion throughout every stage of the process.

We welcome the progress made so far through the cooperation of Sudanese stakeholders and the combined efforts of UNITAMS, the AU, and IGAD. For this UNITAMS-AU-IGAD-facilitated political process to succeed, an enabling environment that allows all stakeholders to participate and freely express their views must be created, and Sudanese citizens must be protected from all kinds of violence. We welcome the commitments of the Sudanese authorities in this regard and encourage their implementation. Full respect for freedoms of association, expression, and peaceful assembly is vital, as is protection of property.

We are deeply concerned by the immense economic pressures currently facing the Sudanese people and are committed to continuing to provide direct, humanitarian support to them during this difficult period. We look forward to the restoration of a credible transitional

government agreed through the UNITAMS-AU-IGAD-facilitated political process, which would pave the way to restore economic assistance and international debt relief.

As members of the Friends of Sudan, we continue to endorse the Sudanese-led political process facilitated by UNITAMS, the AU, and IGAD as the best vehicle to realize the Sudanese people's aspirations for freedom, peace, and justice and to restore Sudan's democratic transition. We continue to pledge our full support to the Sudanese people and this process.

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On May 9, 2022, the State Department released a press statement reiterating the United States' support for the Sudanese tripartite political process. The statement is available at https://www.state.gov/united-states-support-for-the-sudanese-tripartite-political-process/ and below.

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The United States reiterates its strong support for the combined efforts of the United Nations Integrated Transition Assistance Mission in Sudan (UNITAMS), the African Union (AU), and the Intergovernmental Authority on Development (IGAD) to facilitate a political process to restore a civilian-led transition to democracy in Sudan. We welcome the outreach and progress made to date.

As the process moves forward and the facilitators begin conversations with stakeholders on the substance of a solution, we are convinced that the UNITAMS-AU-IGAD facilitated process is the most inclusive mechanism to achieve an urgently needed agreement on a civilian-led transitional framework. We continue to encourage all Sudanese civilian and military actors to utilize this process to achieve democratic progress and national stability.

In recent phone calls with Sudanese civilian and military leaders, Assistant Secretary for African Affairs Molly Phee welcomed the release of political detainees in the past few weeks. At the same time, she pressed for the full implementation of promised confidence-building measures by the Sudanese military including lifting the state of emergency and the release of the remaining political detainees. She stressed the need for all stakeholders to participate constructively in the UNITAMS-AU-IGAD facilitated process and to make rapid progress on the framework for a civilian transitional government. She underscored the need for the military to transfer power to a civilian government established under such a framework to enable the resumption of international financial support and development assistance.

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On December 5, 2022, the members of the Quad and Troika (Norway, the Kingdom of Saudi Arabia, the United Arab Emirates, the United Kingdom, and the United States) issued a joint statement welcoming the agreement of an initial political framework. The statement is available as a State Department media note at https://www.state.gov/joint-statement-by-the-quad-and-troika/ and excerpted below.

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This is an essential first step toward establishing a civilian-led government and defining constitutional arrangements to guide Sudan through a transitional period culminating in elections. We commend the parties' efforts to garner support for this framework agreement from a broad range of Sudanese actors and their call for continued, inclusive dialogue on all issues of concern and cooperation to build the future of Sudan.

We urge all Sudanese actors to engage in this dialogue urgently and in good faith. We acknowledge the military has made clear it is ready to step back from politics and engage constructively in the ongoing dialogue. We call on all parties to put Sudan's national interest above narrow political ends. We also fully support the UNITAMS-AU-IGAD (the Tripartite Mechanism) role in facilitating these negotiations and call on all parties to do the same. Quad and Troika members support this Sudanese-led process and condemn spoilers attempting to restrict political space and undermine Sudan's stability and democratic transition.

A concerted effort to finalize negotiations and reach agreement quickly to form a new civilian-led government is essential to address Sudan's urgent political, economic, security, and humanitarian challenges. This is the key to unlocking the resumption of international development assistance and deeper cooperation between the government of Sudan and international partners. We are working with partners to coordinate significant economic support to a civilian-led transitional government to help address the challenges facing the people of Sudan.

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3. South Sudan

On March 29, 2022, the State Department issued a statement noting its concern about the situation in South Sudan. The statement is excerpted below and available at https://www.state.gov/u-s-concern-about-the-deteriorating-situation-in-south-sudan/.

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The United States notes with concern the growing tensions in South Sudan, including recent clashes between the South Sudan People's Defense Force's (SSPDF) and the Sudan People's Liberation Army/Movement-In Opposition (SPLA/M-IO) in Upper Nile state. We call for both sides to observe fully their obligations under the existing peace agreement and note that inflammatory rhetoric is counterproductive and should cease immediately. The SPLM-IO's withdrawal from all peace agreement monitoring and verification mechanisms undermines the peace agreement and must be immediately reversed as ceasefire monitoring bodies investigate the recent violence and seek to hold perpetrators responsible.

The United States calls on President Salva Kiir and First Vice President Riek Machar to do their utmost to de-escalate tensions and to uphold their respective obligations under the 2018 peace agreement, including its ceasefire provisions. We call on both leaders to resume implementation of key, long-delayed provisions of the revitalized peace agreement, including taking the necessary steps to establish an inclusive process to draft a new constitution, to establish necessary electoral legislation and mechanisms, and to respect the freedoms of expression, association, and peaceful assembly. We urge regional states and institutions, namely the Intergovernmental Authority on Development, that are guarantors of the revitalized peace agreement to take swift action to lower tensions and put the peace process back on track prior to the expiration of the already extended transition period in February 2023.

All sides bear responsibility for the deteriorating situation. Neither President Kiir nor First Vice President Machar have made good faith efforts to implement the provisions of the revitalized peace agreement, and both have resisted serious attempts to move South Sudan towards the peace, security, and prosperity the South Sudanese people continue to desire. Furthermore, numerous other political leaders also fail to carry out their official responsibilities and many engage in political violence and otherwise violate the letter and spirit of the peace agreement. We call on all members of the Revitalized Transitional Government of National Unity to take the actions necessary to be seen as credible in the eyes of the South Sudanese people, starting with full adherence to and implementation of the 2018 peace agreement.

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On July 15, 2022, the State Department issued a press statement of support for the people of South Sudan and calling for urgent progress from South Sudan's leaders. The statement is available at https://www.state.gov/the-united-states-stands-with-the-people-of-south-sudan-and-calls-for-urgent-progress-from-south-sudans-leaders/ and follows.

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The United States laments the failure of South Sudanese leaders to implement the commitments they have made to bring peace to South Sudan and has consequently decided to end U.S. assistance for peace process monitoring mechanisms, effective July 15, as we assess next steps.

Due to the lack of sustained progress on the part of South Sudan's leaders, and following consultation with Congress, the United States is ending support for the Reconstituted Joint Monitoring and Evaluation Commission and the Ceasefire and Transitional Security Arrangements Monitoring and Verification Mechanism. South Sudan's leaders have not fully availed themselves of the support these monitoring mechanisms provide and have demonstrated a lack of political will necessary to implement critical reforms. For example, South Sudan has yet to pass critical electoral legislation in keeping with the revitalized peace agreement's timetable. South Sudan still lacks a unified, professional military to serve and protect the population. Civil society members and journalists are routinely intimidated and prevented from

speaking out. The government continues to divert proceeds from oil production before they reach the national budget and has not implemented public financial management reforms.

The United States continues to provide significant assistance to save lives and reduce the suffering of the people of South Sudan, including approximately $1 billion in humanitarian and development assistance, support to the UN Mission in South Sudan (UNMISS), and additional assistance in coordination with partners through the World Bank and other international financial institutions.

The United States stands with the South Sudanese people and is committed to working with them, in concert with the UNMISS, the African Union, the Intergovernmental Authority on Development, and other partners to build a state that lives up to the promises for freedom, democracy, and prosperity made more than a decade ago when the country won its hard-fought struggle for independence.

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4. Haiti

On June 16, 2022, Ambassador Linda Thomas-Greenfield delivered remarks at a UN Security Council Briefing on Haiti. The statement is available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-briefing-on-haiti-3/ and is excerpted below.

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Once again, this Council has before it a report from the Secretary-General highlighting gang violence, insecurity, and worrying humanitarian and economic conditions in Haiti. Once again, we will all express our concern regarding the trends highlighted in this report, as well as more recent reports of attacks on a courthouse in Port-au-Prince. Once again, we will condemn the horrific toll the ongoing violence has exacted on women and children in Haiti. And once again, we will all reiterate that it is long past time for Haiti's stakeholders to set aside their differences, and to finally put Haiti and Haitians first.

That action can only be taken by Haiti's leaders. Until they choose to do so collectively, years-long discussions in search of a political accord and deteriorating security conditions will remain fundamental challenges to an electoral process.

The people of Haiti deserve better. As we have repeatedly emphasized to Haiti's stakeholders, the time is long past for Haiti's various competing coalitions to find their way to consensus. The United States stands ready to support Haitian efforts to establish a broadly representative and inclusive Provisional Electoral Council.

In the interim, the Government of Haiti must also start the technical work needed to enable free and fair elections when conditions permit. In response to the security situation, the United States will continue to provide increased levels of capacity building assistance to the

Haitian National Police, technical assistance, and other logistical support to improve citizen security.

Haiti's ongoing political impasse, difficult human rights conditions, and high levels of poverty and food insecurity only underscore the importance of BINUH. The United States commends BINUH for its expertise, and for its coordination of the international community's efforts in support of political progress, human rights, and security in Haiti.

We also take note of the Secretary-General's assessment that a special political mission remains the UN's recommended configuration to address Haiti's most pressing challenges, his endorsement of a 12-month mandate, and his recommendations to further enhance BINUH's effectiveness. . . .

But let us also be clear: while BINUH and a robust UN presence in Haiti are essential, they are not substitutes for meaningful reforms that can only be undertaken by Haiti's leaders. Ultimately, only the people of Haiti can determine the way forward.

Given the challenges ahead, Haiti needs the strong support of this Council and the international community…

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On December 21, 2022, Ambassador Robert Wood, Alternate Representative to the United Nations for Special Political Affairs, delivered remarks at a UN Security Council briefing on Haiti. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-haiti-4/.

> We recognize that any security gains must also be tied to a political accord among Haiti's various actors, and we call on the Haitian people to find a way to achieve an inclusive, broad-based consensus on moving forward with a political accord. We recognize the need to support institutional reforms in addition to addressing Haiti's immediate security and humanitarian needs. Through the 10-year Global Fragility Act plan, the United States seeks to address root causes of instability, building on justice sector reform while addressing civic engagement and economic opportunity.

5. Libya

On March 4, 2022, 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-2/.

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France, Germany, Italy, the United Kingdom, and the United States of America take note of the statement of 2 March by the spokesperson of the Secretary-General of the United Nations and subsequent developments regarding the situation in Libya.

We echo the UN Secretary-General's call on all actors to refrain from actions that could undermine stability in Libya and express our concern at recent reports of violence, threats of violence, intimidation, and kidnappings.

We stress that any disagreement on the future of the political process must be resolved without resorting to violence, and we stand ready to hold to account those who threaten stability through violence or incitement. We recall that individuals or entities, inside or outside Libya, who obstruct or undermine Libya's successful completion of its political transition, may be designated by the United Nations Security Council's Libya Sanctions Committee in accordance with UNSC resolution 2571 (2021) and relevant resolutions.

In reaffirming our full respect for Libyan sovereignty and for the UN-facilitated, Libyan-led and owned political process, we reiterate our support for UN mediation efforts through the Secretary-General's Special Adviser and UNSMIL to sustain the country's peaceful transition, to facilitate dialogue among political, security, and economic actors, and to maintain their focus on holding credible, transparent, and inclusive presidential and parliamentary elections as soon as possible in order to fulfil the democratic aspirations of the Libyan people.

We encourage all Libyan stakeholders, including the House of Representatives and the High State Council, to cooperate fully with these efforts and in the next steps of the transition, as proposed by the UN, in order to establish a consensual constitutional basis that would lead to presidential and parliamentary elections as soon as possible.

We reaffirm our readiness to work with Libya and all international partners to build a more peaceful, stable future for the country and its people and to support its stability, independence, territorial integrity, and national unity.

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On August 30, 2022, Ambassador Jeffrey DeLaurentis, Senior Advisor for Special Political Affairs, delivered remarks on at a UN Security Council briefing on Libya. The remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-libya-10/ and excerpted below.

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This ongoing instability is a reminder of the urgent need for the immediate appointment of a new UN Special Representative of the Secretary-General for Libya to resume mediation efforts, with unified support from the international community, including the members of this Council. UN leadership on the Libya file remains essential to reestablishing stability and achieving forward progress on the political process.

The United States will continue to fully support UN efforts to secure a constitutional framework for elections and a concrete timeline to election day. We reiterate that persons who obstruct or undermine the political process, and those providing support for armed groups or

criminal networks, through the illicit exploitation of crude oil or any other natural resources in Libya may be subject to UN sanctions.

Under former Special Advisor Williams' leadership, the delegations from the House of Representatives and High State Council made important progress on elections issues. We urge House of Representatives Speaker Agila Saleh and the President of the High State Council Khaled al Mishri to continue their efforts by engaging constructively with UNSMIL and the Special Representative, once appointed, to finalize the eligibility requirements for the candidates running in the presidential elections and commit to an election calendar.

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On September 23, 2022, the Governments of the United States of America, France, Germany, Italy, and the United Kingdom released a joint statement on the situation in Libya. The statement is available at https://www.state.gov/joint-statement-on-the-situation-in-libya-4/, and follows.

> Senior officials representing France, Germany, Italy, the United Kingdom, and the United States met on September 22 on the margins of the United Nations (UN) General Assembly in New York to review the ongoing crisis in Libya. They expressed their support for Special Representative of the Secretary-General Abdoulaye Bathily as he takes up his mandate to advance political stability and reconciliation among Libyans. The officials affirmed their full support for UN mediation aimed at producing a constitutional basis to enable free, fair, and inclusive presidential and parliamentary elections throughout Libya in the shortest possible time. The officials also discussed the importance of fulfilling Libyan aspirations for the transparent management of oil revenues and agreeing on a unified executive with a mandate focused on preparing for elections. Participants strongly rejected any use of violence and reiterated their support for full implementation of the October 23, 2020 ceasefire agreement.

6. Mali

On June 9, 2022, the State Department issued a press statement acknowledging an announcement on the transition timeline in Mali. The statement is excerpted below and available at https://www.state.gov/on-the-transition-timeline-in-mali/.

> The United States acknowledges the announcement by Mali's transition government of a 24-month transition timetable starting in March 2022. We urge the Malian transition government to make sustained, tangible action toward holding elections, including detailed benchmarks and the early adoption of the electoral law. Transparent and inclusive processes that respect diverse perspectives and fundamental freedoms are critical to building a strong foundation for the future.
>
> We welcome the commitment of the Economic Community of West African States (ECOWAS) to continued engagement with Malian authorities to

> support efforts to restore constitutional rule. We encourage Mali and ECOWAS to reach agreement in particular on a robust monitoring mechanism with tangible benchmarks for the remainder of the transition.
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> The United States reiterates our commitment to support transition processes to foster a future of accountable democratic governance for the Malian people.

On July 7, 2022, Ambassador Richard Mills, Deputy U.S. Representative to the United Nations, delivered remarks on the transition in Mali at a UN Security Council briefing on West Africa and the Sahel, which are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-west-africa-and-the-sahel-3/.

> In Mali, the authorities must urgently restore constitutional rule by holding timely elections. Fortunately, ECOWAS and Mali came to a welcomed agreement on a 24-month transition timeline starting from March 2022. We trust the transition government of Mali will turn its full attention to implementing the benchmarks for the remainder of this transition. That is what we expect. That is what the Malian people expect. And that is what the entire international community expects. We will all pay close attention to those benchmarks in the days to come. I must stress that the United States government is very concerned about the alarming increase of credible allegations of human rights violations and abuses carried out by the Malian Armed Forces in conjunction with the Kremlin-backed Wagner Group. These potential abuses and violations are exactly why we warn countries against partnering with the Russia-backed Wagner Group.

7. Guinea

On July 7, 2022, Ambassador Richard Mills, Deputy U.S. Representative to the United Nations, delivered remarks on Guinea at a UN Security Council briefing on West Africa and the Sahel, which are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-west-africa-and-the-sahel-3/.

> Turning to Guinea, the transition government must support the right of peaceful assembly and peaceful protest. It is long past time to return the country back to constitutional, civilian-led democracy. ECOWAS is an essential partner here. We encourage its continued engagement and dialogue with all stakeholders.

On September 27, 2022, the State Department issued a press statement supporting ECOWAS sanctions in Guinea. The statement follows and is available at https://www.state.gov/u-s-support-of-ecowas-sanctions-on-guinea/.

> The United States commends the strong actions taken by the Economic Community of West African States (ECOWAS) in defense of democracy in Guinea following its Extraordinary Summit on September 22 in New York City. We share ECOWAS' concern that the transition government has not made progress towards establishing a transition timeline and organizing elections. The United States supports ECOWAS' actions designed to encourage the transition government to move Guinea quickly toward a constitutional, civilian-led democracy through a transparent and consultative process.

8. Burkina Faso

On July 7, 2022, Ambassador Richard Mills, Deputy U.S. Representative to the United Nations, delivered remarks on Burkina Faso at a UN Security Council briefing on West Africa and the Sahel, which are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-west-africa-and-the-sahel-3/.

> Likewise, in Burkina Faso, ECOWAS plays a key role in support of transition processes and security. We are encouraged by the transition government's proposal to ECOWAS for a two-year transition timeline to return Burkina Faso to democratically elected civilian-led governance. We encourage partners to prioritize productive engagement with the transition government and to take into account Burkina Faso's security and humanitarian challenges. Finally, at the regional level, terrorist violence against civilian and military targets in the Sahel is tragically rampant. The ongoing conflict in neighboring Libya increases instability by contributing to an increased flow of arms and mercenary groups in the region.

On October 1, 2022, the State Department issued a press statement on the situation in Burkina Faso. The statement is available at https://www.state.gov/the-situation-in-burkina-faso/ and follows.

> The United States is deeply concerned by events in Burkina Faso. We note that for the second time in eight months, military officers have asserted that they have dissolved the government and National Assembly and suspended the constitution. We join our partners at ECOWAS, the African Union, and the European Union in condemning these acts and the ongoing violence, which put in jeopardy the agreed-upon timeline for a return to a democratically elected, civilian-led government. We call on those responsible to deescalate the situation, prevent harm to citizens and soldiers, and return to a constitutional order. The United States is closely monitoring this fluid situation, and we call for restraint by all actors. The United States stands firmly with the people of

> Burkina Faso in their aspirations for democracy, peace, development, and respect for human rights.

9. Afghanistan

On September 15, 2022, the Special Envoys and Representatives for Afghanistan of the European Union, France, Germany, Italy, Norway, the United Kingdom and the United States met in Washington D.C. on September 15, 2022, to discuss the situation in Afghanistan. On September 22, 2022, the U.S.-Europe group issued a communiqué, which is available at https://www.state.gov/communique-of-the-u-s-europe-group-on-afghanistan/. Remarks are included below.

> Emphasized that enduring peace and stability in Afghanistan requires a credible and inclusive national dialogue leading to a constitutional order with a representative political system; noted that the risk of armed conflict is likely to increase significantly without a broadly representative and accountable government chosen through a credible process in which all adult Afghan women and men can participate; and called on the Taliban to fulfill their commitment made in the February 2020 Doha Agreement to participate in intra-Afghan dialogue and negotiations over a political roadmap that leads to a new Afghan Islamic government.

B. STATUS ISSUES

1. Ukraine

On February 16, 2022, Secretary Blinken issued a press statement on the Russian Duma resolution on Eastern Ukraine. The statement is available at https://www.state.gov/russian-duma-resolution-on-eastern-ukraine/ and below.

> The Russian Duma has stated that it plans to send to President Putin an appeal to recognize the so-called Donetsk and Luhansk People's Republics as "independent." To be clear: Kremlin approval of this appeal would amount to the Russian government's wholesale rejection of its commitments under the Minsk agreements, which outline the process for the full political, social, and economic reintegration of those parts of Ukraine's Donbas region controlled by Russia-led forces and political proxies since 2014. Enactment of this resolution would further undermine Ukraine's sovereignty and territorial integrity, constitute a gross violation of international law, call into further question Russia's stated commitment to continue to engage in diplomacy to achieve a peaceful resolution of this crisis, and necessitate a swift and firm response from the United States in full coordination with our Allies and partners.

On February 21, 2022, Secretary Blinken issued a press statement condemning the Kremlin's decision to recognize "so-called 'Donetsk and Luhansk People's Republics' as 'independent.'" The statement is available at https://www.state.gov/kremlin-decision-on-eastern-ukraine/ and includes the following.

> …As we said when the Duma first made its request: this decision represents a complete rejection of Russia's commitments under the Minsk agreements, directly contradicts Russia's claimed commitment to diplomacy, and is a clear attack on Ukraine's sovereignty and territorial integrity.
>
> States have an obligation not to recognize a new "state" created through the threat or use of force, as well as an obligation not to disrupt another state's borders. Russia's decision is yet another example of President Putin's flagrant disrespect for international law and norms.

On September 29, 2022, Secretary Blinken issued a press statement on Russia's sham referenda in Ukraine. The statement is excerpted below and available at https://www.state.gov/russias-sham-referenda-in-ukraine/.

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The Kremlin's sham referenda are a futile effort to mask what amounts to a further attempt at a land grab in Ukraine. To be clear: the results were orchestrated in Moscow and do not reflect the will of the people of Ukraine. The United States does not, and will never, recognize the legitimacy or outcome of these sham referenda or Russia's purported annexation of Ukrainian territory. This spectacle conducted by Russia's proxies is illegitimate and violates international law. It is an affront to the principles of international peace and security.

Russia has forced much of the population in areas it seized to flee and compelled Ukraine's citizens that remained to cast ballots at gunpoint, in fear for their safety, and the safety of their loved ones. Ukraine's people have consistently expressed their desire for a free and democratic future. They want their country to remain independent and sovereign. Their soldiers are fighting bravely, and citizens in Russia-controlled or occupied areas of Ukraine are resisting Moscow's efforts to change Ukraine's internationally recognized borders by brute force.

The United States and our allies and partners will continue to assist Ukraine in its fight to defend its territory against Russian aggression. We wholeheartedly support Ukraine's unity, sovereignty, independence, and territorial integrity within its internationally recognized borders.

As President Biden has said, we will never recognize these areas as part of any country other than Ukraine, and we will support Ukraine for as long as it takes.

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On September 30, 2022, Ambassador Linda Thomas-Greenfield delivered the U.S. explanation of vote before the vote on a UN Security Council resolution condemning Russia's sham referenda. The statement is available at

https://usun.usmission.gov/explanation-of-vote-before-the-vote-on-a-un-security-council-resolution-condemning-russias-sham-referenda-in-ukraine/ and excerpted below.

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Yesterday, the Secretary-General said, "The UN Charter is clear: Any annexation of a state or territory by another state resulting from the threat or use of force is a violation of the principles of the UN Charter and international law." That very violation is what we are confronted with today. The United States has proposed a resolution, with Albania, to condemn the illegal so-called referenda held in Ukrainian territory.

The resolution is straightforward. It condemns these illegal referenda. It calls on all states to not recognize any altered state of Ukraine. And it requires that Russia withdraw its troops from Ukraine immediately.

We have heard from many of you over the course of the past few days that you felt the process was rushed. Let me be clear: What was rushed was the Russian illegal act to annex Ukrainian territory. As a Council we had to respond.

Colleagues, this is exactly what the Security Council was made to do. Defend sovereignty. Protect territorial integrity. Promote peace and security. The United Nations was built on an idea that never again would one country be allowed to take another's territory by force. That path, we agreed, leads to history's most horrific outcomes. Russia's attempted annexations are, without a shadow of doubt, exactly that. We are talking about a UN Member State, a Security Council member, attempting to annex part of another through force.

The outcomes of these sham referenda were pre-determined in Moscow, and everybody knows it. They were held behind the barrel of Russian guns. Time and time again we have seen the Ukrainian people fight for their country and their democracy. The Ukrainian civilian who removed a Russian landmine with his bare hands. The Ukrainians abroad who returned to fight for their country. The soldiers sacrificing their lives to stop Russian advances.

Putin miscalculated the resolve of the Ukrainians. The Ukrainian people have demonstrated loud and clear: they will never accept being subjugated to Russian rule. And so, the United States will never recognize any territory Russia attempts to seize or allegedly annex as anything other than part of Ukraine.

Secretary-General Guterres has said the same. He said yesterday, "Any decision to proceed with the annexation of Donetsk, Luhansk, Kherson, and Zaporizhzhya regions of Ukraine would have no legal value and deserves to be condemned."

Let me repeat that: Deserves to be condemned.

The Secretary-General then said that it went against "the purposes and principles of United Nations. It is a dangerous escalation."

In his words, "It has no place in the modern world." It has no place in the modern world.

Colleagues, we all have an interest in defending the sacred principles of sovereignty and territorial integrity. In defending peace in our modern world. All of us understand the implications for our own borders, our own economies, and our own countries if these principles are tossed aside.

This is also bigger than any one nation, large or small. It's about our collective security. Our collective responsibility to maintain international peace and security. Not just for ourselves,

but for the world. This is what this body is here to do. We are the first line of defense for the UN Charter. And we must demonstrate that we take that defense seriously. We must show that the Council can work despite the actions of one Permanent Member. This is not a moment to stand on the sidelines. This is a moment to stand up for the UN Charter, for its values, for its principles, and for its purposes.

And if Russia chooses to shield itself from accountability, then we will take further steps in the General Assembly to send an unmistakable message to Moscow that the world is still on the side of defending sovereignty and protecting territorial integrity.

Earlier today, we saw Putin celebrate this clear violation of international law. He threw a party on Red Square to pat himself on the back for these illegal referenda. He is gloating and reminiscing about the Soviet empire and stated that this was just the beginning. As we all sit in this chamber and solemnly consider this resolution, Putin is instead boastfully shoving our shared values in our faces.

It's time we stand up to defend our collective beliefs. Together. In defense of these principles that we hold dear, the United States is putting forward this resolution with Albania. In defense of all countries to have the right to be safe from invasion and annexation, we are voting "yes." And in defense of the world's collective peace and security, we urge you to vote "yes" too. Let us show Putin the resolve of this Council.

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Following the vote on the UN Security Council resolution condemning Russia's sham referenda, Ambassador Thomas-Greenfield delivered remarks. The September 30, 2022 remarks are available at https://usun.usmission.gov/ambassador-thomas-greenfields-remarks-at-the-un-security-council-stakeout-following-a-vote-on-a-resolution-condemning-russias-sham-referenda/ and excerpted below.

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The illegal referenda that Russia held in Ukraine and the purported annexations of Ukrainian territory by force are a violation of the UN Charter and international law. They change nothing about the status and borders of Ukraine. That is the firmly-held conviction of the United States. This is the firmly-held conviction of the Secretary-General. And as you saw just now, that is the conviction of the Security Council – besides, of course, Russia.

Not a single country voted with Russia. Not one. You cannot go door to door, hold people at gunpoint, and force them to vote for your sham referendum. You cannot seize another UN Member State's territory by force and call it your own.

You also just saw Russia, once again, shield itself from accountability and responsibility by using the veto. This is not surprising, but it is a disgrace to this institution. It's an insult to every Member State that has signed on to the UN Charter.

For our part, the United States will never, ever recognize any territory Russia attempts to seize or allegedly annex as anything other than part of Ukraine. As you heard from Secretary Blinken today, the United States, and our allies and partners, made clear that we would impose swift and severe costs to those who attempt to illegally change the status of Ukrainian territory.

And we will also continue to pursue accountability here at the United Nations. We are moving to the General Assembly where every country has a vote. In the General Assembly, the nations of the world will say loud and clear: It is illegal, and simply unacceptable, to attempt to redraw another country's borders through force. It goes against everything – everything – the UN stands for.

Putin has miscalculated. He is partying in Red Square and giving provocative speeches, convinced that the world will let him tear up the UN Charter and do as he pleases. But he is sorely mistaken.

The United Nations was built on an idea: that never again would one country be allowed to take another's territory by force. And I still believe in that idea. The United States still believes in that idea. And I am confident that the vast majority of the world does too. We look forward to demonstrating that belief and reaffirming our commitment to Ukraine and to the UN Charter in the General Assembly in the days to come.

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2. Georgia

On June 8, 2022, Ambassador Chris Lu, U.S. Representative for UN Management and Reform, delivered remarks following the adoption of a UN General Assembly resolution on the status of internally-displaced people and refugees in Abkhazia and South Ossetia, Georgia. The remarks are available at https://usun.usmission.gov/remarks-following-the-adoption-of-a-un-general-assembly-resolution-on-the-status-of-internally-displaced-persons-and-refugees-in-abkhazia-and-the-tskh/ and excerpted below.

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The United States is pleased to co-sponsor and support this resolution. Over a decade ago, Russia's aggression upended the lives and livelihoods of millions of Georgian civilians. Many of these individuals remain unable to return to their pre-conflict lives and homes. Ordinary citizens' lives were upended as a direct consequence of a brutal and unjustified war of choice by Russia, and while their suffering continues, Russia's aggression has expanded into Ukraine.

The United States fully supports Georgia's sovereignty, independence, and territorial integrity within its internationally recognized borders, just as we support the territorial integrity of all UN Member States. Russia's military presence in the Georgian regions of Abkhazia and South Ossetia violates the territorial integrity of Georgia and undermines Georgia's sovereignty, threatening not just Georgia but also the principles enshrined in the UN Charter and our collective security.

We call on Russia to cease its recognition of the so-called independence of the Georgian regions of Abkhazia and South Ossetia, which are integral parts of Georgian territory. We also call on Russia to fulfill its obligation under the 2008 ceasefire agreement to withdraw its forces to pre-conflict positions, and to allow and facilitate unhindered access for humanitarian organizations.

Further, Russia and the de facto authorities in Abkhazia and South Ossetia need to take immediate steps to respect human rights, cease construction of barriers along the administrative

boundary lines, and create security conditions conducive to the voluntary, safe, dignified, and unhindered return and reintegration of internally displaced persons (IDPs) and refugees.

Across the globe, the United States supports the human rights, dignity, and humanitarian needs of IDPs and refugees. We are alarmed by the increasing number of ongoing, urgent, and in many cases completely avoidable conflict-driven crises involving human rights violations, abuses, and limits on humanitarian access. We welcome the UN Secretary-General's Action Agenda on Internal Displacement. With forced displacement and humanitarian needs reaching unprecedented levels year after year, there is no time to waste. We encourage the UN to strengthen its vision for improving protection and assistance for IDPs and create incentives for development and peacebuilding actors and affected states to increase their efforts to meet IDPs and refugees' needs. We must all do our part and promote durable solutions.

The United States is focused on the plight of IDPs and refugees displaced from the Georgian territories of Abkhazia and South Ossetia, and all others whose lives and homes have been destroyed by Russia's unnecessary war of choice in Georgia. And now we must also fear for the lives and livelihoods of the people forced to flee Russia's unnecessary war of choice in Ukraine. We urge the General Assembly to adopt the resolution on Georgian IDPs and refugees, and to continue to protect the principles enshrined in the UN Charter.

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On August 7, 2022, Secretary Blinken delivered a press statement on the anniversary of the Russian invasion of Georgia. The statement is available at https://www.state.gov/anniversary-of-the-russian-invasion-of-georgia/ and included below.

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Fourteen years ago today, Russia invaded the sovereign nation of Georgia. As we have done since 2008, we remember those killed and injured by Russian forces. For decades, the citizens of Georgia in Abkhazia and South Ossetia have lived under Russian occupation and tens of thousands have been displaced, persecuted, and impoverished. Lives and livelihoods have been taken from them.

This year, Russia's unprovoked further invasion of Ukraine underscores the need for the people of Georgia and Ukraine to stand together in solidarity. The people of Georgia know all too well how Russia's aggressive actions, including disinformation, so-called "borderization," and mass displacement cause untold hardships and destruction.

Russia must be accountable to the commitments it made under the 2008 ceasefire – withdrawing its forces to pre-conflict positions and allowing unfettered access for the delivery of humanitarian assistance. It also must reverse its recognition of Georgia's Abkhazia and South Ossetia regions. This is essential for hundreds of thousands of internally displaced persons to be able to return to their homes safely and with dignity.

We remain steadfast in our support for the people of Georgia as they seek to protect their sovereignty and territorial integrity and find a peaceful solution to the conflict.

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On August 15, 2022, UN Security Council Members France, Ireland, Norway, the United Kingdom, Albania, and the United States, along with incoming Security Council Members: Japan and Malta issued a joint statement following an AOB on Georgia. The statement is available at https://usun.usmission.gov/joint-statement-by-un-security-council-members-following-an-aob-on-georgia-2/ and follows.

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Fourteen years have passed since Russia's full-scale military aggression and the beginning of its invasion of Georgia's territories started on -7 August 2008. The Russian invasion of Georgia in 2008 marked a more aggressive trend in Russia's policy regarding its neighbouring countries and the European security architecture. As we are witnessing in Ukraine today, Russia has continued down this path.

We are resolute in our reaffirmation of Georgia's independence, sovereignty, and territorial integrity within its internationally recognized borders. We deplore the continuous blatant violation of the territorial integrity of Georgia by the Russian Federation. We condemn Russia's illegal invasion and continued military presence and exercising of control over Abkhazia and Tskhinvali region/South Ossetia, integral parts of Georgia, and its steps toward annexation of these Georgian regions.

We reiterate our condemnation of Russia's continuous provocations, which go on in parallel with the Russian unprovoked and unjustified war against Ukraine – the continued military presence and military drills on Georgia's territory, the enhanced so-called "borderisation" process, unlawful detentions and kidnappings of the local population, hindrance of freedom of movement and lengthy closures of so-called crossing points, discrimination against ethnic Georgians in Gali and Akhalgori districts, and prohibition on education in residents' native language. We recall with regret the uninvestigated murders of Georgian citizens Davit Basharuli, Giga Otkhozoria and Archil Tatunashvili, whose perpetrators have not yet been brought to justice and held accountable.

We recall the judgment of the Grand Chamber of the European Court of Human Rights on January 21, 2021, that has stated that given Russia is in effective control of the Georgian regions of Abkhazia and Tskhinvali region/South Ossetia, it is responsible for grave human rights violations including the killing of civilians, torture of prisoners of war, inhumane and degrading treatment, preventing Georgians from returning to their homes, and failure to conduct investigations in to human rights violations. We further emphasize the decisions of the International Criminal Court of June 2022 to issue arrest warrants for war crimes committed during Russia's invasion in 2008.

We remain deeply worried that in the past several years no international human rights monitoring mechanism has been granted unrestricted access to the regions of Abkhazia and Tskhinvali region/South Ossetia. We therefore call for immediate unhindered access to be granted to the Office of the High Commissioner of Human Rights and other international and regional human rights mechanisms, as well as to the EU Monitoring Mission.

We recall the urgent need for unimpeded humanitarian access to all civilians in need. The conditions for a safe, voluntary, dignified and unhindered return of internally displaced people and refugees must be created.

We remain committed to the Geneva International Discussions (GID) and support the continued meetings of the Incident Prevention and Response Mechanisms (IPRMs) as important formats to address the implementation of the EU-mediated 12 August 2008 Ceasefire Agreement, as well as the security, humanitarian and human rights challenges stemming from the unresolved Russia-Georgia conflict.

We stress the necessity of a peaceful resolution of the Russia-Georgia conflict based on international law, including the UN Charter, and on the Helsinki Final Act, especially in the context of Russia's ongoing aggression against Ukraine.

Today we once again call on the Russian Federation to fully implement its obligation and commitments under the EU-mediated Ceasefire Agreement of 12 August 2008 and withdraw its military and security forces from the territory of Georgia without delay. We reiterate our 14 years old call to Russia to reverse the recognition of the so-called independence of Georgia's territories Abkhazia and the Tskhinvali region/South Ossetia, and not to impede the creation of an international security mechanism and allow access of international human rights organizations to both regions.

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3. Armenia and Azerbaijan

In 2022, the United States engaged in helping Armenia and Azerbaijan work toward a peace agreement. Secretary Blinken held calls with Azerbaijani and Armenian officials throughout 2022. On October 6, 2022, Ambassador Michael Carpenter delivered remarks to the Permanent Council in Vienna on developments between Armenia and Azerbaijan. The remarks are available at https://osce.usmission.gov/on-the-latest-development-between-armenia-and-azerbaijan/ and excerpted below.

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The United States remains deeply engaged in helping Armenia and Azerbaijan work toward a comprehensive peace agreement. National Security Advisor Jake Sullivan met with Azerbaijani presidential advisor Hikmet Hajiyev and Armenia's National Security Council Secretary Armen Grigoryan at the White House on September 27 to advance the peace process. On October 4, Secretary Blinken held a trilateral call with Armenian Foreign Minister Mirzoyan and Azerbaijani Foreign Minister Bayramov during which he encouraged confidence-building and further progress in their talks. Secretary Blinken also expressed our appreciation for the positive steps Armenia and Azerbaijan have taken towards reaching a sustainable peace agreement, including and importantly the return of 17 prisoners of war from Azerbaijan to Armenia.

We continue to encourage Armenia and Azerbaijan to resolve outstanding issues at the negotiation table. There will be no lasting peace without reconciliation, and diplomacy is the

only way to achieve that end. The surfacing last weekend on social media channels of an appalling video appearing to show Azerbaijani armed forces executing unarmed Armenian prisoners must be fully and impartially investigated. Those responsible for any abuses of detainees must be held to account. We take note of the inquiry which has been launched by theProsecutor General of Azerbaijan and remind the parties to abide by their commitments to swiftly return all prisoners of war and to treat such prisoners in accordance with their international obligations.

The recent violations of the ceasefire on September 13 and 14, and again on September 28, are of grave concern to the United States. The United States encourages Armenia and Azerbaijan to strictly adhere to a sustainable ceasefire, pull back and distance their armed forces, and continue negotiations on border delimitation to support a peaceful resolution. We reiterate our call on Azerbaijan's forces to return to their initial positions prior to the outbreak of hostilities on the night of September 12. Border disputes must be resolved through negotiations, not violence. The deaths of Armenian soldiers and Azerbaijani civilians from landmines during the past week clearly and tragically demonstrate the ongoing human consequences of this conflict.

Finally, Mr. Chair, the United States strongly supports the activation of the OSCE's confidence-building and conflict prevention instruments, including the establishment of a Fact Finding Mission, as has been requested by Armenia. We urge Armenia and Azerbaijan to take urgent steps to de-escalate tensions, build confidence, and hold themselves accountable to international obligations and commitments. We encourage further progress in resolving the issue of missing persons and the return of all remaining prisoners of war. The United States supports a comprehensive peace process and is committed to working bilaterally, with close partners like the European Union, and through international organizations such as the OSCE.

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On November 7, 2022, Secretary Blinken delivered remarks before a meeting with Armenian Foreign Minister Ararat Mirzoyan and Azerbaijani Foreign Minister Jeyhun Bayramov. The remarks are available at https://www.state.gov/secretary-antony-j-blinken-armenian-foreign-minister-ararat-mirzoyan-and-azerbaijani-foreign-minister-jeyhun-bayramov-before-their-meeting/ and excerpted below.

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The United States is committed to the peace negotiations between Armenia and Azerbaijan. Direct dialogue is the best way to a truly durable peace, and we are very pleased to support that.

The United States strongly supports the sovereignty and territorial independence[i] of both Armenia and Azerbaijan, and the 1991 restoration of independence was a vitally important moment in guaranteeing the rights of both countries, rights that we strongly support.

I think it's also fair to say that 30-plus years of conflict over Nagorno-Karabakh have had tremendous human, material costs – lives lost, scars that are deep. But what we are seeing now are real steps, and courageous steps, by both countries to put the past behind and to work toward a durable peace. Both countries are working to that end and to, ultimately, a brighter future for

the South Caucasus – a future of peace, countries at peace, countries working together for a better future.

And I'd simply say that the United States, as a friend to both Armenia and Azerbaijan, is committed to doing everything that we can to support you in this effort; to walk the path to a durable peace with you, to help in any way that we can. This is, I think, the promise of a better, brighter future. And I applaud both of you and your governments for the courage and determination that you're showing to get to that destination.

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4. Bosnia and Herzegovina

On November 3, 2022, 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-the-people-of-bosnia-and-herzegovina-and-the-dayton-peace-accords/.

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The United States welcomes the UN Security Council's unanimous reauthorization of the mandate for the European Union Force in Bosnia and Herzegovina's (EUFOR) 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). We thank the EU for their continued contributions to and leadership of EUFOR ALTHEA.

The United States congratulates the citizens of BiH for exercising their rights during October 2 general elections, and encourages newly elected leaders to form responsive, accountable governments at the state and entity levels as soon as possible. The citizens of BiH deserve institutions that will work to consolidate multi-ethnic democracy, strengthen democratic institutions, counter corruption, and provide economic opportunity for all people.

The United States fully supports High Representative Christian Schmidt and his ability to exercise all necessary authorities, including the Bonn Powers, until the 5+2 Agenda is complete and BIH is irreversibly on course for European integration. We fully support the High Representative's efforts to address longstanding power sharing problems and counter any anti-Dayton acts. The High Representative and his Office merit the full support of the international community in this task.

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5. Hong Kong

Secretary Blinken's March 31, 2022 press statement condemns the People's Republic of China's ("PRC") dismantling of democratic institutions in Hong Kong. The statement, available at https://www.state.gov/hong-kongs-diminishing-freedoms/, is excerpted below.

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Over the past year, the People's Republic of China (PRC) has continued to dismantle Hong Kong's democratic institutions, placed unprecedented pressure on the judiciary, and stifled academic, cultural, and press freedoms. As the 25th anniversary of Hong Kong's handover to Beijing approaches, Hong Kong's freedoms are diminishing while the PRC tightens its rule. The differences between Hong Kong and cities in mainland China are shrinking due to ongoing repression from the PRC.

This year's **Hong Kong Policy Act Report** documents actions taken by leaders in Hong Kong and the PRC that have further eroded both democratic institutions and human rights, and profoundly impaired independent media operations and freedom of expression. These policies have far-reaching implications for all aspects of life in the city, including for the international business and financial communities.

Sweeping arrests of Hong Kong residents, as well as the forced closure of institutions including Apple Daily and the June 4 Museum, underscore the scope of these deeply damaging changes. In response to heightened risk and uncertainty, some international firms in Hong Kong have relocated entirely, while others have shifted key staff or operations elsewhere. Beijing will ultimately force many of the city's best and brightest to flee, tarnishing Hong Kong's reputation and weakening its competitiveness. Hong Kong's position as a free, global financial center will continue to suffer as a result.

A fully functioning civil society, rule of law, and individual liberties form the bedrock on which vibrant societies grow. We stand with people in Hong Kong.

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The G7 released a statement on Hong Kong's chief executive selection on May 9, 2022. The statement appears below, and is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-the-hong-kong-chief-executive-selection/.

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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, underscore our grave concern over the selection process for the Chief Executive in Hong Kong as part of a continued assault on political pluralism and fundamental freedoms.

Last year, PRC and Hong Kong authorities moved away from the ultimate aim of universal suffrage as set out in Hong Kong's Basic Law by increasing the number of non-elected members appointed to the Election Committee and dramatically curtailing the number of voters eligible to participate in the Committee elections.

The current nomination process and resulting appointment are a stark departure from the aim of universal suffrage and further erode the ability of Hong Kongers to be legitimately represented. We are deeply concerned about this steady erosion of political and civil rights and Hong Kong's autonomy. We continue to call on China to act in accordance with the Sino-British Joint Declaration and its other legal obligations. We urge the new Chief Executive to respect protected rights and freedoms in Hong Kong, as provided for in the Basic Law, and ensure the court system upholds the rule of law.

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Cross References

Special Immigrant Visa program, **Ch.1.B.3.c**
Asylum, refugee, and migrant issues, **Ch. 1.C**
Statement on Ukraine by Special Advisor for Children's Issues, **Ch. 2.B.1.b**
ICC and Sudan, **Ch. 3.C.1.b**
ICC and Libya, **Ch. 3.C.1.d**
Renegotiating Compacts of Free Association, **Ch. 5.D**
HRC on Ukraine, **Ch. 6.A.6**
Statements on the situation of women and girls in Afghanistan, **Ch. 6.B.2.d**
Media freedom in Hong Kong, **Ch. 6.K**
Taiwan at the UN, **Ch. 7.A.2**
UN resolutions related to Russia's aggression against Ukraine, **Ch. 7.A.5**
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.1**
Russia sanctions, **Ch. 16.A.4**
Libya sanctions, **Ch. 16.A.15.h**
South Sudan sanctions, **Ch. 16.A.15.i**
Somalia sanctions, **Ch. 16.A.15.l**
Haiti sanctions, **Ch. 16.A.15.m**
Middle East Peace Process, **Ch. 17.A**
Armenia and Azerbaijan (Nagorno-Karabakh), **Ch. 17.B.4**
South Sudan, **Ch. 17.B.5**
Afghanistan, **Ch. 17.B.9**
Ukraine, **Ch. 17.B.10**
Atrocities in Burma, **Ch. 17.C.4**
Afghanistan, **Ch. 18.A.3**

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 litigants 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. The following section discusses a selection of the significant proceedings that occurred during 2022 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.

NSO Group v. WhatsApp Inc., et al. arises out of a suit by WhatsApp Inc, and Facebook, Inc. (collectively WhatsApp) alleging that a privately owned Israeli company, NSO Group Technologies Ltd. and Q Cyber Technologies Ltd. (collectively NSO), sent malware through WhatsApp's servers in violation of state and federal law. NSO argued

that it was entitled to common-law sovereign immunity from suit, outside of the scope of the FSIA, because it was acting as an agent of a foreign state and therefore entitled to "conduct-based immunity." Conduct-based immunity is a common-law doctrine that applies to the official conduct of foreign officials undertaken in their official capacity. The district court denied NSO's motion to dismiss to the extent that it was based on sovereign immunity. See 472 F. Supp. 3d 649 (N.D. Cal. 2020). On November 8, 2021, the U.S. Court of Appeals, Ninth Circuit, affirmed the district court, holding NSO was not a "foreign state" within meaning of Foreign Sovereign Immunities Act (FSIA) and, thus, was not entitled to sovereign immunity. 17 F.4th 930 (9th Cir. 2021). NSO petitioned for a writ of *certiorari* in the U.S. Supreme Court on April 6, 2022. No. 21-1338. The United States filed an *amicus* brief on November 21, 2022. The U.S. amicus brief is excerpted below (with most footnotes omitted).*

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The court of appeals held that the FSIA entirely forecloses the adoption of any form of immunity under the common law for an entity that acted as an agent of a foreign state. The United States is not prepared at this time to endorse that categorical holding, which is not necessary to resolve this case—and which would foreclose the Executive Branch from recognizing the propriety of an immunity in a particular context in the future even if such a recognition were found to be warranted, including by developments in international law or practice in foreign courts.

Nonetheless, the court of appeals reached the correct result in this case: Whether or not common-law immunity for an entity acting as the agent of a foreign state might be appropriate in some circumstances, NSO plainly is not entitled to immunity here. The State Department has not filed a suggestion of immunity in this case. There is no established practice—or even a single prior instance—of the State Department suggesting an immunity for a private entity acting as an agent of a foreign state. And no foreign state has supported NSO's claim to immunity; indeed, NSO has not even identified the states for which it claims to have acted as an agent.

Nor does the court of appeals' decision otherwise warrant review. It does not conflict with any decision of this Court. The question presented has not divided the courts of appeals—indeed, it has seldom arisen at all. And this unusual case would be a poor vehicle for considering that question in any event. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That NSO Is Not Immune From Suit

1. The FSIA provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity" with the statute. 28 U.S.C. 1602. The FSIA defines a "foreign state" to include not just the "body politic" itself, but also the state's agencies and instrumentalities. *Samantar* v. *Yousuf*, 560 U.S. 305, 314 (2010); see 28 U.S.C. 1603(a). NSO acknowledges that it does not satisfy that statutory definition because it is neither an organ of a foreign state nor majority owned by a foreign state. Pet. App. 32; see 28 U.S.C. 1603(b). But NSO contends that it is nonetheless entitled to a common-law immunity, which it asserts would be analogous to the common-law immunity of foreign officials, for actions NSO allegedly took as an agent of foreign governments.

* Editor's Note: On January 9, 2023, the U.S. Supreme Court denied *certiorari*.

The court of appeals rejected that contention, concluding that the FSIA's specification of the entities (including corporations) that have a sufficient nexus to a foreign state to be covered by the statute's conferral of sovereign immunity categorically forecloses recognition of any common-law immunity for any other entities. The FSIA's grant of immunity to entities in those specified circumstances could be understood to create such a "negative implication" that immunity for entities is "unavailable in any other circumstances." *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). That negative implication also finds some support in the FSIA's legislative history: Both the House and Senate Reports reprinted a section-by-section analysis prepared by the Departments of State and Justice stating that "[a]n entity which does not fall within the definition of Sections1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15 (1976); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976); 122 Cong. Rec. 17,465, 17,466 (1976).

This Court has cautioned, however, that "[t]he force of any negative implication" to be drawn from a statute "depends on context." *Marx*, 568 U.S. at 381. In particular, the presumption that Congress's inclusion of some circumstances implies the exclusion of others "does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.' " *Ibid.* (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). And here, there is reason to question whether Congress, in enacting the FSIA, considered and intended to categorically foreclose any immunity for an entity that acts as an agent of a foreign state, but that does not meet the FSIA's definition of an "agency or instrumentality" of a foreign state.

The FSIA's text and the legislative history cited above specifically address only entities that Congress determined should be covered by a foreign state's *sovereign* immunity because they are so closely connected with the foreign state that they are deemed to be part of the state itself for these purposes. That is a *statusbased* determination: An entity that satisfies the "agency or instrumentality" definition in 28 U.S.C. 1603(b) is treated as a foreign state for purposes of immunity from suit under the FSIA, regardless of the involvement (or non involvement) of the foreign state itself in the events giving rise to the suit.

The question whether an entity should be treated as a foreign state for sovereign immunity purposes under the FSIA is distinct from the question whether a more limited form of *conduct-based* immunity could be recognized for specific acts undertaken on behalf of a foreign state by an entity that does not meet the statutory definition of an "agency or instrumentality." And neither the court of appeals nor WhatsApp has pointed to any specific textual or contextual evidence that Congress considered that specific issue in enacting the FSIA. Cf. *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 424 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law" is "whether the statute 'speaks directly to the question' at issue.") (brackets and citation omitted).

2. Viewed in that light, the FSIA does not necessarily resolve the question whether or to what extent a conduct-based immunity could be recognized for such an entity under the common law—much as this Court has interpreted the FSIA to leave conduct-based immunity for individual foreign officials to be governed by the pre-FSIA common-law regime. See *Samantar*, 560 U.S. at 311-313. There is, however, a significant difference between the immunity for individual officials addressed in *Samantar* and any comparable immunity for entities: Before the FSIA, the State Department and the courts had recognized a conduct-based immunity for "individual foreign officials." *Id.* at 312. In contrast, NSO has not identified—and the United States is not aware of—any history of State Department suggestions of immunity on

behalf of private entities acting as agents of foreign states. Nor has any United States court "ever applied foreign official immunity to a foreign private corporation under the common law." Pet. App. 18.

Unlike in *Samantar*, therefore, the question here is not whether the FSIA should be read to displace a common-law immunity that was recognized at the time of the statute's enactment. Instead, it is whether the FSIA should be read to foreclose the State Department (and the courts) from recognizing an immunity for an entity acting as an agent of a foreign state now or in the future. In deciding whether to recognize an immunity for an entity acting as the agent of a foreign state, the State Department could consider such factors as the nature of the conduct involved; the purpose and scope of the possible immunity; relevant practice in other nations; international-law principles; any assertion by the foreign state involved that the entity was its agent and should in its view be immune; and the foreign policy interests of the United States.

In addition, Congress's enactment of the FSIA means that before recognizing any conduct-based immunity for entities, the State Department and then the courts would at a minimum need to carefully consider the statute's text, structure, context, and purpose. Even where Congress has not completely displaced the common law in a particular area, its "legislative enactments" may supply instructive "policy guidance" for any future consideration of an immunity. *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2278 (2019) (citation omitted).

Those considerations—including the implications to be drawn from the FSIA—may not lend themselves to a uniform answer to the question whether entities that do not satisfy the FSIA's definition of an agency or instrumentality of a foreign state can nonetheless claim a conduct-based immunity similar to that available to individual foreign officials. For example, the State Department has recognized the immunity of foreign officials in suits involving commercial acts for which a foreign state would not be immune under the FSIA. *Greenspan* v. *Crosbie*, No. 74-Civ.-4734, 1976 WL 841, at *1-*2 (S.D.N.Y. Nov. 23, 1976) (pre-FSIA suit); see 28 U.S.C. 1605(a)(2). If a private entity (such as one in which the state owned only 49% of the shares) were similarly entitled to conduct-based immunity when acting as an agent for a foreign state in a commercial transaction, it would enjoy an immunity Congress chose to deny entities that are agencies and instrumentalities of the state itself. Such a result could create an incentive for foreign states to attempt to use private entities to undertake activities for which their agencies or instrumentalities would be subject to suit under the FSIA.

In contrast, a case in which a private entity acted as the agent of a foreign state in connection with the exercise of certain core sovereign authority may not raise similar issues in relation to the FSIA. And in the view of the United States, the FSIA need not be read to entirely foreclose the recognition of such an immunity in the future if the Executive—after considering the nature of the entity and its role as an agent and other relevant considerations such as those identified above—determined that a suggestion of immunity was appropriate in a particular context or circumstance.

3. There is no occasion in this case, however, for the Court to consider whether a private corporation or other entity acting as an agent of a foreign state could be protected by some form of immunity outside the FSIA in certain circumstances, because the prerequisites for any such immunity are not present here. Under the common law, courts surrendered their jurisdiction when the State Department filed a suggestion of immunity, or the courts applied the established principles accepted by the State Department if the United States did not participate in the case. See *Samantar*, 560 U.S. at 311-312. Here, however, the State Department has not filed a suggestion of immunity for NSO, and there are no established principles accepted by the

State Department affirmatively recognizing a conduct- based immunity for a private entity acting as an agent of a foreign state.

In addition, whether a foreign government has requested that the United States recognize a defendant's immunity can be an important consideration for the Executive in determining whether a suggestion of immunity would be appropriate. See *Broidy Capital Mgmt. LLC* v. *Muzin*, 12 F.4th 789, 800 (D.C. Cir. 2021); cf. *In re Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo* v. *Belg.)*, 2002 I.C.J. 3, 2002 WL 32912040, at *25-*26, No. 121 (Feb. 14, 2002). But despite NSO's claim to have acted on behalf of multiple foreign states, no foreign government has requested that the State Department recognize an immunity of NSO from this suit on the rationale that NSO was acting as its agent, or on any other basis.

* * * *

In *Levin v. Bank of New York*, the United States filed an amicus brief on November 10, 2022 before the Second Circuit arguing that foreign sovereign property located abroad is not subject to execution to enforce a judgment against a foreign state. No. 22-624.

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* * * *

A. TRIA Does Not Permit Execution on Foreign Sovereign Property Outside the United States

Plaintiffs primarily rely on TRIA § 201(a), which, as described above, provides that "[n]otwithstanding any other provision of law," the blocked assets of a state sponsor of terrorism against whom a judgment has been entered under § 1605A or its predecessor "shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." 28 U.S.C. § 1610 note. Because plaintiffs hold a judgment against Iran under the terrorism exception, and because the Melli account is a blocked asset (JA 70), plaintiffs contend that TRIA § 201(a) allows execution against that asset.

But as the district court observed, § 201(a) is silent on whether it applies outside the United States. (SPA 5). The statutory silence is fatal to plaintiffs' claim that TRIA's revocation of execution immunity applies to an asset located abroad. "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255. "The question is not whether [a court] think[s] Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed that the statute will do so." *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 335 (2016). Because § 201(a) gives no indication whatsoever—much less a "clear," "affirmative[ ]," and "unmistakabl[e]" one—that it applies to property located abroad, it does not.

Indeed, plaintiffs' efforts to apply § 201(a) to overseas property belonging to a foreign sovereign implicate a core rationale for the presumption against extraterritorial application of statutes: that presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). Even in the

context of actions against state sponsors of terrorism, execution on a foreign sovereign's property located abroad could provoke serious foreign policy consequences, including impacts on the treatment of the United States' own property abroad. *See Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021) ("statutes affecting international relations" should be interpreted "to avoid, where possible, producing friction in our relations with other nations and leading some to reciprocate" (quotation marks and alterations omitted)). Execution could also lead to the diversion of foreign sovereign assets that might otherwise be used to serve critical United States foreign policy objectives. *See Smith v. Federal Reserve Bank of New York*, 346 F.3d 264, 269, 271 (2d Cir. 2003) (noting presidential action making "inapplicable with respect to Iraq" laws that "appl[y] to countries that have supported terrorism" to preserve Iraqi funds for reconstruction and other related purposes; citing Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003)). Accordingly, a clear statement from Congress endorsing extraterritorial application would be required before judgment creditors can seek to execute upon foreign sovereign property abroad.

That § 201(a) begins with the phrase "[n]otwithstanding any other provision of law" does not change that conclusion. That clause serves the purpose of "supersed[ing] conflicting non-attachment provisions of other statutes." *Smith*, 346 F.3d at 271; *accord Rubin*, 138 S. Ct. at 824 (clause overrides "provisions otherwise granting immunity"). Similarly, it eliminates the effect of other barriers to execution with the force of law, such as the presidential waiver of executability of certain blocked assets authorized in 28 U.S.C. § 1610(f). *See Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009). But the clause cannot be read, as plaintiffs contend, to allow "execution on *all* blocked assets of a terrorist state," or to "preclude *any* restriction on such execution." (Brief for Plaintiffs- Appellants ("Br.") 11 (emphasis added)); *see United States v. Holy Land Foundation for Relief & Development*, 722 F.3d 677, 688 (5th Cir. 2013) (rejecting "interpretation of TRIA § 201's 'notwithstanding' clause that operates to override all statutes that, *by their purpose or effect*, shield assets from attachment or execution"). Rather, the "notwithstanding" clause "applies only when some 'other provision of law' conflicts with TRIA." *Smith*, 346 F.3d at 271; *see Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (a "notwithstanding" clause "override[s] conflicting provisions of any other section" of statutory text). The presumption against extraterritoriality is not a "provision of law"—rather, it is a "canon of statutory interpretation," *Kiobel*, 569 U.S. at 115, "designed to help judges determine the Legislature's intent as embodied in particular statutory language," *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Such "guides" to the correct reading of a statute, *id.*, do not prohibit the use of blocked property for execution on a judgment, and therefore do not "conflict" with TRIA.

Plaintiffs seek to avoid the presumption against extraterritoriality by insisting that TRIA "is not silent" on its application outside the United States. (Br. 22-26). They point to the statute's definition of "blocked assets," which refers to the Trading with the Enemy Act, 50 U.S.C. § 4301 *et seq.*, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1702; in turn, Executive Orders issued under IEEPA have been used to block assets both at domestic and foreign branches of U.S. banks. But that is not enough to make TRIA apply extraterritorially. A statute's reference to another statute with extraterritorial effect may be sufficient to overcome the presumption against extraterritoriality, but that situation is "rare," and occurs only when that reference provides a "clear, affirmative indication" that Congress intended

to include foreign activity. *RJR Nabisco*, 579 U.S. at 338-41. In *RJR Nabisco*, the Court found that clear, affirmative indication where the Racketeer Influenced and Corrupt Organizations Act defined racketeering activity to include a number of predicates that expressly applied to foreign conduct, including at least one predicate that applied *only* to extraterritorial conduct. *Id.* at 338-40. By contrast, the mere fact that a statute may cover activity "either within or outside the United States" is not sufficient to "imply extraterritorial reach." *Kiobel*, 569 U.S. at 118. TRIA's references to IEEPA—a statute that can be used to block property both inside and outside the United States—therefore does not establish that TRIA applies extraterritorially. Nor does the fact that TRIA states that it applies "in every case in which a person has obtained a judgment" under the terrorism exception, or that it defines blocked assets to include "any asset seized or frozen" under IEEPA, *see* TRIA § 201(a), (d)(2): "it is well established that generic terms like 'any' or 'every' do not rebut the presumption
against extraterritoriality," *Kiobel*, 569 U.S. at 118.

Even though plaintiffs' interpretation of TRIA might be more favorable to victims of terrorism, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). "Congress had a more complicated set of purposes in mind" in enacting TRIA than simply "enabl[ing] victims of terrorism to collect on judgments
they have won against terrorist parties." *Elahi*, 556 U.S. at 383. Because TRIA does not contain a "clearly expressed congressional intent to the contrary," it has "only domestic application," *RJR Nabisco*, 579 U.S. at 335, and does not permit execution against foreign sovereign property outside the United States.

* * * *

As discussed in *Digest 2020* at 392-98 and *Digest 2021* at 378-85, the Ninth Circuit in *United States v. Pangang Group Co. Ltd.*, affirmed the district court's denial of defendant corporations' motion to dismiss on the ground of sovereign immunity from the criminal jurisdiction of the United States under the FSIA. 6 F.4th 946 (9th Cir. 2021). Following remand from the Ninth Circuit, defendants filed a motion to dismiss, again on sovereign immunity grounds, before the U.S. District Court for the Northern District of California. No. 11-cr-00573. The district court denied the motion on February 25, 2022. The opinion of the court is excerpted below (with footnotes omitted).

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* * * *

1. FSIA.

There is no dispute that each Pangang Defendant is able to satisfy the first and third elements of the FSIA's definition of foreign instrumentality. *Id.* at 955. Therefore, the only question the Court must consider is whether any of the defendants can show the majority of "its shares or other ownership interest is owned by a foreign state or political subdivision thereof" or that it is "an organ of a foreign state or political subdivision thereof[.]" 28 U.S.C. § 1603(b)(2).

a. Ownership Theory.

Pangang Group is the only defendant that relies on the theory that it was directly owned by SASAC when the Government filed the superseding indictment on February 7, 2012. *See*

Pangang VII, 6 F.4th at 957 (citing *Dole*, 538 U.S. at 478). Pangang Group contends that SASAC owned 100% of Pangang Group's shares until January 12, 2014, when Ansteel Group Corporation Limited ("Ansteel") assumed 100% ownership of Pangang Group. (Dkt. No, 1295-2, Declaration of Zi Chun Wang, ¶ 7, Ex. C ("Statement of Equity Change").)[7] Mr. Szamosszegi, however, attests that the merger between Pangang Group and Ansteel occurred in 2010 and, at that time, Pangang Group was indirectly owned by SASAC. (Szamosszegi Decl., ¶ 20.)

According to the Statement of Equity Change, Ansteel made a capital contribution to Pangang Group in 2009. That is consistent with Mr. Szamosszegi's statement that "in 2008, the SOE Anshan Group ('Angang'), also 100% owned by SASAC, began taking positions in Pangang Group subsidiaries in preparation for a merger between the two SOEs." (Szamosszegi Decl., ¶ 18; *see also id.*, Ex. 27, Excerpts of Angang Steel Company Limited Annual Reports, 2008-2010). The annual reports show Anshan Iron and Steel Group Complex was wholly owned by Angang Holding, which was wholly owned by SASAC. (*Id.*) They also show that, on July 28, 2010, SASAC "agreed to the joint restructuring of Angang Holding and Pangang Group (the "Joint Restructuring"). The Joint Restructuring entails the establishment by SASAC (as the representative of the State Council) of a new company, Angang Group Company ('Angang NewCo'), which will wholly own Angang Holding and Pangang Group." (Szamosszegi Decl., Ex. 27 at ECF pp. 36-38.)

The FSIA requires direct "majority" ownership, *i.e.* more than 50%. Assuming that Angang did not obtain 100% of Pangang Group's shares until 2014, that does not preclude Angang from obtaining majority ownership prior to that time. The level of proof needed to establish a *prima facie* showing is not particularly high. *See, e.g., Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977) (noting a *prima facie* showing of jurisdictional facts is less than a preponderance of the evidence). However, taking into consideration Mr. Szamosszegi's attestation that a merger occurred in 2010, the Court concludes the Pangang Group has not made a *prima facie* showing that it was majority owned by SASAC at the time it was indicted.

Accordingly, it DENIES the Pangang Group's motion on this basis.

2. FSIA - Organ Theory.

The Pangang Defendants also argue the allegations in the Third SI and Mr. Szamosszegi's declaration and its exhibits are sufficient to make a *prima facie* showing that they are "organs" of the PRC. The Government did not directly respond to this argument in its opposition to the motion to dismiss. In any other situation the Court would treat the argument as conceded. However, given the importance of the issues, the Court independently evaluated the record to determine if the Pangang Defendants made a *prima facie* showing on this theory.

The term organ has been construed "broadly" and can embody a variety of forms including "a state trading corporation, a mining enterprise, ... a steel company, ..., [or] an export association." *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640 (9th Cir. 2003) (quoting H.R. Rep. No. 94–1487, at 15-16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614). To determine if an entity is an "organ" of a foreign state, a court considers "whether the entity engages in a public activity on behalf of the foreign government[.]" *Id.* An "entity may be an organ even if it has some autonomy from the foreign government." *Id.* (internal quotations and citations omitted).

In *EIE Guam*, the parties' underlying dispute centered on a defaulted loan and failed efforts to resolve the matter. Japan's Resolution and Collection Company ("RCC") had been assigned the loan and removed the case to federal court, and the issue was whether RCC was a

foreign instrumentality entitled to remove the matter. 322 F.3d at 639. The court concluded the RCC was an "organ" of the Japanese government, citing to the fact that "the Japanese government created the RCC expressly to perform a public function[:] ... to carry out Japanese national policy related to revitalization of the Japanese financial system[,]" including the purchase of non-performing loans. *Id.* at 640. The court also noted the RCC was funded by the government and that private companies were not permitted to perform some of its functions, even if they were in the loan collection business. *Id.* The party resisting removal argued against a finding of "organ" status, noting the RCC was a private company, its employees were not civil servants, and it primarily engaged in a "commercial concern." The Ninth Circuit was not persuaded.

> A company may be an organ of a foreign state for purposes of the FSIA even if its employees are not civil servants.... As discussed above, the RCC and the [Deposit Insurance Corporation of Japan] engage in exclusive functions that other loan collection companies may not perform. As to the commercial nature of the RCC's work, we have held that Congress' statement in the legislative history that a "state trading company" and "an export association" can be "organs" of a foreign state indicates Congress' belief that an entity's involvement in commercial affairs does not automatically render the entity non-governmental.... Finally, the district court's key assertion that the RCC's purpose is to carry out Japanese national policy related to the revitalization of the Japanese financial system is well supported in the record.

Id. at 641 (internal quotations and citations omitted). Accordingly, it found that, "on balance," the relevant factors weighed in favor of a finding that the RCC was an "organ" of Japan. *Id.*

In *Gates v. Victor Fine Foods*, the Ninth Circuit concluded that a marketing board for hog producers, Alberta Pork, was an organ of the Province of Alberta, Canada. 54 F.3d 1457, 1461 (9th Cir. 1995). A provincial council approved the establishment of Alberta Pork, and although it did not "exercise day-to-day control" over marketing boards, it played "an active supervisory role." *Id.* at 1460. For example, marketing boards such as Alberta Pork could "only act in a manner and on the subjects that the [council] has previously authorized," were required to provide "information and records" that the council desired, and members of marketing boards were "immune from liability for acts performed in good faith carrying out their duties - ... - a protection normally afforded to governmental actors." *Id.* at 1461.

The Pangang Defendants argue that "a *prima facie* showing of [their] 'organ' status is established by their alleged connection to the SASAC of the PRC." (Mot. at 10:8-9.) They posit that SASAC controlled Pangang Group and, through Pangang Group, SASAC indirectly controlled PGSVTC, PGTIC, and PGIETC. This argument oversimplifies the inquiry a court must make into whether an entity engages in a public activity for a foreign state. Instead, the Court must engage in a "holistic evaluation of the circumstances[.]" *EIE Guam*, 322 F.3d at 640. Pursuant to that evaluation, the Court considers: "[1] the circumstances surrounding [their] creation, [2] the purpose of [their] activities, [3] [their] independence from the government, [4] the level of government financial support, [5] [their] employment policies, and [6] [their] obligations and privileges under state law." *Id.* (internal quotations and citation omitted).

The allegations contained in the Third SI focus on the Pangang Defendants' allegedly criminal conduct and do not specifically address these factors. The Government alleges that SASAC supervises and manages SOEs, but PGSVTC, PGTIC, and PGIETC do not argue they are SOE's. Moreover, the allegations do not suggest that the *PRC* formed PGSVTC, PGTIC, or PGIETC. (Third SI ¶¶ 5.a-c; *see also* Szamosszegi Decl., ¶ 17.)

The Pangang Defendants' reliance on Mr. Szamosszegi's declaration do not add to the equation as to any defendant other than Pangang Group. Mr. Szamosszegi focuses primarily on the general level of control that SASAC exercises over SOE's, which includes the appointment of executives and the development of five-year plans. Mr. Szamosszegi also attests that the government will sometimes provide funding to SOEs. (*See* Szamosszegi Decl., ¶¶ 6-12, Exs. 7, 9-12.) Mr. Szamosszegi's declaration and the exhibits on which the Court has relied do not address several of the relevant factors, such as employment practices. For example, there is nothing to suggest that SASAC directed the Pangang Group to create these subsidiaries or that SASAC provides funding to them. He does attest that PGSVTC and PGIETC share management, which "is typical of the relationship between SOEs and their subsidiaries and a means by which the [Communist Party] and SASAC control the SOEs and their subsidiaries." (*Id.* ¶ 22.)

The Court concludes the factual record here is not analogous to the factual record in either *Gates* or *EIE Guam.* Therefore, although the term "organ" is construed broadly and although a *prima facie* showing is not a high bar, the Court concludes that the allegations of the Third SI alone or in combination with the information contained in the Szamosszegi Declaration are not sufficient to make that showing for PGSVTC, PGTIC, and PGIETC. Although it is a closer question with respect to the Pangang Group, the Court also concludes it has not met its burden to make a *prima facie* case that it was an "organ" of the PRC at the time it was indicted.

Accordingly, the Court DENIES the motion to dismiss on this basis as well.

3. Common Law.

The Pangang Defendants rely on the same factual record to support their argument that they can be considered foreign states under the common law as they do to support their argument under the FSIA. The Court concludes that record is not sufficient to establish that they are entitled to assert sovereign immunity under the common law. *See, e.g., In re Investigation of World Arrangements with Relation to Prod., Transp., Ref. & Distrib. of Petroleum*, 13 F.R.D. 280, 290 (D.D.C. 1952) (looking to "object and purpose of corporation" to determine entitlement to immunity and finding that corporation was "indistinguishable from the Government of Great Britain"); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 301 (N.Y. Sup. Ct. 1960) (noting a corporation may claim immunity "where the corporation functions as a public agency or instrumentality or where evidence of corporate separateness from the government was not strong" but finding corporation not entitled to immunity where conduct giving rise to suit was not sort of "public act" typically giving rise to immunity).

Accordingly, the Court DENIES the motion to dismiss on this basis as well.

D. The Court Concludes the FSIA Does Not Apply to Criminal Cases.

Assuming for the sake of argument that any of the Pangang Defendants have made a *prima facie* showing that they are "foreign instrumentalities" under the FSIA, the Court concludes it can no longer avoid the question of whether the FSIA applies to criminal prosecutions. Therefore, it wades into those "murky waters"[9] by beginning, as it must, with the text of the FSIA. *See, e.g., United States v. Lopez*, 4 F.4th 706, 720 (9th Cir. 2021). Under the FSIA, "[s]ubject to existing international agreements to which the United States is a party at the time of 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 (emphasis added). Sections 1604 and 1330(a) of the FSIA "work in tandem: [section] 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and [section] 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to

immunity." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis in original) ("*Amerada Hess*").

The Supreme Court has repeatedly stated that if the FSIA applies, it "is the 'sole basis for obtaining jurisdiction over a foreign state in federal court.' " *Samantar*, 560 U.S. at 314 (quoting *Amerada Hess*, 488 U.S. at 439); *Amerada Hess*, 488 U.S. at 434 ("[T]he text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."). To date, the Supreme Court has not "extended [that] holding to a criminal case." *Turkiye Halk Bankasi*, 16 F.4th at 347 n. 42.

Section 1604 neither expressly excludes nor expressly includes criminal cases, but it is drafted broadly enough to include them. "Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear, ... or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law[.]" *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988); *see also United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020).

Looking at the FSIA holistically, it contains a "panoply of provisions that are consistent only with an application to civil cases and not to criminal proceedings[.]" *United States v. Hendron*, 813 F. Supp. 973, 975 (E.D.N.Y. 1993). In *Hendron*, the defendant, a Polish citizen and a director at a corporation wholly owned by the state of Poland, was charged with: conspiracy; importing assault weapons into the United States; importing arms without a license; and transaction of business involving proceeds of unlawful activity. *Id.* at 974. The court denied his motion to dismiss and held the FSIA does not apply in criminal cases. It reasoned that "[o]ther than the broad text of [section] 1604's declaration of immunity, nothing in the text of the Act suggests that it applies to criminal proceedings." *Id.* at 975.

For example, Section 1602 uses the term litigants, which "ordinarily refers to a party in a civil suit and not to the state or federal government as prosecutor of criminal charges." *Id.* at 975. As discussed in *Hendron*, other portions of the FSIA contain terms that are associated with civil litigation, such as "action" and "money damages." *See, e.g.*, 28 U.S.C. §§ 1605(a)(5)-(6), 1605(g) (addressing Attorney General's ability to seek to stay discovery in "actions" filed that are subject to exceptions set forth in 28 U.S.C. sections 1605A and 1605B and referring to motions filed pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56), 1605A(c) (providing for "private right of action" and "money damages"), 1606 (restricting liability for punitive damages but allowing for compensatory and actual damages), 1607 (addressing counterclaims), 1608 (addressing service, time to answer, and default); *see also Hendron*, 813 F. Supp. at 975.

The Pangang Defendants rely on *Amerada Hess* to argue that Section 1330(a) trumps any other statutory jurisdictional provisions when a claim of foreign sovereign immunity is raised. In *Amerada Hess*, the plaintiff filed suit relying on the Alien Tort Statute, 28 U.S.C. section 1350, to assert jurisdiction for an act for which the defendant normally be immune: bombing a ship during the Falklands War. 488 U.S. at 432. The Court concluded that neither the Alien Tort Statute nor other "grants of subject matter jurisdiction in Title 28" provided the district court with jurisdiction over the plaintiff's claims. *See* 488 U.S. at 433-39.

It is a "settled proposition that the subject matter jurisdiction is determined by Congress in the exact degrees and character which to Congress may seem proper for the public good." *Id.* at 433 (internal citations and quotations omitted). Although the FSIA provides for original

jurisdiction of non-jury actions, Congress also expressly granted district courts "original jurisdiction, exclusive of the courts of the states, of *all* offenses against the laws of the United States." 18 U.S.C. § 3231 (emphasis added). In *In re Grand Jury Subpoena*, a corporation moved to quash a grand jury subpoena and argued the FSIA "eliminated all criminal subject-matter jurisdiction over foreign sovereigns[.]" 912 F.3d at 628; *see also id.* (noting corporation relied on Section 1330(a) to argue that "the provision ... silently and simultaneously revoke[d] jurisdiction over any case not falling within its terms, including any criminal proceeding").

Although the D.C. Circuit did not decide whether the FSIA applied in criminal cases, it aptly noted that "[i]t is hard to imagine a clearer textual grant of subject-matter-jurisdiction" than 18 U.S.C. section 3231. *Id.* " 'All' means 'all'; the provision contains no carve-out for criminal process served on foreign defendants." *Id.*; *accord Turkiye Halk Bankasi*, 16 F.4th at 347. The D.C. Circuit also reasoned that on the facts, the case did not present a situation where exercising jurisdiction would "provide an end run around the [FSIA's] immunity provision," which was one of the *Amerada Hess* court's chief concerns. 912 F.3d at 629. Instead, it determined that if a criminal case falls within an exception to the FSIA, Section 3231 and the FSIA can "coexist peacefully" *Id.* at 629-31.

Congress articulated the FSIA's purpose in Section 1602, which provides that foreign states are not "are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned," and that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with" those principles. In light of that statement of purpose, this Court is not convinced that "Congress ... dramatically gutted the government's crime-fighting toolkit" by creating an absolute grant of immunity from criminal prosecution. *In re Grand Jury Subpoena*, 912 F.3d at 630.

The legislative history of the FSIA also supports the conclusion that it was not intended to apply to criminal cases. Like the text of the statute, the legislative history is replete with terms generally associated with civil cases. For example, Charles N. Brower, Legal Advisor to the Department of State, and Bruno Ristau, Chief of the Foreign Litigation Unit of the DOJ's Civil Division, testified before a Congressional Subcommittee about a draft version of the FSIA. *Immunities of Foreign States: Hearing Before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary*, House of Representatives, Ninety-Third Congress, First Session on H.R. 3493, at 19-20, 23-24, 29, 30-34 (June 7, 1973). Their testimony includes references to "suits" or parties being sued, "plaintiffs" or "litigants", removal, "actions for damages," "summons and complaint," and the Federal Rules of Civil Procedure. *Id.* at 19-20, 23-24, 29, 30-34; *see also* H.R. Rep. 94-1487, at 6, 19, reprinted in 1976 U.S.C.C.A.N. 6604, at 6605, 6617-18 (1976) (in discussion of commercial activity referencing claims for unjust enrichment, violations of securities law, and wrongful discharge).

Consistent with the statutory text, the section-by-section analysis in the House Report contains references to terms that are consistent with civil litigation, including references to the Federal Rules of Civil Procedure. *See, e.g.*, H.R. Rep. 94-1487, at 25-26, 28, 32, 1976 U.S.C.C.A.N. at 6623-24, 6627, 6631. The *Hendron* court also found support for its conclusion within that legislative history. 813 F. Supp. at 975-76. Having surveyed the House Report that court concluded it gave "no hint that Congress was concerned that a foreign defendant in a criminal proceeding would invoke the Act to avoid a federal court's jurisdiction." *Hendron*, 813 F. Supp. at 976. This Court concurs with that assessment, as well as the D.C. Circuit's conclusion that the legislative history does "not say a single word about possible criminal proceedings under the statute" and is focused on "headaches born of private plaintiffs' civil

actions against foreign states." *In re Grand Jury Subpoena*, 912 F.3d at 630 (internal quotations and citations omitted).

The Court also has considered the cases cited in its previous order and the issue of the FSIA's applicability to criminal cases anew. The Court still finds the reasoning in *Hendron* more persuasive than the reasoning of the Courts that have determined the FSIA does apply in criminal cases. Accordingly, the Court concludes the FSIA does not apply in criminal proceedings, and it DENIES the Pangang Defendants' motion on that basis.

E. If the FSIA, Its Exceptions Apply as Well.

Assuming for the sake of argument the FSIA does apply to criminal prosecutions, the Court once again concludes that its exceptions would apply as well.[12] The Pangang Defendant have not convinced the Court that it should revisit its conclusions on the applicability of the commercial activity exception or the waiver exception. Accordingly, the Court incorporates by reference its previous analysis on those exceptions and finds they would apply. *Pangang VI* at 11:9-17:8. The Court's conclusion on the commercial activity exception is further supported by the Second Circuit's opinion in *Turkiye Halk Bankasi* rejecting the defendant's argument that its activities were sovereign in nature. The court found the defendant conflated the purpose of the act with the act itself, and it determined the defendant's "participation in money laundering schemes designed to evade U.S. sanctions" were activities "that could be, and in fact regularly [are], performed by private-sector businesses[.]" 16 F.4th at 350.

Accordingly, the Court DENIES the motion to dismiss on this alternative basis.

F. Common Law.

The Court also considers the Pangang Defendants argument that they are completely immune from prosecution under the common law.[13] Assuming for the sake of argument that they established they would be entitled to claim foreign sovereign immunity, which the Court concludes they have not, the Court concludes they cannot find shelter in the common law.

The Pangang Defendants argue that under the common law the restrictive theory of sovereign immunity does not apply and absolute immunity remains the rule. *Cf. Gould*, 750 F. Supp. at 844 ("[I]n peacetime situations, this country does not bring criminal proceedings against other nations."); *see also* Hazel Fox & Philippa Webb, *The Law of State Immunity* at 92 & n. 67 (3d ed. 2015) ("legislation in common law countries introducing the restrictive approach of immunity in civil proceedings excludes its application to criminal proceedings"); *Research Handbook on Jurisdiction and Immunities in International Law*: Chapter 7, Elizabeth Helen Franey, *Immunity from the criminal jurisdiction of national courts*, at 205 (2015) ("State immunity from the criminal jurisdiction of foreign states is a matter of customary international law.").

The Court does not find it dispositive that the Department of Justice chose to prosecute this case. However, that decision does factor into its analysis. *See, e.g., United States v. Sinovel Wind Group Co.*, 794 F.3d 787, 792 (7th Cir. 2015) (affirming denial of motion in quash service where PRC held minority ownership interest in defendant and stating "the decision to prosecute a foreign corporation represents the assessment of the Executive Branch, through the Department of Justice, that the proceeding furthers U.S. interests"). The Court also has considered legislative history of the EEA, in which Congress stated the act was intended to cover and punish a "foreign government that uses its classic espionage apparatus to spy on a company, ... two American companies that are attempting to uncover each other's bid proposals, or [a] disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics." H.R. Rep. 104-788 at 5 (1996).

The Second Circuit's analysis of common law immunity in *Turkiye Halk Bankasi* is minimal. 16 F.4th at 350-51. However, the court noted that "customary international law" recognizes the restrictive theory of sovereign immunity, which would not protect commercial activity. *Id.* at 351 n.70 (citing Rest. (Fourth), For. Rel. L. of the U.S. § 454 cmt. h). Because the Court has determined that the charged conduct is commercial in nature, it concludes the Pangang Defendants are not entitled to immunity under the common law.

* * * *

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.2, *infra*, and *Rodriquez v. Pan American Health Organization*, section D.3, *infra*.

Türkiye Halk Bankasi A.S., aka Halkbank v. United States concerns an October 22, 2021 judgment on appeal to the U.S. Supreme Court from the U.S. Court of Appeals, Second Circuit. At issue is the sovereign immunity claim of Halkbank, a Turkish instrumentality, in a criminal proceeding for U.S. sanctions violations. The Second Circuit denied the sovereign immunity claim of Halkbank, finding that even if the FSIA applied to criminal actions against foreign State instrumentalities, the FSIA commercial activity exception (28 U.S.C. 1605(a)(2)) deprives petitioner of immunity and permits criminal jurisdiction over Halkbank in the United States. 16 F.4th 336 (2d Cir. 2021). Halkbank filed a petition for writ of *certiorari*. The Supreme Court granted *certiorari* on October 3, 2022. No. 21-1450. The United States filed its brief on December 14, 2022. The question on appeal was whether the FSIA confers blanket immunity on foreign-State-owned enterprises from all criminal proceedings in the United States. The government argued that the FSIA, which codifies the prevailing "restrictive theory" of sovereign immunity under customary international law, applies only to civil actions, and not criminal prosecutions. The United States argued in the alternative that, even if the FSIA applies in criminal cases, the FSIA's commercial activity exception (28 U.S.C. 1605(a)(2)) deprives

petitioner of immunity, echoing the holding of the Second Circuit. The United States brief is excerpted below.**

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* * * *

A. The FSIA Does Not Apply To Criminal Cases

The FSIA is "a comprehensive set of legal standards governing claims of immunity in every *civil action* against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488 (emphasis added); accord, *e.g., Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (same). The FSIA "lays down a baseline principle of foreign sovereign immunity from civil actions" and then "lists a series of exceptions from that principle." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022). The Court has never suggested that the FSIA has any bearing in the criminal context. And the FSIA's text, structure, and history make clear that it does not.

1. The FSIA's text, structure, and history demonstrate that it exclusively addresses civil actions

In *Samantar*, this Court considered the FSIA's "text," "history," and "purpose" and concluded that its "comprehensive solution for suits against states" does not "extend[] to suits against individual officials," in which common-law principles continue to govern. 560 U.S. at 313, 325. A similar analysis here illustrates that the FSIA's "comprehensive solution" for civil suits against foreign states and their instrumentalities, *id.* at 323 - the entire issue at which the Act is directed - does not extend to federal criminal prosecutions.

a. The FSIA 's text is directed at civil suits

The FSIA's text, which this Court considers "as a whole," *Samantar*, 560 U.S. at 319, is itself dispositive in demonstrating that the Act is exclusively civil in its scope and application. i. The Act contains a grant of jurisdiction for district courts over "any nonjury *civil* action *** as to any claim for relief in personam with respect to which a foreign state is not entitled to immunity." 28 U.S.C. 1330(a) (emphasis added). It provides that such jurisdiction attaches "without regard to amount in controversy," *ibid.* - a requirement that arises in civil, not criminal cases. The Act mentions federal criminal prosecutions only once, and in so doing recognizes that such prosecutions will occur ancillary to cases under the Act. See 28 U.S.C. 1605(g) (requiring courts to stay discovery requests in terrorism-related cases under the FSIA when the Attorney General certifies that the request "would significantly interfere with a criminal investigation or prosecution"). And the Act sets forth a reticulated procedural scheme that relates to only civil cases, without any similar procedural provisions for criminal cases.

For example, the FSIA's sole venue provision addresses "civil action[s]." 28 U.S.C. 1391(f). The Act also authorizes removal of "[a]ny civil action brought in a State court against a foreign state" but does not speak to removal of criminal cases. 28 U.S.C. 1441(d). Similarly, the Act establishes rules applicable to service on foreign states of "the summons and complaint," 28 U.S.C. 1608(a)(1), and rules applicable to the foreign state's "answer or other responsive

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** Editor's Note: On January 17, 2023, the Supreme Court held its hearing in this case. On April 19, 2023, the Court affirmed in part, holding that, as a matter of first impression, the Foreign Sovereign Immunities Act (FSIA) does not grant immunity to foreign states or their instrumentalities in criminal proceedings. The Supreme Court remanded the case to the Second Circuit on the question of sovereign immunity in criminal proceedings under common law. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. __, 143 S. Ct. 940 (2023).

pleading to the complaint," 28 U.S.C. 1608(d), but contains no comparable rules for criminal matters. And the Act provides that in cases where no immunity exists, "the foreign state shall be liable in the same manner and to the same extent as a private individual," except that foreign states (but not agencies or instrumentalities) "shall not be liable for punitive damages." 28 U.S.C. 1606. "Liability" is typically a civil term and punitive damages are a civil remedy.

ii. The FSIA's "careful calibration" of civil jurisdiction, procedure, and remedies - and the complete absence of any similar framework governing criminal prosecutions - shows that "Congress did not mean to cover" criminal prosecutions at all. *Samantar*, 560 U.S. at 319. Petitioner's contrary argument (Br. 33-34) focuses on the FSIA's immunity provision, Section 1604, which states that "[s]ubject to existing international agreements," 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." 28 U.S.C. 1604. But although Section 1604 does not expressly limit itself to civil cases, "[c]ourts have a duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (citation and internal quotation marks omitted).

Construed in light of the FSIA as a whole, Section 1604 "lays down a baseline principle of foreign sovereign immunity from *civil* actions." *Cassirer*, 142 S. Ct. at 1508 (emphasis added). Section 1604 is designed to "work in tandem" with Section 1330(a)'s "confer[ral of] jurisdiction on district courts," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989), which is limited to civil actions. Even petitioner itself, in arguing that application of FSIA immunity to criminal cases should come without the express exceptions to such immunity in Section 1605, recognizes that other FSIA provisions "must be read in connection with section 1330(a)'s conferral of *civil* jurisdiction." Pet. Br. 42 (emphasis added). Congress would not have enacted a statute otherwise exclusively directed at civil cases and then inserted one provision implicitly stripping the Executive Branch of the power to bring, and the Judiciary of the power to hear, criminal cases against foreign entities.

Federal courts presumptively have the jurisdiction granted to them by statute - here, jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231. And the "Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *Armstrong*, 517 U.S. at 464 (citation and internal quotation marks omitted). "They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Ibid.* (quoting U.S. Const. Art. II, § 3). This Court should not read the FSIA - which is silent on criminal matters - to both repeal a portion of Section 3231 and infringe on the Executive Branch's core "constitutional function" of determining whether and when to initiate criminal prosecutions. *Id.* at 465; see *Morton, All* U.S. at 549; *United States* v. *Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016).

b. The FSIA was not designed to address criminal cases

The FSIA's background, history, and purpose confirm that Congress intended no such result. See *Sa-mantar*, 560 U.S. at 316 n.9, 319 n.12, 320-325 (conducting a similar analysis). Instead, the Act's provisions were designed to address only civil cases. The "Act and its legislative history do not say a single word about possible criminal proceedings." *In re Grand Jury Subpoena*, 912 F.3d at 630 (citation omitted). "To the contrary, the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states." *Ibid.*

i. Leading up to the FSIA, "American citizens [we]re increasingly coming into contact with foreign states and entities owned by foreign states," particularly in the commercial sphere. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976) (1976 House Report). That increased contact spawned questions about "whether our citizens will have access to the courts in order to resolve ordinary legal disputes" - which would of course be civil disputes - with foreign states and foreign-state-owned entities. *Ibid.*

Because the maintenance of such suits was subject to "the case-by-case prerogative of the Executive Branch," *Beaty*, 556 U.S. at 857, "[f]rom the standpoint of the private litigant, considerable uncertainty" existed about how "his legal dispute with a foreign state" would be decided, 1976 House Report 9. Among other things, private civil lawsuits against foreign states sometimes prompted those states to "place[] diplomatic pressure on the State Department in seeking immunity." *Verlinden*, 461 U.S. at 487; see 1976 House Report 6-9. To address that uncertainty, the Executive Branch itself proposed a bill to govern "[h]ow, and under what circumstances *** private persons [can] maintain a lawsuit against a foreign government or against a commercial enterprise owned by a foreign government." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (1976 Hearings).

In its proposal, the Executive Branch emphasized the need to "legislate comprehensively regarding the competence of American courts to adjudicate disputes between private parties and foreign states" relating to "activities which are of a private law nature." 1976 Hearings 29 (Department of Justice). The House Report similarly stated that the "purpose" of the resulting statute was "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States." 1976 House Report 6. And the House Report stressed the need for "comprehensive provisions" to "inform parties when they can have recourse to the courts to assert a legal claim against a foreign state." *Id.* at 7.

Thus, the history, like the text, speaks in exclusively civil-litigation terms and shows that Congress sought to address exclusively civil cases. The House Report repeatedly referenced "plaintiffs," "suits," "litigants," and "liability." 1976 House Report 6-8, 12. And in discussing the FSIA's immunity provision specifically, the House Report referenced "the plaintiff" and "the plaintiff's claim." *Id.* at 17. Immunity in criminal matters "simply was not the particular problem to which Congress was responding." *Samantar*, 560 U.S. at 323.

ii. Petitioner contends (Br. 41) that Congress's focus on "civil litigation against sovereigns reflects the fact that criminal litigation against sovereigns was inconceivable in 1976." But by 1976, the Executive Branch had subjected foreign-government-owned entities to criminal jurisdiction on multiple occasions, see pp. 25-26, *supra*, and surely Congress would have mentioned any concerns that would lead it to altogether preclude the Executive from continuing to do so.

Congress particularly would have made such mention in the context of a statute that had its genesis in an executive proposal and that tracked executive policy. For instance, as this Court has recognized, the FSIA "codif[ies] the restrictive theory of sovereign immunity" previously adopted by the State Department. *Sa-mantar*, 560 U.S. at 313. Under that theory, immunity attaches to a foreign state's "sovereign acts," but not to its "commercial acts." *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 766 (2019); see Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), 26 Dep't of State Bull. 984 (1952).

It would be highly anomalous for Congress to codify executive judgments about when foreign sovereign immunity is appropriate, but reject executive judgments about immunity in the criminal context without saying a word on that topic. Indeed, "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing A. Doyle, Silver Blaze, in *The Complete Sherlock Holmes* 335 (1927)).

2. Neither precedent nor policy supports petitioner's reading of the FSIA as implicitly barring federal prosecutions of foreign-government-owned corporations

To the extent that petitioner contends that this Court has already implicitly decided, or that policy considerations suggest that it should decide, this issue in its favor, that contention is unsound.

a. Petitioner's reliance (Br. 34) on the Court's decision in *Amerada Hess* is misplaced. There, the plaintiffs filed a civil suit against Argentina under general grants of civil jurisdiction, including the Alien Tort Statute, 28 U.S.C. 1350, and the admiralty and maritime jurisdiction provision, 28 U.S.C. 1333. See *Amerada Hess*, 488 U.S. at 432. This Court held that the plaintiffs could not invoke such general grants of civil jurisdiction "in Title 28" to sue a foreign state and thereby evade "the comprehensiveness of the statutory scheme in the FSIA." *Id.* at 437.

Nothing suggests that *Amerada Hess* considered, much less addressed or resolved, the FSIA question here. Instead, it simply recognized that the FSIA displaces the general grants of *civil* jurisdiction "in Title 28" in cases involving foreign states, 488 U.S. at 437 - the precise type of jurisdiction that the FSIA comprehensively addresses. *Amerada Hess* does not imply that the FSIA displaces the grant of criminal jurisdiction in Section 3231, which is not even "in Title 28," *ibid.* - and, unlike the FSIA, specifically addresses jurisdiction over criminal cases. Thus, "even the briefest peek under the hood of *Amerada Hess* shows that the Supreme Court's reasons for finding section 1330(a) to be the exclusive basis for jurisdiction in the civil context have no place in criminal matters." *In re Grand Jury Subpoena*, 912 F.3d at 629.

b. Petitioner asserts (Br. 37) that if the FSIA does not apply in the criminal context, "courts and the Executive" will be "muddling along without congressional guidance." But the same objection could have been made in *Samantar*, where the Court held that the FSIA does not apply to foreign official immunity claims, thereby leaving such claims to be resolved "under the common law," 560 U.S. at 324 - that is, "without congressional guidance," Pet. Br. 37.

Moreover, petitioner acknowledges (Br. 38) that the Federal Rules of Criminal Procedure will govern criminal cases if the FSIA does not. Although petitioner emphasizes (Br. 37-38) differences between the Federal Rules and the FSIA's procedural rules, that is simply more evidence that the FSIA does not address criminal prosecutions.

In any event, petitioner does not identify any genuine practical problems in applying the Federal Rules. Petitioner's primary complaint is that juries may resolve criminal cases against foreign-government-owned entities. But petitioner disregards that, consistent with *Samantar*, juries already resolve criminal cases against foreign officials. See, *e.g., United States* v. *Nsue*, 14-cr-312 (E.D. Va. Apr. 17, 2015). And petitioner offers no basis for why the Rules would be appropriate for foreign officials but not for foreign-government-owned corporations.

B. If The FSIA Applies To Criminal Cases, This Prosecution Can Proceed Under The Commercial-Activity Exception

Even if the FSIA applies to criminal cases, petitioner would still lack immunity here. As the court of appeals properly recognized, see Pet. App. 18a-24a, this case would fall within the FSIA's commercial-activity exception. Petitioner's suggestion that the FSIA implicitly grants

much broader immunity in criminal cases than it does in the civil cases that it comprehensively addresses is unsound.

1. The commercial-activity exception applies in "any case" in which the FSIA itself applies and the exception's terms are met

Where it applies, the FSIA only confers immunity "except as provided in sections 1605 to 1607." 28 U.S.C. 1604. Section 1605, in turn, provides "[g]eneral exceptions to the jurisdictional immunity of a foreign state." 28 U.S.C. 1605 (emphasis omitted). And it expressly specifies that those exceptions to immunity apply "in any case." 28 U.S.C. 1605(a). The "word 'any' naturally carries 'an expansive meaning.'" *SAS Inst. Inc.* v. *Iancu*, 138 S. Ct. 1348, 1354 (2018) (citation omitted). To the extent that the FSIA applies to criminal cases, such cases would be plainly encompassed by the term "any case" in the Act's immunity exceptions.

In petitioner's view (Br. 42-43), the FSIA's immunity grant applies to both criminal and civil cases, but its immunity exceptions apply to civil cases alone. At bottom, petitioner's position would mean that the immunity of a foreign-government-owned entity "sweep[s] far more broadly" in criminal prosecutions brought by the United States than in civil actions brought by private parties based on "the same commercial conduct." Pet. App. 17a n.48. As the court of appeals recognized, that interpretation makes little sense. *Ibid.* And petitioner's selective reading of Sections 1604 and 1605 lacks support from any principle of textual analysis.

Petitioner asserts (Br. 40) that Section 1605's exceptions "should be read narrowly" because they operate as sovereign-immunity waivers. But that interpretive principle, which has primarily arisen in the domestic context, would apply only where the sovereign-immunity waiver is ambiguous, see, *e.g., United States* v. *Williams*, 514 U.S. 527, 531 (1995) - which the term "any case" is not. And while petitioner would (for the purpose of the FSIA's exceptions, if not its broader scope) read Section 1605 in tandem with Section 1330(a)'s grant of civil jurisdiction, see Pet. Br. 42-43, petitioner offers no basis for assuming that when Congress said "in any case," it actually meant "in any case under Section 1330(a)."

Petitioner again tries to have it both ways - FSIA immunity, but broader than what the FSIA itself confers - when it observes (Br. 43) that some Section 1605 immunity exceptions could be invoked in only civil cases. See 28 U.S.C. 1605(a)(5) (referring to certain cases "in which money damages are sought against a foreign state for personal injury or death"). But that is more evidence that the FSIA does not address criminal cases at all - not evidence that it confers blanket immunity, without any exception, from any criminal prosecution.

Petitioner's argument is also inherently unsound, as certain exceptions, while not designed for criminal cases, would naturally be understood to include them were they covered by the FSIA. In particular, the commercial-activity exception - the only exception at issue here - applies "in any case *** in which the action is based upon a commercial activity" with certain domestic connections. 28 U.S.C. 1605(a)(2). There is nothing "odd," Pet. Br. 43, about a framework in which certain exceptions can be triggered in a broader set of cases than others. Indeed, that result would follow even from petitioner's reading: Section 1605(a)(6), for example, can be triggered only in cases involving arbitration - not in every civil case. See 28 U.S.C. 1605(a)(6).

2. The prosecution here would fall within the commercial-activity exception

As the court of appeals recognized (Pet. App. 18a-24a), the conduct described in the indictment would fit within the commercial-activity exception. The commercial-activity exception provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States *** in any case *** in which the action is based upon" (1) "a commercial

activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). The conduct alleged in the indictment involves all three types of acts.

a. Application of the commercial-activity exception starts with identifying "the particular conduct that constitutes the gravamen" of the action. *OBB Personen-verkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015) (internal quotation marks omitted). Here, the gravamen of the counts charging petitioner with conspiring to defraud the United States and conspiring to violate IEEPA is petitioner's participation in fraudulent financial transactions designed to evade U.S. sanctions against Iran, which it concealed through misrepresentations to Treasury Department officials. See J.A. 3, 11-12, 22-30; Pet. App. 19a. And the gravamen of the counts charging petitioner with bank fraud, conspiring to commit bank fraud, money laundering, and conspiring to commit money laundering is petitioner's facilitation of sanctions violations through transfers of restricted Iranian funds through unwitting U.S. financial institutions. See J.A. 3, 17, 28, 30-34.

Petitioner maintains (Br. 46) that the gravamen of the prosecution is limited solely to petitioner's illicit transactions in Turkiye, and excludes its misrepresentations to Treasury Department officials. But petitioner does not dispute that the gravamen of a case can include multiple aspects of intertwined activities, particularly when one of them is the violation of economic sanctions imposed by the United States - the overarching basis for the prosecution here. See Pet. App. 19a. All of the counts center on financial transactions, in violation of U.S. sanctions, that involved the U.S. government and U.S. institutions. Petitioner's attempt to sever its misrepresentations to Treasury Department officials from the case's core cannot be squared with the indictment, which devotes pages to those misrepresentations. See J.A. 5, 17-18, 20-21, 27-28.

At the very least, the gravamen of Counts 1 and 2 encompasses the misrepresentations. See, *e.g., Rodriguez* v. *Pan Am. Health Org.*, 29 F.4th 706, 714 (D.C. Cir. 2022) ("considering the 'gravamen' on a claim-by-claim basis"). Count 1 charges petitioner with "obstruct[ing] the lawful and legitimate governmental functions and operations of the U.S. Department of the Treasury," J.A. 29, while Count 2 charges petitioner with "evad[ing] and avoid [ing]" U.S. sanctions, including those implemented through Treasury Department regulations, J.A. 30.

Petitioner inaptly analogizes (Br. 46) this case to *OBB Personenverkehr AG* v. *Sachs*, in which the Court found that "the conduct constituting the gravamen of [the] suit plainly occurred abroad," 577 U.S. at 35. As petitioner acknowledges (Br. 46), the U.S.-based conduct there would not have been "wrongful" without the conduct abroad. *Sachs*, 577 U.S. at 35. Here, in contrast, violating U.S. sanctions, laundering the proceeds through U.S. banks, and making material misrepresentations to U.S. government officials are wrongful acts regardless of where they occur.

Moreover, in *Sachs*, the relevant "injuries [were] suffered in Austria." 577 U.S. at 35. Here, in contrast, petitioner caused injuries in the United States by freeing up funds for uses inimical to the interests of the United States and its citizens, deceiving U.S. government officials, and "causing victim-U.S. financial institutions to take part in laundering over $1 billion through the U.S. financial system in violation of U.S. law." Pet. App. 21a.

b. Once the gravamen is identified, the next question is whether the relevant conduct is "commercial" in nature. 28 U.S.C. 1605(a)(2); see, *e.g., Merlini* v. *Canada*, 926 F.3d 21, 28 (1st Cir. 2019) ("After a court identifies the particular conduct by the foreign state on which the

plaintiff's claim is 'based,' the next step in the inquiry requires a court to determine whether that conduct qualifies as 'commercial activity."') (citation omitted), cert. denied, 140 S. Ct. 2804 (2020). "The 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). And "the issue is whether the particular actions that the foreign state performs *** are the *type* of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation and internal quotation marks omitted).

Under that test, petitioner's conduct here was plainly commercial. This prosecution is based on petitioner's provision of financial services, facilitation of financial transactions, and communication with financial regulators. See, *e.g.*, J.A. 14-15, 18, 23, 27. Those are all activities in which private banks regularly engage. Petitioner asserts (Br. 48) that it only "had Iranian money in the first place" because the Turkish government designated petitioner as Turkiye's "repository for Iranian assets." But the underlying reason why petitioner held Iranian assets does not change the commercial "'nature"' of "the particular actions" that petitioner subsequently took with those assets. *Weltover, Inc.*, 504 U.S. at 614 (citation omitted); see Pet. App. 22a. And the grant of a government license does not inherently imbue the licensed activities with a sovereign character. See *Petersen Energia Inversora S.A.U.* v. *Argentine Republic*, 895 F.3d 194, 207 (2d Cir. 2018) (activity was "commercial" even though it was "triggered by [a] sovereign act"), cert. denied, 139 S. Ct. 2741 (2019).

Petitioner also asserts (Br. 47) that its activities were "sovereign, not commercial" because it purportedly conducted them in order "to boost Turkiye's exports statistics" and to "administer[]" a "U.S.-approved program to provide Iranian oil and gas to the Turkish people." But that assertion again disregards "that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose."' *Weltover, Inc.*, 504 U.S. at 614 (quoting 28 U.S.C. 1603(d)). Because petitioner's conduct was "in the manner of a private player" operating in "a market," not "as regulator of [that] market," *ibid.*, it is immaterial whether petitioner engaged in that conduct for the purported purpose of assisting the Turkish government.

c. Finally, the commercial conduct that is the gravamen of the indictment falls within the scope of activity covered by the commercial-activity exception.
See, *e.g., Devengoechea* v. *Bolivarian Republic of Venez.*, 889 F.3d 1213, 1224 (11th Cir. 2018). Indeed, each of the exception's three alternatives applies to the conduct in this case.

The counts charging petitioner with conspiring to defraud the United States and conspiring to violate IEEPA are based "upon an act performed in the United States," 28 U.S.C. 1605(a)(2) - misrepresentations to Treasury Department officials "in meetings and in conference calls," Pet. App. 20a, see, *e.g.*, J.A. 27-28 - in connection with commercial activity in Turkiye. Alternatively, those counts are "based upon a commercial activity carried on in the United States," 28 U.S.C. 1605(a)(2), because petitioner's evasion of U.S. sanctions and deception of U.S. officials "ha[d] substantial contact with the United States," 28 U.S.C. 1603(e). Similarly, petitioner's laundering of approximately $1 billion through unwitting U.S. banks - at the core of the bank-fraud and money-laundering counts - had "substantial contact with the United States" as well. *Ibid.*; see *Rodriguez*, 29 F.4th at 716-717 (explaining that "a financial crime in the U.S." involving "moving money" through U.S. bank accounts "constituted 'commercial activity carried on in the United States"').

All of the counts additionally fit the commercial-activity exception's third alternative because petitioner's fraudulent transactions in Turkiye were "act [s] outside the territory of the

United States in connection with a commercial activity of the foreign state elsewhere" that "cause[d] a direct effect in the United States." 28 U.S.C. 1605(a)(2). Specifically, petitioner's schemes defrauded the U.S. government, violated U.S. sanctions, and channeled approximately $1 billion in restricted funds through the U.S. financial system. See J.A. 28-34. That charged conduct plainly had a "direct effect" in this country. Pet. App. 22a.

Petitioner asserts that Zarrab's actions were "intervening events" that preclude any "direct effect." Br. 47 (citation omitted). But Zarrab was petitioner's coconspirator, so his acts were not intervening events, but instead acts chargeable to petitioner as if petitioner itself had engaged in them. See, *e.g., Salinas* v. *United States*, 522 U.S. 52, 64 (1997). In any event, it would not matter that Zarrab's acts were deemed an additional cause of the direct effect in the United States. The statute does not require that the defendant be the *sole* cause of a "direct effect in the United States." 28 U.S.C. 1605(a)(2). It simply requires that the defendant's "act cause[] a direct effect in the United States." *Ibid.*

It is precisely because petitioner's alleged acts caused such effects in multiple ways that the United States has made the weighty decision to prosecute a commercial bank whose shares are majority-owned by a foreign government. That prosecution is proper under Section 3231 and in no way barred by the FSIA. It should be allowed to proceed.

* * * *

3. Expropriation Exception to Immunity: *Germany v. Philipp* and *Hungary v. Simon*

The expropriation exception to sovereign 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 and *Digest 2021* at 385-92, *Germany v. Philipp*, No. 19-351, 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. On August 25, 2022, following the Supreme Court's 2021 decision, the U.S. District Court for the District of Colombia granted the motion to dismiss of the remaining defendant for lack of subject matter jurisdiction based on foreign sovereign immunity. 628 F. Supp. 3d 10. Excerpts from the opinion follow (with footnotes omitted).[***]

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* * * *

B. Exception to the Domestic Takings Rule

Even assuming *arguendo* that Plaintiffs did preserve a domestic takings rule argument below, Plaintiffs would need to establish an exception to that rule. To survive a motion to dismiss in this

[***] Editor's note: On July 14, 2023, the D.C. Circuit affirmed the district court decision. *Philipp v. Stiftung Preussischer Kulturbesitz*, 77 F.4th 707 (D.C. Cir. 2023).

context, the plaintiffs' complaint must plead facts establishing that the alleged taking was an actual violation of international law. *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, —— U.S. ——, 137 S. Ct. 1312, 1318-22, 197 L.Ed.2d 663 (2017) (*Helmerich I*); *see Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 Fed. App'x 442, 448-53 (D.C. Cir. 2018) (*Helmerich II*) (because a plaintiff is required to allege facts establishing an actual (not merely possible) violation of international law, a plaintiff has the burden of showing that their supposed rule was clearly established in international law). Accordingly, Defendant asserts that because "the domestic-takings rule is a well-established principle of the law of takings, *Philipp III*, 141 S. Ct. at 709-11, Plaintiffs must allege facts establishing that this was not a domestic taking." Def.'s Mem., ECF No. 63-1, at 32. Plaintiff must also demonstrate that the "claimed exception is clearly established customary international law." *Id.* at 32-33.

1. Who are the Consortium members?

In this case, Defendant asserts that the 1935 sale of the Welfenschatz, which is the claimed taking, occurred when "the Consortium was solely entitled to ownership rights of the collection ..." Def's Mem., ECF No. 63-1, at 33 (quoting First Am. Compl, ¶ 34, Sec. Am. Compl. ¶ 32).[12] Under international law, "a corporation ***23** has the nationality of the state under the laws of which the corporation is organized." *Helmerich II*, 743 Fed. App'x at 447 (quotation and quotation marks omitted). Pursuant to the domestic takings rule, claims that a state has taken the property of its own corporations are barred. *See, e.g., Helmerich II*, 743 Fed. App'x at 447-448 (holding that domestic-takings rule applied to Venezuela's taking of a Venezuelan corporation's property);[13] *Ivanenko v. Yanukovich*, 995 F. 3d 232, 237 (D.C. Cir. 2021) (same for Ukraine's taking of Ukrainian company property). Defendant argues that "[b]ecause Plaintiffs allege that Germany took property belonging to the Consortium or the art dealership firms — German corporate entities — the domestic-takings rule makes SPK immune from suit." Def.'s Mem, ECF No. 63-1, at 33 (relying on the allegations in the complaint as well as the expert opinion of Professor Dr. Christian Armbruster [attached at ECF 63-2] as to the characterization of a "consortium," which has the legal capacity to own property). "Since the complaint alleges that the Consortium's only members were three Frankfurt-based firms, and the Consortium's business activities were centered in Germany, it must be treated as [a] German corporate entity." Def.'s Mem., ECF No. 63-1, at 34 (citing Prof. Armbruster Op. ¶¶ 22-26). Accordingly, Defendant concludes that the German's government's alleged "taking of an art collection belonging to this German legal entity thus falls squarely within the domestic-takings rule." Def.'s Mem., ECF No. 63-1, at 34; *see Helmerich II*, 743 Fed. App'x at 447-448.

Defendant turns next to the three art dealership firms that made up the Consortium – Z.M. Hackenbroch, I. Rosenbaum and J.& S. Goldschmidt – and asserts that because "the complaint's own allegations and exhibits establish that they were based in Frankfurt," accordingly, "they too were German corporate nationals." Def.'s Mem., ECF No. 63-1, at 35 (citations omitted). Plaintiffs do not specifically address the domestic takings argument at the "Consortium" or "art dealership firm" level, but instead look to the individual owners of the art dealership firms. Defendant asserts however that this focus on whether "the individual owners of the art dealership firms – Hackenbroch, Rosenbaum and Rosenberg, or one of the two Goldschmidts – were *foreign* nationals" bypasses "clearly established international law [and] would ignore the nationality of the Consortium and the art dealership firms and look instead to the nationality of the individuals who owned those firms." Def.'s Mem., ECF No. 63-1, at 36; *see Helmerich II*, 743 Fed. App'x. at 447-453 (noting that entities are legally distinct from their

owners and shareholders and rejecting claims that a state violates international law by taking the property of a domestic corporation owned by foreign nationals).

Defendant asserts therefore that the nationality of the individuals at issue in this case is irrelevant because the property was owned by the Consortium or the art dealership firms. Def.'s Mem., ECF No. 63-1, at 37. In this case, however, the Supreme Court's remand specifically asks about the "Consortium members" and whether they were German nationals, as opposed to discussing the Consortium itself. The Supreme Court opinion references a "consortium of three art firms owned by Jewish residents of Frankfurt." *Philipp III*, 141 S. Ct. at 708. While the term "Consortium members" could be interpreted as the art dealership firms comprising the Consortium or the individuals who owned the art dealership firms, the parties' arguments focus on the latter and this Court interprets it as such.

2. Nationality

The Supreme Court's remand in this case and the Court of Appeals mandate direct that this Court 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," Pls.' Opp'n, ECF No. 66, at 29 (citing *Philipp III*, 141 S. Ct. at 715 (emphasis added)). Relying on that exact language, Plaintiffs argue that the "question on remand is whether they were *not* German nationals, not whether they were nationals of some other country." *Id.* at 29-30 (citing *Philipp III*, 141 S. Ct. at 711) (noting that "the expropriation exception's reference to 'violation of international law' does not cover expropriations of property belonging to a country's *own nationals*") (emphasis added by Plaintiffs). Plaintiffs submit that "[t]he Supreme Court could easily have held that a taking violates international law *only* when the property [of someone] who possess[es] the affirmative nationality of another state is targeted - but it did not." Pls.' Opp'n, ECF No. 66, at 29.

Defendant explains however that "the reason the Supreme Court did not itself reject Plaintiffs' alternative theory is that Plaintiffs simply "noted" it in the Supreme Court without fully arguing it." Def.'s Reply, ECF No. 67, at 22 (citing *Philipp III,* 141 S. Ct. at 715), *accord Simon v. Republic of Hungary*, Civil Action No. 10-1770 (BAH), ––– F. Supp. 3d ––––, ––––, 2021 WL 6196995, at *18 (D.D.C. December 30, 2021) ("*Simon II*") (discussing *Philipp* and recognizing that Plaintiffs only "obliquely" raised this theory and noting that "the clearest statement of what is meant by this residual argument on remand was whether the German governmental treatment of German Jews in the 1930s would transgress [the] nationality line, ... a question plaintiff's counsel acknowledged would be a case-specific question of fact that may require the submission of historical expertise[.]") (internal citations and quotation marks omitted).

As a preliminary matter, this Court notes that with the exception of Rosenberg and Rosenbaum, who are alleged by Plaintiffs to be Dutch nationals at the time of the sale, Plaintiffs' argument that the other individual art dealers lost their German nationality would leave those individuals stateless. Defendant asserts that Plaintiffs' argument fails because "[a] state's taking of a stateless person's property does not violate the customary international law of takings [a]nd, even if it did, Plaintiffs have not alleged facts establishing that any of the individual owners were stateless in 1935." Def.'s Mem., ECF No. 63-1, at 39. The issue of whether a state violates the customary international law of takings when it takes property from an allegedly stateless person is an issue that has not been decided in this Circuit.[15] The Court of Appeals for the Eleventh Circuit is the only court that appears to have addressed this issue. *See Mezerhane v. Republica Bolivariana De Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015) (after limited analysis, the court

dismissed a claim by a plaintiff who was alleged to be "*de facto* stateless" because the claim did not "implicate multiple states" as required by the law of takings). "*Mezerhane* distinguished this holding from Holocaust-related cases on the grounds that the expropriation at issue in the latter cases were part of a genocidal plan, *id.* at 551, a distinction that *Philipp* later rejected with respect to the applicability of the expropriation exception." *Simon II*, 2021 WL 6196995 at *19 n. 20.

The Court notes that, in *Simon II, id.* at *18, Chief Judge Howell concluded that it is "unnecessary [for the Court to make] fact-specific determinations of which instances of abhorrent historical conduct are *de facto* denationalizing and which are not." This is because:

> *Philipp* provided sufficiently clear breadcrumbs of a path to conclude that expropriations conducted as an integral part of a broad genocidal program [Holocaust] ... simply cannot trigger the expropriation exception with regard to takings from individuals regarded as citizens of the expropriating state during or just prior to the genocidal events. Put another way, if a loss of nationality is part and parcel of a set of genocidal acts that happen to include expropriation, then the expropriation exception becomes the very type of "all-purpose jurisdictional hook for adjudicating human rights violations" rejected in *Philipp*, 141 S. Ct. at 713 ... The logical result of plaintiffs' argument, then, is that any program of genocidal conduct of which expropriations are a part – because it inherently entails a loss of nationality – falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses, only without articulating the intermediate "loss of nationality" step. As the defendant in *Philipp* articulates in a renewed motion to dismiss on remand, "claim[ing] some de facto statelessness exception to the domestic-takings rule ... do[es] little more than ask[ ] this Court to reinstate the unanimously overruled *Simon [I]* decision in new words."

Simon II, id., at *18. Accordingly, "genocidal expropriations, including those directly associated with the result of denaturalization, cannot under *Philipp* trigger the expropriations exception with respect to plaintiffs that would have been nationals of the offending state but for the genocidal conduct." *Id.* at *19; *see also Heller v. Republic of Hungary*, No. 21-cv-1739-BAH, 2022 WL 2802351, at * 1 (D.D.C. July 18, 2022) (declining to find jurisdiction over claims brought by certain heirs of Hungarian Jews who sought compensation for "property unlawfully seized by Hungary in the course of the many atrocities surrounding Hungary's treatment of its Jewish residents before and during World War II").[16] This Court need not weigh in on whether a state violates the customary international law of takings when it takes property from an allegedly stateless person unless the Court finds that Plaintiffs have demonstrated that any of the Consortium members were anything other than German nationals at the time of the sale. Accordingly, this Court turns now to its analysis of whether Plaintiffs demonstrate that members of the Consortium were not German nationals at the time of the sale.

a. "Defining" Nationality

As a preliminary matter, both parties acknowledge that, in 1930, Germany, among other states, entered into a multilateral convention agreeing that "[i]t is for each State to determine under its own law who are its nationals" and further, "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State." Convention on Certain Questions Relating to the Conflict of Nationality Law arts. I & II, Apr. 12, 1930, 179 L.N.T.S. 89. Furthermore, international law leaves to the states' domestic laws the question of "certain criteria for acquisition and loss of nationality[.]" *See* Oliver Dorr, *Nationality*, Max Planck Encyclopedias of International Law at ¶ 4 (2019) (International law

"neither contains nor proscribes certain criteria for acquisition and loss of nationality," leaving those questions to states' domestic laws.); *see also Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1321-22 (11th Cir. 2018) (International law's basic rule on nationality is "that it is generally up to each state (i.e. country) to determine who are its nationals.")

Defendant notes the distinction between nationality and citizenship, and explains that it is "nationality, not citizenship, that matters to the domestic-takings rule." Def.'s Mem., ECF No. 63-1, at 38 n.15; *see e.g.*, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 n.6 (7th Cir. 2012) (explaining this point and rejecting argument that deprivation of citizenship brought a case outside the domestic-takings rule).[17] Defendant contends therefore that "[w]hether the art dealers were German nationals or instead were "stateless" thus depends on the status German law gave them in 1935." Def.'s Reply, ECF No. 67, at 24-25; *see Comparelli*, 891 F. 3d at 1321 (finding that whether plaintiffs were Venezuelan nationals at the time of the alleged taking was "determined by the laws of Venezuela").

Plaintiffs assert that nationality "is determined by one's social ties to the country of one's nationality, and when established, gives rise to rights and duties on the party of the state, as well as on the part of the citizen/national." Pls.' Opp'n, ECF No. 66, at 21 (citing Alice Edwards & Laura Van Waas*, Nationality and Statelessness Under International Law* at 12 (Cambridge University Press, Kindle Ed. 2014)); *see also* Restatement (Second) of the Foreign Relations Law of the United States § 26 (1965) ("An individual has the nationality of a state that confers it upon him provided there exists a genuine link between the state and individual.") According to Plaintiffs, "nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties." Pls.' Opp'n, ECF No 66, at 20 (quoting *Nottebohm (Liech v. Guat.) Judgment*, 49 AM J INTER'L L. 396 (1955) ("*Nottebohm*")).

Defendant contests Plaintiffs' reliance on the International Court of Justice decision insofar as *Nottebohm*, 1955 I.C.J. 4 (Apr. 6), involved "a German citizen and long-time resident of Guatemala, who, at the outset of World War II, briefly visited Liechtenstein and became a national of that country through a sham process." Def.'s Reply, ECF No. 67, at 25; *see Nottebohm* at 13-16. Upon his return to Guatemala, authorities there tried to seize his assets at the behest of the United States as part of the war effort against Germany. *Id.*; *Nottebohm* at 17-20. The ICJ found that Liechtenstein lacked standing to espouse a claim against Guatemala on Nottebohm's behalf because there was no "genuine connection" between Nottebohm and Liechtenstein (such as acquiring nationality by birth, owning property, or living there) that supported his acquisition of that country's nationality. *Id.;* see *Nottebohm* at 20-24. Defendant notes that *Nottebohm* is "not generally accepted and therefore not part of customary international law." Def.'s Reply, ECF No. 67, at 25-26; *see* Oliver Dorr, *Nationality,* ¶ 4; *see also* Restatement (Third) of the Foreign Relations of the United States § 211 reporter's note 1 ("Nothing in [*Nottebohm*] suggests that a state may refuse to give effect to a nationality acquired at birth, regardless of how few other links the individual had at birth or maintained later.") Reviewing the authorities relevant to defining nationality that were cited by the parties, this Court looks to German law for guidance regarding the art dealers' nationality at the time of the sale.

* * * *

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. See *Digest 2021* at 392-403 for discussion of the opinion issued by the U.S. Court of Appeals for the D.C. Circuit on July 27, 2021. 6 F.4th 31. 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. Turkey filed a petition for writ of *certiorari* to the U.S. Supreme Court on January 13, 2022. No 21-1013. On September 28, 2022, the United States filed an *amicus* brief. The Court denied *certiorari* on October 31, 2022, consistent with the views of the United States. Excerpts follow from the September 28, 2022 *amicus* brief of the United States (with most footnotes omitted).

* * * *

The court of appeals correctly held that petitioner is not immune from these suits. Both domestic law and international practice establish that foreign nations have the authority to protect their diplomats and senior officials in the United States, including outside their diplomatic missions, just as the United States can pro-tect a U.S. diplomat or senior official overseas. That authority affords foreign security personnel discretion to use force on U.S. territory when they reasonably believe that doing so is necessary to protect diplomats and senior officials from threats of bodily harm. If foreign security personnel exercise their discretion to use force that is protective in character—even if they abuse that discretion—the foreign state is immune from suits arising from its agents' discretionary conduct. But if foreign security personnel use force in a manner that does not reasonably appear necessary to protect against bodily harm, they are acting outside any reasonable conception of the protective function and thus outside their le-gally protected discretion. The FSIA's discretionary-function exception therefore does not apply.

The district court—having reviewed an extensive body of evidence, including videos of the altercations and declarations from security experts—determined that Turkish security personnel "violently" attacked protesters with no reasonable basis for perceiving a threat to President Erdoğan. Pet. App. 41. The court of appeals accepted the district court's factual findings. *Id.* at 5. Because the Turkish agents' conduct as deter-mined by the district court cannot reasonably be regarded as an exercise of the protective function, the court of appeals was correct to hold that the agents' con-duct is not protected by the discretionary-function exception. Certain aspects of the court's opinion raise questions about the scope of its reasoning, but those questions have no practical significance in this case, and petitioner identifies no other basis for this Court's re-view. The petition for a writ of certiorari should accordingly be denied.

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER IS NOT IMMUNE FROM THESE SUITS IS CORRECT AND DOES NOT WARRANT THIS COURT'S REVIEW

A. Both Sending And Receiving States Have Responsibilities To Protect Diplomats And Senior Officials

International law has long recognized the im-portance of protecting diplomats and senior government officials during their travels abroad. See, *e.g.*, 4 Emmerich de Vattel, *The Law of*

Nations Bk. III § 82, at 465 (Joseph Chitty trans., 1844) (6th Am. ed.) (stating that an act of violence to a foreign public minister is "an offence against the law of nations"). The United States' respect for that principle is as old as the Nation itself. In 1781, "the Continental Congress adopted a resolution calling on the States to enact laws punishing 'in-fractions 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) (citation omitted); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716-717 (2004) (discussing similar history). The United States' commitment to protecting visiting diplo-mats and foreign officials reflects not just "our Nation's important interest in international relations," but also the need to "ensure[] that similar protections will be ac-corded those that we send abroad to represent the United States." *Boos*, 485 U.S. at 323.

International law assigns to the receiving state—that is, the nation receiving foreign diplomats or senior 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, *done* Apr. 18, 1961, art. 29, Dec. 13, 1972, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502 (entered into force for the United States, Dec. 13, 1972). Congress has authorized 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) and (D), and both agencies routinely exercise that authority. Assigning receiving states the primary responsibility for protecting visiting foreign government officials and diplomatic missions reflects the reality that otherwise such protection "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 im-prove relations between governments." *Finzer* v. *Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986), aff'd in part, rev'd in part, *Boos* v. *Barry*, *supra*.

While 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, *e.g.*, 22 U.S.C. 4802(a) (directing the Secretary of State to "develop and implement * * * policies and pro-grams" 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 over-seas, as discussed above, and it has impliedly recognized foreign nations' authority to protect their diplo-mats and senior officials in the United States. In 1999, Congress prohibited the possession of firearms by per-sons 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. 2681-71, 2681-72. The amendment's sponsor explained that the exception was meant to cover "categories of people wh[o] might" need to possess a firearm "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) (statement of Sen. Durbin). The State Department has accordingly informed foreign missions that foreign "Protective Escorts" may import firearms "for the purpose of protecting the visiting foreign government dignitary they are accompanying." *Circular Diplomatic Note* 2 (June 10, 2015), https://go.usa.gov/xsxPX (*Circular*); see *United States* v. *Alkhaldi*, No. 12-cr-1, 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.[4]

B. Foreign Security Personnel Have Discretion To Use Force On Domestic Territory Only When Doing So Reasonably Appears Necessary To Defend A Protected Person

Foreign states' authority and responsibility to protect their diplomats and senior officials abroad is subject to an important limitation: foreign security personnel may use force 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. Consistent with that limitation, the State Department's guidance to foreign missions states 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* 2. No source of law affords foreign security personnel discretion to use force 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 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." Office of Diplomatic Security, U.S. Dep't of State, 12 *Foreign Affairs Manual* §§ 091, 092 (Feb. 22, 2021), https://go.usa.gov/xsPrZ.

C. The FSIA's Discretionary-Function Exception Does Not Protect Sending States Whose Agents Use Force Out-side Their Protective Function

As explained above, the FSIA provides an exception to a foreign state's immunity for specified noncommercial torts, 28 U.S.C. 1605(a)(5), but that exception does not apply to "any

[4] The court of appeals stated that "a sending state has a right in customary international law to protect diplomats and other high officials representing the sending state abroad." Pet. App. 18. The United States has not taken the position that a sending state has a right as a matter of international law to provide such protection out-side of its territory, and the United States emphasizes that the authority of the sending state to provide such protection is subject to the authorization of the receiving state.

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).

Foreign security agents' protection of diplomats and senior officials against threats of bodily harm ordinarily involves 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.*, *Wood* v. *Moss*, 572 U.S. 744, 759 (2014) ("[O]fficers 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.") (citation omitted). As in the Fourth Amendment context, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a rea-sonable 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) (citation and internal quotation marks omitted). The FSIA thus expressly provides that, in a noncommercial-tort suit, a foreign state retains immunity for the exercise of a discretionary function "regardless of whether the dis-cretion be abused." 28 U.S.C. 1605(a)(5)(A).

The FSIA's discretionary-function rule cannot apply, however, when agents have no lawful discretion to exercise. That is the case when foreign security personnel use force 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 agents, 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, the discretionary-function rule bars the suit, regardless of whether the agents abused their discretion; if not, the suit may proceed.

D. The Force Used By Turkish Security Personnel Was Not Protective In Character

The facts found by the district court, which the court of appeals accepted (Pet. App. 5), establish that Turkish security personnel used force in a manner outside any reasonable conception of their protective function. Their use of force is therefore not protected by the FSIA's discretionary-function exception. That conclusion rests on two principal bases.

First, at the time of the main altercation, respondents—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." Pet. App. 64. Both the Turkish agents (along with supporters of President Erdoğan) and U.S. law enforcement separated the protesters from the Am-bassador's residence at which President Erdoğan had arrived. *Id.* at 39-40. Yet the Turkish agents "crossed [the] police line" separating them from the protesters "to attack the protesters" "violently," and the district court found that they took that aggressive action without any indication "that an attack by the protesters was imminent," *id.* at 65, or any other reasonable basis for perceiving a threat to President Erdoğan. There is no basis, given those factual findings, to regard the "at-tack" by Turkish agents as protective in nature. *Ibid.*

Second, the actions taken by the Turkish agents af-ter the initial attack strongly support the conclusion 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"; instead, they "either fell to the ground * * * or ran away." Pet. App. 65. Yet the Turkish agents "continued to strike and kick the protesters who were lying prone on the ground," and the agents "chased * * * and vio-lently physically attacked many of" the protesters who were running away from the

scene. *Id.* at 41. The agents then "ripped up the protesters' signs." *Ibid.* None of those actions can 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 respondent Lacy MacAuley. Pet. App. 42. 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 "[a]fter President Erdogan's motorcade had already passed." *Id.* at 66. Those actions likewise cannot reasonably be regarded as protective in character.

Because the Turkish agents' use of force was not pro-tective in character, the agents were not exercising legally protected discretion, and petitioner is accordingly subject to these suits under the FSIA's noncommercial-tort exception, 28 U.S.C. 1605(a)(5).

E. The Court Of Appeals Reached The Correct Result, And Its Decision Does Not Warrant Review

1. The court of appeals correctly determined, based on the facts found by the district court, that the FSIA's discretionary-function exception does not shield petitioner from these suits. Pet. App. 27. In particular, the court of appeals recognized that a sending state has discretion to use force on domestic territory only in the exercise of their protective function, *id.* at 18 (relying on government's amicus brief), and that the "nature of the challenged conduct" here "was not plausibly related to protecting President Erdogan" and thus exceeded "the only authority Turkey had to use force against United States citizens and residents," *id.* at 27.

2. Several aspects of the court of appeals' opinion could be read to characterize the discretionary-function exception too narrowly, but those aspects of the opinion were not material to the court's holding in this case and do not warrant this Court's review.

a. In applying the first part of the FTCA discretionary-function standard articulated by this Court in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), the court of appeals appeared to suggest that a state or local law—if sufficiently specific—could cabin the discretion of a foreign-government actor such that the actor's con-duct would not "involve[] an element of judgment or choice" for purposes of the discretionary-function rule. *Id.* at 536; see Pet. App. 18-23. Decisions applying the FTCA's discretionary-function exception, however, have long established that only *federal* law—not state or local law—can negate a federal employee's discretion in this sense. See, *e.g.*, *Carroll* v. *United States*, 661 F.3d 87, 101 (1st Cir. 2011) (collecting cases). The same is true of the FSIA's parallel discretionary-function exception, particularly "given the 'concern for uniformity in this country's dealings with foreign nations' that ani-mated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted).

b. At the second step of the *Berkovitz* framework, the court of appeals contrasted the Turkish agents' "use[]" of security "resources" with decisions as to "how many security officers to deploy and how to train and arm them"—decisions that, the court explained, would involve "policy tradeoffs." Pet. App. 26. This Court has explained, however, that "[d]iscretionary conduct is not confined to the policy or planning level." *Gaubert*, 499 U.S. at 325. For example, the "acts of agency employees in executing" a "system of 'spot-checking' airplanes" for safety are subject to the discretionary-function exception, even if those employees did not play any role in planning the program. *Ibid.* (discussing *United States* v. *Varig Airlines*, 467 U.S. 797 (1984)). Consistent with that understanding, lower courts regularly apply the discretionary-function exception to operational law enforcement activities, such as conducting investigations, *Dichter-*

Mad Family Partners, LLP v. *United States*, 709 F.3d 749, 750 (9th Cir.) (per curiam), cert. denied, 571 U.S. 823 (2013), or deciding whether to bring a prosecution, *Gray* v. *Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

As discussed above (pp. 13-14, *supra*), protecting diplomats and senior officials often requires operational decisions, which ordinarily fall within the FSIA's discretionary-function exception. The reason the conduct at issue in this case fell outside that rule is that it was not an exercise of the Turkish agents' protective function (pp. 15-16, *supra*)—not that it was operational.

c. Notwithstanding those aspects of the court of appeals' reasoning, this Court's review is unwarranted. Petitioner identifies no division of authority among the courts of appeals as to the application of the FSIA's discretionary-function exception. Petitioner's argument (Pet. 13-24) is instead that the court of appeals misapplied this Court's decisions construing the FTCA's discretionary-function exception. But even assuming those FTCA decisions are fully applicable to the FSIA context, the court of appeals' decision does not present the sort of conflict that warrants review.

That is particularly true because, in other cases, the D.C. Circuit has correctly applied this Court's discretionary-function precedents. In *Macharia* v. *United States*, 334 F.3d 61 (2003), cert. denied, 540 U.S. 1149 (2004), for example, the court stated that the first prong of the *Berkovitz* test "requires that [courts] determine whether any '*federal* statute, regulation, or policy specifically prescribes a course of action for an employee to follow.' " *Id.* at 65 (emphasis added). And in *Griggs* v. *Washington Metropolitan Area Transit Authority*, 232 F.3d 917 (2000), the court recognized that, under *Gaubert*, "discretionary activity can include operational activities and is 'not confined to the policy or planning level.'" *Id.* at 923 (citation omitted). Because future panels of the D.C. Circuit will need to read the decision here as consistent with those prior D.C. Circuit precedents and this Court's precedents, see, *e.g.*, *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), the language discussed above is unlikely to have any significant effect on future cases, and no need exists for this Court's intervention.

3. Petitioner asserts (Pet. 29-32) that the decision below will produce adverse foreign-relations consequences for the United States. But as the United States' position in the court of appeals and this Court demonstrates, petitioner's assessment of the United States' interests is misplaced. The United States values its relationship with Turkey, a NATO ally, and the United States has a paramount interest in protecting its diplomats and senior officials traveling abroad. Cf. *Wood*, 572 U.S. at 758-759. But the decision below does not undermine those interests. The decision is consistent with other decisions in which U.S. courts have held that foreign states are not entitled to sovereign im-munity for torts that involve the use of violence in the United States outside a sphere of protected conduct. See, *e.g.*, *Liu* v. *Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990); *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980). And while the United States has strong reciprocal interests in maintaining sovereign immunity for foreign states whose security personnel exercise protective functions to defend foreign diplomats and leaders from physical attack, the United States does not have the same reciprocal interests in maintaining a foreign state's immunity for the use of force by security officials in the United States targeting those who do not pose a physical threat to the protected foreign officials.

II. THE ALLOCATION OF THE BURDEN OF PROOF ON APPLICATION OF THE FSIA'S DISCRETIONARY-FUNCTION EXCEPTION DOES NOT WARRANT RE-VIEW IN THIS CASE

Petitioner separately contends (Pet. 27-29) that the Court should grant review to determine how courts should allocate the burden of proof in applying the FSIA's discretionary-function rule. But that issue played no role in the court of appeals' decision. This case would therefore not be an appropriate vehicle to consider the question petitioner proposes.

Moreover, petitioner errs in asserting that courts of appeals are divided on the question. The rule in the D.C. Circuit is that a "plaintiff bears the initial burden to overcome" the FSIA's "presumption of immunity * * * by producing evidence that an exception applies," and, if the plaintiff meets that burden, "the sovereign bears the ultimate burden of persuasion to show the exception does not apply." *Bell Helicopter Textron, Inc.* v. *Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). Other courts of appeals resolving cases under the FSIA have adopted the same approach. See, *e.g.*, *Universal Trading & Inv. Co.* v. *Bureau for Rep-resenting Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013); *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42, 52 (2d Cir. 2021); *Federal Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 & n.13 (3d Cir. 1993), cert. denied, 511 U.S. 1107 (1994); *Velasco* v. *Government of Indonesia*, 370 F.3d 392, 397-398 (4th Cir. 2004); *Frank* v. *Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 367 (5th Cir. 2016); *O'Bryan* v. *Holy See*, 556 F.3d 361, 376 (6th Cir.), cert. denied, 558 U.S. 819 (2009); *Broidy Cap. Mgmt., LLC* v. *State of Qatar*, 982 F.3d 582, 590-591 (9th Cir. 2020), cert. denied, 141 S. Ct. 2704 (2021); *Orient Mineral Co.* v. *Bank of China*, 506 F.3d 980, 991-992 (10th Cir. 2007), cert. denied, 553 U.S. 1079 (2008); *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009).

Petitioner suggests that the Seventh Circuit adopted a conflicting rule in its nonprecedential decision in *Nwoke* v. *Consulate of Nigeria*, 729 Fed. Appx. 478 (2018), cert. denied, 139 S. Ct. 1172 (2019). But *Nwoke* simply stated in passing that the plaintiff had "not met her burden to show that immunity does not apply," *id.* at 479, and the circuit precedent that *Nwoke* cites for that proposition—*Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983)—in fact states the same rule that applies in the D.C. Circuit: plaintiffs bear the burden of offering evidence to show that an exception to immunity applies, and if they carry that bur-den, then "[d]efendants bear the ultimate burden of proving that they are entitled to immunity." *Id.* at 255.

The government has previously expressed the view, in addressing an analogous issue in a case involving diplomatic immunity under the Vienna Convention on Diplomatic Relations, that the burden-shifting framework adopted by courts applying the FSIA is inconsistent with the FSIA's presumption of foreign sovereign im-munity, 28 U.S.C. 1604. See U.S. Amicus Br. at 16-17, *Broidy Cap. Mgmt. LLC* v. *Benomar*, 944 F.3d 436 (2d Cir. 2019) (No. 19-236). Courts have overlooked that aspect of the FSIA's text and instead relied on a snippet of its legislative history incorrectly suggesting that foreign sovereign immunity should be treated as an affirmative defense. See *ibid.* But because the Court need not address the burden of proof to resolve the immunity issue here, this case does not provide an appropriate vehicle to consider that question.

Finally, while petitioner asserts (Pet. 28-29) that courts have divided on the proper allocation of the burden with respect to the FTCA's discretionary-function exception, the appropriate vehicle for reviewing any such conflict would be a case brought under the FTCA.

* * * *

5. Arbitration Exception

Process & Industrial Devs. v. Nigeria, in the U.S. Court of Appeals, District of Columbia Circuit, was brought by an engineering and project management company seeking confirmation of an arbitral award against Nigeria. No. 21-7003. Nigeria moved to dismiss for lack of jurisdiction and asserted sovereign immunity under the FSIA in the district court. On January 20, 2022, the United States filed an *amicus* brief, excerpted below (with footnotes omitted).

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* * * *

I. The Court should affirm the district court on the basis that the arbitration exception provides subject-matter jurisdiction here.

The FSIA's arbitration exception provides subject-matter jurisdiction in this case. Given that, it is unnecessary to decide whether the waiver exception also ***6** applies--a question that raises difficult questions of statutory construction and could also implicate adverse reciprocity concerns were foreign courts to take a broad view of waiver in cases brought against the United States. The Court should therefore affirm, on the basis of the arbitration exception, the district court's decision denying dismissal for lack of subject-matter jurisdiction. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013) (explaining that the Court may affirm the judgment of the district court "on any basis supported by the record" (quoting *Carney v. American Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998))).

1. The conditions of the arbitration exception are satisfied here. The arbitration exception applies in cases "in which the action is brought . . . to confirm an award made pursuant to" an arbitration agreement "made by the foreign state with or for the benefit of a private party" to arbitrate disagreements that arise "with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States," 28 U.S.C. § 1605(a)(6), if the award "is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," *id*. § 1605(a)(6)(B).

Nigeria does not dispute that the award is "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," 28 U.S.C. § 1605(a)(6)(B). Nor could it, as the ***7** New York Convention governs the award and "the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception.' " *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 123-24 (D.C. Cir. 1999) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993)).

Nigeria's only argument against the arbitration exception's application is the purported invalidity of the arbitral award. *See* Reply Br. 14-18. But the award need not be valid to provide the district court with jurisdiction under the arbitration exception, as the validity of an arbitral award is a merits question. *See Diag Human, S.E. v. Czech Republic-Ministry of Health*, 824

F.3d 131, 137-38 (D.C. Cir. 2016). In *Diag Human*, the arbitral award in question had been reversed by an appellate arbitration panel, but "the legitimacy of that reversal" was disputed by the parties. *Id*. at 137. The Court held that this dispute did not affect the district court's subject-matter jurisdiction, because "[w]hether the arbitration award is final will be a question going to the merits of the case." *Id*. at 138. So too here.

This reading is rooted in the text of the arbitration exception. On its face, the exception requires only an "award," 28 U.S.C. § 1605(a)(6), not a "valid award." Moreover, the arbitration exception applies in "any case . . . in which the action is brought . . . to confirm an award made pursuant to" a qualifying arbitration agreement. *Id*. § 1605(a), (a)(6). The exception ties jurisdiction to the goal of the suit, not to its likelihood of success. Under the arbitration exception, as long as a party can establish the existence of an award under normal pleading standards, it establishes a basis for the court's exercise of jurisdiction under the arbitration exception, provided the other requirements of § 1605(a)(6) are satisfied.

The Supreme Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017), is not to the contrary. There, the Court held that a district court may not find jurisdiction under the FSIA's expropriation exception without deciding whether "rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3), not just whether there is a "nonfrivolous argument" that the property had been taken in violation of international law. *Helmerich*, 137 S. Ct. at 1316. *Helmerich*'s holding was specific to the text of the expropriation exception. *Id*. at 1319. Under that exception, the rights in question need not ultimately exist to provide jurisdiction--they must only be "in issue" at the jurisdictional stage--but the asserted rights must be of the correct type, *i.e.*, "rights in property taken in violation of international law." *Id*. (quoting 28 U.S.C. § 1605(a)(3)). If the asserted rights are not the correct type, the expropriation exception cannot provide jurisdiction. The text of the arbitration exception similarly governs here. It requires an "action . . . brought . . . to confirm an award," 28 U.S.C. § 1605(a)(6)--it does not require a threshold jurisdictional determination that the award is confirmable, *i.e.*, valid, as that is a question for the merits phase of the litigation.

Requiring a valid award to establish jurisdiction under the arbitration exception would also be in tension with the enforcement scheme established by the New York Convention and implementing legislation, under which an award that has been set aside by a foreign court may nevertheless be enforceable in a U.S. court. The Convention states that a court "may"--not "must"--refuse to recognize or enforce an award that "has been set aside or suspended by a competent authority." *See* New York Convention, art. V(1)(e). Put differently, a court may agree to recognize or enforce an award that has been set aside by a competent authority, if crediting the set-aside order would be "repugnant to fundamental notions of what is decent and just" and therefore offend the public policy of the United States. *See Corporación Mexicana De Mantenimiento Integral, S. De. R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 105-07 (2d Cir. 2016) (quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)) (holding that the district court did not abuse its discretion in confirming an arbitral award that had been invalidated in Mexican court). Requiring a valid award at the outset would preclude that possibility.

2. Because the district court had jurisdiction over this action under the FSIA's arbitration exception, it is unnecessary for the Court to decide whether it could also exercise jurisdiction over an action to enforce an arbitral award under the general waiver exception, 28 U.S.C. § 1605(a)(1)--a difficult question of statutory construction with potential consequences for the

United States in foreign courts.

Traditional canons of statutory construction suggest that the arbitration exception was intended to displace the waiver exception, at least for arbitration agreements and arbitral awards that come within its ambit. Subparagraph (D) of § 1605(a)(6) provides that, if the arbitration agreement meets the other statutory requirements, jurisdiction exists over a petition to confirm an arbitral award where "paragraph (1) of this subsection is otherwise applicable." 28 U.S.C. § 1605(a)(6). "[P]aragraph (1) of this subsection" is the waiver exception. *See id*. § 1605(a)(1). Subparagraphs (A) through (C) of the arbitration exception identify specific scenarios in which jurisdiction exists--where the arbitration takes place in the United States, for example, or where the award is governed by the New York Convention. *See id*. § 1605(a)(6)(A)-(C). Subparagraph (D), on the other hand, captures awards that do not fall within the other specified scenarios but do involve an express or implied waiver of sovereign immunity.

If the waiver exception were able to support jurisdiction in arbitration cases, Subparagraph (D) would be entirely superfluous. A party that could establish an express or implied waiver of sovereign immunity, such that subparagraph (D) is satisfied, would necessarily also satisfy the waiver exception. Indeed, by going through the waiver exception, the party would avoid the need to satisfy any of the arbitration exception's other preconditions. Statutory interpretation principles counsel against this result. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting "cardinal principle" against construing statutory text as superfluous (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). Statutory interpretation principles also suggest that the specific guidance of the arbitration exception as to when a court can exercise jurisdiction in arbitration cases involving waiver should supplant the general terms of the otherwise-applicable waiver exception, 28 U.S.C. § 1605(a)(1). *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling." (quoting *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932))).

The legislative history sheds light on Congress' intent as well. The arbitration exception was added in 1988 to clarify courts' jurisdiction to enforce arbitration agreements and confirm arbitral awards. Before the amendment, courts were, for the most part, applying the FSIA's waiver exception in 28 U.S.C. § 1605(a)(1) to "find[] that arbitral agreements constitute[d] waivers in the appropriate cases." 132 Cong. Rec. 28,800 (1986) (statement of Sen. Lugar). Some confusion remained, however, and so the arbitration exception was intended to provide "explicit guidance to judges in dealing with these issues." *Id*.

Earlier drafts of the amendment included versions of only subparagraphs (A) through (C). *See, e.g.*, H.R. 3137, 99th Cong. (1985); H.R. 1888, 100th Cong. (1987). Commenting on this approach, the State Department noted at the time that "the amendment should be drafted to leave open the possibility of courts finding implicit waiver in other appropriate circumstances, should they arise." *Arbitral Awards: Hearing on H.R. 3106, H.R. 3137, H.R. 4342, and H.R. 4592 Before the Subcomm. on Administrative Law and Gov't Relations of the H. Comm. on the Judiciary*, 99th Cong. 32 (1986) (1986 Hearing) (statement of Elizabeth G. Verville, Deputy Legal Adviser, U.S. Dep't of State). In other words, "the three proposed circumstances should not become an exclusive list of conditions in which courts may enforce arbitral agreements and awards." *Id*. The Justice Department similarly recommended that, in addition to the three specific scenarios set out in the arbitration exception, "courts should retain the ability afforded them under current law to make case-by [-]case assessments of the relevant factors to determine if the foreign sovereign has implicitly waived immunity" under § 1605(a)(1). 1986 Hearing, 99th

Cong. 69 (statement of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, U.S. Dep't of Justice).

Congress responded to these suggestions by expressly incorporating a waiver provision in the new arbitration exception. One plausible construction of that provision is that it reflects Congress' intent to require that a court exercising jurisdiction to enforce an arbitration agreement or arbitral award on the basis of implied or express waiver do so only where the threshold requirements of the arbitration exception have been met.

On the other hand, construing § 1605(a)(6) as exclusive would mean that a court lacks jurisdiction to enforce an arbitration agreement that is not made "with or for the benefit of a private party," despite the lack of evidence of Congress' intent to foreclose jurisdiction in those circumstances. This Court's unpublished decision in *Tatneft v. Ukraine*, 771 F. App'x 9 (D.C. Cir. 2019), rejected that construction, instead reading the waiver exception and arbitration exception as nonexclusive--albeit without addressing the fact that its reading of the statute would render § 1605(a)(6)(D) entirely superfluous. *Id*. at 10.

In any event, the Court need not decide these thorny issues in this case because the arbitration exception squarely applies--P&ID has brought an action to confirm an arbitral award governed by the New York Convention. The Court should therefore affirm the district court's finding of subject-matter jurisdiction on that alternate ground alone. The Court took a similar approach in *de Csepel v. Republic of Hungary*. There, plaintiffs asserted jurisdiction under the FSIA's expropriation and commercial activity exceptions. *de Csepel*, 714 F.3d at 597. The district court found jurisdiction under the expropriation exception, but this Court--"without ruling on the availability of the expropriation exception"--concluded that plaintiffs' claims fell "comfortably within the FSIA's commercial activity exception." *Id*. at 598. Here, similarly, where the application of the arbitration exception is plain, affirmance on that ground is appropriate.

II. It is not necessary to reach the question of the United States' potential implied waiver of sovereign immunity.

The Court also invited the United States to provide its views on whether it "impliedly waives sovereign immunity from actions seeking the recognition and enforcement of foreign arbitral awards in the courts of other New York Convention states by becoming a party to the Convention and agreeing to arbitrate a dispute in a Convention state." Order (Nov. 15, 2021).

As explained above, the Court can and should resolve this case under the arbitration exception. There is no need, therefore, to decide whether the FSIA's waiver exception applies to an action to enforce an arbitral award in the United States--a New York Convention state--based on Nigeria's agreement to arbitrate in another New York Convention state. And whether the United States has impliedly waived its immunity for purposes of an action against it in a foreign court is a further step removed from that statutory question and the facts of this case.

The United States has not, to its knowledge, taken a position on this question, though it would generally urge foreign courts to reject a finding that the United States had implicitly waived its sovereign immunity. As a Contracting State, the United States has an interest in the vitality of the New York Convention and in the ability of its courts to enforce covered arbitral awards. But addressing the question posed by the Court here could have potential reciprocal consequences. Although United States courts exercise restraint in construing implied waivers, other countries may not do so. The United States is not infrequently sued in foreign courts--"[a]t any given time, foreign lawyers under [the Office of Foreign Litigation's] direct supervision represent the United States in approximately 1,800 lawsuits pending in the courts of over 100

countries." *See* Dep't of Justice, *Office of Foreign Litigation*, https://go.usa.gov/xtB5C (updated Aug. 27, 2021). Taking the position that the United States has implicitly waived its sovereign immunity could disfavor the United States as a litigant, particularly in those countries that may otherwise provide for foreign sovereign immunity in such circumstances.

The United States further notes that some jurisdictions may allow for sovereign immunity in circumstances covered by the arbitration exception. The United Nations Convention on the Jurisdictional Immunities of States and Their Property, for example, provides a more limited exception, which denies sovereign immunity only for an action in the state in which the arbitration is seated that seeks judicial supervision over the arbitration (or to nullify an arbitral award)--*not* an exception for any action to recognize and enforce an arbitral award from an arbitral tribunal seated in another Contracting State. *See* United Nations Convention on the Jurisdictional Immunities of States and Their Property, art. 17, Dec. 2, 2004 (not in force), https://perma.cc/7ZEF-UJWB.

Because the hypothetical question whether the United States waives its sovereign immunity by becoming a party to the New York Convention and agreeing to arbitrate in a New York Convention state is entirely distinct from the statutory interpretation question decided by the district court--which itself is unnecessary to decide on appeal--the United States declines to take a position on that question here.

* * * *

On March 11, 2022, the D.C. Circuit affirmed the district court's denial of Nigeria's motion to dismiss but did so on the basis of the arbitration exception to sovereign immunity under the FSIA, sec. 1605(a)(6), consistent with the *amicus* brief of the United States. *Process & Industrial Devs. v. Nigeria*, 27 F.4th 771 (D.C. Cir. 2022). The D.C. Circuit concluded that "a foreign court's order ostensibly setting aside an arbitral award has no bearing on the district court's jurisdiction and is instead an affirmative defense properly suited for consideration at the merits stage." *Id.* at 772. Excerpts from the opinion follow (with footnotes omitted). On May 10, 2022, the D.C. Circuit denied a petition for rehearing en banc.

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III.

The New York Convention applies "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, art. I(1). It further provides that signatory states "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the ... articles [of the Convention]." *Id.* at art. III. There is no dispute that the Federal Republic of Nigeria, the United States and the United Kingdom—the location of the arbitration proceedings—are signatories to the New York Convention.[2] The Congress declared in the legislation implementing the Convention:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall

> have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 203.

It is settled law that "[t]he FSIA is 'the sole basis for obtaining jurisdiction over a foreign state in our courts' " in civil cases. *Creighton*, 181 F.3d at 121 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989)). In civil cases, 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), and that immunity is preserved unless one of the FSIA's exceptions to sovereign immunity applies, *see* 28 U.S.C. § 1604 ("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.").

Two FSIA exceptions are relevant here: the waiver exception, *id.* § 1605(a)(1), and the arbitration exception, *id.* § 1605(a)(6). The district court grounded its ruling in the waiver exception, *P & ID*, 506 F. Supp. 3d at 6–11, and declined to resolve whether the arbitration exception applies, *id.* at 6 n.1. Because "as an appellate court, we can 'affirm the District Court on any valid ground, and need not follow the same mode of analysis,' " we take a different approach. *Baird v. Gotbaum*, 792 F.3d 166, 171 (D.C. Cir. 2015) (quoting *Molerio v. FBI*, 749 F.2d 815, 820 (D.C. Cir. 1984)); *see also de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013) (an appellate court may affirm the district court "on any basis supported by the record" (quoting *Carney v. Am. Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998)). We decline to address the district court's interpretation and application of the waiver exception and instead find Nigeria's sovereign immunity abrogated by the arbitration exception.

*776 **159 The FSIA's arbitration exception provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... in which the action is brought ... to confirm an award made pursuant to ... an agreement to arbitrate, if ... the agreement or award is or may be governed by a treaty or other international agreement in force ... calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a), (a)(6). We have recognized that "the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception.' " *Creighton*, 181 F.3d at 123–24 (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993)).

The application of the arbitration exception here is straightforward, as all of the jurisdictional facts required by the statute exist. 28 U.S.C. § 1605(a)(6); *see LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021) ("[T]he existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established."). P & ID's contract with Nigeria included an agreement to arbitrate. The arbitral tribunal issued an award to P & ID. And the New York Convention governs the award, as Nigeria, the United States and the United Kingdom are all member states.

Nigeria contends that the arbitration exception does not apply because P & ID lacks a valid and enforceable arbitral award. Nigeria argues that the award is not valid and enforceable because, in its view, the Federal High Court of Nigeria set aside the arbitral tribunal's liability award. For support, it cites Article V of the New York Convention, which states that "enforcement of the award may be refused" if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made."[4] New York

Convention, art. V(1)(e). As we have made clear, the *validity or enforceability* of an arbitral award is a merits question. *See Diag Human, S.E. v. Czech Republic–Ministry of Health*, 824 F.3d 131, 137–38 (D.C. Cir. 2016) (legitimacy of award reversed by appellate arbitration panel did not affect district court's subject matter jurisdiction because "[w]hether the arbitration award is final will be a question going to the merits of the case"). Thus, Nigeria's argument is foreclosed by our precedent on the arbitration exception and the district court need not determine the validity of the arbitral award as part of its jurisdictional inquiry.

* * * *

6. Choice-of-Law in FSIA Cases

As discussed in *Digest 2021* at 403-08, 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). 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). Excerpts from the Court's opinion follow (with footnotes omitted).

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* * * *

II

The FSIA, as indicated above, creates a uniform body of federal law to govern the amenability of foreign states and their instrumentalities to suit in the United States. See *supra*, at 1507. The statute first lays down a baseline principle of foreign sovereign immunity from civil actions. See § 1604. It then lists a series of exceptions from that principle (including the expropriation exception found to apply here). See §§ 1605–1607; *supra*, at 1507. The result is to spell out, as a matter of federal law, the suits against foreign sovereigns that American courts do, and do not, have power to decide.

Yet the FSIA was never "intended to affect the substantive law determining the liability of a foreign state or instrumentality" deemed amenable to suit. *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). To the contrary, Section 1606 of the statute provides:

> "As to any claim for relief with respect to which a foreign state is not entitled to immunity under [the FSIA], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."

So when a foreign state is not immune from suit, it is subject to the same rules of liability as a private party. Which is just to say that the substantive law applying to the latter also applies to the former. See *First Nat. City Bank*, 462 U.S. at 622, n. 11, 103 S.Ct. 2591. As one court put the point, Section 1606 directs a "pass-through" to the substantive law that would govern a similar suit between private individuals. *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (CADC

2009). The provision thus ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would.

And in so doing, Section 1606 also dictates the selection of a choice-of-law rule: It, too, must mirror the rule that would apply in a similar suit between private parties. For only the same choice-of-law rule can guarantee use of the same substantive law—and thus (see above) guarantee the same liability. See *Barkanic v. General Admin. of Civ. Aviation of People's Republic of China*, 923 F.2d 957, 959–960 (CA2 1991) ("[T]he same choice of law analysis" is needed to "apply[ ] identical substantive laws," and so to "ensure identity of liability" between a foreign state and a private individual). Consider two suits seeking recovery of a painting—one suit against a foreign-state-controlled museum (as here), the other against a private museum. If the choice-of-law rules in the two suits differed, so might the substantive law in fact chosen. And if the substantive law differed, so might the suits' outcomes. In one case, say, the plaintiff would recover the art, and in the other not. Contrary to Section 1606, the two museums would not be "liable in the same manner and to the same extent."

In this case, then, Section 1606 requires the use of California's choice-of-law rule—because that is the rule a court would use in comparable private litigation. Consider the just-hypothesized suit against a private museum for return of a piece of art, brought as this case was in California. The claims asserted (again, as in this case) turn only on state or foreign property law, with no substantive federal component. If the private suit were filed in state court, California's choice-of-law rule would of course govern. And if the private suit were filed in federal court, under diversity-of-citizenship jurisdiction, the same would be true. According to long-settled precedent, a federal court sitting in diversity borrows the forum State's choice-of-law rule. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). So the private-museum suit would begin with the application of California's choice-of-law rule, to decide on the governing substantive law. And if that choice-of-law rule applies in the private-museum suit, so too it must apply in the suit here, against the Foundation. That is the only way to ensure—as Section 1606 demands—that the Foundation, although a Spanish instrumentality, will be liable in the same way as a private party.

In choosing instead to apply a federal choice-of-law rule, the courts below could well have created a mismatch between the Foundation's liability and a private defendant's. As described earlier, those courts found that the federal rule commanded the use of Spanish property law to determine *Rue Saint-Honoré* 's rightful owner. See *supra*, at 1507. Spanish law (as the courts below understood it) made everything depend on whether, at the time of acquisition, the Foundation knew the painting was stolen: If the Foundation did not know—as the courts in fact found—then it owned the painting by virtue of possession. See ECF Doc. No. 621, at 26–30, aff 'd, 824 Fed.Appx. at 454–455. But now consider the possible result if the courts below had instead applied California's choice-of-law rule, as they would have done in a private suit. The Cassirer plaintiffs contend that the California rule would lead to the application of California property law. See Brief for Petitioners 13. And they argue that under California property law, even a good-faith purchaser of stolen property cannot prevail against the rightful pre-theft owner. See *ibid.* We do not today decide those questions; they remain in the hands of the lower courts. But if the Cassirers are right, the use of a federal choice-of-law rule in the courts below stopped Section 1606 from working: That rule led to the Foundation keeping the painting when a private museum would have had to give it back.

And even were Section 1606 not so clear, we would likely reach the same result, because we see scant justification for federal common lawmaking in this context. Judicial creation of

federal common law to displace state-created rules must be "necessary to protect uniquely federal interests." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). Foreign relations is of course an interest of that kind. But even the Federal Government, participating here in support of the Cassirers' position, disclaims any necessity for a federal choice-of-law rule in FSIA suits raising non-federal claims. See Brief for United States as *Amicus Curiae* 9, 20–23. As the Government notes, such FSIA suits arise only when a foreign state has lost its broad immunity and become subject to standard-fare legal claims involving property, contract, or the like. See *id.*, at 9. No one would think federal law displaces the substantive rule of decision in those suits; and we see no greater warrant for federal law to supplant the otherwise applicable choice-of-law rule. See *id.*, at 21 (State choice-of-law rules do not "ordinarily pose a greater threat to foreign relations than" state-law principles determining "the rights and liabilities of the parties"). Courts outside the Ninth Circuit have long applied state choice-of-law rules in FSIA suits. See *supra,* at 1508, and n. 2. Yet the Government says it knows of no case in which that practice has created foreign relations concerns. See Tr. of Oral Arg. 20–21.[3] So the Ninth Circuit's use of a federal choice-of-law rule in FSIA cases has been a solution in search of a problem, rejecting without any reason the usual role of state law.

* * * *

7. Execution on Judgments

See discussion of *FG Hemisphere v. DRC* in section C.1.c, *infra*.

a. Da Afghanistan Bank ("DAB") Litigation

In Re: Terrorist Attacks on September 11, 2011 concerns four groups of judgment creditors seeking to satisfying judgments against the Taliban for its role in the September 11, 2001 terrorist attacks with funds held by Da Afghanistan Bank ("DAB") in the Federal Reserve Bank of New York. The creditors seek a turnover of the DAB funds under section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"). On February 11, 2022, the United States filed a statement of interest in the United States District Court for the Southern District of New York. No. 03-cv-09848. The statement of interest is excerpted below (with footnotes omitted).

_____

* * * *

A. TRIA Provides for the Attachment of Assets Only to Satisfy Judgments for Compensatory Damages

As an initial matter, the Court should require the Judgment Plaintiffs to substantiate the amounts of their writs. By its text, TRIA permits the attachment of blocked assets of a terrorist party only "to the extent of any *compensatory* damages for which such terrorist party has been adjudged liable." TRIA § 201(a) (emphasis added). Punitive damages are therefore not subject to attachment under TRIA. *See, e.g.*, *Martinez v. Repub. of Cuba*, 149 F. Supp. 3d 469, 471 n.2 (S.D.N.Y. 2016) (excluding punitive damages from the calculation of the total amount plaintiff

sought to attach under TRIA, because "TRIA Section 201 permits attachment only to the extent of compensatory damages.").

As applied to the Judgment Plaintiffs, the *Doe* writ corresponds exactly to the underlying judgment for compensatory damages, but the *Havlish* writ appears to encompass both compensatory and punitive damages. Even before the Court adjudicates the other TRIA requirements, the *Havlish* writ would need to be revised to limit its scope to compensatory damages.

Furthermore, any attempt to execute on the DAB Assets to satisfy a punitive damages award, even if a writ of execution has been served that on its face encompasses punitive damages, would be invalid, because punitive damages are not included within the exception to the FSIA that TRIA provides. Except where TRIA applies, the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434 (1989); *see also* 28 U.S.C. § 1603(b). DAB is the central bank of the State of Afghanistan. Under the FSIA, the assets of a foreign central bank are "immune from attachment arrest and execution," except as provided in sections 1610 or 1611 of the FSIA. 28 U.S.C. § 1609. The FSIA provides no exception to sovereign immunity that would permit attachment of the DAB assets to satisfy punitive damages awarded in these cases. While TRIA supersedes the limitations on execution immunity set out in the FSIA, *see Weininger*, 462 F. Supp. 2d at 483, TRIA cannot provide a basis for attachment of the DAB Assets with respect to punitive damages, because TRIA authorizes attachment only to satisfy compensatory damages.

B. The Portion of the DAB Assets Regulated by the OFAC License Is Not Subject to Attachment.

Moreover, the amount of the DAB Assets that is licensed by OFAC cannot be attached by the Judgment Plaintiffs. Pursuant to well-established precedent in this Circuit, when assets are "regulated" by an OFAC license, they are not "blocked" for purposes of TRIA and are therefore beyond the coverage of TRIA's attachment provision. Accordingly, the $3.5 billion in DAB Assets that OFAC has licensed to be transferred for the benefit of the Afghan people cannot be attached by the Judgment Plaintiffs.

As noted above, TRIA authorizes a judgment creditor to attach only the "blocked assets" of a terrorist party, or of its agency or instrumentality, to satisfy a terrorism judgment. TRIA § 201(a). Assets are "blocked" under TRIA if they have been "*seized or frozen* by the United States under section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of [IEEPA]." *Id.* § 201(d)(2)(A) (emphasis added). IEEPA, in turn, authorizes the President to take a wide range of actions, spanning beyond seizure or freezing; it authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit" the acquisition, use, transfer, or other dealings of property subject to U.S. jurisdiction in which a foreign country or national has an interest. 50 U.S.C. § 1702(a)(1)(B).

In a line of cases beginning with *Weinstein v. Islamic Repub. of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004), courts have concluded that IEEPA authorizes actions that do not "necessarily involve a seizing or freezing of property," and that "not every action regarding property under the authority of the IEEPA . . . results in the property being 'blocked' under the TRIA." *Id.* At 75. In *Weinstein*, the court assessed the status of certain Iranian assets. In 1979, President Carter exercised his authority under IEEPA to block all property and interests in property of the Government of Iran. Blocking Iranian Government Property, E.O. 12170, 44 Fed. Reg. 65,729 (Nov. 15, 1979). In 1981, to implement the Algiers Accords, OFAC took a variety of actions,

including issuing a general license authorizing certain transactions with Iran. *See Weinstein*, 299 F. Supp. 2d at 67.

Against that backdrop, the *Weinstein* court determined that, even though E.O. 12170 remained in effect, the assets licensed by OFAC in 1981 were no longer "blocked" for purposes of TRIA insofar as the license "ha[d] the effect of removing a prohibition." *Id.* at 74; *see also id.* at 68 (the license identified certain transactions as "authorized," and "removed the prohibition" of the underlying sanctions); *id.* at 73 (the license "removed the effect of the blocking order"). The court rejected a reading of IEEPA that would have deemed "all assets 'regulated' or 'licensed' by OFAC under the IEEPA" to still be "blocked assets" under TRIA. *Id.* at 74-75. Rather, the court agreed that assets were "blocked" only if they were subject to a "'freezing' of assets that imposes an 'across-the-board prohibition against transfers or transactions of any kind with regards to the property.'" *Id.* at 75 (quoting U.S. Treasury Dep't, *Foreign Assets Control Regulations for the Financial Community*, at 4 (Dec. 27, 2002)); *see also* OFAC FAQs No. 9, *available at* https://home.treasury.gov/policy-issues/financial-sanctions/faqs/9. And assets were "[s]eized," in turn, only if there was a "transfer [of] *possessory* interest in the property." *Weinstein*, 299 F. Supp. 2d at 75 (quoting *Smith ex rel. Estate of Smith v. Fed. Rsrv. Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003)). Accordingly, "[g]iven that not every type of action authorized by the IEEPA necessarily involves a seizing or freezing of property, it follows that not every action regarding property under the authority of the IEEPA, including assets that may be 'regulated' or 'licensed,' results in the property being 'blocked' under the TRIA." *Id.*

The Second Circuit embraced the *Weinstein* approach in *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007), adopting an opinion that had incorporated the "persuasive analysis" of *Weinstein*. *See id.* Other courts of appeals have similarly concluded that an OFAC license renders assets unblocked and therefore unattachable under TRIA. In *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677, 686-87 (5th Cir. 2013), the Fifth Circuit concluded that assets that were blocked pursuant to an Executive Order but also subject to an OFAC specific license were not subject to attachment under TRIA. The Seventh Circuit reached a similar conclusion. *See United States v. All Funds on Deposit with R.J. O'Brien Assocs.*, 783 F.3d 607, 622-24 (7th Cir. 2015) (funds formally blocked under IEEPA, but also subject to an OFAC specific license that authorized "final . . . transfer, or disposition" of those funds, were not subject to attachment under TRIA). Numerous district courts have reached the same conclusion with respect to assets regulated by both general and specific licenses. *See, e.g.*, *Estate of Heiser v. Islamic Repub. of Iran*, 807 F. Supp. 2d 9, 18 n.6 (D.D.C. 2011) (TRIA is inapplicable to assets that are "made under a general license" because such assets are "regulated," rather than "seized or frozen") (quoting 31 C.F.R. § 560.508, TRIA § 201(d)(2)(A)); *Wyatt v. Syrian Arab Repub.*, 83 F. Supp. 3d 192, 197 (D.D.C. 2015) (funds that were "authorized under a specific license" were immune from attachment, and "[b]ecause the funds are subject to an OFAC license and may now be transferred without further OFAC intervention, they are no longer 'frozen or seized' as required by [TRIA]"); *Hausler v. Repub. of Cuba v. Comcast IP Phone II*, Case No. 09-20942-CIV-JORDAN, 2011 WL 13099669, at *4 (S.D. Fla. Apr. 26, 2011) (funds were not "blocked assets" under TRIA because they were authorized pursuant to an OFAC specific license); R&R on Mots. For Summ. J., *Martinez v. Rep. of Cuba*, NO. 19-22095-CIV-MORENO/TORRES, ECF No. 61, at 15-16, *aff'd*, ECF No. 71 (assets sought to be attached under TRIA were "authorized for transfer to Cuba" under

OFAC licenses, and thus were "not subject to an across-the-board prohibition on transfer" and not "blocked" under TRIA).

As applied here, the OFAC License authorizes specific transfers of, and transactions related to the liquidation of, $3.5 billion of the DAB Assets. *See supra* Part B.2 (Background). Those assets are not frozen or otherwise subject to an "across-the-board prohibition on transfer;" they therefore are not "blocked" for purposes of TRIA and are unavailable for attachment under TRIA.

C. The Court Should Provide the Judgment Plaintiffs a Full Opportunity to Submit Their Arguments Regarding the Attachability of the Blocked Assets Under TRIA.

Leaving aside the assets regulated by the OFAC License that are therefore not blocked (and not attachable) for TRIA purposes, there remain substantial DAB Assets that are certainly "blocked assets," subject to the prohibitions of the E.O. And the Judgment Plaintiffs have "obtained a judgment against a terrorist party on a claim based upon an act of terrorism." TRIA § 201. So with respect to those two requirements, the Judgment Plaintiffs have satisfied the applicable standards under TRIA.

The question remaining for the Court is therefore whether the unlicensed DAB Assets are "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." *Id.*; *see also Hausler*, 770 F.3d at 212 (citing *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001 (2d Cir. 2014)); *Heiser v. Islamic Repub. of Iran*, 735 F.3d 934, 937-40 (D.C. Cir. 2013).

On that question, the United States respectfully urges that the Judgment Plaintiffs should be afforded a full opportunity—consistent with the purpose and standards of TRIA—to submit their arguments as to why they believe this legal requirement is satisfied. The United States has a compelling interest in permitting victims of terrorism to obtain compensation to the greatest degree permitted under the law. The United States does not, at this stage, take a position regarding whether the Judgment Plaintiffs have satisfied the remaining requirement for attachment under TRIA but identifies below considerations relevant to the Court's analysis of whether the requirement is satisfied.

Ownership. In assessing whether the DAB Assets constitute the "blocked assets of [a] terrorist party" or the "blocked assets of any agency or instrumentality of that terrorist party," the word "of" plays an important role. TRIA's standard requires an inquiry into whether a terrorist party (or an agency or instrumentality thereof) has an ownership interest in the DAB Assets. *See, e.g.*, *Heiser*, 735 F.3d at 937-40 (applying TRIA § 201 only against assets that the terrorist party owns). As explained in greater detail below, determinations of ownership for purposes of TRIA implicate significant issues of foreign policy that sound in federal law, both as pertains to the governance of the international banking system and the prerogative of the President to recognize and to conduct diplomacy with foreign states.

Terrorist Party. In assessing whether the DAB Assets, as Afghan central bank assets, constitute the "blocked assets of [a] terrorist party," itself, TRIA § 201(d)(4), "a foreign state is a 'terrorist party' for purposes of TRIA § 201(d) when it is 'designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or section 620A of the Foreign Assistance Act of 1961,'" *Calderon-Cardona*, 770 F.3d at 999 (quoting *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 394 (S.D.N.Y. 2011)). The State of Afghanistan has not been designated as a state sponsor of terrorism, nor have its agencies or instrumentalities been designated under other counterterrorism sanctions

authorities. A non- state entity is a "terrorist party" if it satisfies the definition specified in 8 U.S.C. § 1182(a)(3)(B)(vi). TRIA § 201(d)(4). The Taliban satisfies that definition.

Agency or Instrumentality. In assessing whether the DAB Assets constitute the "blocked assets of any agency or instrumentality of that terrorist party," it will be necessary for the Court to consider the meaning of "agency or instrumentality" in this context. Although TRIA does not define "agency or instrumentality," *see id.* § 201(d), the FSIA provides a starting point, defining "agency or instrumentality of a foreign state" as "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 € and € of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The DAB is an agency or instrumentality of the State of Afghanistan under the FSIA's definition and thus is to be treated as a "foreign state" for purposes of the FSIA. 28 U.S.C. § 1603(a) ("A 'foreign state', . . . includes . . . an agency or instrumentality of a foreign state as defined in subsection (b).").

Courts have held that the meaning of "agency or instrumentality" in TRIA cannot, however, be fully coextensive with the FSIA's definition because TRIA's definition of "terrorist party" encompasses non-state actors, whereas the FSIA applies only to foreign sovereigns. For example, the Second Circuit has cautioned that TRIA's definition of an "agency or instrumentality" should not be read to "require[] a foreign state principal." *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 133 (2d Cir. 2016), *abrogated on other grounds by Rubin v. Islamic Repub. of Iran*, 138 S. Ct. 816 (2018) (citation omitted). In a case concerning whether an entity holding blocked assets was the agency or instrumentality of a foreign state that had been designated as a state sponsor of terrorism, the *Kirschenbaum* court granted the terms "agency or instrumentality" their "ordinary meanings." In evaluating whether the non-state entity acted as the "agency or instrumentality" of the designated state sponsor of terrorism, the Second Circuit held that a plaintiff must establish that a defendant "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, *or* (3) was owned, controlled, or directed by the terrorist party." *Id.* at 135 (citing *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 723 (11th Cir. 2014)); *see also, e.g.*, *Kirschenbaum v. Assa Corp.*, 934 F.3d 191, 198-99 (2d Cir. 2019) (concluding that a corporation was an "agency or instrumentality" of a designated state sponsor of terrorism because it was undisputed that the corporation was an alter ego of the state and was "owned, controlled, and directed" by the state); *Levin v. Bank of New York Mellon*, No. 09 Civ. 5900 (JPO), 2019 WL564341, at *4 (S.D.N.Y. Feb. 12, 2019) (holding that a genuine issue of material fact existed as to whether a private individual was an agent or instrumentality of Iran).

Kirschenbaum arose in a different posture than is presented here. The Second Circuit had no occasion in that case to consider whether, and under what circumstances (if any), an agency or instrumentality of a foreign state can simultaneously also be an agency or instrumentality of a non-state entity. As discussed below, the relevant legal considerations may differ when a court is asked to assess whether a foreign state, including its agency or instrumentality, can also act as an agency or instrumentality of a non-state entity.

A district court has applied *Kirschenbaum*'s agency or instrumentality standard to assess whether an agency of a foreign government is also an agency or instrumentality of a terrorist party. In *Caballero v. Fuerzas Armadas Revolucionarias de Columbia*, No. 20-MC-0040-LJV (W.D.N.Y. Dec. 18, 2020), the court issued a sealed order on a sealed, *ex parte* motion seeking to attach assets held by Venezuelan state-owned oil company PDVSA, on the theory that PDVSA was an agency or instrumentality of the terrorist group FARC. *See Caballero*, ECF No. 15. In light of the sealed posture of *Caballero*, the district court did not consider or pass upon the considerations identified in this Statement—particularly whether TRIA might limit the circumstances in which a court could determine that an agency or instrumentality of a foreign state not designated as a state sponsor of terrorism could nevertheless be deemed an agency or instrumentality of a terrorist party.

Central Bank Considerations. In considering the position of the Judgment Plaintiffs, the Court should be mindful of the developed body of law as to ownership of assets in the context of foreign central banks. As a general rule, "[a]ny funds in an account in the name of a foreign central bank are . . . funds 'of' that central bank." *Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica Del Ecuador* ("*Weston*"), 823 F. Supp. 1106, 1112 (S.D.N.Y. 1993); *see also NML Capital, LTD v. Banco Central de la Republica Argentina*, 652 F.3d 172, 195 (2d Cir. 2011). Some courts have refined this principle into a presumption, at least in the context of the FSIA's provision governing property of foreign central banks (28 U.S.C. § 1611(b)): "[A]n account that is registered in the name of a foreign central bank is *presumed* to be the 'property of' that foreign central bank under Section 1611 absent specific evidence overcoming the presumption and establishing that the central bank does not own the account." *Cont'l Transfert Technique*, 2019 WL 3562069, at *7. "That presumption can be rebutted only by providing evidence that the Account is not, in fact, the property of the foreign central bank," a burden that is "substantial." *Id.* at *10 (citation omitted). This mode of reasoning accords with and, indeed, is based upon, New York state law. *See EM Ltd. v. Repub. of Argentina*, 473 F.3d 463, 473-74 (2d Cir. 2007) ("[Under New York law] [w]hen a party holds funds in a bank account, possession is established, and the presumption of ownership follows") (quoting *Karaha Bodas Co, LLC v. Perusahaan Pertambangan Minyak Dan Gas Gumi Negara*, 313 F.3d 80, 86 (2d Cir. 2002)).

There are federal-law implications, under the FSIA and TRIA, if the assets at issue are deemed to be the property of a central bank. The FSIA provides that property of a central bank held for its own account is immune from attachment and execution unless the parent foreign government has "explicitly waived its immunity from attachment in aid of execution." *See* 28 U.S.C. § 1611(b)(1) ("the property of a foreign state shall be immune from attachment and from execution, if . . . the property is of a foreign central bank or monetary authority held for its own account"); *see also, e.g.*, *NML Capital*, 652 F.3d at 189 (this provision "reflects Congress's understanding that while the 'funds of foreign central banks' are managed through those banks' accounts in the United States, those funds are, in fact, the 'reserves of the foreign states' themselves") (quoting H.R. Rep. No. 94-1487 at 31, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630) (brackets omitted); *EM Ltd. v. Repub. of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007) (discussing protections provided to foreign central banks under FSIA).

Under TRIA, the FSIA's immunities and exemptions are inapplicable, but there would be a series of potential implications to a determination that the DAB Assets are the property of a central bank. To the extent the assets of a foreign central bank represent the foreign state's

reserves, such assets belong necessarily to the foreign state and thus would not be the assets of a private party.

Recognition and Sovereign Immunity Issues. If the Court determines that attachability turns on whether the Taliban is the Government of Afghanistan or that the DAB Assets constitute foreign state assets, a series of principles of hornbook law will prove instructive.

First, there is a distinction between a foreign government and a foreign state, and "[a] state can . . . recognize or treat an entity as a state while denying that a particular regime is its government." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a. Accordingly, there is a distinction between property owned by the state, and property owned by a regime that comprises the government of that state. This principle accords with more general principles of corporate and agency law such as the idea that corporate property (by analogy, the property of the state) is not the property of the shareholders or directors of the corporation (the leaders of the state), but of the corporation itself. *See*, *e.g.*, *Movitz v.Todd*, 24 Fed. App'x 708, 709 (9th Cir. 2001) ("By the very nature of the corporation the corporate property is vested in the corporation itself and not in its stockholders.") (quoting *Corp. Comm'n v. Consol. Stage Co.*, 62 Ariz. 257 (1945)). And in this context, the assets of a central bank are considered those of the foreign state itself, not its government. *See supra*.

Second, the authority to recognize a foreign government rests exclusively with the President and is not a matter for judicial inquiry. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) ("[T]he Court has long considered recognition to be the exclusive prerogative."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Here, the United States has not yet made a decision as to whether to recognize the Taliban or any other entity as the Government of Afghanistan or as part of such a government.

Third, as a general rule, "a regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 205(1); *see also Repub. of Panama v. Rep. Nat. Bank of N.Y.*, 681 F. Supp. 1066, 1071 (S.D.N.Y. 1988); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59, 66 (N.D. Cal. 1952), *aff'd*, 209 F.2d 467 (9th Cir. 1953); *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944). Thus, under the Restatement, certain questions of ownership can be answered by looking to which entity has been recognized by the United States.

Fourth, exceptions to execution immunity are, as a general matter, to be narrowly defined. This principle:

> is both well established and based on a critical diplomatic reality: Seizing a foreign state's property is a serious affront to its sovereignty . . . Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.

Rubin v. Islamic Repub. of Iran, 830 F.3d 470, 480 (7th Cir. 2016); *see also Repub. of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 142 (2014) (discussing "narrower" exceptions to execution immunity under FSIA); *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011) (collecting cases noting that limits on execution immunity are intended to promote foreign relations and comity). Accordingly, the Judgment Plaintiffs' theory of ownership must be measured against a benchmark that accounts for the risk of reciprocal challenges to American property abroad.

Synthesizing these principles, the Judgment Plaintiffs must establish a theory of ownership by the Taliban that would not require this Court—either expressly or by implication— to make its own determination as to the identity of Afghanistan's government or to make its own determination as to whether Afghanistan is a state sponsor of terrorism.[9] The United States appreciates the opportunity to submit its views and to describe its interests in this matter.

* * * *

On August 26, 2022, a magistrate judge for the United States District Court for the Southern District of New York issued a report recommending that the Court deny the motions for turnover. *In Re: Terrorist Attacks on September 11, 2011*, No. 01-cv-10132. The report and recommendation is excerpted below (with footnotes omitted).

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* * * *

I. The Court Lacks Subject Matter Jurisdiction Over the Turnover Motions Under the FSIA

The Court lacks subject matter jurisdiction over DAB and by extension over these turnover motions. This analysis begins with the critical and uncontroverted fact that DAB is the central bank of Afghanistan. As an instrumentality of a foreign state, it enjoys immunity from jurisdiction under the FSIA. The Judgment Creditors propose to overcome this immunity through TRIA § 201. This statute defeats the immunity from execution that the property of sovereign states and their instrumentalities normally enjoy. Sovereign states and instrumentalities, however, possess immunity from both jurisdiction and execution on their property. Both immunities must be independently overcome. In limited circumstances, TRIA can overcome jurisdictional immunity. Those circumstances are not present here. DAB therefore retains its jurisdictional immunity.

* * * *

C. Judgment Creditors Lack an Original Judgment That May Overcome DAB's Immunity and Grant This Court Subject Matter Jurisdiction

There has been no waiver of jurisdictional immunity against DAB or Afghanistan in any of the Judgment Creditors' underlying judgments. Without this original waiver of jurisdictional immunity, TRIA § 201(a) does not provide a freestanding mechanism for waiving a foreign sovereign instrumentality's immunity to jurisdiction. Accordingly, the Court lacks jurisdiction over DAB and its assets.

1. DAB is a Central Bank Under the FSIA

DAB is the instrumentality of a foreign state, and specifically, a central bank. An entity must have three attributes to be a foreign instrumentality: separate legal personhood, not being a U.S. citizen or third-party legal entity, and being an "organ" of a foreign state. 28 U.S.C. § 1603(b)(1)-(3) While these factors are sometimes sharply disputed, that is not the case here. Central banks are "the paradigm of a state agency or instrumentality." S & S Mach. Co. v. Masinexportimport, 706 F.2d 411, 414 (2d Cir. 1983), and all parties agree that DAB is the

central bank of Afghanistan. While the United States has not yet recognized any entity as the government of Afghanistan, it agrees that DAB is Afghanistan's central bank. ECF No. 7661 at 9, 16, 23. The Havlish Creditor's expert states that "DAB is the central bank of Afghanistan and has been since its formation in 1939." ECF No. 7766 at ¶ 16. The Doe and Federal Insurance Creditors both rely on this expert's declaration in support of their own motions. ECF Nos. 7771-1 (Doe Creditors), 7938 at ¶ 10 (Federal Insurance Creditors). The Smith Creditors have their own expert who also states that "DAB is the central bank of Afghanistan . . . and its main tasks, as described on DAB's website, are those commonly associated with a central bank." Smith, No. 01-cv-10132, ECF No. 64 at ¶ 33.

Because DAB is Afghanistan's central bank, it is immune from the jurisdiction of this Court under 28 U.S.C. § 1604 unless an exception to jurisdictional immunity applies. The Judgment Creditors do not identify one. The Court has not either. They acknowledge that they do not have a judgment against either the state of Afghanistan or DAB for which immunity under the FSIA was waived. All of their turnover motions are based on judgments against the Taliban. See ECF No. 7764 at 9 n.7 (Havlish Creditors), ECF No. 7769 at 9 n.7 (Doe Creditors), ECF No. 7937 at 9 (Federal Insurance Creditors), Smith, No. 01-cv-10132, ECF No. 63 at 5 (Smith Creditors).

In fact, TRIA § 201(a) could not be wielded against Afghanistan or its instrumentalities independently. The statute defines a "terrorist party" whose assets may be targeted as "a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or section 620A of the Foreign Assistance Act of 1961 . . . ." TRIA § 201(d)(4). Alternatively, it may be employed to collect on judgments for acts for which a terrorist party lacks immunity under 28 U.S.C. § 1605A. Section 1605A similarly requires that a state be designated a state sponsor of terrorism. 28 U.S.C. §1605A(a)(2)(A)(i)(I), (c). Afghanistan is not and has never been designated a state sponsor of terrorism, ECF Nos. 7661 at 17 n.2, 7764 at 9 n.7, so it could not be a "terrorist party" or a nation liable for acts of terrorism under 28 U.S.C. § 1605A.

2. DAB's Assets May Not Be Attached Under TRIA Based on a Judgment Against the Taliban

To overcome DAB's immunities, the Judgment Creditors proffer TRIA's "agency and instrumentality" language as a backdoor exception to jurisdictional immunity that could not be obtained otherwise. Lacking a judgment against either Afghanistan or DAB, the Judgment Creditors propose to take their judgments against the non-sovereign Taliban, have DAB declared a Taliban instrumentality, and obtain a waiver of both DAB's immunities under TRIA § 201(a). The text and history of the FSIA and TRIA foreclose this.

The lynchpin of the Judgment Debtor's case is TRIA's broad language. It applies "[n]otwithstanding any other provision of law . . . ." TRIA § 201(a). The Judgment Creditors argue that this is sufficient to overcome any barrier to execution posed by DAB's immunities to jurisdiction and execution.

A "notwithstanding clause," however, is not a bulldozer that clears every possible legal obstacle between a litigant and their goal. A court may not handwave away requirements of jurisdiction, service, liability, judgment, or execution simply because some law the suit touches includes a "notwithstanding" clause. Rather, when confronted with a "notwithstanding" clause, a court must determine its scope. Laws that fall within that scope yield to the statute with the "notwithstanding" clause.

Kucana v. Holder is instructive. 558 U.S. 233 (2010). There, the Court assessed the

operation of 8 U.S.C. § 1252(a)(2)(B), which stripped courts of jurisdiction over certain immigration issues. It provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory) . . . no court shall have jurisdiction to review" an enumerated array of actions. 8 U.S.C. § 1252(a)(2)(B). As Kucana noted, that "introductory clause . . . does not define the scope of [the enumerated action's] jurisdictional bar. It simply informs that once the scope of the bar is determined, jurisdiction is precluded regardless of what any other provision or source of law might say." 558 U.S. at 238 n.1. Accordingly, to understand what laws are overcome by a statute with a "notwithstanding" clause, a court must first determine that statute's scope.

Courts in this District have already applied this principle to TRIA § 201(a). Smith v. Fed. Rsrv. Bank of New York addressed execution on Iraqi assets held in the FRBNY. 280 F. Supp.2d 314 (S.D.N.Y.), aff'd, 75 F. App'x 860 (2d Cir. 2003), and aff'd sub nom. Smith ex rel. Est.of Smith v. Fed. Rsrv. Bank of New York, 346 F.3d 264 (2d Cir. 2003). Those assets, however,were confiscated by President Bush under the International Emergency Economic Powers Act ("IEEPA") and delivered to the U.S. Treasury. The defendants argued that this put the funds beyond the reach of TRIA. The plaintiffs retorted that TRIA's "notwithstanding" clause trumped the IEEPA. Id. at 317–18.

Smith rejected such an expansive scope of TRIA's "notwithstanding" clause. The court noted that "[a]lthough the 'notwithstanding' language Congress used in the TRIA was broad, it necessarily has a scope and that scope depends on the substance of the provision to which it is attached." Id. at 319. Where TRIA's terms conflict with the terms of another law, that law yieldsto TRIA. The IEEPA, however, merely authorized the President to do something that negatively affected the Plaintiffs. It did not conflict with TRIA's execution provisions. Because "TRIA and the relevant provision of the IEEPA coexist with no conflict," TRIA's notwithstanding clause did not permit the Plaintiffs to execute on assets seized by the President under the IEEPA. Id. At 319–20.

The first step then is to identify TRIA's scope. "[C]ourts must be careful when interpreting the scope of the FSIA's exceptions . . . Too restrictive a reading, and foreign sovereigns could avoid accountability even where Congress dictated otherwise. Too expansive, and the exceptions could result in a flood of suits against foreign states, prompting those nations to reciprocate in foreign suits against the United States." Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse, 999 F.3d 808, 819 (2d Cir. 2021) (internal citations omitted); see also Rubin v. Islamic Republic of Iran, 830 F.3d 470, 480 (7th Cir. 2016), aff'd, 138 S. Ct. 816 (2018) ("Seizing a foreign state's property is a serious affront to its sovereignty . . . Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.")

Courts must be even more cautious about "weakening the immunity from suit or attachment traditionally enjoyed by the instrumentalities of foreign states" because this "could lead foreign central banks, in particular, to withdraw their reserves from the United States and place them in other countries. Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system." EM Ltd. v. Banco Cent. De La Republica Argentina, 800 F.3d 78, 98 (2d Cir. 2015) (internal citations and quotations omitted).

"TRIA . . . [is] an execution statute." Weininger, 462 F. Supp. 2d at 480. It is silent on jurisdiction. This is readily apparent when it is compared to 28 U.S.C. §§ 1605 to 1607, the sections that 28 U.S.C. § 1604 expressly identifies as providing exceptions to jurisdictional immunity. ("[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.") Three of these sections, 28 U.S.C. § 1605, § 1605A, and § 1605B, begin their jurisdictional immunity waiving provisions with virtually the same words. See 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . ."); 28 U.S.C. § 1605(b) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . ."); 28 U.S.C. § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action . . . ."); 28 U.S.C. § 1605A(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . ."); 28 U.S.C. § 1605B(b) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . .") The last section, § 1607, which deals exclusively with counterclaims, provides that a "foreign state shall not be accorded immunity with respect to any counterclaim . . . ."

Similarly, each exception to attachment and immunity identified in 28 U.S.C. § 1609 and set out at 28 U.S.C. §§ 1610 and 1611, including TRIA § 201(a), references the waiver or scope of immunity specifically with respect to attachment or execution. See, e.g., 28 U.S.C. § 1610(a) ("The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment . . . ."); 28 U.S.C. § 1610(b) ("[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State"); 28 U.S.C. § 1610(d) ("The property of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment . . . ."), 28 U.S.C. § 1610(g)(1) ("the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity . . . is subject to attachment in aid of execution, and execution . . . ."); 28 U.S.C. § 1611(b) ("Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if . . . ."). TRIA § 201(a) similarly says that "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) *shall be subject to execution or attachment in aid of execution* . . . ." (emphasis added).

The consistent use of language in the jurisdictional exceptions on the one hand and the execution exceptions on the other reflects that "the FSIA preserves a common law distinction between . . . jurisdictional immunity from actions brought in United States courts and immunity from attachment or execution of the foreign sovereign's property." Weininger, 462 F. Supp. 2d at 481. Where Congress sought to target jurisdictional immunity, the statute references jurisdiction, and in all but one instance, does so with virtually identical language. Where Congress sought to target execution, it does so by explicitly stating what property is "subject to attachment in aid of execution" or what property "shall not be immune from attachment in aid of execution, or from execution."

Comparing these statutes shows that Congress knows how to draft a statute to waive immunity from either jurisdiction or execution and what language accomplishes each goal. TRIA § 201(a) uses the language of execution waivers, not jurisdictional waivers, a topic on which it says nothing. "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident." Comm'r of Internal Revenue v. Beck's Est., 129 F.2d 243, 245 (2d Cir. 1942); see also, e.g., Epic Sys. Corp. v.

Lewis, 138 S. Ct. 1612, 1617 (2018) ("Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so . . . .")

Because TRIA is an execution statute, there is generally no conflict between it and those parts of the FSIA that deal with jurisdictional immunity. Immunities from jurisdiction and execution operate independently. Walters, 651 F.3d at 288. A conflict would arise if the Judgment Creditors sought to execute on TRIA's assets and were prevented from doing so by an immunity to execution contained in 28 U.S.C. § 1610, 28 U.S.C. §1611, or some other statute. Only in that case would TRIA prevail.

Additionally, when, like in Weinstein, jurisdictional immunity has already been overcome against the sovereign, TRIA pulls that jurisdictional waiver through to the sovereign's instrumentalities, since an alternative reading would render parts of TRIA superfluous. 609 F.3d at 49. But this is a limited rule that "provides for federal court jurisdiction over execution and attachment proceedings involving the assets of a foreign sovereign . . . *only* where 'a valid judgment has been entered' against the sovereign." Vera II, 946 F.3d at 133.

TRIA's legislative history further confirms that its scope is execution, not jurisdiction. Its passage was the culmination of an extended battle between Congress and the President over the extent to which foreign sovereigns' property could be subject to execution by plaintiffs. In 1998, Congress modified the FSIA's exceptions to execution immunity in 28 U.S.C. § 1610, by adding a new section, § 1610(f). This waived execution immunity for blocked assets of foreign states that had judgments against them for acts of terrorism. Pub. L. No. 105–277 § 117, October 21, 1998, 112 Stat 2681. This subsection could be waived by the President in the interest of national security. President Clinton waived this section the same day he signed the law. 1998 U.S.C.C.A.N. 576, 581, 1998 WL 971395.

Two years later, Congress modified the section, but again authorized the President to waive this section in the interest of national security. Pub. L. No. 106–386 § 2002, October 28, 2000, 114 Stat 1464. Again, President Clinton waived § 1610(f) the same day he signed the bill into law. Statement by the President on HR 3244 10/28/00 (Oct. 28, 2000), 2000 WL 1617225, at *5. No President has rescinded these waivers, and 28 U.S.C. § 1610(f) has never taken effect. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 826 n.6 (2018).

Congress responded with TRIA, where it "placed the 'notwithstanding' clause in § 201(a). . . to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 386 (2009). The floor statements of Senator Harkin confirm this:

> Let there be no doubt on this point. Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, *available for attachment and/or execution of a judgment issued against that terrorist state*. Thus, *for purposes of enforcing a judgment against a terrorist state*, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.

148 Cong. Rec. S11524-01 at S11528, 2002 WL 31600115 (Nov. 19, 2002) (statement of Sen. Harkin) (emphases added)).

Senator Harkin's references to execution and attachment, rather than jurisdiction confirms that TRIA is an execution statute intended to aid in the enforcement of judgments

already issued against terrorist states. It does not waive jurisdictional immunity for a sovereign state or instrumentality that would not otherwise be viable. Senator Harkin's statements cannot be given controlling effect, but because they are consistent with TRIA's text, they provide further evidence of Congress' intent that TRIA not provide a basis to obtain jurisdiction over a sovereign without an underlying judgment for which immunity under the FSIA was already defeated. See, e.g., Brock v. Pierce Cnty., 476 U.S. 253, 263 (1986) ("[S]tatements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent.")

TRIA § 201(a) does not overcome DAB's jurisdictional immunity under 28 U.S.C. § 1604. The Court, therefore recommends finding that there is no jurisdiction over DAB or, by extension, these turnover motions.

* * * *

b. Caballero v. FARC

The United States filed a statement of interest in *Caballero v. Fuerzas Armadas Revolucionarias de Colombia ("FARC")*. No. 20-mc-00040, in the U.S. District Court for the Western District of New York on September 20, 2022. Caballero, who holds a default judgment against the FARC under the Anti-Terrorism Act, 18 U.S.C. § 2333, seeks to execute the judgment on the assets of a Venezuelan state-owned oil company, Petroleos De Venezuela, S.A. ("PDVSA"). The case raises questions about the immunities of a foreign state its agencies and instrumentalities, and its property under the FSIA, as modified by the Terrorism Risk Insurance Act of 2002 ("TRIA"). Excerpts from the U.S. statement of interest follow (with footnotes omitted).

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…In order to protect its vital interests, the United States submits this Statement of Interest, which addresses the three questions this Court posed.

First, the Court asked whether TRIA itself provides subject-matter jurisdiction in an action where a plaintiff has a liability judgment against a non-state terrorist party and seeks to execute that judgment against the assets of a foreign state that is also alleged to be an agency or instrumentality of that non-state terrorist party. It is the view of the United States that TRIA—which expands exceptions to the attachment immunity normally afforded foreign states—does not provide an independent basis for subject-matter jurisdiction against a foreign state that is not a state sponsor of terrorism, as designated by the Executive. Here, for example, although the plaintiff is seeking to invoke this Court's ancillary jurisdiction over PDVSA, nonetheless he must satisfy one of the exceptions to foreign state jurisdictional immunity provided in 28 U.S.C. §§ 1605 to 1607 in order to execute against PDVSA's assets. This conclusion accords with the long-established principle that foreign states are immune from U.S. court jurisdiction except as specifically provided in the FSIA; the fact that TRIA applies exclusively to post-judgment attachment proceedings; and, at least as applied to foreign states, the fact that TRIA is predicated

on the foreign state not being immune under the FSIA's state sponsor of terrorism exception to immunity. That conclusion also accounts for the significant foreign policy consequences that could inure if the assets of foreign states could be attached without a predicate finding by the Executive that those states are state sponsors of terrorism—an action that would strip foreign states of their immunities in unpredictable ways and in a manner that could have significant negative reciprocal consequences for the United States.

Second, the Court asked if the FSIA's service provisions apply in TRIA post-judgment execution actions. In the view of the United States, they do: the FSIA specifically sets out the procedures for service of process on foreign states and their agencies or instrumentalities. Proper service under the FSIA is required to establish personal jurisdiction over foreign states and, as established under state procedural law that applies here pursuant to Federal Rule of Civil Procedure 69, this Court must have personal jurisdiction over the non-party garnishee. Personal jurisdiction against a foreign state agency or instrumentality cannot be established absent service under the FSIA, which also accords with principles of international comity that ultimately benefit the United States in reciprocal actions abroad.

Third, the Court asked whether TRIA requires that the terrorist party itself have an ownership interest in the assets to be executed upon, or whether it is sufficient for the purported agency or instrumentality of the terrorist party, in this case, as alleged, PDVSA, to own the assets. TRIA has long been held to require, at a minimum, that the plaintiff establish that the entity whose assets are being attached has an ownership interest in the assets, rather than a lesser type of property interest that might be sufficient to justify those assets being blocked by U.S. sanctions. While the United States does not take a position on whether ownership by the agency or instrumentality suffices for an asset to be subject to execution under TRIA, it does take the position that the term "agency or instrumentality" in TRIA must be appropriately and narrowly defined, particularly when applied to foreign state entities that are not state sponsors of terrorism, in order to recognize the Executive's prerogative in making such a critical determination and to minimize international friction that could occur if TRIA's exception to attachment immunity were broadly applied.

* * * *

I. BECAUSE TRIA DOES NOT PROVIDE AN INDEPENDENT BASIS FOR SUBJECT-MATTER JURISDICTION AGAINST AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE THAT IS NOT A STATE SPONSOR OF TERRORISM, ANY GRANT OF JURISDICTION MUST BE PROVIDED IN THE FSIA.

It is the view of the United States that TRIA does not provide an independent basis for subject-matter jurisdiction in a claim against a foreign state, or its agencies and instrumentalities, that is not designated as a state sponsor of terrorism. Instead, the FSIA's jurisdictional requirements—which are the exclusive basis for jurisdiction against foreign states or their agencies or instrumentalities—must first be satisfied.

A. The FSIA is the exclusive basis for subject-matter jurisdiction over foreign states, including their assets or instrumentalities, and such states are immune from court jurisdiction unless a specific exception to jurisdictional immunity applies.

It is a foundational principle that the "FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Argentine Rep.*, 488 U.S. at 434; *see also Samantar v. Yousuf*, 560 U.S. 305, 313-14 (2010) ("The FSIA provides that 'a foreign state shall be immune

from the jurisdiction of the courts of the United States and of the States' except as provided in the Act. Thus, if a defendant is a 'foreign state' within the meaning from the Act, then the defendant is immune from jurisdiction unless one of the exceptions in the Act applies.") (internal citation omitted); *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 86 (D.C. Cir. 2005) ("In the United States, there is only one way for a court to obtain jurisdiction over a foreign state and it is not a particularly generous one—the FSIA."). Such exclusive jurisdiction is defined by two statutes: "[28 U.S.C.] § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and [28 U.S.C.] § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity." *Argentine Rep.*, 488 U.S. at 434. The FSIA draws a further distinction between jurisdictional immunity, which provides the state immunity from suit, and execution immunity, which protects the state's property from attachment and execution. *See, e.g.*, *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 286 (2d Cir. 2011) (summarizing differences). "[T]he FSIA's provisions governing jurisdictional immunity, on one hand, and execution immunity, on the other, operate independently." *Id.* at 288.

For the purposes of the FSIA, including section 1604, a foreign state includes "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). This Court recognizes that PDVSA is "the national oil company of Venezuela," Decision & Order, ECF No. 78, at 3, which is owned by Venezuela, and whose board is appointed by the President of Venezuela, *id.* at 10. Accordingly, it appears to be undisputed that PDVSA is an agency or instrumentality of Venezuela.

As such, Caballero must establish an exception to jurisdictional immunity as set out in 28 U.S.C. §§ 1605 to 1607 that would be applicable to PDVSA. While the United States does not take a position as to whether Caballero could make such a showing, absent a determination that there is an applicable exception to the FSIA that provides subject-matter jurisdiction over PDVSA, there would be no basis to exercise jurisdiction over PDVSA in this case.

B. TRIA—which eliminates attachment immunity in situations to which it applies—does not displace the requirement for an exception to jurisdictional immunity in this case.

TRIA does not provide an explicit exception to jurisdictional immunity. TRIA section 201(a) provides that:

> Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) [(as such section was in effect on January 27, 2008)] of title 28, United States Code, the blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment.

TRIA § 201(a).

It is clear that TRIA expands the category of assets that may be executed upon in service of a terrorism judgment. *Compare* TRIA § 201(a), *with* 28 U.S.C. § 1610 (limited exceptions to foreign state execution immunity). The dispositive question is whether TRIA also waives *jurisdictional immunity* for foreign states. For multiple independent reasons, it is the position of the United States that TRIA does *not* provide an independent grant of subject-matter jurisdiction over foreign states where jurisdiction has not already been established under the FSIA's exception to immunity for state sponsors of terrorism. Rather, in such cases TRIA simply—albeit

significantly—expands the exceptions for *attachment* immunity for entities that fall within its scope.

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II. FSIA'S SERVICE PROVISIONS APPLY TO POST-JUDGMENT EXECUTION ACTIONS AGAINST A FOREIGN STATE'S ASSETS WHERE THE FOREIGN STATE IS NOT THE JUDGMENT DEBTOR.

The United States takes the position that FISA's service provisions, 28 U.S.C. § 1608, apply to post-judgment execution actions under section 201(a) of TRIA, at least where the foreign state was not the judgment debtor, as here.

A. FSIA sets out the process by which foreign states, including their agencies or instrumentalities, are served with judicial process.

The FSIA establishes the process by which "service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign states." 28 U.S.C. § 1608(b). "Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleadings by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities." H.R. Rep. No. 94-1487, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6622. The purpose of these procedures is to ensure that the foreign state has proper notice of litigation in the United States brought against a foreign state, or against foreign states assets, so that the foreign state has an adequate opportunity to appear before U.S. courts to assert its defenses, including sovereign immunity.
Befitting the importance of notice and an opportunity to appear, proper service is a consequential act in litigation against foreign states. Service pursuant to section 1608 is necessary to establishing personal jurisdiction over a foreign state. *See* 28 U.S.C. § 1330(b). Service pursuant to section 1608 is also required before a default judgment can be enforced against a foreign state via the execution or attachment of state assets. *See* 28 U.S.C. §§ 1608(e), 1610(c).

B. Post-judgment execution actions require service to third parties whose assets are subject to attachment.

The United States is not aware of authority directly addressing whether section 1608 requires service with respect to attempts to attach the assets of foreign states who were *not* party to the underlying liability judgment. Indeed, no provision of the FSIA specifically addresses what form of notice must be provided to a foreign state where execution is sought against foreign state property. However, there are several independent reasons why service as set out in the FSIA is required under such circumstances.

i. Service of the attachment action is consistent with the structure of the FSIA, which provides foreign states (and their agencies and instrumentalities) with significant protections, including against attachment proceedings. Under the FSIA, service under section 1608 is required to commence a liability suit against a foreign state, *see* 28 U.S.C. § 1330(b), and is required again before attachment or execution against a foreign state's assets can be effectuated after a default judgment against that state has been entered, *see* 28 U.S.C. § 1610(c). (In a situation where a non-default judgment was entered, the foreign state must have appeared, and thus was on notice of the suit.) The purpose of this provision is to "afford sufficient protection to a foreign state." H.R.
Rep. 94-1487, at 30. By preventing execution except by court order, and by requiring the passage of a reasonable time following entry of default judgment, which must be separately served on the

foreign state, Congress clearly envisioned that there would be a meaningful opportunity for a foreign sovereign to be heard at the enforcement stage to assert immunity.

In the situation here, the foreign state—by definition—would not have been served with the underlying liability judgment, because it was not named in that suit. It would be highly anomalous for Congress to have provided service of process as a prerequisite to execution to a situation where a foreign state was *named* as a defendant in the underlying lawsuit, and then defaulted (*i.e.*, affirmatively chose not to appear even after being provided notice), but to have provided no protection when a foreign state's assets are being attached in a situation where the foreign state was not even named as a defendant in the underlying action or provided any notice of that action.

The Federal Rules also are best understood to require service in a post-judgment execution motion consistent with the FSIA. Any pleading "asserting new or additional claims" against a foreign state must be served in conformance with 28 U.S.C. § 1608. *See* Fed. R. Civ. P. 5(a), 4(j)(1). In light of the distinct rights and interests implicated for the first time when a judgment is sought to be enforced—particularly against a new party—a motion seeking an order of enforcement against foreign state property can be viewed as analogous to a pleading asserting a new claim for relief.

Courts have "stressed a foreign sovereign's interest—and our interest in protecting that interest—in being able to assert defenses based on its sovereign status." *FG Hemisphere Assocs., LLC v. Dem. Rep. of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Service of process pursuant to the FSIA is the best way of ensuring that foreign states have notice that their property is subject to enforcement efforts and an opportunity to appear to assert immunity from execution.

ii. Service of process under section 1608 is also required under applicable federal and state procedural law. Federal Rule of Civil Procedure 69 states that writs of execution "must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Here, the relevant New York state statute appears to be N.Y. C.P.L.R. § 5225(b), which allows the judgment creditor to bring an execution action "against a person in possession or custody of money or other personal property in which the judgment debtor has an interest." N.Y. C.P.L.R. § 5225(b).

Importantly, in order to proceed against a non-party garnishee,8 as here, the court must "ha[ve] personal jurisdiction over the garnishee." *CSX Transp., Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 469 (2d Cir. 2018). To establish personal jurisdiction over a foreign state agency or instrumentality, that entity must, among other requirements, be served pursuant to section 1608. *See* 28 U.S.C. § 1330(b). Indeed, even if section 1330(b) does not apply here—and it does—before a court may exercise personal jurisdiction over a party "the procedural requirement of service of summons must be satisfied." *Omni Cap. Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Because section 1608 sets out the procedures by which "service in the courts of the United States . . . shall be made," 28 U.S.C. § 1608(b), and because Rule 69 dictates that applicable federal statutes govern with respect to post-judgment execution writs, as is involved here, service under 1608 is required.

C. Requiring service of process pursuant to section 1608 accords with principles of international comity that ultimately benefit the people of the United States.

Requiring service of process pursuant to section 1608 also accords with the underlying principles of comity and predictable and friendly international relationships that are a core purpose of the FSIA. "[T]he FSIA's purposes include 'promoting harmonious international relations,' and according foreign sovereigns treatment in U.S. courts that is similar to the

treatment the United States would prefer to receive in foreign courts." *Aquamar, S.A. v. Del Monte Fresh Produce, N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (quoting *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998)). Moreover, as the Supreme Court stated in *Republic of Philippines v. Pimentel*, "'judicial seizure' of the property of a friendly state may be regarded as 'an affront to its dignity and may . . . affect our relations with it.'" 553 U.S. 851, 866 (2008) (quoting *Rep. of Mex. v. Hoffman*, 324 U.S. 30, 35-36 (1945)).

The United States has an interest in ensuring that the procedures provided under the FSIA are followed. The United States will not appear in foreign litigation unless proper service of process was provided consistent with principles of customary international law concerning service on foreign states. The Department of Justice and the Department of State are unaware of any instance similar to this one, where an execution proceeding has been successfully initiated against assets of the United States in the absence of an underlying judgment against the United States. In such an unusual scenario, the United States would insist on proper service of process. Thus, it is in the interests of the United States to ensure that the FSIA is interpreted in a manner that not only furthers U.S. reciprocal interests but is consistent with what the United States considers a rule of customary international law concerning service of process on foreign states.

Indeed, that is particularly true in a case like this, where a foreign state is accused of being an "agency or instrumentality" of terrorists. Were the situation reversed, the United States would expect service of process to be made in such a way that it would have notice of such a claim so that it could respond accordingly, lest the United States be held to be a supporter of terrorism in a foreign court without an ability to respond, and its assets subject to execution without an ability to defend. Providing service of process consistent with the requirements of the FSIA is the best way to ensure those foreign countries provide the United States the same protections it would expect in those foreign courts.

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

1. *Cengiz v. Bin Salman*

Cengiz v. Bin Salman arises from an action brought against Mohammed bin Salman, the Crown Prince of Saudi Arabia, in the U.S. District Court of the District of Colombia for allegations that he ordered the torture and murder of Saudi Arabia-born journalist Jamal Khashoggi. No. 20-cv-03009. On July 1, 2022, the court invited the United States to submit a statement of interest regarding the applicability of head of state immunity in the case. On November 17, 2022, the United States filed a statement of interest informing the Court that bin Salman was entitled to head of state immunity while he held the position of Prime Minister. Excerpts from the statement of interest follow (with footnotes omitted).

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3. Pursuant to these principles, the U.S. Department of State has informed the Department of Justice that the "State Department recognizes and allows the immunity of Prime Minister Mohammed bin Salman as a sitting head of government of a foreign state. Under common law

principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and informed by customary international law, Prime Minister Mohammed bin Salman as a sitting head of government of a foreign state. Under common law principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and informed by customary international law, Prime Minister bin Salman as a sitting head of government is immune while in office from the jurisdiction of the United States District Court in this suit. In making this immunity determination, the Department of State takes no view on the merits of the present suit and reiterates its unequivocal condemnation of the heinous murder of Jamal Khashoggi." Exhibit A, Letter from Richard C. Visek, Acting Legal Adviser, U.S. Department of State, to Brian M. Boynton, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice (Nov. 17, 2022).

4. For many years, the Executive Branch exclusively determined the immunity of both foreign states and foreign officials, and courts have deferred completely to the Executive's immunity determinations. *See*, *e.g.*, *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1602 *et seq*.; *see id*. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

5. The Supreme Court, however, has held Congress has not similarly codified standards governing the immunity of foreign officials from suit. *Samantar v. Yousuf*, 560 U.S. 305, 308, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 314, 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). The Executive Branch therefore retains its authority to determine a foreign official's immunity from suit. *See id.* at 312 & n.6 (noting expressly the Executive Branch's role in determining head of state immunity).

6. The doctrine of head of state immunity is well established in customary international law. *See Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See*, *e.g.*, *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (discussing generally the immunity of foreign ministers in U.S. courts); *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (Feb. 14) (Merits) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states).

7. Courts routinely defer to the Executive Branch's immunity determinations concerning sitting heads of state and heads of government. When the Executive Branch determines an official is immune from suit under the head of state doctrine, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. *See Ye*, 383 F.3d at 626 (citing *e.g., Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974)). Judicial deference to the Executive Branch in these matters is "motivated by the caution . . . appropriate of the Judicial

Branch when the conduct of foreign affairs is involved." *Id.; see also Spacil*, 489 F.2d at 619 ("Separation-of- powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy."); *Ex parte Peru*, 318 U.S. 578, 588 (1943). In no case has a court subjected a person to suit after the Executive Branch has determined that the head of state or head of government is immune.

8. The Executive Branch accepts the principle of customary international law that head of state immunity attaches to a head of state's or head of government's status as the *current* holder of the office and applies even to conduct that occurs before the individual took office. Here, the Executive Branch has determined that Defendant bin Salman, as the sitting head of a foreign government, enjoys head of state immunity from the jurisdiction of U.S. courts as a result of that office and is entitled to immunity from the Court's jurisdiction of this suit while he holds that office.

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On December 6, 2022, the district court dismissed the case in light of the U.S. statement of interest. The opinion of the court is excerpted below (with footnotes omitted).

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I. Claims Against Mohammed bin Salman

Plaintiffs have named Mohammed bin Salman as a defendant in this case and allege that he "ordered the murder of Mr. Khashoggi." Compl. ¶ 8. At the time of Khashoggi's death and the filing of this lawsuit, bin Salman was the Crown Prince of Saudi Arabia and, he claims, widely viewed as Saudi Arabia's "acting head of state" despite his formal titles of just Deputy Prime Minister and Minister of Defense. See bin Salman Mot. at 21–22. In his motion to dismiss, bin Salman argued that his status in the government entitled him to head-of-state immunity. See id. at 20–23.

Under customary international law, foreign heads of state, heads of government, and foreign ministers are traditionally entitled to status-based immunity from civil suit in other countries while they remain in office. Restatement (Second) of the Foreign Relations Law of the United States § 66 (Am. L. Inst. 1965); see also Samantar v. Yousuf, 560 U.S. 305, 321 n.15 (2010) (noting the Restatement's application of absolute immunity "to the head of state, head of government, or foreign minister" but "express[ing] no view on whether Restatement § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials"). In most instances, the Executive Branch makes the immunity determination and expresses its conclusion through a "suggestion of immunity" filed in the civil case, which the district court defers to and then dismisses the case. See, e.g., Miango v. Democratic Republic of Congo, Civ. A. No. 15-1265 (ABJ), 2019 WL 2191806, at *2 (D.D.C. Jan. 19, 2019).

On July 1, 2022, the Court invited the United States to "submit a statement of interest regarding any issue in this case, but particularly with respect to ... the applicability of head-of-state immunity in this case." July 1, 2022 Order [ECF No. 39] at 1. The United States indicated it may file such a statement and requested an extension of time until October 3, 2022, which the

Court granted. See Notice of Potential Participation & Unopposed Req. for Extension [ECF No. 41]; July 18, 2022 Min. Order.

Six days before the government's statement of interest was due, King Salman bin Abdulaziz Al Saud appointed bin Salman, his son, as Prime Minister of the Kingdom of Saudi Arabia. See Notice of Suppl. Authority [ECF No. 45] at 1. Shortly after his appointment as Prime Minister, bin Salman notified the Court of his new position and argued that "the United States has made clear in prior cases" that "a sitting Prime Minister such as the Crown Prince enjoys immunity from the jurisdiction of U.S. courts in light of his current status as his nation's head of government." Id. at 1–2 (cleaned up). The United States requested an extension of time to submit a statement of interest in light of this development, see Notice by the United States & Second Req. for Extension of Time [ECF No. 44], and then on November 17, 2022, filed a statement of interest informing the Court that bin Salman was entitled to head-of-state immunity based on his current position as Prime Minister, see Suggestion of Immunity at 1.

The United States' Suggestion of Immunity stressed that:

> The United States Government has expressed grave concerns regarding Jamal Khashoggi's horrific killing and has raised these concerns publicly and with the most senior levels of the Saudi government. It has also imposed financial sanctions and visa restrictions as a result of, and related to, Mr. Khashoggi's killing, and has sought to promote transparency through the release of the intelligence community assessment of the Saudi government's role in the incident.

Suggestion of Immunity ¶ 2 (footnote omitted). However, the United States concluded that "the doctrine of head-of-state immunity is well-established in customary international law and has been consistently recognized in longstanding Executive Branch practice as a status-based determination that does not reflect a judgment on the underlying conduct at issue in the litigation." Id. And, the United States argued, "this determination is controlling and is not subject to judicial review." Id. ¶ 1.

Plaintiffs vigorously disagree. See Resp. to Notice of Suppl. Authority [ECF No. 51]; Resp. to Suggestion of Immunity [ECF No. 55]. They make two primary claims in opposition: (1) an analysis of the Saudi Arabian government structure suggests that the Saudi Prime Minister is not in fact the head of government, and thus King Salman remains both the head of state and the head of government; and (2) the "unusual timing and circumstances" of the decree suggest the appointment of Mohammed bin Salman as Prime Minister is an "attempt to manipulate the Court's jurisdiction," which the Court should not credit. Resp. to Notice of Suppl. Authority at 2; see Resp. to Suggestion of Immunity at 2–9.

As to their first argument, plaintiffs appear to concede that the Executive Branch's determination that bin Salman is the head of government is controlling for purposes of the immunity analysis. See Resp. to Suggestion of Immunity at 2 (noting that however "unfounded" the determination may be, plaintiffs "acknowledge the Executive Branch's authority to decide whether to recognize MBS as Saudi Arabia's head of government").

Plaintiffs instead dedicate most of their response to the government's Suggestion of Immunity to the argument that the Court need not accept the Executive Branch's determination that a head of state is entitled to immunity under these circumstances. As described above, bin Salman was appointed Prime Minister just days before the United States' deadline to take a position on his immunity status. The government positions he held prior to his appointment as Prime Minister were not historically recognized as the "head of state" for immunity purposes, and "there is no suggestion that the Executive has yet extended this immunity to ... [the]

positions that the Crown Prince [held]." Aldossari on behalf of Aldossari v. Ripp, 537 F. Supp. 3d 828, 852 (E.D. Pa. 2021), vacated and remanded on other grounds, 49 F.4th 236 (3d Cir. 2022).[7] Beyond the suspicious timing, plaintiffs note two other anomalies in the Royal Order appointing bin Salman Prime Minister: his appointment was "an unexplained and unprecedented 'exception' to the Basic Law of Governance," under which the King is the Prime Minister; and King Salman "continue[d] to chair the sessions of the Council of Ministers." Resp. to Suggestion of Immunity at 6. A contextualized look at the Royal Order thus suggests that it was not motivated by a desire for bin Salman to be the head of government, but instead to shield him from potential liability in this case. See, e.g., Stephanie Kirchgaessner, Mohammed bin Salman Named Prime Minister Ahead of Khashoggi Lawsuit, Guardian (Sept. 27, 2022, 6:19 PM), https://amp.theguardian.com/world/2022/sep/27/mohammed-bin-salman-named-prime-minister-ahead-of-khashoggi-lawsuit ("[T]he timing of the decision was seen by critics of the Saudi government as almost certainly linked to a looming court-ordered deadline [the following] week."). Plaintiffs' argument, then, proceeds in two steps: first, they argue that the Court is not bound by the Executive Branch's immunity determination, see Resp. to Suggestion of Immunity at 3–5; and second, they urge the Court to consider "principles of customary international law" in an independent analysis of the immunity issue, which caution against finding bin Salman immune, see id. at 5–8.[8] For the reasons set forth below, the Court concludes that even if it is not strictly bound by the Executive Branch's determination, it is nonetheless appropriate to defer to the Executive Branch's decision in this instance.

Plaintiffs contend that this Court has authority to reject the Executive Branch's immunity determination. Historically, when the State Department filed a suggestion of immunity, "the district court surrendered its jurisdiction." Manoharan v. Rajapaksa, 711 F.3d 178, 179 (D.C. Cir. 2013) (quoting Samantar, 560 U.S. at 312). But, as plaintiffs note, courts may entertain some challenges to the application of common-law immunity—including head-of-state immunity—in certain cases. For example, in Manoharan, the D.C. Circuit considered whether the Torture Victim Protection Act had displaced common-law head-of-state immunity such that a court retained jurisdiction over the sitting president of Sri Lanka—despite the Suggestion of Immunity filed on his behalf. See id. at 274–75. Plaintiffs urge this Court similarly to entertain a challenge to a head of state's entitlement to immunity based on the circumstances of his appointment under customary international law. But even assuming the Court has authority to make such a determination—a questionable proposition, see, e.g., Doe v. State of Israel, 400 F. Supp. 2d 86, 111 (D.D.C. 2005) ("When ... the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases.")—it declines to do so here.

As described above, plaintiffs first argue that the Court does not need to defer to the Executive Branch, then move to reasons why the Court, undertaking an independent analysis of customary international law, should decline to grant bin Salman immunity. But plaintiffs do not grapple with the intermediate question of whether the Court should nonetheless defer to the Executive Branch's conclusion on the issue—a question grounded in separation of powers principles, not customary international law, see Ye, 383 F.3d at 626 (noting in response to plaintiff's customary international law arguments that the court's "first concern ... is to ascertain the proper relationship between the Executive and Judicial Branches insofar as the immunity of foreign leaders is concerned").

Deference to the Executive Branch's foreign immunity determinations is motivated by "the caution [courts] believe appropriate of the Judicial Branch when the conduct of foreign

affairs is involved." Ye, 383 F.3d at 626. As the branch of government primarily responsible for international affairs and diplomacy, the Executive Branch may be hindered or embarrassed should the judiciary second-guess its foreign immunity decisions. See, e.g., In re Muir, 254 U.S. 522, 533 (1921) (explaining that deference to the Executive Branch on foreign immunity questions "makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision"); Ex parte Republic of Peru, 318 U.S. 578, 588 (1943) ("[C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."). Thus, it is well-settled that judicial interference "in the chess game that is diplomacy"—where grants of immunity may "serve as a bargaining counter in complex diplomatic negotiations" and denials could "preclude a significant diplomatic advance"—is ill-advised. See, e.g., Spacil, 489 F.2d at 619.

These considerations are no less present when the circumstances of a head of state's appointment are suspect: the Executive Branch remains responsible for foreign affairs, including with Saudi Arabia, and a contrary decision on bin Salman's immunity by this Court would unduly interfere with those responsibilities all the same.

If the immunity determination was in front of the Court without input from the Executive Branch, the Court certainly would consider plaintiffs' arguments about whether, as a substantive matter, bin Salman was entitled to head-of-state immunity. But because the United States has determined that bin Salman is so entitled, "the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the [Executive Branch] in reaching [its] conclusion." Rich, 295 F.2d at 26; see also Doe I, 400 F. Supp. 2d at 111 (noting that plaintiff's arguments against immunity when the Executive Branch had weighed in were "entirely irrelevant" because "the filing of a Suggestion of Immunity ends the court's inquiry").

Despite the Court's uneasiness, then, with both the circumstances of bin Salman's appointment and the credible allegations of his involvement in Khashoggi's murder, the United States has informed the Court that he is immune, and bin Salman is therefore "entitled to head of state immunity ... while he remains in office." Manoharan, 711 F.3d at 180. Accordingly, the claims against bin Salman will be dismissed based on head-of-state immunity.

* * * *

2. *Fallahi v. Sayyid Ebrahim Raisolsadati*

On August 17, 2022, Plaintiffs brought claims against Sayyid Ebrahim Raisolsadati (also known as Ebrahim Raisi), the President of the Islamic Republic of Iran, pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, *id*. § 1350 note, alleging that Raisi was responsible for either their torture or the torture and extrajudicial killings of their relatives. No. 22-cv- 07013 (S.D.N.Y.). On September 7, 2022, Plaintiffs sought leave to effect substitute service on a member of Raisi's security detail while was in New York attending the UN General Assembly. On September 16, 2022, the U.S. government filed a Suggestion of Immunity, informing the court that Raisi was immune from service of process during an anticipated visit to New York pursuant to

the Convention on the Privileges and Immunities of the United Nations ("CPIUN"), adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, as well as the head of state immunity doctrine. Excerpts from the U.S. suggestion of immunity follow (with footnotes omitted).

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* * * *

I. Representatives of Members of the United Nations and Other Diplomatic Envoys Are Immune from Service of Legal Process While Attending United Nations Meetings

The CPIUN and the Vienna Convention provide immunity from legal process for representatives of member states of the United Nations. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Raisi as a representative of a member state of the United Nations attending United Nations General Assembly meetings from the jurisdiction of the United States District Court in this suit, pursuant to the Convention on the Privileges and Immunities of the United Nations, which precludes service of process while in New York for this purpose." Letter from Mary Catherine Malin to Brian M. Boynton, dated September 15, 2022 (annexed hereto as Exhibit A).

The CPIUN provides that:

> Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy . . .
>
> (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy . . . .

CPIUN § 11. Because the CPIUN "is a self-executing treaty," its provisions are "binding on American courts." *Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010).

The privileges and immunities enjoyed by diplomats are in turn governed by the Vienna Convention on Diplomatic Relations. "The purpose of diplomatic immunity, as stated in the Preamble to the Vienna Convention, 'is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.'" *Devi v. Silva*, 861 F. Supp. 2d 135, 140 (S.D.N.Y. 2012) (quoting Vienna Convention, pmbl., cl. 4).

The Second Circuit has held that, pursuant to section 11(g) of the CPIUN, representatives of United Nations member states are protected by the "inviolability principle" of Article 29 of the Vienna Convention, which generally precludes service of process on persons entitled to diplomatic immunity. *Tachiona*, 386 F.3d at 221-22; *see id.* at 223 (indicating that "service of process on a diplomat in any action not specified in [the exceptions to diplomatic immunity in] Article 31 would be improper"); *Brzak*, 597 F.3d at 113 ("current diplomatic envoys enjoy absolute immunity from civil . . . process" under the Vienna Convention). Because President Raisi is a representative of a member state of the United Nations, whose anticipated presence in this district is related to his attending the United Nations General Assembly, he is immune from service of legal process.

Moreover, section 11(g) of the CPIUN "extends to temporary U.N. representatives . . . the full range of immunity from legal process afforded by Article 31 of the Vienna

Convention." *Tachiona*, 386 F.3d at 219. Article 31 of the Vienna Convention provides that diplomatic agents "enjoy immunity from [the] civil and administrative jurisdiction" of the receiving State—here, the United States—except with respect to: (a) privately owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities outside of official functions. *See* Vienna Convention, art. 31, § 1. Plaintiffs—whose complaint asserts claims under the Alien Tort Statute, the Torture Victim Protection Act, other statutory provisions, and the common law, *see* Compl. ¶¶ 35-64—do not assert that any of the Vienna Convention's exceptions from immunity apply. Thus, "[w]ith limited exceptions," the Vienna Convention "broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts." *Tachiona*, 386 F.3d at 215.

To the extent there could be any alternative reading of the text of the CPIUN or the Vienna Convention, the Court should defer to the Executive Branch's interpretation. The Executive Branch, and specifically the Department of State, is charged with maintaining relations with foreign sovereigns and their diplomatic envoys, so its views are entitled to deference. *See Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Tachiona*, 386 F.3d at 216, 223 (interpreting the CPIUN and Vienna Convention in light of the United States' views, and holding that the United States' interpretation is entitled to "great weight" (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982))).

Plaintiffs' motion relies upon *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *see* Motion at 2-4, but that case is inapposite. *Kadic* involved a suit against the "President of the self-proclaimed Republic of Srpska," who was not a "designated representative of any member of the United Nations." 70 F.3d at 239, 247. The defendant in *Kadic* claimed immunity from legal process, relying upon the Agreement Between the United Nations and the United States Respecting the Headquarters of the United Nations ("UN Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (codified at 22 U.S.C. § 287 note). But that treaty is not at issue here—it pertains in relevant part only to whether service of process may take place on United Nations property.[2] *Kadic* did not discuss the separate immunity from legal process provided by the CPIUN and the Vienna Convention that protects representatives of United Nations member states attending United Nations functions, at issue here, because the individual at issue in that case was not entitled to such immunity.

In contrast, as a representative of a member state of the United Nations, President Raisi is immune from legal process pursuant to the CPIUN and the Vienna Convention during his anticipated attendance at the United Nations General Assembly. Accordingly, plaintiffs' motion should be denied.

II. Head of State Immunity Separately Bars the Service of Legal Process on Sitting Heads of State and Heads of Government

In addition to immunity under the CPIUN and related diplomatic immunity, the sitting head of a foreign government enjoys immunity from service of legal process while serving in that office. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that "under common law principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and

informed by customary international law, President Raisi, as the sitting head of government of a foreign state, enjoys personal inviolability while in the United States, which precludes service of process." Exhibit A.

For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. *See, e.g.*, *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945). Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, transferring to the courts the responsibility for determining whether a foreign state is subject to suit.

As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials in U.S. courts. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *Id.* at 323. Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity, including the immunity of foreign heads of state and heads of government. *Id.* at 311-12 & n.6.

Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See, e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (discussing generally the immunity of foreign ministers in U.S. courts); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 289 (S.D.N.Y. 2001) ("the courts uniformly have accepted" the assertion of head of state immunity "as to heads-of-state and heads-of- government recognized by the United States"), *aff'd in relevant part on other grounds and rev'd in part*, *Tachiona*, 386 F.3d 205; *see also Yousuf v. Samantar*, 699 F.3d 763, 769 n.2 (4th Cir. 2012) ("Under customary international law, head of state immunity encompasses the immunity of not only the heads of state but also of other holders of high-ranking office in a State such as the Head of Government and Minister of Foreign Affairs." (quotation marks omitted)).

In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by suggestions of immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. 578, 588-89 (1943); *see also Samantar*, 560 U.S. at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Such a determination by the Executive Branch "must be accepted by the courts as a conclusive determination by the political arm of the Government," and after a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. *Ex parte Peru*, 318 U.S. at 588-89.

Although *Hoffman* and *Ex parte Peru* involved foreign sovereign immunity determinations made prior to the enactment of the FSIA, the same reasoning has caused courts to defer to the Executive Branch's immunity determinations concerning sitting heads of state and heads of government. Courts have held that they "must accept such a determination without reference to the underlying claims of a plaintiff." *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004); *accord Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued exercise of jurisdiction interferes with the proper conduct of

our foreign relations." (brackets and quotation marks omitted)); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (finding "compelling reasons to defer" to the Executive Branch's foreign sovereign immunity determination "without question"); *see generally In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. . . . [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.").

The Executive Branch's power to assert the immunity of foreign heads of government includes the power to assert immunity from personal service. As noted above, the Office of the Legal Adviser has informed the Department of Justice that the State Department recognizes President Raisi's immunity from service of process in the United States during his tenure as President of the Islamic Republic of Iran. Exhibit A.

Once the Executive Branch has made the determination that a foreign head of state is immune from service of process, the courts must accept the Executive Branch's determination, which has been constitutionally assigned to that branch. *See Spacil*, 489 F.2d at 619 ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive."). For this reason, in *Wei Ye v. Jiang Zemin*, the Seventh Circuit reversed a district court's ruling permitting service of process on a former President of China. 383 F.3d at 627-28. The court "agree[d] with the Executive Branch that its power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state. . . ." *Id.* at 628. The court explained that "[r]ecognizing the immunity of a head of state and precluding service of process on a head of state are motivated by the same concern for the effective conduct of this nation's foreign affairs." *Id.*

Accordingly, the Department of State's recognition that President Raisi enjoys personal inviolability that precludes service of legal process while he serves as a foreign head of government, *see* Exhibit A, is conclusive, and should be recognized by this Court. *See Samantar*, 560 U.S. at 323; *Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. at 588-89; *Wei Ye*, 383 F.3d at 626-28.

* * * *

On September 20, 2022, the district court denied the motion for substitute services on the ground that the CPIUN and the Vienna Convention on Diplomatic Relations ("VCDR") provide Raisi with immunity from legal process while in the United States. *Fallahi v. Raisolsadati*, No. 22-cv- 07013 (S.D.N.Y). The memorandum opinion is excerpted below (with footnotes omitted).

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* * * *

Upon review of the motion papers, the Court is compelled to, and does, deny Plaintiffs' motion for substitute service on the ground that the CPIUN and the Vienna Convention provide Raisi with immunity from legal process while he is in the United States for the opening of the United Nations General Assembly. That conclusion is mandated by *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), in which the Second Circuit squarely held that, pursuant to Section 11(g) of

the CPIUN, representatives of United Nations member states — a category that indisputably includes Raisi during his anticipated visit — are protected by the "inviolability principle" of Article 29 of the Vienna Convention, which generally precludes service of process on persons entitled to diplomatic immunity. *See* 386 F.3d at 221-22, 224; *see also Brzak v. United Nations*, 597 F.3d 107, 113 (2d Cir. 2010) (reaffirming that "current diplomatic envoys enjoy absolute immunity from civil ... process" under the Vienna Convention). Plaintiffs ask the Court to ignore *Tachiona* by arguing that "today, states are less automatically deferential than they were in 2004 ... to asserted claims of immunity by diplomats accused of crimes, especially when those offenses have an international dimension." Pls.' Reply 16. But the only authority Plaintiffs cite in support of that assertion is a *Politico* article reporting that, "in 2021, a court in Belgium tried, convicted, and sentenced ... an accredited senior Iranian diplomat ... for a (thankfully failed) attempt to bomb the 2018 Paris Free Iran World Summit." *Id.* That is not a basis for the Court to ignore a binding Second Circuit decision that is squarely on point.

Plaintiffs' allegations in this case are serious and the Court is certainly sympathetic to their desire to have their day in court. But the Court's sympathy does not permit it to disregard the law. To be clear, the Court need not and does not decide here whether Raisi would be immune *from suit* pursuant to the doctrine of head of state immunity or otherwise. To resolve Plaintiffs' motion, it suffices to hold that Raisi is immune from service of process while he is here for the opening of the United Nations General Assembly. Whether or to what extent Raisi ultimately has to answer for Plaintiffs' claims are questions for another day.

* * * *

In a related action filed in the Southern District of New York, plaintiffs again sought to effect substitute services on Raisi, but outside the United States. No. 22-cv-07013. On November 22, 2022, the United States filed a suggestion of immunity, arguing that Raisi, as a sitting head of government, is immune from suit. Plaintiffs argued that the court need not defer to the Government's judgment. The suggestion of immunity is excerpted below (with footnotes omitted).

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* * * *

The United States has vigorously condemned the 1988 extrajudicial executions of thousands of political prisoners in Iran and the role of the so-called "death commission" in these events, and has sought to promote accountability for these and many other human rights violations and abuses committed by Iranian officials. As particularly relevant here, in 2019, the United States imposed financial sanctions on President Raisi under Executive Order 13,876, and noted his participation in the "death commission."[3] In 2021, the Department of State identified President Raisi as meeting the criteria for immigration restrictions under Section 221 of the Iran Threat Reduction and Syria Human Rights Act of 2012, due to his involvement in serious human rights abuses.[4] However, the doctrine of head of state immunity is well established in customary international law and has been consistently recognized in longstanding Executive Branch practice as a status-based determination that does not reflect a judgment on the underlying conduct at issue in the litigation.

In response to the Court's request for the views of the United States concerning the instant motion, the Department of State has advised:

> The Department of State recognizes and allows the immunity of President Raisi as a sitting head of government of a foreign state. Under common law principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and informed by customary international law, President Raisi as a sitting head of government is immune while in office from the jurisdiction of the United States District Court in this suit. In making this immunity determination, the Department of State takes no view on the merits of the present suit and reiterates its unequivocal condemnation of the extrajudicial executions of thousands of political prisoners in Iran in 1988, as well as the many other human rights violations and abuses committed by Iranian officials.

Letter from Richard C. Visek to Brian M. Boynton, dated November 21, 2022 (annexed hereto as Exhibit A).

For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations.[5] *See, e.g.*, *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945). Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, transferring to the courts the responsibility for determining whether a foreign state is subject to suit.

As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials in U.S. courts. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010). Instead, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *Id.* at 323. Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity, including the immunity of foreign heads of state and heads of government. *Id.* at 311-12 & n.6.

Although the doctrine is referred to as "head of state immunity," it applies to heads of government and foreign ministers as well. *See, e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (discussing immunity of foreign ministers in U.S. courts); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 289 (S.D.N.Y. 2001) ("the courts uniformly have accepted" the assertion of head of state immunity "as to heads-of-state and heads-of-government recognized by the United States"), *aff'd in relevant part on other grounds and rev'd in part*, 386 F.3d 205 (2d Cir. 2004); *see also Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (Feb. 14) (Merits) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states).

In the United States, head of state immunity determinations are made by the Department of State on behalf of the Executive Branch, incident to the Executive Branch's authority in the field of foreign affairs. The Supreme Court has held that U.S. courts are bound by suggestions of immunity submitted by the Executive Branch. *See Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. 578, 588-89 (1943); *see also Samantar*, 560 U.S. at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). A suggestion by the Executive Branch that a foreign official enjoys head-of-government immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government,"

and after a suggestion of immunity is filed, it is the "court's duty" to surrender jurisdiction. *Ex parte Peru*, 318 U.S. at 588-89.

Although *Hoffman* and *Ex parte Peru* involved foreign sovereign immunity determinations made prior to the enactment of the FSIA, courts have since routinely deferred to Executive Branch immunity determinations concerning sitting heads of state and heads of government. Indeed, courts "must accept such a determination without reference to the underlying claims of a plaintiff." *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004); *accord Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued exercise of jurisdiction interferes with the proper conduct of our foreign relations." (brackets and quotation marks omitted)); *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (finding "compelling reasons to defer" to the Executive Branch's foreign sovereign immunity determination "without question"); *see generally In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. . . . [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.").

Once the Executive Branch determines that a foreign head of state is immune from suit, the courts must accept its determination, which has been constitutionally assigned to that branch. *See Spacil*, 489 F.2d at 619 ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill- equipped to second-guess the executive."). While plaintiffs suggest that the Court should itself decide which individuals should be considered foreign heads of state or heads of government who qualify for immunity, *see* Motion at 4-6, their proposed approach is inconsistent with the law. *See Yousuf v. Samantar*, 699 F.3d 763, 772 (4th Cir. 2012) ("Courts have generally treated executive 'suggestions of immunity' for heads of state as a function of the Executive's constitutional power and, therefore, as controlling on the judiciary." (collecting cases)). Indeed, in no case has a court in the United States subjected a sitting head of state or government to suit

after the Executive Branch has determined the relevant official is immune.[6]

The Department of State's recognition on behalf of the Executive Branch that President Raisi enjoys immunity while he serves as a foreign head of government is conclusive and should be recognized by this Court. *See Samantar*, 560 U.S. at 323; *Hoffman*, 324 U.S. at 35-36; *Ex parte Peru*, 318 U.S. at 588-89; *Wei Ye*, 383 F.3d at 626-27.

* * * *

On December 21, 2022, the court dismissed the case. *Fallahi v. Raisolsadati*, No. 22-cv-07013 (S.D.N.Y). The court's opinion is excerpted below (with footnotes omitted).

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* * * *

…Although the Court is sympathetic to Plaintiffs' desire to have their day in court, it is

compelled to agree with the Executive Branch.

That conclusion follows from two principles. First, the Supreme Court has long held that, "as a matter of comity," foreign heads of state, heads of government, and foreign ministers are entitled to status-based immunity from suit in United States courts. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (tracing the origins of American foreign sovereign immunity jurisprudence to Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), concerning a French ship acting under the orders of Napoleon Bonaparte). Second, a court is required to defer to the Executive Branch's "suggestion that a foreign head of state is immune from suit — even for acts committed prior to assuming office — as a conclusive determination by the political arm of the Government that the continued exercise of jurisdiction interferes with the proper conduct of our foreign relations." *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (cleaned up); *see, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[T]his Court consistently has deferred to the decisions of the political branches — in particular, those of the Executive Branch — on whether to take jurisdiction over actions against foreign sovereigns...."); *Ye v. Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("[A] determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff."); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."). Indeed, for almost two hundred years, "American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch ... *with no further review of the executive's determination.*" *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974) (emphasis added) (footnote omitted).[1]

Plaintiffs' attempts to avoid or overcome these fundamental principles are unavailing. First, Plaintiffs argue that Raisi does not qualify for head of state immunity because he is not a head of state or head of government under Iranian law. *See* Pls.' Motion 4-5. Plaintiffs assert that the Iranian president simply "acts as a kind of emissary or functionary of the Supreme Leader, subject to the pleasure of the latter, and has few if any of the powers and authorities that are characteristic of a head of government." *Id.* at 5. The courts, however, are "particularly ill-equipped to second-guess the executive" with respect to such determinations because "[t]he executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary." *Spacil*, 489 F.2d at 619.[2] Nor does it matter that the Executive Branch provided "no explanation, no justification, and no citation to any official act of the [State] Department or anyone else reflecting the 'recognition' of Raisi by the United States 'as a sitting head of government.' " Pls.' Response 4. Although courts are empowered to examine the basis of executive actions in some contexts, "[w]hen the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts, there are compelling reasons to defer to that judgment without question." *Spacil*, 489 F.2d at 619. Indeed, "[t]o require the executive to enlighten us with the foundation of its decision to recognize and allow a claim of sovereign immunity might itself create a serious risk of interference with foreign relations. It cannot be disputed that some legitimate diplomatic maneuvers demand total secrecy." *Id.* at 619-20.

Second, Plaintiffs argue that Iran's status as a pariah state lacking diplomatic relations with the United States and the fact that Raisi himself is under sanctions permit an exception from the general rule. Pls.' Response 4, 7. They do not. For one thing, the doctrine of head-of-state immunity permits no judicial — as opposed to political — exceptions. Courts "are no more free

to ignore the Executive Branch's determination than [they] are free to ignore a legislative determination concerning a foreign state." *Ye*, 383 F.3d at 627. Instead, the Court can and must assume that the Executive Branch took into account "all pertinent considerations," including, presumably, those pressed by Plaintiffs. *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("[T]he doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion [about immunity]."). If anything, the types of considerations cited by Plaintiffs counsel in favor of *more* caution and deference to the Executive Branch rather than less. After all, foreign policy judgments with respect to hostile states are likely to be especially sensitive and fraught. As the Fifth Circuit put it almost fifty years ago, "in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves. Will granting immunity serve as a bargaining counter in complex diplomatic negotiations? Will it preclude a significant diplomatic advance; perhaps a detente between this country and one with whom we are not on the best speaking terms? These are questions for the executive, not the judiciary." *Spacil*, 489 F.2d at 619 (citation omitted).

In the final analysis, the fact that Plaintiffs cannot cite a single instance in which a court ignored a suggestion of immunity filed by the Executive Branch speaks volumes. The best that Plaintiffs can do is to cite the recent decision by Judge Bates in a lawsuit brought against Mohammed bin Salman of Saudi Arabia in connection with the alleged torture and murder of journalist Jamal Khashoggi. *See Cengiz et al. v. Bin Salman*, No. 20-CV-3009, 2022 WL 17475400 (D.D.C. Dec. 6, 2022). Judge Bates, they note, "divided the issue into two parts, concluding that, were he to agree with the plaintiffs that the Court 'does not **need** to defer to the Executive Branch,' he would then be required to 'grapple with the intermediate question of whether the Court **should** nonetheless defer to the Executive Branch's conclusion on the issue — a question grounded in separation of powers principles, not customary international law.' " Pls.' Response 5 (quoting *Cengiz*, 2022 WL 17475400, at *6). True enough, but in the first part of his opinion, Judge Bates reached the same conclusion that the Court reached here: that he was likely required to defer to the Executive Branch's determination. *See Cengiz*, 2022 WL 17475400, at *5-6 & nn.9-10. And in the second part, he concluded that, even if he was entitled to second guess the Executive Branch's determination — "a questionable proposition" — that determination warranted deference for reasons relating to separation of powers. *Id.* at *6-7. The same would be true here, substantially for the reasons discussed above.[3]

In short, although the Court has deep sympathy for Plaintiffs' efforts to seek justice for their alleged wrongs, it has no choice. It is compelled by centuries of precedent to defer to the Executive Branch's determination that Raisi is entitled to immunity from suit as long as he is President of Iran.

* * * *

C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Vienna Convention on Diplomatic Relations ("VCDR")

a. Broidy v. Muzin

On August 26, 2022, the United States, at the request of the U.S. Court of Appeals for the District of Columbia Circuit, filed an amicus brief in *Broidy Capital Management LLC*

v. Muzin, an appeal concerning a discovery dispute over documents in an ongoing case before the district court. The U.S. amicus brief articulated a framework for identifying the limited circumstances in which documents possessed by third parties constitute part of a foreign mission's inviolable archives for purposes of the Vienna Convention on Diplomatic Relations. No. 22-7082. Excerpts from the U.S. *amicus* brief follow (with footnotes omitted).[****]

* * * *

II. This Court Should Correct the District Court's Erroneous Interpretation of Article 24

Article 24's inviolability protections cover documents in the possession of the mission (including documents that are off the mission premises in the hands of mission personnel) and documents possessed by outside parties with a special relationship to the mission where the document was provided by the mission or, alternatively, was solicited by and incorporated information from archives or documents of the mission for purposes essential to the functions of the mission and with reasonable expectations of continued confidentiality. Although a significant number of the documents likely fall outside Article 24's scope, this Court should remand to allow the district court to apply the correct legal framework and perform the needed analysis.

A. Documents Possessed by Third Parties May in Limited Circumstances Be Documents "of the Mission" Under Article 24

1. The Legal Framework

Article 24 provides that the "archives and documents of the mission shall be inviolable at any time and wherever they may be." The provision's use of the phrase "of the mission" demonstrates that Article 24's protections reach documents in the possession of the mission (either on mission premises or off mission premises in the hands of mission personnel). *See Webster's Third New International Dictionary* 1565 (2002) ("of" can be "used as a function word indicating a possessive relationship"). And there is a general understanding by states and international legal scholars that lost or stolen documents are not stripped of their inviolability merely because they no longer reside at the mission. *E.g.*, Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 159 (4th ed. 2016).

In addition, mission documents sent to outside parties may in certain circumstances remain "of the mission" and continue to be subject to the protections of Article 24. In a variety of contexts, something may continue to be a part "of" one entity when possessed by another. *See United States v. Kranovich*, 401 F.3d 1107, 1113 (9th Cir. 2005) (funds are "of the United States" for purposes of a criminal statute, even if possessed by an outside party, where the United States had "title to, possession of, or control over" the funds); *United States v. Aubrey*, 800 F.3d 1115, 1125-26 (9th Cir. 2015) (similar); *cf. McKinley v. Board of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 336 (D.C. Cir. 2011) ("When an agency record is submitted by outside consultants as part of the [agency's] deliberative process, and it was solicited by the agency," it is "entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of" Freedom of Information Act Exemption 5). That principle applies

[****] Editor's Note: On March 10, 2023, the D.C. Circuit dismissed the appeal. *Broidy Capital Management LLC v. Muzin*, 61 F.4th 984 (D.C. Cir. 2023).

to Article 24's broad protection of materials "wherever they may be," which makes it "clear beyond argument" that archives and documents "not on the premises of the mission and not in the custody of a member of the mission" do not automatically lose their inviolability. Denza, *supra*, at 158.

Although Article 24's text does not resolve *when* documents provided to outside parties retain their inviolability, its clear purpose provides relevant guideposts. The "underlying purpose" of inviolability under Article 24 "is the protection of the confidentiality of [the] information stored," so "the inviolability given to" archives and documents "is *entirely* for the protection of the confidentiality of mission records." Denza, *supra*, at 161, 168 (emphasis added). In light of that purpose, documents in the hands of outside parties with a special relationship to the mission may retain their status as documents "of the mission" where the documents were provided with the reasonable expectation of continued confidentiality and provided for the purpose of carrying out "the efficient performance of the functions of" the mission, Vienna Convention on Diplomatic Relations, pmbl. ¶5. And documents generated by third parties can be subject to Article 24 protections only in rare circumstances: either when they were solicited by the mission in the performance of essential functions and incorporate information from archives or documents of the mission, or where they include a portion of an inviolable mission document provided by the mission (for example, if a non-mission document quotes an inviolable mission document). *Cf. Taiwan v. U.S. Dist. Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997) (overturning an order compelling an individual to testify about the contents of an organization's documents because the inviolability protection afforded to the documents "would be practically useless" if compelled testimony about the documents were permissible).

This framework's focus on confidentiality recognizes that, where a mission has no reasonable expectation that its archives and documents provided to outside parties will remain confidential, the documents cease to be inviolable. For example, a document a mission posts on the internet or sends to an outside party for widespread publication or as part of a commercial transaction does not remain inviolable.

The framework also acknowledges that a mission's reasonable expectations of confidentiality will be informed by the nature of the relationship between the foreign mission and an outside party. A foreign mission that shares information with an outside party such as an agent or contractors or consultants working for it may have greater expectations of confidentiality compared to information shared with someone who has no relationship with the mission, such as a commercial vendor or service provider.[4] As the State Department has explained, although an outside contractor working on U.S. embassy construction may possess mission documents that are subject to continued protection under Article 24, a different situation arises for "information passed to third parties" without "any relationship of lender and borrower, bailor and bailee or principal and agent" between the foreign state and the outside party. Qatar Stay Mot. Ex. E, at 2-3 (2002 Kelly Submission).

Finally, the framework recognizes that the inquiry may be affected by the nature of the archives and documents. A foreign mission may share routine commercial information with contractors--such as account numbers, account transactions, and phone records maintained by the outside vendor--to facilitate the provision of commercial services. Such routine commercial information, when maintained by the outside vendor, is not properly considered to be the archives or documents of the mission and thus is not inviolable. By contrast, where the mission shares information that is directly related to the functions of the diplomatic mission as defined in

Article 3 of the Convention, the mission may have a greater expectation that its archives and documents will remain inviolable.

2. The District Court Adopted a Flawed Interpretation of Article 24

The district court concluded that mission documents "freely given to non-mission parties," JA300, necessarily fall outside of Article 24. That overly restrictive view could undermine the respect owed to foreign sovereigns that need to rely on outside contractors to carry out essential mission functions. And it could implicate reciprocity concerns for U.S. embassies relying on, for example, the provision of sensitive mission documents to architects, building contractors, and security contractors to safeguard U.S. missions.

As a threshold matter, the district court's interpretation lacks support in Article 24's text. To reconcile its approach with Article 24's broad textual guarantee of inviolability of documents "wherever they may be," the district court stated that Article 24's reference to "inviolability" indicates a concern with the theft or seizure of diplomatic materials. JA300. But the inviolability provided by the Vienna Convention is broader, applies in a variety of circumstances, and is designed to ensure that a foreign mission can perform its diplomatic functions without interference from the host state. *E.g.*, Arts. 22, 30(1) (inviolability of mission premises); Denza, *supra*, at 158. And "[t]he risk in creating an exception to mission inviolability in this country is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law." *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to U.N.*, 988 F.2d 295, 300 (2d Cir. 1993). Further, although the district court defined "inviolable" to mean "safe from violation," disclosure of mission documents during a discovery dispute between private parties would encroach on inviolability afforded by Article 24.

The district court's categorical approach, moreover, overlooks the Vienna Convention's negotiating history that allows for the possibility that documents provided to outside parties may remain inviolable. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1646 (2020) ("Our precedents have looked to the negotiating and drafting history of a treaty as an aid in determining the shared understanding of the treaty." (quotation marks omitted)). The initial draft article proposed by the U.N. International Law Commission in 1957 stated that "[t]he archives and documents of the mission shall be inviolable." *Report of the Commission to the General Assembly*, [1957] 2 Y.B. Int'l L. Comm'n 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1. Though the language "wherever they may be" had not yet been added, the Commentary clarified that inviolability applied to archives and documents "regardless of the premises in which they may be." *Id.*

During the course of negotiations, the United States sought to limit inviolability to "archival material . . . on the premises of the mission, in ordinary transit by courier or sealed pouch, or in the personal custody of duly authorized officers of the mission for use in the performance of their functions." *Comments by Governments on the Draft Articles Concerning Diplomatic Intercourse and Immunities*, [1958] 2 Y.B. Int'l L. Comm'n 136, U.N. Doc. A/CN.4/SER.A/1958/Add.1. That construction was rejected. As the Special Rapporteur observed, "protection is due to the mission's documents regardless of their whereabouts." A. Emil. F. Sandstrom, *Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur* 43, U.N. Doc. A/CN.4/116 (May 2, 1958).

The 1958 draft article was considered at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. The delegates from France and Italy submitted a joint amendment to add language establishing that archives and documents are inviolable "at any time

and anywhere they may be" with a second sentence requiring that they "be identified by visible signs" outside of the mission.

The delegate from Pakistan objected to the French-Italian language as overly broad. He stated that Pakistan would not regard as inviolable documents that a mission had allowed to pass into "unauthorized hands," such as "nationals of the receiving State," and urged that the article be redrafted to "prohibit [] such abuse." 1 *U.N. Conference on Diplomatic Intercourse and Immunities: Official Records* 148, U.N. Doc. A/CONF.20/14, U.N. Sales No. 61.X.2 (1962). Some delegates also worried that adopting the identification provision of the French-Italian amendment would impose an unwarranted condition on inviolability. *Id*. at 149-50. Ultimately, advocates for a broader construction prevailed. The identification provision of the French-Italian amendment was rejected. *Id*. Instead, the Committee adopted the first sentence of the French-Italian amendment, altering Article 24 to read that mission archives and documents are inviolable "at any time and wherever they may be." *Id*. at 150.

When Article 24 was considered at the Conference's sixth plenary meeting, the delegate from Pakistan once again raised his concerns regarding its "sweeping" language. *U.N. Conference on Diplomatic Intercourse and Immunities: Official Records*, *supra*, at 16. Pakistan did not dispute the immunity of mission archives and documents "when ordinarily used, stored or despatched in transit." *Id*. But Pakistan would not regard as inviolable documents given by a mission "to persons not entitled to hold them." *Id*. Here again, the delegates chose a more expansive construction of inviolability and voted to retain the words "at any time and wherever they may be," adopting what would become the final language of Article 24. *Id*.

This negotiating history is also consistent with longstanding State Department views and practice with respect to its assertion of inviolability abroad to protect the archives and documents of U.S. missions. In 2002, the House Committee on Government Reform invited the State Department to opine on whether the House could compel production of records from contractors for a foreign embassy in the United States. Although it declined to offer a definitive legal view of the "complex" and "novel" question, JA371, the State Department testimony rejected the view adopted by the district court in this case that mission documents sent to outside parties automatically lose their inviolability.

The State Department explained that "the mere fact that archives have passed to a third party does not resolve the issue." JA371 (2002 Taft Submission). For example, if a foreign sovereign were to seek to compel an outside contractor working on U.S. embassy construction to produce information the United States has provided the contractor, "we would want to argue that the information is protected under the Vienna Convention." Qatar Stay Mot. Ex. E, at 2 (2002 Kelly Submission). These concerns are not hypothetical: "In a number of instances, the Department has in fact asserted that the official information in the possession of the local national working in the embassy is 'archival' under the Vienna Convention and thus inviolable." JA369. The United States "would have greater difficulty making this argument persuasively if, in the United States, the information of foreign embassies given to contractors is subject to compulsory process and release." Qatar Stay Mot. Ex. E, at 3.

The district court's contrary approach appeared to stem from its view that the Vienna Convention's safeguards do not "extend protections to private citizens" of the receiving state. JA301. It noted, for example, that the Convention does not provide consultants with sovereign immunity or the ability to refuse requests to give evidence as a witness. JA300, JA301. And it similarly stated that other provisions in the treaty focus on "protecting diplomatic missions and their members from harassment and interference" but do not "shield non-mission parties."

JA301. But Article 24's inviolability protections apply by their plain terms to *documents* of the mission "wherever they may be," not to people. These protections are independent of any separate treaty rights the possessor of the documents--whether a mission or a non-mission party--might have.

B. On Remand, the District Court Should Examine Whether the Documents at Issue Are Documents "of the Mission"

Remand is warranted because the district court adopted an overbroad rule and did not consider individual documents or categories of documents pursuant to the analyses set forth above. *See In re Terrorist Attacks on Sept. 11, 2001*, No. 03-MDL-01570, 2019 WL 3296959, at *4 (S.D.N.Y. July 22, 2019) (analyzing inviolability under Article 24 according to particular documents); *cf. Rojas v. Federal Aviation Admin.*, 989 F.3d 666, 675 (9th Cir. 2021) ("Because the scope of Exemption 5 turns on the character of the document at issue--it is the memorandum or letter that must be 'intra-agency'--these principles should be applied on a document-by-document basis."), *cert. denied*, 142 S. Ct. 753 (2022). Although the court erred in adopting a categorical approach that documents sent to outside parties automatically lose their inviolability status, it is likewise not correct that every mission document provided to an outside party retains that status.

In light of the limited factual development below, it is unclear whether any of the documents fall under Article 24. To resolve this discovery dispute, the district court should conduct a two-part inquiry that asks whether a document ever was "of the mission" and, if so, whether it continues to be so even when possessed by another party.

At step one, a significant number of the documents do not appear to ever have been documents "of the mission" because the Qatari mission never possessed the documents (meaning that it also did not provide them to defendants), nor is there any indication that it both solicited the creation of those particular documents and provided information from inviolable documents or archives that is included in the documents. *E.g.*, Dkt. No. 109-3, at 18-19 (defendant's correspondence with private parties); *id*. at 13-14 (documents showing payments to Qatar).

At step two, materials in this case that were at one time documents of the mission may fall outside Article 24's scope because Qatar may have lacked sufficient objectively reasonable expectations of those documents' confidentiality. The court should look at the mission's expectations of confidentiality by examining the nature of the relationship between the mission and a defendant, the nature of the documents, and any other relevant indicia of confidentiality. Relevant to that inquiry, when a foreign government hires outside parties to perform non-mission functions under circumstances in which its communications are not being provided any reasonable expectation of confidentiality, such documents are not inviolable within the meaning of Article 24.

In this case, the defendants are all registered agents of Qatar who must comply with the requirements of the Foreign Agents Registration Act. That Act requires registered agents to keep "such . . . records" as the Attorney General may prescribe, and to make those records available for "inspection." 22 U.S.C. §§ 612(a), 615. For records that fall within this provision of the Act, the expectation of confidentiality is diminished because the documents are provided with the prospect that they could be subject to further disclosure. This case does not require this Court to determine whether any document subject to inspection under the Act falls outside Article 24, *see* Qatar Br. 50-51, because Qatar's consulting agreement with the defendants in this case specifically acknowledged that the documents may be disclosed "as required by law," JA225; Qatar Br. 7-8 & nn.4-5.[5] Given that language, which contemplates disclosures required by law

regardless of any protections provided by Article 24, and the specific requirements of the Act, Qatar did not have a reasonable expectation that the documents that are in fact subject to inspection under the Act would remain protected from disclosure.

* * * *

b. United States v. Saab Moran

U.S. v. Saab Moran arises out of a criminal complaint against Saab Moran in the U.S. District Court for the Southern District of Florida. See No. 19-cr-20450. Saab Moran moved to dismiss the complaint claiming to be a "special envoy" of Venezuela in transit to Iran when he was detained in, and ultimately extradited from, Cabo Verde. The United States filed an opposition to the motion to dismiss on November 7, 2022, covering a wide range of issues from application of the VCDR, special missions immunity, and recognition. The excerpts of the opposition brief of the United States below pertain to diplomatic immunity under the VCDR and other forms of immunity under customary international law (with footnotes omitted).

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* * * *

1. SAAB MORAN Has No Diplomatic Status in the United States and Does Not Benefit from Diplomatic Immunity while in the United States

Even if the Court were to find that SAAB MORAN was a head of mission or "special envoy" to Iran for the Maduro regime of Venezuela, which as argued further below, it should not, SAAB MORAN cannot claim any valid diplomatic immunity in the United States.

A. Non-Recognition of the Maduro Regime

As an initial matter, the United States does not recognize the Maduro regime as the government of Venezuela and does not recognize members of the Maduro regime as diplomatic representatives of Venezuela. See U.S. Department of State, U.S. Recognition of Venezuela's 2015 National Assembly and Interim President Guaido, https://www.state.gov/u-s-recognition-ofvenezuelas-2015-national-assembly-and-interim-president-guaido recognizing Guaido as interim President of Venezuela). Nor is the United States required to change its recognition policy to provide in transit immunity to an individual allegedly appointed as a "special envoy" by the Maduro regime. *See Petroleos De Venez. S.A. v. Mufg Union Bank, N.A.*, 495 F. Supp. 3d 257, 272-73 (S.D.N.Y. 2020) (holding that Executive branch has authority to recognize a foreign government that binds the courts and that recognition of "Guaido as legitimate necessarily means that the Maduro regime is and was illegitimate."). These facts alone are dispositive of SAAB MORAN's meritless claim of transit immunity while in the United States. As a leading authority on the VCDR has noted, "where the transit State...does not recognize as a government the authorities who accredited the diplomat, it will in consequence not regard that person as a diplomatic agent at all, so that it will not regard itself as bound by the duties in Article 40 so far as he is concerned." Eileen Denza, Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations, 370-371 (4th ed. 2016). If the Court were to decide that SAAB MORAN is a diplomatic agent, it would intrude on the President's exclusive authority to recognize a

foreign government. *See*, *e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015).

SAAB MORAN argues that the United States' non-recognition of the Maduro regime as the government of Venezuela does not deprive SAAB MORAN of immunity. Motion at 21-26. In support of this position, SAAB MORAN argues that neither a "change in government, nor a break in diplomatic relations, relieves a state of its legal obligations" under a treaty. *Id.* at 21 (citations omitted).10 This argument is irrelevant. The United States does not argue that it has no obligations under the VCDR generally or that it no longer has diplomatic relations with Venezuela. In fact, the United States recognizes the Guaido government of Venezuela, Venezuela continues to maintain an Embassy in the United States, and the United States continues to have obligations under the VCDR with respect to the accredited members of that diplomatic mission. It does not, however, recognize the Maduro regime or members of the Maduro regime. SAAB MORAN's claim that he was sent on a special mission as a special envoy to Iran to negotiate specific transactions on behalf of the Maduro regime accords him no diplomatic immunity in the United States because he was not doing so as a special envoy of the Venezuelan government recognized by the United States. *See*, *e.g.*, *United States v. Cordones*, 2022 WL 815229, *4-7 (S.D.N.Y. 2022) (holding an official of the Maduro regime was not entitled to foreign official immunity because the Executive does not recognize the Maduro regime and "the Executive Branch has manifested its intent that no immunity applies.").

B. Lack of State Department Certification

Moreover, merely being a diplomat from one country to another (non-U.S. country) does not afford any immunity from prosecution by the United States for violating the laws of the United States, let alone immunity for crimes committed prior to SAAB MORAN's alleged appointment as "special envoy," or any other alleged immunity. Despite his claims that he is a diplomat or "special envoy," SAAB MORAN does not enjoy immunity in the United States under theDiplomatic Relations Act, 22 U.S.C. §§ 254a-254e. The Diplomatic Relations Act requires dismissal of actions brought against individuals entitled to diplomatic immunity. 22 U.S.C. §§ 254d ("Any 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, under sections 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure").

However, SAAB MORAN has never been entitled to such immunity. As noted by the attached Exhibit 5, SAAB MORAN has never been notified to the Department of State as a member of any foreign mission in the United States, including Venezuela's bilateral mission, the Delegation of the African Union Mission at Washington, DC, or the Office of the Permanent Observer for the African Union to the United Nations, or as a representative in or to any designated international organization. Exhibit 5. As such, the Department of State "Office of Foreign Missions is not aware of a basis for Alex Nain SAAB MORAN to enjoy immunity from the criminal or civil jurisdiction of the United States." *Id*. "[C]ourts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984) (citing *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949)); *see also In re Baiz*, 135 U.S. 403, 432 (1890) (The Court noted that it does "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 ...."); 22 U.S.C. § 2656 (Secretary of State's responsibility to manage foreign affairs). Courts generally defer to the "Executive Branch's suggestion of immunity" as it is "influenced by the longstanding reluctance of the Judicial Branch to intrude into the conduct of foreign affairs, a matter exclusively vested in the Executive Branch by our Founding Fathers." *Weixum*, 568 F. Supp.2d at 38 (citing *Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945)).

Whether SAAB MORAN is a special envoy with diplomatic immunity protections is a factual question. SAAB MORAN's Motion argues that the United States view on this factual question is irrelevant because it is neither the sending nor the receiving state. The United States is, crucially, the state from which SAAB MORAN seeks immunity. Further, SAAB MORAN's Motion concedes that the State Department deserves deference in the fact of diplomatic status. See Motion at 33 (citing In re Baiz, 135 U.S. at 421). Indeed, the very cases cited by SAAB MORAN make clear that where there is a factual question of diplomatic status, the State Department's recognition (or lack thereof) is unreviewable. *See In re Baiz*, 135 U.S. at ("the certificate of the secretary of state…is the best evidence to prove the diplomatic character of a person accredited"); *Id*. at 432 ("we 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"); *United States v. Al-Hamdi*, 356 F.3d 564, 573 (4th Cir. 2004) (holding the "State Department's certification…is conclusive evidence as to the diplomatic status of an individual" and the Court "will not review the State Department's factual determination"); *Abdulaziz*, 741 F.2d at 1331 ("[C]ourts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status."); *see also Weixum*, 568 F. Supp.2d at 37-38 (according the Executive branch deference in determining whether an individual was protected by immunity); *Sissoko*, 995 F. Supp. at 1471 (finding an individual was not protected by diplomatic immunity in the absence of certification by the State Department).

C. Lack of Status Under VCDR

Even if the Court were to find that SAAB MORAN was a "special envoy," the term itself does not grant protection under the VCDR. The VCDR only applies to accredited members of a foreign state's permanent diplomatic mission. It is clear as a factual matter that SAAB MORAN was not an accredited member of Venezuela's permanent diplomatic mission and therefore would not be entitled to the immunities afforded by the VCDR. Instead, he travelled on a temporary visit to Iran, in whatever role he travelled in for the Maduro regime, and not "to take up or return to his post" in Iran as required by Article 40 of the VCDR in order to benefit from transit immunity. See[DE 149-2] (referencing two prior trips to Iran by SAAB MORAN, two seven-day trips, and a third trip for SAAB MORAN in June 2020); [DE 149-6] (referencing SAAB MORAN's "stay in Iran"); and [DE 149-7] (confirming "the dates of 13 to 16 June for" SAAB MORAN's visit to Iran). By his own admission, his travel from Venezuela to Iran was a short visit to purportedly meet with Iranian government officials to discuss the sale of oil and potential assistance in the Maduro regime's efforts to combat COVID-19. [DE 149-6, 149-7].

SAAB MORAN attempts to confuse the court by noting that he was designated as a "special envoy" and "envoy" is a term used under the VCDR. Article 14 of the VCDR does reference "envoys" accredited to Heads of State as one of three classes of "heads of missions." However, SAAB MORAN's travel for a discrete meeting for a specific purpose does not accord him status as the head of a permanent post or mission under Article 14 of the VCDR. In addition, the Maduro Regime already had appointed an Ambassador to Iran at the time of SAAB MORAN's detention, see Exhibit 6 Venezuela Official Gaceta No. 41.527 (Nov. 19, 2018)

(naming Carlos Antonio Alcata Cordonea Maduro regime Ambassador to the Islamic Republic of Iran). Further, SAAB MORAN was never notified as a member of the permanent diplomatic mission to Iran. Therefore, he could not have been taking up or returning to his "post" and the VCDR does not provide SAAB MORAN with any transit immunity during his temporary travel to Iran.

"Post" as used in the VCDR must refer to a foreign state's permanent diplomatic mission in a country, not short trips or "special missions." The term "diplomatic agent" under the VCDR includes the head of the mission and members of the diplomatic staff of that mission. VCRD Art. 1(e), see also U.S. Department of State, Office of Foreign Missions, Diplomatic and Consular Immunity, Guidance for Law Enforcement and Judicial Authorities at 6 (defining "members of diplomatic missions" as "the staffs of diplomatic missions (embassies)"). And while the VCDR does not expressly define the term "mission," the context of the treaty makes clear that it is addressing permanent diplomatic missions. See Article 2 ("The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."). In addition, a reading of Article 20 of the VCDR helps clarify that the term mission would be a permanent embassy or consulate in a foreign country – "[t]he mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport." VCDR, Art. 20.

The Convention on Special Missions also confirms that the VCDR addresses permanent diplomatic missions and not the temporary missions covered by the Special Missions Convention. The definition of "post" as a permanent mission in a country is supported by the fact that the Convention on Special Missions was drafted to specifically address temporary diplomatic missions not covered by the VCDR. Convention on Special Missions Preamble ("Believing that an international convention on special missions would complement those two Conventions [VCDR and the Vienna Convention on Consular Relations] and would contribute to the development of friendly relations among nations, whatever their constitutional and social systems.") (emphasis in original). Article 1 of the Convention on Special Missions specifically distinguishes between a "special mission," which is a temporary mission, and a "permanent diplomatic mission" which the Convention defines as "a diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations."

This definition of "post" is also clear from a straightforward reading of cases cited by SAAB MORAN. *See Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948); *see also United States v. Rosal*, 191 F. Supp. 663, 664 (S.D.N.Y. 1960)("Furthermore, under the common law of nations, diplomats-in-transit (although not accredited to the United States) are entitled to immunity when they are in the United States en route between their diplomatic posts and their respective home countries."); *United States v. Melekh*, 190 F. Supp. 67 (S.D.N.Y. 1960) (holding that the defendant did not have diplomatic status and did not qualify as a diplomatic agent as he was an employee of the United Nations and not a representative of his country).

* * * *

D. Lack of Transit Immunity under VCDR

Unable to establish that he has any diplomatic status in the United States, SAAB MORAN instead incorrectly asserts that he is entitled to transit immunity under the DRA, the VCDR, and the VCLT. Def.'s Motion to Dismiss, at 4. We note at the outset that even where

Article 40 of the VCDR does apply, the transit state is only required to accord a diplomatic agent "inviolability and such other immunities as may be required to ensure his transit or return."12 Article 40 does not provide for full criminal immunity in the transit state, require that the transit state dismiss (or not bring) criminal charges against the diplomatic agent, or speak at all to the diplomatic agent's guilt, innocence, or punishment. Article 40 is simply designed to facilitate the travel of a diplomat to and from the diplomat's home country and diplomatic posting.

Even if this Court failed to follow the well-established precedent that U.S. Courts do not review a foreign state's decision concerning its own obligations to afford diplomatic immunity, argued more fully below, and if the Court then recognized a diplomatic agent appointed by a regime that the United States does not recognize as the government of a foreign state, Article 40 of the VCDR still would not provide transit immunity to SAAB MORAN in this case. SAAB MORAN cannot in any meaningful sense be considered for purposes of Article 40 to be passing through the United States while proceeding to take up a purported diplomatic post in Iran. He is in the United States not as part of his travel to Iran, but because he was extradited to the United States by Cabo Verde for criminal violations of U.S. law after being accorded extensive judicial process including an exhaustive appeal process. To the extent SAAB MORAN argues that his extradition to face criminal proceedings in the United States was as a mere detour in his transit to his purported diplomatic posting in Iran, the transit protections afforded by Article 40 only apply if the transit State (here the United States) has granted the diplomatic agent "a passport visa if such visa was necessary." SAAB MORAN has not obtained such a visa for transit through the United States and as a citizen of Colombia and Venezuela, he would need a visa to transit through the United States. SAAB MORAN argues the United States waived this requirement by extraditing SAAB MORAN. Motion at 31. He cites no law or facts to support this waiver claim. No such waiver occurred. SAAB MORAN's immunity argument is therefore not supported by the very provision of the VCDR which he relies upon for his immunity claim.

2. SAAB MORAN Does Not Qualify for Transit Immunity Under Customary International Law

As discussed in greater detail below, the Cabo Verdean courts have already considered SAAB MORAN's diplomatic immunity claims as part of the extradition process. Any transit immunity to which SAAB MORAN could possibly enjoy in the United States must be an extension of the transit immunity he enjoyed when transiting Cabo Verde. Yet, the Cabo Verde courts did not find that Cabo Verde had an obligation under international law to afford SAAB MORAN the immunity which he now seeks in the United States. For a U.S. court to now determine that SAAB MORAN is entitled to transit immunity under international law would necessarily involve the U.S. court second guessing Cabo Verde's own determinations about whether Cabo Verde had any international obligations to afford immunity to SAAB MORAN.

Moreover, SAAB MORAN was, at best, on some type of short-term mission for Venezuela. But not all agents of the government qualify for immunities under customary international law and SAAB MORAN also would not benefit from transit immunity under customary international law.

A. Convention on Special Missions and Customary International Law

As SAAB MORAN concedes, the United States is not a party to the Convention on Special Missions. [DE 147 at 20]. In support of his position that the Court should, nevertheless, follow the Convention on Special Missions as customary international law, SAAB MORAN searches across the Atlantic and cites to a single case from the Court of Appeal of England and Wales (civil division) that does not even address the issue of transit immunity.

14 Motion at 20. In doing so, he completely ignores a case directly on point from within the Southern District of Florida. In *United States v. Sissoko*, 995 F.Supp. 1469 (S.D. Fla. 1997) (Moore, J.), the court did "not find that the U.N. Convention on Special Missions is 'customary international law' that binds this Court." *Id*. at 1471. The court reasoned that "[n]either the United States nor The Gambia are signatories to the convention." *Id*. Nor had any "of the members of the U.N. Security Council" signed the convention. *Id*. While certain provisions of the Convention may reflect customary international law, it is clear that the Convention in its entirety does not constitute customary international law. *Sissoko*, 995 F.Supp. at 1471 (noting "resistance to the tenets of the convention such that it is not yet 'customary international law.'" (citations omitted)). And specifically concerning the Convention on Special Missions provision on transit immunity, that provision was subject to significant disagreement during negotiations of the Convention and cannot be viewed as fully reflecting customary international law. *Supra* at pg. 10.

Not only is the Convention on Special Missions not considered customary international law for determining if special missions transit immunity applies to diplomats on a special mission, but in any case, the transit State must be "informed in advance, either in the visa application or by notification, of the transit of those persons as members of the special mission, members of their families or couriers, and has raised no objection to it." Convention on Special Missions, Art. 42(4). As argued below, there is serious question as to whether SAAB MORAN was a "special envoy" or diplomat for the Maduro regime on a special mission as of June 12, 2020. Regardless, he cannot qualify for transit immunity under customary international law because the Cabo Verdean Supreme Court of Justice found that "there is no evidence in the record to date that the State of Cabo Verde has consented to the Appellant's transit through its territory with the status ofspecial envoy," and did not "recognize the status of Special Envoy to the Appellant," and found that SAAB MORAN did "not enjoy the inviolability and immunities to which he claims, based on the 1969 UN Convention on Special Missions."16 Exhibit 1, Judgment No. 28/2021 at 33. In fact, Cabo Verde has submitted a Certificate of No Record for any notice by the Maduro regime of SAAB MORAN's transit through Cabo Verde for his transit to Iran. See Exhibit 7. Therefore, he would not have any transit immunity under customary international law.

B. Force Majeure

SAAB MORAN argues, alternatively, that he should be protected via transit immunity under the *force majeure* provisions of the VCDR or Convention on Special Mission because he made a refueling stop in Cabo Verde and was extradited against his will. Motion at 31. First, this argument is meritless as the VCDR does not apply to SAAB MORAN and the United States is no bound by the Convention on Special Missions. Further, even if any of these protections did apply, SAAB MORAN would not be protected by any force majeure provision. Force majeure describes "[a]n event or effect that can be neither anticipated nor controlled." Black's Law Dictionary 718 (9th ed. 2009). The refueling stop that led to SAAB MORAN's arrest in Cabo Verde was a planned refueling stop. SAAB MORAN could have provided notice of his travel but choose not to. His aircraft could have chosen another destination for the stop.
SAAB MORAN's extradition was based on an indictment made public in July 2019, after which SAAB MORAN was declared a fugitive and a reward was made public for his arrest. SAAB MORAN's argument that his eventual arrest and extradition to the United States was an unanticipated event is false. SAAB MORAN may have hoped he could evade the law but that does not bring his extradition under the gambit of force majeure. Force Majeure does not apply.

* * * *

On December 23, 2022, the district court denied Saab Moran's motion to dismiss. *U.S. v. Saab Moran*, No. 19-cr-20450 (S.D. Fla.). The final order is excerpted below.[*****]

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* * * *

3. Conclusions of Law

Even more, Saab Moran cannot be entitled to diplomatic immunity because he could not—as a matter of law—have been an agent of the Venezuelan government. At the time of his arrest, Saab Moran was, at best, a special envoy of the Maduro regime, which the United States has not recognized to be the official government of Venezuela since January 2019. So, Saab Moran is not entitled to diplomatic immunity in the United States.But even assuming that Saab Moran was traveling as a special envoy entitled to diplomatic status in the United States, his arguments under the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227 [hereinafter "VCDR"], and customary international law fail.

A. Saab Moran Was Not a Diplomatic Agent of Venezuela

Saab Moran claims that he is entitled to transit-based diplomatic immunity because he was, and remains, in transit to his "diplomatic post" in Iran. Transit-based immunity is a limited form of protection that may be granted to a diplomatic agent while he is passing through the territory of a third country on his way to/from his diplomatic post upon that third country's consent. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 78 (1965). Putting aside the question of consent, an evident prerequisite to a person's ability to assert such immunity is their diplomatic status. In the Government's eyes, Saab Moran was not one. (See Resp. 16.) Only the President may determine "which governments are legitimate in the eyes of the United States and which are not[.]" See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 3 (2015); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204. It is clear that the United States does not recognize the Maduro regime to represent the official government of Venezuela. Instead, "[t]he United States recognizes Interim President Juan Guaid[ó] and considers the 2014 democratically elected Venezuelan National Assembly, which he currently leads, to be the only legitimate federal institution, according to the Venezuelan Constitution." U.S. DEP'T OF STATE, U.S. RELATIONS WITH VENEZUELA (2022), https://www.state.gov/u-s-relations-with-venezuela/. In fact, Maduro's regime has been deemed "illegitimate." *Id*. Accordingly, any claim to diplomatic immunity asserted by a representative of the Maduro regime must also be considered illegitimate. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 73 cmt. g. ("A diplomatic agent claiming to represent a revolutionary government that is not recognized by the receiving state is not entitled to diplomatic immunity in the courts of that state."); see also *U.S. v. Cordones*, No. 11-cr-205, 2022 WL 815229 (S.D.N.Y. Mar. 17, 2022) (denying a motion to dismiss an indictment filed by an official of the Maduro regime citing the President's non-recognition of the Maduro regime); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204(1) ("a regime not

[*****] Editor's note: In 2023, Saab Moran petitioned the U.S. Court of Appeals for the Eleventh Circuit for interlocutory appeal on the question of immunity. The United States supported the request. See U.S. v. Saab Moran, No. 23-10066. The court noted probable jurisdiction after issuance of the immunity question, leading to further proceedings.

recognized as the government of a state [ ] is ordinarily denied access to courts in the United States.").

Contrary to Saab Moran's suggestion, this ruling does not run afoul of the United States' responsibilities under international law. Indeed, any such responsibilities must be understood to extend to the acts and representatives of the Guaidó administration, not to those of Maduro's illegitimate regime. *See* Eileen Danza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 371 (4th ed. 2016) (noting that where a transit nation "does not recognize as a government the authorities who accredited the diplomat, it will in consequence not regard that person as a diplomatic agent at all [under the VCDR], so that it will not regard itself as bound by the duties in Article 40 so far as he is concerned.")

Although Saab Moran purports to invoke the autonomy of other regimes to recognize whom they wish as diplomats, the matter before this Court concerns not the decisions of those regimes but the sovereignty of the United States to choose which foreign governments it recognizes as legitimate. That power is vested exclusively in the Office of the President. *See Zivotofsky*, 576 U.S. at 3,14.

So, because Saab Moran, at best, represented only a regime deemed illegitimate by the President, he could not have carried any cognizable diplomatic status. The result is that he cannot assert any form of diplomatic immunity in this Court as a matter of law.

B. Diplomatic Immunity Under the VCDR

Yet, even if Saab Moran had carried some cognizable diplomatic status as a "special envoy" of the Maduro regime, he would still not be entitled to transit immunity under the VCDR. The United States ratified the VCDR in 1972 and incorporated it into the DRA in 1978. *See* 22 U.S.C. § 254a(4). Neither the VCDR nor the DRA use or define the term "special envoy."

Instead, the VCDR speaks of immunities afforded to "diplomatic agents." Article 31 provides a straightforward example: "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." VCDR art. 31.1. In arguing for immunity, Saab Moran invokes that provision and Article 40, which says: "If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return." *Id.* art. 40.1.

Because the Court must determine if Saab Moran qualifies as a "diplomatic agent" under the VCDR, the Court "'begin[s] with the text of the treaty and the context in which the written words are used.'" *Pielage v. McConnell*, 516 F.3d 1282, 1287 (11th Cir. 2008) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699–700 (1988)).

The VCDR defines a "diplomatic agent" to be "the head of the mission or a member of the diplomatic staff of the *mission*." VCDR art. 1(e) (emphasis added). So, the threshold inquiry becomes whether Saab Moran was the head or member of a *diplomatic mission* in the sense of the VCDR. The answer is no.

The VCDR does not explicitly define what it qualifies as a "mission," and the DRA merely says that "the term 'mission' includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention." 22 U.S.C. § 254a(3). However, the VCDR's use of the

term makes clear that the types of diplomatic "missions" the VCDR applies to are permanent representative missions, not special or temporary missions such as the one Saab Moran, at best, formed part of when arrested.

For example, the convention's text recognizes that the "establishment of diplomatic relations between States, and of *permanent diplomatic missions*, takes place by mutual consent." VCDR art. 2 (emphasis added). It also speaks of "missions" in the following context: "The mission and its head shall have the right to use the flag of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport." VCDR art. 20. And perhaps most indicative of the fact the VCDR concerns itself only with *permanent* missions is the very existence of a separate treaty that governs temporary missions, known as the United Nations Convention on Special Missions ("UNCSM"). 1400 U.N.T.S. 231, Dec. 8, 1969.That treaty came about after the U.N. Conference on Diplomatic Intercourse and Immunities adopted the VCDR's text and contemporaneously recommended that the U.N. separately undertake "further study of the subject of special missions." U.N. Doc. A/Conf.20/10/Add.1, at 90 (Apr. 10, 1961).

Now, to be sure, the Court is entitled to rely on these observations because it "may look beyond the written words to the history of [a] treaty, the negotiations, and the practical construction adopted by the parties," to discern a term's meaning. *Pielage*, 516 F.3d at 1287 (quoting *Volkswagenwerk*, 486 U.S. at 699-700).

So, the Court finds that the VCDR only concerns the protections of "diplomatic agents" in the context of *permanent* missions. That conclusion is consistent with past applications of the VCDR by this and other courts, including the International Court of Justice. *See Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 387 (S.D.N.Y. 2002) ("The genesis and negotiating history of the Vienna Convention make clear that the purpose the treaty intended to address was the codification of rules governing diplomatic relations between sovereign states and the organization and functioning of permanent diplomatic missions in states with established relations.") (emphasis added); *U.S. v. Sissoko*, 995 F. Supp. 1469, 1470-71 (S.D. Fla. 1997) (Moore, J.) (differentiating between the UNCSM and the diplomatic processes "set forth for members of a permanent mission in the Diplomatic Relations Act and the Vienna Convention."); *R v. Governor of Pentonville Prison*, *ex parte Teja* [1971] 2 All ER (QB) 11 at 17 (Eng.) (finding that the VCDR applies to permanent missions instead of ad hoc missions); see also *Satow's Diplomatic Practice* 188 (6th ed. 2009) ("The Vienna Convention on Diplomatic Relations therefore relates only to permanent diplomatic missions."); Jonathan Brown, *Diplomatic immunity: state practice under the Vienna Convention on Diplomatic Relations*, 37(1) INT'L & COMP. L. Q. 53, 62 (1988) ("In those circumstances, the Vienna Convention on Diplomatic Relations, which is concerned with permanent and not ad hoc diplomatic missions, should not have been applicable at all."); s*ee generally Immunities and Crim. Proc*. (*Eq. Guinea v. Fr*.), Judgment, 2020 I.C.J. Rep. 300 (Dec. 11) (applying the VCDR to the question of whether certain property constituted the premises of Equatorial Guinea's permanent mission).

* * * *

C. Diplomatic Immunity Under Customary International Law

Next, Saab Moran argues that he is entitled to diplomatic immunity under customary international law. He begins this argument by pointing the Court to the UNCSM, which he says provides immunities for diplomatic agents on temporary or "special missions," such as himself.

At the same time, he concedes that "the United States has not ratified" the UNCSM, (Mot. 23), which means that the treaty has no force of law in this Court. Additionally, neither Venezuela nor Cape Verde have ratified it. Nevertheless, Saab Moran seems to posit that the UNCSM simply codifies the customary international law governing "core immunities of personal inviolability . . . for diplomats on special missions," (*see* Mot. 23 (cleaned up)), such that any nation's ratification of the UNCSM is irrelevant to the question of whether the United States owes him immunity under customary international law itself.

This Court has flatly held that the UNCSM does not represent binding customary international law. *Sissoko*, 995 F. Supp. at 1470. Regardless, Saab Moran attempts to draw support from *R v. Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWCA Civ 1719, 2018 WL 03459145, an intermediate appellate decision from the United Kingdom. That court found that "a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognizes as such, immunity from arrest or detention (i.e. personal inviolability) and immunity from criminal proceedings for the duration of the special mission's visit." *Id.* However, this non-binding decision speaks nothing of customary international law's recognition of *transit-based* immunity, which is what Saab Moran purports to invoke here. The decision instead dealt with the *in-situ* immunity of a diplomatic agent taking up his post in the United Kingdom after the United Kingdom had consented to his presence on its territory as part of a temporary mission.

Aside from invoking *R v. Secretary of State*, Saab Moran does little to discuss the parameters of transit immunity and fails to point the Court to any binding authority that recognizes its existence in the case of diplomatic agents serving temporary undertakings.

But even if customary international law—independent of the UNCSM—somehow *did* recognize some form transit-based immunity for diplomatic agents on temporary missions, the weight of authority suggests that it would require the transiting state to proactively afford that immunity by consenting to it. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 78(1) (1965) ("[a] person entitled to immunity from the exercise of jurisdiction by the receiving state as indicated in §§ 73 and 74, *who has been permitted* to pass through the territory of another state . . . is entitled to [diplomatic immunity]") (emphasis added); *see also Ex parte Teja*, [1971] 2 All ER (QB) at 17 (rejecting a claim of transit-based immunity for a diplomatic agent on a temporary mission because "immunity depends on mutual agreement [of the transiting state] on the person entitled to the immunity.").

This means that Saab Moran's "special envoy" title alone does not—and cannot—unilaterally compel any country to afford him diplomatic immunity under customary international law. *See, e.g.*, *Sissoko*, 995 F. Supp. at 1471 (denying diplomatic protection to a "special advisor" of The Gambia where the State Department had not certified his diplomatic status); *U.S. v. Kuznetsov*, 442 F. Supp. 2d 102, 106 (S.D.N.Y. 2006) ("diplomatic immunity is premised upon recognition by the receiving State, so that no person or government may 'unilaterally assert diplomatic immunity.'") (quoting *U.S. v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984)); *see also* Op. of the Sup. Ct. of Just. of Cape Verde 33, ECF No. 153-1 ("Therefore, it is clear that the status of special envoy cannot result, contrary to what the Appellant [Saab Moran] seems to maintain, only from a unilateral declaration of the State that says it sent him on a mission[.]"). Even the VCDR recognizes that in the case of representatives of permanent missions, diplomatic recognition requires reciprocity. *See* VCDR arts. 4, 9.2, 11.2, 43; *Ali*, 743 Fed. App'x. at 358 (noting that the VCDR premises "diplomatic immunity upon recognition by the receiving state.") (cleaned up); *Satow's Diplomatic Practice* 170, 192 (6th ed. 2009)

("Article 40 of the Vienna Convention is clearly based on the assumption that the diplomat has no right of transit across a third State . . . . [and] as in the case of members of diplomatic missions, there is no right of passage through a third State [under the UNSMC] and [ ] the third State must consent to the transit before being required to accord any special privileges to members of special missions.").

Here, no transiting state's consent—including that of the United States— has been established. Indeed, the Supreme Court of Cape Verde explicitly found no evidence of Cape Verde's ever having consented to Saab Moran's passage through its territory as a diplomatic agent. (Op. of the Sup. Ct. of Just. of Cape Verde 33, ECF No. 153-1 ("What is reiterated is that there is no evidence in the record to date that the State of Cabo Verde has consented to the Appellant's transit through its territory with the status of special envoy."); *see also* Gov. Ex. 4. This Court is bound by that determination insofar as the act of state doctrine forecloses any inquiry into the matter. *See Glen v. Club Mediterranee S.A.*, 365 F. Supp. 2d 1263, 1267 (S.D. Fla. 2005) (Moore, J.).

So, aside from proving immaterial under the VCDR, Saab Moran's title as a "special envoy" also proves inconsequential under customary international law. That title only "reflects the designation provided [to him]" by the Maduro regime. *See Abdulaziz*, 741 F.2d at 1331.

In sum, Saab Moran has failed to prove, as a threshold matter, that customary international law recognizes transit immunities for diplomatic agents on temporary missions. And even then, the weight of the authorities before the Court strongly indicates that, if it exists, such immunity would require the consent of the transiting state(s), which Saab Moran has also not proven.

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c. FG Hemisphere v. DRC

See *Digest 2021* at 419-24 for discussion of the U.S. statement of interest in *FG Hemisphere v. Democratic Republic of Congo ("DRC")*, No. 19-mc-00232, filed in U.S. District Court for the Southern District of New York on December 17, 2021. The U.S. statement asserted that certain court actions to enforce judgments against the DRC were precluded by the VCDR and the UN Headquarters Agreement. On May 16, 2022, the court granted defendant's motion to modify the court's September 14, 2021 order, which had authorized Plaintiff to deliver writs of execution to the United States Marshals Service permitting execution on the DRC and its agents' property in the United States to satisfy their judgments. The court vacated the September 14, 2021 order "to the extent that it authorized execution against, and discovery from, the Permanent Mission of the Democratic Republic of Congo and Mission employees…"

d. 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.

* * * *

2. Determinations under the Foreign Missions Act

As set forth in a May 18, 2022 Federal Register notice, the State Department's Office of Foreign Missions determined that, effective at 12:00 p.m. on March 16, 2022, the Embassy of Afghanistan and Afghanistan's consular posts at Beverly Hills, CA and New York, NY formally ceased conducting diplomatic and consular activities in the United States. 87 Fed. Reg. 30,323 (May 18, 2022). The determination includes the following:

> A protecting power or other agent charged with responsibility for the property of said missions has not been requested, nor approved by the Secretary of State.
>
> In accordance with section 205 (c) of the Foreign Missions Act (22 U.S.C. 4305 (c)) and until further notice, the Department of State's Office of Foreign Missions has assumed sole responsibility for ensuring the protection and preservation of the property of the referenced missions, including but not limited to all real and tangible property, furnishings, archives, and financial assets of the Afghan Embassy or its consular posts in the United States.

D. INTERNATIONAL ORGANIZATIONS

1. *FG Hemisphere v. DRC*

See discussion of *FG Hemisphere v. DRC* in section C.1.c, *supra*, involving immunities of Permanent Missions to the UN and diplomats' accounts.

2. *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). See *Digest 2021* at 432-36 for a discussion of the statements of interest filed by the United States and the D.C. Circuit opinion, which aligned 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. *Jam v. Int'l Finance Corp*, 3 F.4th 405 (D.C. Cir. 2021). After the D.C. Circuit denied rehearing en banc in 2021, Jam and the other plaintiffs petitioned the Supreme Court for a writ of *certiorari* on January 10, 2022. The Supreme Court denied *certiorari* on April 25, 2022. No. 21-995.

3. *Rodriguez v. Pan American Health Organization (PAHO)*

See *Digest 2021* at 436-41 for a discussion of the United States amicus brief in the Court of Appeals for the D.C. Circuit in *Rodriquez v. Pan American Health Organization*, No. 20-7114. On March 29, 2022, the D.C. Circuit affirmed the district court decision, holding that the Pan American Health Organization's ("PAHO") alleged transfer of money for a fee between the Cuban and Brazilian governments, as described in plaintiffs' pleadings,

constituted "commercial activity" under the FISA and that the immunity provision of the World Health Organization (WHO) Constitution that PAHO had argued provided it absolute immunity was not self-executing. 29 F.4th 706. The opinion of the court is excerpted below (with footnotes omitted). On May 26, 2022, the D.C. Circuit denied a request for rehearing en banc.

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* * * *

A. IOIA Immunity

The IOIA grants an international organization "the same immunity from suit ... as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The IOIA provisions link the immunity of international organizations and foreign governments. *Jam*, 139 S. Ct. at 768. In 1960, President Eisenhower designated PAHO an international organization for IOIA purposes. *Tuck v. PAHO*, 668 F.2d 547, 550 n.5 (D.C. Cir. 1981).

The IOIA, through the FSIA provisions, grants PAHO immunity from suit brought in American courts. 28 U.S.C. § 1604. Under the FSIA's commercial activity exception, however, PAHO loses its immunity if "the action is based upon a commercial activity carried on in the United States by the [international organization]." *Id.* § 1605(a)(2). The Supreme Court has said that courts should look to "the gravamen" of the action when determining whether an action is "based upon" a commercial activity in the United States. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35, 136 S.Ct. 390, 193 L.Ed.2d 269 (2015). "The gravamen" simply means "the crux" of the action. *Fry v. Napoleon Cmty. Schs.*, —– U.S. ——–, 137 S. Ct. 743, 755, 197 L.Ed.2d 46 (2017). Unsurprisingly, the parties describe neither the gravamen nor its application under the commercial activity exception in the same way. Their dispute includes whether to identify the gravamen on a claim-by-claim basis and, further, whether the gravamen took place in the United States.

1. Whether to determine the gravamen on a claim-by-claim basis

PAHO contends that we should look to the entire complaint in determining the gravamen of the action. It notes that the commercial activity exception applies if "*the action* is based upon a commercial activity," 28 U.S.C. § 1605(a)(2) (emphasis added), and argues that "the action" refers to the entire lawsuit. If PAHO is correct, we must consider the entire complaint to determine the "gravamen." *See Sachs*, 577 U.S. at 35, 136 S.Ct. 390 (court looks to "gravamen" in considering whether "an *action* is based upon a commercial activity carried on in the United States" (emphasis added)). In *Sachs*, the Supreme Court interpreted its earlier FSIA holding in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). It observed that *Nelson* "did not undertake ... an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action" in analyzing the "gravamen." *Sachs*, 577 U.S. at 34, 136 S.Ct. 390. "Rather than individually analyzing each of the Nelsons' causes of action, [the Court] zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." *Id.* at 35, 136 S.Ct. 390. We read *Sachs*—and 28 U.S.C. § 1605(a)(2)—differently from PAHO.

First, the FSIA text does not require courts to look to the entire lawsuit to determine the gravamen thereof. PAHO relies significantly on the assumption that "action" in 28 U.S.C. § 1605(a)(2) refers to the entire suit. But "action" can refer both to "a ... judicial proceeding," *Action*, Black's Law Dictionary (11th ed. 2019), and serve as shorthand for a "cause of action,"

id. (referring to "cause of action" entry); *see also Cause of Action*, Black's Law Dictionary (11th ed. 2019) ("group of operative facts giving rise to one or more bases for suing"). And the Supreme Court has stated that "statutory references to an 'action' have not typically been read to mean that every claim included in the action must meet the pertinent [jurisdictional] requirement before the 'action' may proceed." *Jones v. Bock*, 549 U.S. 199, 221, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

Second, *Sachs* instructs courts to define the "gravamen" on a claim-by-claim basis. Earlier, in *Nelson*, the plaintiff had claimed that the commercial activity exception lifted Saudi Arabia's sovereign immunity. 507 U.S. at 355–56, 113 S.Ct. 1471. In that case, the Supreme Court read the commercial activity exception to require a court to look to the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case" in determining whether an action is "based upon" commercial activity in the United States. *Id.* at 357, 113 S.Ct. 1471. After *Nelson*, the Ninth Circuit *Sachs* opinion adopted an "element-by-element" approach under which the commercial activity exception applies if any element of a claim involves a "commercial activity ... in the United States." *Sachs v. Republic of Austria*, 737 F.3d 584, 599 (9th Cir. 2013) (en banc).[3]

In *Sachs*, the Supreme Court rejected that approach. *Sachs*, 577 U.S. at 34, 136 S.Ct. 390. Sachs had purchased a Eurail train pass in the United States and was later injured at a government-owned train station in Austria. *Id.* at 30, 136 S.Ct. 390. She sued Austria's railway operator, relying on the commercial activity exception because an element of her claim—her Eurail purchase—involved "commercial activity ... in the United States." *Id.* at 30, 136 S.Ct. 390. The Supreme Court clarified that earlier, in *Nelson*, it did not "individually analyz[e] each of the [plaintiffs'] causes of action" because the "Saudi sovereign acts that actually injured them ... form[ed] the basis for the [plaintiffs'] suit." *Id.* at 35, 136 S.Ct. 390 (quoting *Nelson*, 507 U.S. at 358, 113 S.Ct. 1471) (internal quotation marks omitted). PAHO argues that the *Sachs* Court, in saying that *Nelson* "did not undertake ... an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action," *id.* at 34, 136 S.Ct. 390, instructs us to look to the entire lawsuit to determine whether an action is "based upon" commercial activity in the U.S. But *Sachs* rejected the Ninth Circuit's "one-element" approach and instead reaffirmed its direction to look to the "gravamen" of the suit. Indeed, *Sachs* itself considered individual claims, declaring that "the gravamen of Sachs's suit plainly occurred abroad. All of her *claims* turn on the same tragic episode in Austria." *Id.* (emphasis added). The Court explicitly rejected Sachs's assertion that some of her claims were based upon American activity. *Id.* at 35–36, 136 S.Ct. 390 ("Sachs maintains that some of those claims are not limited to negligent conduct or unsafe conditions in Austria, but rather involve at least some wrongful action in the United States. ... However Sachs frames her suit, the incident in Innsbruck remains at its foundation."). The Court in fact emphasized its opinion's limited reach, noting it "consider[ed] here only a case in which the gravamen of *each claim* is found in the same place." *Id.* at 36, n.2, 136 S.Ct. 390 (emphasis added). *Sachs*, then, approves considering the "gravamen" on a claim-by-claim basis.

Since *Sachs*, we have considered "FSIA immunity determinations on a claim-by-claim basis." *Simon v. Republic of Hungary*, 812 F.3d 127, 141 (D.C. Cir. 2016) (citing precedent from other circuits), *vacated on other grounds by Federal Republic of Germany v. Philipp*, —— U.S. ––, ——, 141 S. Ct. 703, —— L.Ed.2d —— (2021); *see also Action All. of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) (vacated opinions "continue to have precedential weight, and in the absence of contrary authority, we do not disturb them"). In *Simon*, we reviewed claims made by fourteen Holocaust survivors against the Republic of

Hungary and its state-owned railway. *Id.* at 132. The survivors "assert[ed] causes of action ranging from the common law torts of conversion and unjust enrichment for the plaintiffs' property loss, to false imprisonment, torture, and assault for their personal injuries, to international law violations." *Id.* at 134. They argued that FSIA's expropriation exception applied, *id.* at 140, which requires, *inter alia*, "that the claims are ones in which 'rights in property' are 'in issue,' " *id.* at 141 (quoting 28 U.S.C. § 1605(a)(3)). We reviewed the causes of action separately, noting that property rights were at issue in the plaintiffs' conversion claims but not in their personal injury claims. *Id.* Although PAHO emphasizes that the commercial activity exception uses "action" (and the expropriation exception does not), we think it unlikely that this implicit word choice differentiates commercial activity exception analysis from that of other FSIA exceptions.

The parties also contest PAHO's alleged delict—whether PAHO "moved money for a fee" (i.e., acting as a financial intermediary) or, instead, arranged medical services for a fee (i.e., acting as an international public health organization). As described *supra*, the complaint alleges that PAHO "moved money for a fee" under the "pretext" of arranging medical services. PAHO, of course, maintains that it in fact organized a public health program. At this stage of the litigation, however, we accept all well-pleaded allegations as true. *Valambhia*, 964 F.3d at 1137. The complaint plainly asserts that, with respect to the funds that constituted its financial benefit in violation of 1589(b), PAHO had the role of financial "intermediary," transferring money among *Mais Médicos* participants.

2. Whether the gravamen occurred in the United States

The parties also dispute how to define the gravamen under the claim-by-claim approach and whether the gravamen constitutes "commercial activity carried on in the United States." PAHO maintains that the "gravamen" is the activity that in fact injured the physicians, the alleged human trafficking and forced labor. In *Sachs*, the Supreme Court rejected Sachs's argument that, for her failure-to-warn claim, the gravamen occurred in the United States. 577 U.S. at 35–36, 136 S.Ct. 390. "Under any theory of the case that Sachs presents ... there is nothing wrongful about the sale of the [train] 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 [train] pass. However Sachs frames her suit, the incident in [Austria] remains at its foundation." *Id.* Moreover, in *Jam v. International Finance Corporation,* 3 F.4th 405 (D.C. Cir. 2021), we recently applied a similar rationale. The plaintiff alleged that the International Finance Corporation (IFC) negligently lent money to an Indian power-generation project that allegedly caused significant environmental damage. *Id.* at 407. Relying in part on the Supreme Court's earlier decision in the case, *see Jam*, 139 S. Ct. at 779 ("[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."), we held that, notwithstanding the IFC loan transaction took place in the United States, the "gravamen" occurred in India because all the allegedly wrongful conduct occurred there. *Jam*, 3 F. 4th at 409.

PAHO asserts that "moving money for a fee" likewise becomes "wrongful" only due to activity that occurred elsewhere—in this instance, alleged human trafficking and forced labor in Cuba and/or Brazil. Absent the alleged trafficking and forced labor, PAHO would have merely acted as a typical financial intermediary. As in *Sachs* and in *Jam*, PAHO argues that we should look to what "actually injured" the physicians in identifying the "gravamen." *See Sachs*, 577 U.S. at 35–36, 136 S.Ct. 390. If PAHO is right, the "gravamen" occurred abroad and the commercial activity exception would not apply.

We think that *Sachs* does not require defining the "gravamen" by looking to the acts that "actually injured" the physicians. In defining the "gravamen" according to the activity that injured the plaintiffs, the *Sachs* Court clarified that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." 577 U.S. at 36 n.2, 136 S.Ct. 390; *see also id.* ("Justice Holmes wrote that the 'essentials' of a personal injury narrative will be found at the 'point of contact'—'the place where the boy got his fingers pinched.' *At least in this case*, that insight holds true." (citation omitted) (emphasis added)). *Nelson*, *Sachs* and *Jam* all considered commercial activity connected with tortious activity that occurred abroad. *See Jam*, 139 S. Ct. at 779 ("[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." (emphasis added)). The Court expressed concern that artful pleading would allow litigants to "recast virtually any claim of intentional tort" as a failure to warn and thus create an exception to sovereign immunity. *Sachs*, 577 U.S. at 36, 136 S.Ct. 390 (quoting *Nelson*, 507 U.S. at 363, 113 S.Ct. 1471).

Here, however, the alleged financial activity itself gives rise to a cause of action. *See* 18 U.S.C. § 1589(b) (prohibition on financially benefitting from participation in human trafficking). At least with regard to alleged illegal financial activity, we consider the "gravamen" of *that* alleged wrongful conduct rather than any harm that may result elsewhere. The "gravamen" of a suit consists of "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," *Nelson*, 507 U.S. at 357, 113 S.Ct. 1471, or, phrased differently, "the core" of a claim, *see Sachs*, 577 U.S. at 35, 136 S.Ct. 390. If the conduct is itself wrongful—as opposed to wrongful based only on other conduct—it constitutes the "core" of the claim. The physicians allege that PAHO committed a financial crime in the U.S., *see* 18 U.S.C. § 1589(b), and press the corresponding civil claim, *see* 18 U.S.C. § 1595(a) ("individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator ... and may recover damages"). The "financial benefit" that violates § 1589(b) is itself "wrongful conduct" and occurred in the United States, to wit: PAHO received, forwarded and retained the *Mais Médicos* money through its Washington, D.C. bank account. Apart from the wrongful conduct PAHO allegedly participated in abroad, the physicians also allege wrongful conduct that occurred entirely within the U.S.

Accordingly, we believe that the physicians have sufficiently alleged that PAHO's conduct of "moving money for a fee" constituted "commercial activity carried on in the United States." We emphasize, however, that we hold only that the physicians have made sufficient allegations to survive dismissal; the district court retains the authority to reassess its jurisdiction as the litigation progresses. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("subject-matter jurisdiction ... may be raised by a party, or by a court on its own initiative, at any stage in the litigation"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (burden of establishing jurisdiction varies "with the manner and degree of evidence required at the successive stages of the litigation").

B. WHO Constitution Immunity

PAHO also claims immunity under the WHO Constitution. The WHO Constitution provides that it "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." WHO Const. art. 67(a). "Such ... 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. We assume *arguendo* that PAHO, the WHO's

Regional Office for the Americas, *Agreement Between the World Health Organization and the Pan American Sanitary Organization*, May 24, 1949, also enjoys the immunity granted to the WHO under the WHO Constitution. We nonetheless reject PAHO's immunity claim because the relevant provision of the WHO Constitution is not self-executing.

Although the Supremacy Clause of the United States Constitution guarantees that "all Treaties ... shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, the Supreme Court has long recognized the "distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law." *Medellin v. Texas*, 552 U.S. 491, 504, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). The court must determine whether a treaty has domestic legal effect—that is, whether the treaty is "self-executing." "When [a treaty's] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888).

To determine whether a treaty is self-executing, the court must "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." *Medellin*, 552 U.S. at 521, 128 S.Ct. 1346. "The interpretation of a treaty [is] like the interpretation of a statute." *Id.* at 506, 128 S.Ct. 1346. We first look to the treaty's text. *Id.* Because a treaty is "an agreement among sovereign powers, we have traditionally [also] considered as aids to its interpretation the negotiating and drafting history *(travaux préparatoires)* and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); *see also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431, 63 S.Ct. 672, 87 L.Ed. 877 (1943) (courts "look beyond the written words" more often when interpreting treaty than when interpreting contract). Nonetheless, "[t]he 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." *United States v. Stuart*, 489 U.S. 353, 365–66, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989) (quoting *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 180, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)) (internal quotation marks omitted).

As made plain by the language of Articles 67(a) and 68 of the WHO Constitution, Article 67(a) is not self-executing. First, Article 67(a) does not provide an enforceable rule-of-decision. If a treaty provision does not contain a judicially manageable rule of decision, the provision is ordinarily not self-executing. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (treaty is not self-executing if it does "not provide specific standards"); *cf. Edye v. Robertson*, 112 U.S. 580, 598–99, 5 S.Ct. 247, 28 L.Ed. 798 (1884) ("A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."). Article 67(a) provides that the WHO enjoys "privileges and immunities ... necessary for the fulfillment of [the WHO's] objective." That standard is far too general to establish a rule of decision.

Moreover, Article 68 stipulates that the political branches will enforce Article 67(a). *See* WHO Const. art. 68 (Article 67(a)'s "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"). If treaty language requires a political branch to take future action, courts almost always conclude that the treaty language committed discretion to the political branches and is therefore not self-executing. *See Diggs*, 555 F.2d at 851 (treaty not self-executing if it "call[s] upon governments to take certain action"); *Republic of*

Marshall Islands v. United States, 865 F.3d 1187, 1194 (9th Cir. 2017) (treaty provision that "anticipates future action ... to implement or honor the treaty obligation" is not self-executing); *cf. Medellin*, 552 U.S. at 509, 128 S.Ct. 1346 ("The U.N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that [International Court of Justice] judgments were not meant to be enforceable in domestic courts."). Article 68 states that Article 67(a)'s "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." The WHO Constitution thereby requires members to conclude an agreement defining the privileges and immunities. By adopting the WHO Constitution, the President and the Congress thereby agreed that another agreement is required to define the WHO's privileges and immunities, relieving the courts of the task of defining them.

In response, PAHO relies on Article 67(a)'s mandatory language. *See* WHO Const. art. 67(a) (WHO "*shall* enjoy ... such privileges and immunities as may be necessary for the fulfillment of its objective and for the exercise of its functions") (emphasis added). Indeed, if a treaty provision does not include mandatory language like "shall" or "must," that omission usually indicates that the provision is not self-executing. *Medellin*, 552 U.S. at 508, 128 S.Ct. 1346. But "even mandatory language may not be conclusive evidence that a provision is self-executing if the context and treaty objectives indicate otherwise." *Doe v. Holder*, 763 F.3d 251, 255 (2d Cir. 2014). In other words, in determining whether a treaty provision is self-executing, mandatory language is required but not necessarily sufficient.

PAHO asserts that the U.S. has by implication bound itself to the separate treaty that defines the WHO's "privileges and immunities." In 1947, as provided by Article 68, the United Nations General Assembly approved the Convention on the Privileges and Immunities of the Specialized Agencies (CPISA). *See Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261 (1947) (art. I, § 1(ii)(g) & art. III, § 4). The CPISA grants the WHO immunity from every form of legal process. *Id.* at 264, 266. The United States joined the WHO in 1948, *see Constitution Adopted by the United States of America and Other Governments Respecting a World Health Organization*, June 21, 1948, 62 Stat. 2679, T.I.A.S. No. 1808, one year after the U.N. General Assembly adopted the CPISA. But the United States has never ratified the CPISA.

PAHO contends that the United States "by implication" ratified the CPISA, at least insofar as it defines the "privileges and immunities" of Article 67(a) of the WHO Constitution, when it ratified the WHO Constitution. But the United States did not ratify the CPISA by virtue of the WHO Constitution's provision requiring a subsequent agreement defining "privileges and immunities." Indeed, when the U.S. eventually entered into a corresponding treaty that granted immunity to the U.N.—the Convention on the Privileges and Immunities of the United Nations (CPIUN)—the Senate Report indicates that the political branches had not ratified treaties like the CPISA because they thought that the IOIA itself provided sufficient immunity to international organizations. S. Exec. Rep. No. 91-17, p. 1, 8, 11, 14 (1970). Moreover, the political branches thought it necessary to ratify the CPIUN—which expanded IOIA immunity in "minor ways," *id.* at 1—even though Articles 105(1) and 105(3) of the U.N. Charter effectively mirror the WHO Constitution's Article 67(a) and Article 68, respectively.

Finally, we note that the United States has submitted an amicus brief affirming that, in its view, WHO Constitution Article 67(a) is not self-executing. "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El*

Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999). The Executive Branch's position reinforces our decision.

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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.2**
Alien Tort Statute, **Ch. 5.B**
Usoyan v. Republic of Turkey, **Ch. 5.C.1**
Hungary v. Simon and Germany v. Philipp*,* **Ch. 5.C.2**
Investor-State dispute resolution (including expropriation), **Ch. 11.B**
Saint-Gobain v. Venezuela *(Hague Service Convention case)*, **Ch. 15.C.1**
"Khashoggi Ban" related to transnational repression, **Ch. 16.A.15.b**

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 2022, U.S. air transport agreements with Kazakhstan and Tanzania entered into force. In addition, a protocol of amendment an agreement with Colombia was agreed in 2022. A new agreement in accord with U.S. Open Skies policy was signed with Ecuador at the end of 2022.

a. Kazakhstan

On April 1, 2022, the U.S.-Kazakhstan Air Transport Agreement, signed on December 30, 2019, entered into force. See April 1, 2022 State Department media note, available at https://www.state.gov/the-united-states-kazakhstan-open-skies-air-transport-agreement-enters-into-force/. The December 30, 2019 agreement is available at https://www.state.gov/kazakhstan-22-315.

b. Tanzania

On June 10, 2022, the U.S.- Tanzania Air Transport Agreement, signed on August 28, 2000, entered into force. The August 28, 2000 agreement is available at https://2009-2017.state.gov/e/eb/rls/othr/ata/t/tz/114134.htm. The parties amended the agreement on December 7, 2017, and the amendment is available at https://www.state.gov/u-s-tanzania-air-transport-agreement-amendment-of-december-7-2017/. See June 14, 2022 State Department media note, available at https://www.state.gov/the-united-states-tanzania-open-skies-air-transport-agreement-enters-into-force/, which includes the following:

> This bilateral agreement establishes a modern civil aviation relationship with Tanzania consistent with U.S. Open Skies international aviation policy and with commitments to high standards of aviation safety and security. The agreement includes provisions that allow for unrestricted capacity and frequency of services, open route rights, a liberal charter regime, and open code-sharing opportunities.
>
> This agreement with Tanzania is also a step forward in liberalizing the international civil aviation sector in Africa. It further expands our strong economic and commercial partnership; promotes people-to-people ties; and creates new opportunities for airlines, travel companies, and customers. With this agreement, air carriers can provide more affordable, convenient, and efficient air services to travelers and shippers, which in turn promotes tourism and commerce.

c. Colombia

On July 27, 2022, the United States and Colombia signed a protocol of amendment to the 2011 U.S.-Colombia Air Transport Agreement (the ATA) in Bogota. The protocol of amendment is available at https://www.state.gov/protocol-of-amendment-to-us-colombia-air-transport-agreement/. See July 27, 2022 State Department media note, available at https://www.state.gov/the-united-states-and-colombia-add-all-cargo-rights-to-air-transport-agreement/, which includes the following:

> The amendment adds seventh-freedom traffic rights for U.S. and Colombian all-cargo air services to the ATA and will enter into force following an exchange of diplomatic notes. It has been applied on the basis of comity and reciprocity since it was initialed on December 14, 2018.
>
> The rights in the amendment facilitate the movement of goods throughout the world by providing air carriers greater flexibility to meet their cargo and express-delivery customers' needs more efficiently. Specifically, the amendment allows U.S. air carriers to fly all-cargo services between Colombia and a third nation without needing to perform a commercial stop in the United

States. Colombian air carriers have reciprocal rights to serve the United States on a seventh-freedom all-cargo basis. This amendment further expands our strong economic and commercial partnership with Colombia while creating new opportunities for airlines, exporters, and consumers. It fully opens the Colombian air cargo services market to U.S. carriers and represents one way in which the U.S. government is delivering for U.S. air carriers and American workers.

d. Ecuador

On November 16, 2022, the United States and Ecuador signed an Air Transport Agreement. The agreement is available at https://www.state.gov/u-s-ecuador-air-transport-agreement-of-november-16-2022/. See November 17, 2022 State Department media note, available at https://www.state.gov/united-states-and-ecuador-sign-open-skies-agreement/.

2. Forced Diversion of Ryanair Flight to Minsk

On January 20, 2022, the Department of Justice ("DOJ") announced the charging of Belarusian government officials with aircraft piracy for diverting Ryanair Flight 4978 to Minsk in May 2021 for the purpose of detaining an opposition journalist. See the DOJ press release available at https://www.justice.gov/opa/pr/belarusian-government-officials-charged-aircraft-piracy-diverting-ryanair-flight-4978-arrest.

On January 31, 2022, the U.S. Representative to the International Civil Aviation Organization ("ICAO") issued a statement on the ICAO Fact Finding Investigation Team ("FFIT") Report on the Ryanair Flight 4978 Forced Diversion by Belarus. The statement is excerpted below and available at https://icao.usmission.gov/statement-of-the-u-s-representative-to-icao-on-the-icao-ffit-report-on-the-ryanair-flight-4978-forced-diversion-by-belarus/.

* * * *

The United States welcomes the report by ICAO's Fact-Finding Investigation Team on the May 23, 2021, forced diversion of Ryanair Flight 4978 by the Lukashenka regime. The Report's findings leave no doubt that Belarusian officials manufactured a false bomb threat to divert Flight 4978 to land in Minsk in order to detain passenger and opposition journalist, Raman Pratasevich, and his companion, Sofia Sapega. This action by the Lukashenka regime was a direct affront to international norms, an egregious act of transnational repression, and a blatant – and dangerous – manipulation of the civil air navigation system.

There must be consequences for the Lukashenka regime. We cannot allow civil aircraft in mid-flight to become the instruments of dictators. The United States calls on this Council to

condemn the regime for its actions and send a strong message that we will not tolerate such attacks on international civil aviation.

As we consider the Lukashenka regime's actions, and our response today, I call your attention to several elements of the Fact-Finding Report that reveal major inconsistencies with the Belarus authorities' version of events:

Belarusian authorities assert they received an e-mail with a bomb threat against Flight 4978 at 12:25 local time, however, the e-mail service provider, ProtonMail, confirmed to investigators that the bomb threat email was sent to the Minsk airport at 12:56. In other words, Belarusian authorities acted on the supposed threat more than 30 minutes before it was sent to their inbox. Despite repeated requests, the regime did not provide the original e-mail, claiming instead that it had been erased. Throughout the investigation, Belarusian authorities claimed that critical evidence to support their assertions was destroyed or unavailable.

Despite the Belarusian authorities declaring to the pilots that the bomb threat was a "Code Red" situation, the authorities demonstrated no urgency over the threat once the plane landed. Authorities did not evacuate the aircraft for nearly an hour, insisted that a pilot remain onboard, and conducted a cursory 18-minute inspection of the plane before cancelling the "distress" signal.

After having delivered a "Code Red" bomb threat, Belarusian officials did not focus on securing the plane; they focused instead on their main objectives: detaining Pratasevich and Sapega. While Belarusian authorities shared excerpts from recordings of its security officials' interactions with the passengers, they refused to provide the entirety of the tapes and claimed instead that the evidence had been erased.

While we've highlighted only a few of the inconsistencies in the Lukashenka regime's claims, it is clear that officials in Minsk acted with a total disregard for passengers' safety and violated the fundamental trust that must exist between pilots and air traffic controllers for international civil aviation to function both seamlessly and safely. The evidence exposed that Belarus Air Traffic Control actively misled the pilots, failed to contact Ryanair's Operations Center, and deliberately provided incomplete information about the alleged threat to the pilots. Given the circumstances, and without access to any other source of information, the pilots had no credible option other than to divert the aircraft to Minsk. Such an outrageous manipulation of civil aviation for domestic political purposes strikes at the foundation of the Chicago Convention to create a safe and secure international aviation system.

This Council must therefore exercise its responsibility to protect international civil aviation by taking a decision today that will condemn the unlawful interference with international civil aviation identified in the report and highlight the inconsistencies in the account given by the Belarusian authorities. We should decide that the Fact-Finding Investigation Team must continue its critical work and report back to the Council as it compiles additional evidence, and that the report must be forwarded to the UN Secretary General so that the UN Security Council may consider its own response. Finally, in the interest of transparency, we also request that the report – including any updated versions and, to the extent possible, the supporting evidence – be published on ICAO's website.

* * * *

On February 17, 2022, Ambassador Sully Sullenberger issued a statement on the ICAO Council's January 31, 2022 decision on the ICAO FFIT Report on the forced

diversion of Ryanair Flight 4978. The statement is available at https://icao.usmission.gov/ambassador-sullenberger-on-the-icao-councils-1-31-22-decision-on-report-into-ryanair-flight-4978-in-belarus-airspace-on-23-may-2021/ and excerpted below.

* * * *

The United States welcomes the decision of the ICAO Council based on the report of the ICAO Fact Finding Investigation Team (FFIT). This is an important first step towards protecting international civil aviation from the type of unlawful interference identified in the FFIT's report, and in holding to account those who engage in acts that undermine the trust between pilots and air traffic controllers.

Carefully cataloguing the many gaps and discrepancies in Belarus's version of events, the FFIT report's findings leave no doubt that Belarusian officials manufactured a false bomb threat to coerce the pilots of Ryanair Flight 4978 to land in Minsk for the purpose of detaining opposition journalist Raman Pratasevich, and his companion, Sofia Sapega.

Speaking as a long-time pilot and aviation safety professional, I am particularly troubled by the indications that Belarusian officials actively misled the crew of Ryanair Flight 4978 and deliberately provided incomplete information about the alleged threat. Further, by not honoring the flight crew's request to contact Ryanair's operations center, Belarusian officials deprived the crew of a valuable resource to assess the credibility and urgency of the alleged threat.

Knowing well how a flight crew would react in these circumstances, it is clear that Belarusian officials exploited the crew's professionalism, diligence, and dedication to the safety and security of their passengers. The subterfuge and outright lies of Belarusian officials were precisely timed for maximum effect, forcing the flight crew of Ryanair Flight 4978 into a situation where the only viable option was landing at Minsk — all for the purpose of detaining, and jailing an independent journalist and his traveling companion.

By manipulating Ryanair Flight 4978's flight crew, Belarusian officials put the passengers and crew at risk, contravened international aviation norms and shattered the essential bond of trust between air traffic controllers and pilots in that region. In its pursuit of a political opponent flying from Greece to Lithuania, the Lukashenka regime created a dangerous precedent such that international flight crews might now reasonably question if they can rely on the air traffic control for accurate and reliable information and assistance. We cannot yet know the full consequences of the Belarusian officials' brazen act on the future safety and security of international civil aviation.

I appreciate the professional, impartial work of the ICAO Fact-Finding Investigation Team to date, and I look forward to the final report from the FFIT that provides an accurate and complete narrative of the forced diversion of Ryanair Flight 4978. When the FFIT's work is eventually done, the work will still not be complete for those of us who care about safe and secure global flight – we must continue to hold those who undermine aviation safety to account. Nothing less than the safety and security of all who travel by air is at stake.

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3. International Civil Aviation Organization ("ICAO") Negotiation Conference

The United States participated virtually and in person in the fourteenth ICAO Air Services Negotiation Event ("ICAN 2022") in Abuja, Nigeria from December 5-9, 2022.

4. Statement to ICAO on Russian Aggression in Ukraine

On February 25, 2022, Ambassador Sullenberger issued a statement to the ICAO Council Regarding Russian Aggression in Ukraine. The statement is excerpted below and available at https://icao.usmission.gov/statement-of-ambassador-sullenberger-to-the-icao-council-regarding-russian-aggression-in-ukraine/.

* * * *

The United States condemns Russia's unprovoked and massive invasion of Ukraine in the strongest possible terms. As President Biden said, President Putin has chosen a premeditated war that will bring a catastrophic loss of life and human suffering. Russia alone is responsible for the death and destruction this attack will bring.

Russia's actions are a violation of international law and the international principles that we as an international community have all pledged to respect: national sovereignty, territorial integrity, and the right of states to make their own decisions regarding their foreign and security policy arrangements.

We recall that state sovereignty is fundamental to ICAO, as set out in Article 1 of the Chicago Convention.

Russia's attack from air, land, and sea on the territory of Ukraine – another ICAO member state – represents an unprecedented threat to international security and the safe operation of civil aviation in the region. Russian military strikes have reportedly targeted infrastructure essential to civil aviation, including airports and radar.

The Council cannot ignore the danger for international civil aviation in the region. We recall that, in July 2014, Malaysia Airlines Flight 17 was shot down, killing 283 passengers and 15 crew, from territory controlled by Russia-backed militants – the same area in which the Russian Federation now recognizes two [quote-unquote] "independent" republics.

We remain committed to upholding the sovereignty and territorial integrity of Ukraine within its internationally recognized borders and its airspace above.

We call on Russia to halt its military operations in Ukraine immediately, return its troops and equipment to Russia, and cease all further aggressive activities against Ukraine, including attacks or operations against critical civil aviation infrastructure.

Russia must respect the safety and security of civil air navigation over all of the territory within Ukraine's internationally-recognized borders, including areas affected by Russian operations, and respect all of its obligations under the Chicago Convention and relevant international civil aviation law instruments.

In particular, Russia must be transparent and timely in sharing relevant safety information for the protection of airline crews and passengers from its ongoing military hostilities.

The Council should publicly condemn Russia's actions. There must be consequences for Russia's unprovoked invasion and the threat that it poses to international civil aviation.

* * * *

5. Blocking Russian Access to U.S. Airspace

On March 2, 2022, the Federal Aviation Administration ("FAA") announced that Russian aircraft and operators would be prohibited from using all U.S. domestic airspace, with limited exceptions. The Notice to Air Missions ("NOTAM") (FDC 2/9510) is available at https://www.faa.gov/sites/faa.gov/files/2022-03/63620382.pdf. The March 2, 2022 FAA press release is available at https://www.faa.gov/newsroom/us-will-block-russian-aircraft-using-all-domestic-airspace and includes the following:

> "The United States stands with our allies and partners across the world in responding to Putin's unprovoked aggression against the people of Ukraine," said **U.S. Transportation Secretary Pete Buttigieg.**
>
> The Notice to Air Missions (NOTAM) and regulatory orders will suspend operations of all aircraft owned, certified, operated, registered, chartered, leased, or controlled by, for, or for the benefit of, a person who is a citizen of Russia. This includes passenger and cargo flights, and scheduled as well as charter flights, **effectively closing U.S. air space to all Russian commercial air carriers and other Russian civil aircraft.**

On March 10, 2022, the FAA revised the NOTAM (FDC 3/9274, available at https://www.faa.gov/air_traffic/publications/us_restrictions/media/FDC%203-9274.pdf), which narrowed the scope of the order from prohibiting flights benefiting Russian citizens to only those Russians on Trade's Consolidated Screening List. The NOTAM was renewed on November 22, 2022.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement ("NAFTA")

Article 1128 of the North American Free Trade Agreement ("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. Alicia Grace v. Mexico

On April 24, 2022, the United States made an oral submission under Article 1128 in *Alicia Grace and others v. Mexico*, ICSID Case No. UNCT/18/4. The oral submission follows. See also *Digest 2021* at 451-52 for a discussion of the August 24, 2021 written submission of the United States.

* * * *

1. Thank you, Mr. President and Members of the Tribunal for this opportunity. Pursuant to Article 1128 of the NAFTA, I will make a brief submission on behalf of the United States, addressing four questions of treaty interpretation arising out of the Claimants' responses to the U.S. written submission, dated August 24, 2021. As is always the case with our non-disputing Party submissions, the United States does not take a position here on how the interpretations offered apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed.

2. I will address first the weight of non-disputing Party submissions; second, the limitations on the kinds of loss or damage that may be claimed by an investor under Articles 1116 and 1117; third, the methodology for determining rules of customary international law within the minimum standard of treatment; and, fourth, the scope of the obligation to accord "full protection and security".

Article 1128 - ***Authority of a Non-Disputing Party Submission*****]**

3. I begin my remarks by addressing the weight due to the U.S. views on matters addressed in a non-disputing party submission. States Parties are well placed to provide authentic interpretations of their treaties, including in proceedings before investor-State tribunals like this one. The Claimants' ignore the very import of Article 1128 – a provision expressly ensuring that the non-disputing Parties to a dispute under the NAFTA can provide their views on the correct interpretation of the Agreement. The NAFTA Parties consider non-disputing Party submissions to be a critical tool in this respect, and the United States consistently includes non-disputing Party provisions in its investment agreements to reinforce the importance of these submissions in the interpretation of the provisions of these agreements, and we routinely make such submissions.

4. 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. Although the United States is not a party to the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation. Article 31, 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 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."

5. Article 31 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."

6. First, 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 subsequent agreement into account.

7. And second, the NAFTA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). Any suggestion that non-disputing Party submissions are not entitled to deference because they are made in the course of arbitration should be rejected. The NAFTA Parties expressly included the mechanism to provide interpretations to investor-State tribunals in the course of an arbitration for a reason. Indeed, the International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute."[1] Accordingly, where the NAFTA Parties' submissions in an arbitration evidence their common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

8. Additionally, investment 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."[2] I am quoting from paragraph 158 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility dated July 13, 2018 and would point you to paragraphs 103, 104, and 158-160 for context. The tribunal in *Canadian Cattlemen for Fair Trade* reached a similar conclusion at paragraphs 188 to 189 of its Award on Jurisdiction, dated January 28, 2008.[3]

9. I would note also, in response to comments on this issue, that NAFTA Articles 2001 and 1131(2), which concern 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. 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 under international law. Indeed, the fact that the NAFTA Parties included the Article 1128 mechanism demonstrates that the Parties did not intend to limit their ability to issue authentic interpretations solely through the Free Trade Commission process. Claimants, in fact, appear to acknowledge this when they emphasize that such submissions "must be seen in their interaction with other means of interpretation," and recognize that the Tribunal "would need to take [them] into account."[4]

10. To sum up this point, the Tribunal cannot, as Claimants request in their Conclusion, "ignore" the submissions of the NAFTA Parties regarding the interpretation of the NAFTA. Whether the Tribunal considers that the interpretations presented by the three NAFTA Parties as a subsequent agreement under Article 31(3)(a), as subsequent practice under Article

[1] Report of the ILC, Seventieth Session, UN Doc. A/73/10, Chapter VI, para. 18.
[2] *See, e.g., Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (July 13, 2018) ¶¶ 158, 160.
[3] *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188-90 (Jan. 28, 2008).
[4] Claimant's Observations, ¶ 7.

31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the NAFTA Parties' common understanding of the provision of their Treaty into account.

Articles 1116/1117 (Reflective Loss)

11. The second issue I will address concerns the distinct kinds of loss or damage that may be claimed under NAFTA Article 1116 on the one hand and Article 1117 on the other.

12. As the United States explained in its written submission, Articles 1116 and 1117 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 1116. Allowing an investor to claim for indirect loss under Article 1116(1) would render the framework of complementary provisions discussed in our written submission ineffective. For example, if an investor had the right to bring its own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under Article 1116(1) rather than Article 1117(1) in order to protect the award from creditors or other shareholders. Such a result would render the provisions of paragraph 2 of Article 1135, which requires awards to be paid to the domestic enterprise, meaningless.

13. Conversely, where the investor seeks to recover loss or damage to an enterprise that the investor owns or controls, the investor's injury is only indirect. Such a derivative claim must be brought, if at all, under Article 1117. We explained in our written submission that this distinction between Articles 1116 and 1117 was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations, as confirmed by the International Court of Justice in the *Barcelona Traction* and *Diallo* cases.

14. Claimants' response to our non-disputing Party submission suggests that the interpretation of the NAFTA Parties is incorrect because Article 1117 does not allow investors to bring claims on behalf of entities that are not constituted or organized in a NAFTA State or on behalf of an enterprise where the investors are only minority shareholders without control. According to claimants, this would leave indirect and minority investors without a remedy. But this conclusion misses the mark.

15. In the first situation, as the United States previously explained, Article 1117 was drafted as a limited carve-out from the customary international law rule precluding claims against a State by its own nationals. Article 1117 was designed therefore to address the common situation whereby investors make an investment through an enterprise incorporated in the host State and to allow a remedy in that situation. It would be nonsensical to extend such a remedy to investors with respect to enterprises incorporated in their own States or in non-NAFTA States – such enterprises are not investments by an investor of a NAFTA Party in another NAFTA Party. And it would be unnecessary, moreover, to extend such a remedy to investors with respect to enterprises incorporated in their own States, for the additional reason that such enterprises could be claimants and bring a NAFTA claim on their own behalf.

16. In the second situation, minority shareholders who do not control the relevant enterprise cannot bring claims on behalf of that enterprise. This is purposeful, and for the reasons provided in our written submission. Allowing a minority investor or other creditor who does not own or control the enterprise to get around this limitation and bring a claim for indirect loss under Article 1116 would invite a new class of claims that would undermine other provisions of Chapter 11. If a minority investor could bring a claim for its indirect loss, the domestic enterprise of which it is an investor could initiate or continue separate parallel proceedings relating to the same injury because it would not have to submit the waiver required by NAFTA Article 1121(b). Nor would Article 1117(3) require the consolidation of minority

investors' claims (of which there could be many). There would be a consequent risk of forum shopping, multiple actions, double-recovery, and inconsistent awards that was clearly not contemplated by the NAFTA Parties.

17. This result does not mean that minority shareholders are completely without remedies. As we explained, such investors may claim for direct loss or damage in the event, for example, they were denied rights to a declared dividend, to vote their shares, or to share in the residual assets of the enterprise on its 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.[5]

Article 1105 (Minimum Standard of Treatment-Methodology)

18. The third topic of my remarks concerns the customary international law minimum standard of treatment; specifically, the methodology for determining rules of customary international law that fall within the minimum standard of treatment.

19. NAFTA Article 1105, entitled "Minimum Standard of Treatment," paragraph 1 requires the NAFTA Parties to accord to investments of investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security." As explained in our written submission, the NAFTA Free Trade Commission issued an interpretation on July 31, 2001, reaffirming that Article 1105(1) "prescribes the customary international law minimum standard of treatment to be afforded to investments of investors of another Party."[6] The FTC clarified that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment "in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[7] This interpretation is binding on the Tribunal pursuant to NAFTA Article 1131(2).

20. The FTC's interpretation therefore confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.

21. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach--State practice and *opinio juris*--is the standard practice of States and international courts, including the International Court of Justice. Thus, this two-element approach is the proper methodology for determining whether a customary international law rule covered by Article 1105 has crystallized.

22. As the United States observed in our written submission, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported

[5] Under Article 1110, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

[6] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.1 (July 31, 2001) [hereinafter "FTC Interpretation"].

[7] *Id.* at ¶ B.2.

rule of customary international law based entirely on arbitral awards that lack this examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105. The United States therefore does not assert that arbitral awards are without relevance – our submissions do cite to arbitral awards concerning the minimum standard. But we cite to certain awards such as *Glamis* because they correctly observe that arbitral awards do not constitute State practice and cannot by themselves create or prove customary international law. We acknowledge that arbitral awards can be relevant and illustrative where they have examined State practice and *opinio juris* in order to determine whether a purported element of fair and equitable treatment has crystallized into a rule of customary international law within the minimum standard.

23. Finally on this topic, I would also note that while the NAFTA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the Agreement and applicable rules of international law, they did not consent to delegate to Chapter 11 tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*.

Article 1105 (Full Protection and Security)

24. The fourth and last topic of my remarks today concerns the scope of the obligation in Article 1105(1) to accord "full protection and security" to the investments of investors of another Party.

25. As the United States explained in its written submission, the obligation to provide "full protection and security" does not require States to 1) prevent economic injury inflicted by third parties, 2) provide for legal security, 3) provide for stability of a State's legal environment, or 4) 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 agreed by the NAFTA Parties.

26. As Claimants observed in their response to our written submission, the United States has concluded other agreements subsequent to the NAFTA explaining that the scope of the "full protection and security" obligation under customary international law requires that the contracting Parties QUOTE "provide the level of police protection required under customary international law." UNQUOTE According to the Claimants, this demonstrates that the NAFTA full protection and security standard is not also limited in the same manner. This supposition is incorrect, for two reasons.

27. The first reason is that in its Model BITs and investment chapters of Free Trade Agreements concluded after the FTC's Article 1105 interpretation, the United States has prefaced its description of the content and scope of the minimum standard of treatment by use of the phrase "[f]or greater certainty." So, for example, in the corollary Article of the U.S.-Colombia Trade Promotion Agreement concerning the minimum standard of treatment, paragraph 2 of that Article reads:

"For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" 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;

and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law."

28. The same "for greater certainty" language appears in the 2012 U.S. Model BIT as well as the more recently concluded USMCA between the three NAFTA Parties.

29. As a general practice, the United States uses the words "for greater certainty" in its international trade and investment agreements to introduce confirmation regarding the meaning of the agreement. In other words, the phrase "for greater certainty" signals that the text it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the text following the phrase were absent. As a consequence, "for greater certainty" sentences also serve to spell out more explicitly the proper interpretation of similar provisions, *mutatis mutandis*, in other agreements. By explaining that "for greater certainty" the obligation to accord full protection and security extends only to the provision of the level of police protection required under customary international law, the United States signaled its understanding that this is what the obligation to accord full protection and security has always meant in agreements where that language pertaining to the scope is absent, such as in the NAFTA.

30. The United States previously explained the use and significance of "for greater certainty" phrases in other non-disputing party submissions – written and oral – including in *Omega v. Panama* and *Carrizosa v. Colombia* and would be pleased to provide the tribunal with those submissions, if helpful.

31. The second reason that Claimants' arguments are incorrect is that all three NAFTA parties have confirmed their agreement (through submissions in this case and others), that the full protection and security provision of the NAFTA is limited to the scope of police protection under customary international law. As I explained earlier, this agreement is entitled to considerable weight.

* * *

32. Finally, I would just emphasize that the United States stands by the interpretations set forth in its written submission, although we did not address all of those issues today. With that final observation, I will close my remarks. I thank the Tribunal for the opportunity to present the views of the United States on these important interpretive issues.

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b. B-Mex v. Mexico

The United States made an Article 1128 submission in *B-Mex, LLC v. Mexico*, ICSID Case No. ARB(AF)/16/3, on June 13, 2022. The Article 1128 submission is excerpted below (with footnotes omitted) and available at https://www.state.gov/wp-content/uploads/2023/03/B-Mex-v-Mexico-Fourth-US-Article-1128-Submission-FINAL.pdf.

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Definition of "Investment" (Article 1139)

2. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.

Article 1139(g)

3. Article 1139(g) includes within the definition of "investment" "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests."

Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the "property right" at issue.

Article 1139(h)

4. Article 1139(h) includes within the definition of "investment" "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]"

5. To qualify as an investment under Article 1139(h), more than the mere commitment of funds is required. An investor must also have a cognizable "interest" that arises from the commitment of those resources. Specifically, Article 1139(h)(i) states that such interests might arise from, for example, turnkey or construction contracts or concessions. Similar interests might arise, according to Article 1139(h)(ii), from "contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

6. Not every economic interest that comes into existence as a result of a contract, however, constitutes an "interest" as defined in Article 1139(h). Article 1139(i) specifically excludes from the definition of "investment" "claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." Article 1139(j) likewise excludes "any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h) [of the definition of 'investment' in Article 1139]."

* * * *

Most-Favored-Nation Treatment (Article 1103)

15. The requirements for establishing a breach of Most-Favored-Nation ("MFN") Treatment under Article 1103 are the same as for establishing a National Treatment breach under Article 1102, except that the applicable comparators are investors or investments of another Party or non-Parties. Thus, as is the case under Article 1102, if a claimant does not identify such investors or investments as allegedly being in like circumstances with the claimant or its investment, no violation of Article 1103 can be established. Once it has identified comparators, the claimant then has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with the identified comparators; and (3) received treatment "less favorable" than that accorded to the identified comparators.

16. 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 1103 can be established. Article 1103 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.

17. 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 IV of the NAFTA. In particular, all Parties took an exception "to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement."

18. 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 1103 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.

* * * *

Participation by a Non-Disputing Treaty Party (Article 1128)

66. Article 1128 provides: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

67. States Parties are well placed to provide authentic interpretations of their treaties, including in proceedings before investor-State tribunals. Article 1128 was included in the NAFTA expressly to ensure that the non-disputing Parties to a dispute under the NAFTA can provide their views on the correct interpretation of the Agreement. The NAFTA Parties consider non-disputing Party submissions to be a critical tool in this respect. The United States consistently includes non-disputing Party provisions in its investment agreements to reinforce the importance of these submissions in the interpretation of the provisions of these agreements and the United States routinely makes such submissions.

68. 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. Although the United States is not a party to the Vienna Convention, it considers that Article 31 reflects customary international law on treaty interpretation. Article 31, 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 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."

69. Article 31 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."

70. Thus, if the submissions by the three NAFTA Parties demonstrate either that they agree on the proper interpretation of a given provision in accordance with Article 31(3)(a) or constitute subsequent practice establishing such an agreement in accordance with Article 31(3)(b), the Tribunal must take them into account.

71. The fact that Article 1128 submissions are made in the course of arbitration does not affect the deference or the weight to which they are entitled. As noted above, the NAFTA Parties expressly included the Article 1128 mechanism for the very purpose of providing interpretations to investor-State tribunals in the course of an arbitration. Indeed, the International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute," and prior NAFTA tribunals have likewise concluded that the NAFTA Parties' submissions in arbitration may constitute subsequent practice.

Accordingly, where the NAFTA Parties' submissions in an arbitration evidence their common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

72. NAFTA Articles 2001 and 1131(2), which concern interpretations by the Free Trade Commission, and Article 1128, which concerns non-disputing Party submissions, establish separate mechanisms for the Parties to provide interpretations of their treaty. 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 under international law. Indeed, the fact that the NAFTA Parties included the Article 1128 mechanism demonstrates that the Parties did not intend to limit their ability to issue authentic interpretations solely through the Free Trade Commission process.

73. In sum, whether the Tribunal considers the interpretations presented by the three NAFTA Parties as a subsequent agreement under Article 31(3)(a), as subsequent practice under Article 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the NAFTA Parties' common understanding of the provision of their Treaty into account.

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c. Koch Industries v. Canada

The United States made an Article 1128 submission in *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, on October 28, 2022. The Article 1128 submission is excerpted below (with footnotes omitted) and available at https://www.state.gov/wp-content/uploads/2023/03/Koch-Industries-v-Canada-US-Article-1128-Submission-FINAL-Accessible.pdf.

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* * * *

Minimum Standard of Treatment (Article 1105)

10. Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

11. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party." The Commission clarified that the concepts of "fair and equitable treatment" and "full protection and security" do "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." The Commission also confirmed that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." The Commission's interpretation "shall be binding" on tribunals established under Chapter Eleven.

12. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."

13. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This two-element approach—State practice and *opinio juris*—is the standard practice of States and international courts, including the International Court of Justice.

14. Relevant State practice must be widespread and consistent accepted as law, meaning that the practice must also be accompanied by a sense of legal obligation. "[T]he indispensable requirement for the identification of a rule of customary international law is that *both* a general practice and acceptance of such practice as law (*opinio juris*) be ascertained." A perfunctory reference to these requirements is not sufficient.

15. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State* (*Germany v. Italy*), the Court emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.

16. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 1105 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the

context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 1105(1).

17. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. While the NAFTA Parties consented to allow investor-State tribunals to decide issues in dispute in accordance with the Agreement and applicable rules of international law, they did not consent to delegate to Chapter Eleven tribunals the authority to develop the content of customary international law, which must be determined solely through a thorough examination of State practice and *opinio juris*. Thus, a formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).

18. As all three NAFTA Parties agree, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party." Tribunals applying the minimum standard of treatment obligation in Article 1105 have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill Inc. v. United Mexican States*, for example, acknowledged that

> **the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.**

19. Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule. A determination of a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." Chapter Eleven tribunals do not have an open-ended mandate to "second-guess government decision-making." A failure to satisfy requirements of domestic law does not necessarily violate international law. Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ." Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 1105.

* * * *

Contributory Fault

52. It is well established that a claimant may not be awarded reparation for losses to the extent of its contribution to such losses, and nothing in the NAFTA indicates otherwise. Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides: "In the determination of reparation, account shall be taken of the contribution to the injury by

willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."

* * * *

2. Non-Disputing Party Submissions under other Trade Agreements

a. *U.S.-Colombia TPA*

Foster Wheeler

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 April 4, 2022, the United States made a written submission in *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. the Republic of Colombia*. ICSID Case No. ARB/19/34. The submission is available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8193/DS17480_En.pdf and excerpted below (with footnotes omitted).

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* * * *

Article 10.16 (Submission of a Claim to Arbitration)

2. Article 10.16.1 provides in relevant part (emphases added):

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> a. the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> b. 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 [a relevant obligation] and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach[.]

3. As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), to submit a claim to arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach.[2] As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party "*has* breached" a relevant obligation, and also "*has* incurred loss or damage

by reason of, or arising out of" (*i.e.*, caused by) that breach. (Emphasis added). Thus, there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach. The breach and loss must have already occurred prior to the submission of a claim to arbitration. No claim based solely on speculation as to future breaches or future loss may be submitted.

4. Moreover, if the measures of which an investor complains have not yet been applied to it, the claim is not ripe and may not be brought.[3] Article 10.16.1 does not embrace hypothetical claims – *e.g.*, that a loss may be incurred in the future if circumstances ripen into an actual breach of an obligation under the Agreement. The issue of ripeness therefore turns on the determination of whether the challenged measure had harmed claimant "by the time [c]laimant submitted its claim to arbitration."

Claims Based on Judicial or Administrative Adjudicatory Proceedings

5. It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. As such, non-final judicial acts cannot be the basis for claims under Chapter Ten of the U.S.-Colombia TPA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court (or administrative tribunal) that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.

Notice of Intent

6. 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.-Colombia 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."

7. Pursuant to Article 10.17, the Parties to the U.S.-Colombia TPA did not provide unconditional consent to arbitration under any and all circumstances. Rather, the Parties have only consented to arbitrate investor-State disputes under Chapter 10, Section B where an investor submits a "claim to arbitration under this Section in accordance with this Agreement."

8. Article 10.16 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly. 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')." (Emphasis added). Article 10.16.2 further provides that this notice "*shall specify*":

> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
> (c) the legal and factual basis for each claim; and

> (d) the relief sought and the approximate amount of damages claimed.

(Emphasis added)

9. A disputing investor that does not deliver a Notice of Intent at least 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.

10. 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. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 of the NAFTA (the NAFTA's counterpart to Article 10.16's Notice of Intent requirement) "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim[.]"

11. 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. Rather, satisfaction of the requirements of Article 10.16.2 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by at least 90 days in order to engage respondent's consent to arbitrate.

* * * *

Angel Samuel Seda

Article 10.20.2 of the U.S.-Colombia TPA authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. On May 3, 2022, the United States made an oral submission in *Angel Samuel Seda and others v. the Republic of Colombia*. ICSID Case No. ARB/19/6. The oral submission follows. See *Digest 2021* at 464-67 for a discussion of the February 26, 2021 written submission of the United States.

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* * * *

Good morning, Mr. President, Members of the Tribunal. Thank you for giving us this opportunity.

Pursuant to Article 10.20.2 of the United States-Colombia Trade Promotion Agreement, or the TPA, I will make a brief submission on behalf of the United States, addressing four questions of treaty interpretation arising out of the Claimants' Reply on Jurisdiction and Merits dated September 19th, 2021, and the Respondent's Rejoinder on Jurisdiction and Merits dated February 17th, 2022. As is always the case with our Non-Disputing Party submissions, the United States does not take a position here on how the interpretations offered apply to the facts of the case, and no inference should be drawn from the absence of comment on an issue not addressed.

First, I will address the authority of Non-Disputing Party submissions under Article 10.20.2 in interpreting the TPA.

Second, I will address the essential security interests exception in Article 22.2(b).

And third, I will expand on two points related to claims for indirect expropriation under Article 10.7.

And finally, I will comment on claims based on judicial or administrative adjudicatory proceedings in the context of the submission of a claim under Article 10.16.

I would like to begin my remarks by addressing the weight due to the views of the United States on matters addressed in a Non-Disputing Party submission under Article 10.20.2. State Parties are well-placed to provide authentic interpretations of their treaties, including in proceedings before Investor-State tribunals like this one. Article 10.20.2 ensures that the Non-Disputing Party to a dispute under the U.S.-Colombia TPA can provide its views on the correct interpretation of the TPA. The TPA Parties consider Non-Disputing Party submissions to be an important tool in this respect, and the United States consistently includes Non-Disputing Party provisions in its investment agreements to reinforce the importance of these submissions in the interpretation of the provisions of these agreements, and the United States routinely makes these Non-Disputing Party submissions.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role the State Parties play in the interpretation of their agreements. And although the United States is not a party to the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation. Article 31, Paragraph 3 states that, in interpreting a treaty, and I quote, "there shall be taken into account, together with the context (a) any subsequent agreement between the Parties regarding the interpretation of the Treaty or 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."

So, Article 31 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.

First, where the submissions of the TPA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take the subsequent agreement into account.

And second, the TPA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). Any suggestion that Non-Disputing Party submissions are not entitled to deference because they are made in the course of the Arbitration should be rejected. The TPA Parties expressly included the mechanism to provide interpretations of treaty provisions to Investor-State tribunals in the course of an arbitration for a reason. Indeed, the International Law Commission has commented that subsequent practice may include statements in the course of a legal dispute. Accordingly, where the TPA Parties' submissions in an

arbitration evidence their common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

Additionally, in support of this general position, we note that investment tribunals constituted under the NAFTA have considered this issue and 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--observe, and I quote, "the subsequent practice of the Parties to a treaty, if it establishes the agreement of Parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight." And, I'm quoting from Paragraph 158 of the Mobil v. Canada Decision on Jurisdiction and Admissibility dated July 13th, 2018, and I would point you also to Paragraphs 103, 104, and 158 to 160 for context. The Tribunal in Canadian Cattlemen for Fair Trade reached a similar conclusion at Paragraphs 188 to 189 of its Award on Jurisdiction, dated January 28th, 2008.

I would note also, in response to comments on this issue, that TPA Article 10.22.3 which concerns interpretations by the Free Trade Commission, and Article 10.20.2 which concerns Non-Disputing Party submissions, merely establish separate mechanisms for the Parties to provide interpretations of their Treaty. Nothing in the TPA text suggests that, in granting the Free Trade Commission the ability to issue binding, authoritative interpretations of the TPA, the Parties intended to preclude themselves from issuing non-binding but nevertheless authentic means of interpretation of TPA provisions through their submissions to investor-State tribunals or to preclude a tribunal from giving such submissions the weight to which they would otherwise would be entitled.

So, to sum up this point, whether this Tribunal considers the interpretations presented by the TPA Parties as a subsequent agreement under Article 31(3)(a), a subsequent practice under Article 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the TPA Party's common understanding of the provisions of their Treaty into account.

Second, I would like to address the essential security interest exception in Article 22.2(b). The language of the Article 22.2(b) is clear, that the exception is self-judging. Article 22.2(b) states, and I quote, "nothing in this Agreement shall be construed to preclude a party from applying measures that it considers necessary for the protection of its own essential security interests."

The ordinary meaning of the word "considers" is to come to judge or classify. Under Article 22.2(b), what must be considered or judged or classified is whether the relevant measure is necessary to protect the State's essential security interests. That this determination is made solely by the State Party itself is plain by the use of the word "it" preceding "considers." Thus, the ordinary meaning of the phrase "it considers" is that the exception is for the Party itself to determine--or in other words, that the exception is self-judging.

That Article 22.2(b) is self-judging accord with the long-standing U.S. position that similarly worded essential security interests exceptions in U.S. agreements are to be read as self-judging. Indeed, Footnote 2 clarifies that, and I quote, "If a party invokes Article 22.2 in an arbitral proceeding initiated under Chapter 10 or Chapter 21, the Tribunal or panel hearing the matter shall find that the exception applies."

In other words, once a State Party to the TPA raises the exception, its invocation is non-justiciable, and a Chapter 10 Tribunal must find that the exception applies to the dispute before it.

Further, Footnote 2 to Article 22.2(b) is prefaced with the phrase "for greater certainty," which in U.S. practice confirms that the self-judging nature and non-justiciability of the essential security interests exception is inherent in the language of the exception itself. As a general practice, the United States uses the words "for greater certainty" in its International Trade and Investment Agreements to introduce confirmation regarding the meaning of the Agreement. In other words, the phrase "for greater certainty" signals that the text it introduces reflects the understanding of the United States and the other Treaty Party or Parties of what the provisions of the Agreement would mean, even if the text following the phrase were absent. As a consequence, "for greater certainty" sentences also serve to spell out more explicitly the proper interpretation or similar provisions, mutatis mutandis, "in other agreements." By explaining that "for greater certainty" a tribunal shall find that the essential security interests exception applies where a party has invoked it, the United States signaled its understanding that this is what the essential security interest exception has always required, including in agreements where that "for greater certainty" language is absent.

The United States previously explained the use and significance of the "for greater certainty" phrase in other Non-Disputing Party submissions, both written and oral, including in the Alicia Grace and others v. Mexico Case, the Legacy Vulcan v. Mexico Case, Omega v Panamá Case, and Carrizosa v. Colombia Case. We would be happy to provide those to the Tribunal, if that would be helpful.

Finally on this point, I would like to address an argument we heard from Claimants yesterday that Article 22.2(b) merely allows a State to apply, or continue to apply, measures that it considers necessary for the protection of its own essential security interests, but that Article 22.2(b) does not address the question of liability or compensation. The United States disagrees. Once the essential security interest exception is invoked, a tribunal may not, thereafter, find the relevant measure in breach of the Chapter 10 obligation and may not, consequently, order the payment of any compensation in connection with that measure.

Mr. President, Members of the Tribunal, turning to my third topic, I would like to expand on two points that the United States made in its written submission on claims for indirect expropriation under Article 10.7.

First, is that in the context of an expropriation claim, a substantive element of that claim is that there must exist a permanent deprivation of the relevant investment. For example, the United States agrees with the holding of the oft-cited Burlington Resources v. Ecuador Tribunal that "a state measure constitutes expropriation under the Treaty if (1) the Measure deprives the Investor of his investment; (2) the deprivation is permanent, and (3) the deprivation finds no justification under the Police Powers Doctrine."

Conversely, it is well-established that a temporary reversible measure leading to an ephemeral deprivation does not result in an expropriation. For example, in Fireman's Fund Insurance Company v. Mexico, the Tribunal held that one of the elements of an expropriation is that "the taking must be permanent and not ephemeral or temporary." Therefore, a non-binding final determination or a ruling that is subject to challenge cannot cause the kind of permanent and irreversible deprivation that is required as a substantive element of expropriation.

Second, as we noted in our written submission, under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. The Disputing Parties accept this principle, also commonly called the "Police Powers Doctrine." As this is a doctrine recognized by customary international law, any additional elements of the doctrine would have to be established by reference to both State practice and opinio juris.

However, while the United States accepts that State practice demonstrates that the Police Powers Doctrine under customary international law is subject to non-discrimination and bona fide limbs, State practice does not support a further requirement of proportionality, as, for example, between the policy aim and the regulatory measure taken.

There is no evidence of the kind of widespread consistent State practice necessary to conclude that proportionality has crystallized into a component of the Police Powers Doctrine. As reflected in our written submission and in the 2004 and 2012 U.S. Model BITs, the long-standing U.S. formulation of the test does not include proportionality. And I quote: "Under international law, where an action is a bona fide, non-discriminatory regulation, it will not ordinarily be deemed expropriatory." The restatement third of foreign relations of the United States's discussion of the Police Powers Doctrine similarly makes no reference to proportionality.

So, in sum, there is no widespread consistent State practice that would be necessary to conclude that proportionality has crystallized as a component of the Police Powers Doctrine under customary international law.

Finally, I would like to address claims based on judicial or administrative adjudicatory proceedings in context of submission of a claim under Article 10.16. It is well-established that the International Responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. As the Tribunal in Apotex Inc. v the United States of America held in its Award on jurisdiction and admissibility, and I quote, "a claimant cannot raise a claim that a judicial act constitutes a breach of international law without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself." As such, non-final judicial acts cannot be the basis for claims under Chapter 10 of the U.S.-Colombia TPA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court (or an administrative tribunal) that remains subject to appeal has not ripened into the type of Final Act that is sufficiently definite to implicate State Responsibility, unless such recourse is obviously futile or manifestly ineffective. Thus, absent finality, no claim based on judicial or administrative adjudicatory proceedings may be submitted under Article 10.16 unless further recourse is obviously futile or manifestly ineffective.

In concluding, I would just emphasize that the United States stands by the interpretations set forth in our written submission, although we did not address all of those issues today.

Mr. President, Members of the Tribunal, with that final observation, I will close my remarks. I thank the Tribunal for this opportunity to present the views of the United States on these important interpretive issues.

* * * *

Neustar v. Colombia

Article 10.20.2 of the U.S.-Colombia TPA authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. On May 13, 2022, the United States made a written submission in *Neustar, Inc. v. the Republic of Colombia*. ICSID Case No. ARB/20/7. The submission is available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8333/DS18500_En.pdf and excerpted below (with footnotes omitted).

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Article 10.5 (Minimum Standard of Treatment)

24. Article 10.5 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." This provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments." Specifically, "'fair and equitable treatment' 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[.]" And, "'full protection and security' requires each Party to provide the level of police protection required under customary international law."

25. This text demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."

26. Annex 10-A to the U.S.-Colombia TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.

27. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-step approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*, the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.

28. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. "The party which relies on a custom" therefore "must prove that this custom is established in such a manner that it has become binding on the other Party." Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter Eleven, which likewise affixes the standard to customary international law, have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that: the proof of change in a custom is not an easy matter to establish. However, *the burden of doing so falls clearly on Claimant*. If the Claimant does not provide the Tribunal with proof of such evolution,

it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.

29. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule. Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." A failure to satisfy requirements of domestic law does not necessarily violate international law. Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements. . . ." Accordingly, a departure from domestic law does not in-and-of-itself sustain a violation of Article 10.5.

30. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5. Likewise, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.

Fair and Equitable Treatment

31. 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."

32. As discussed below, the concepts of legitimate expectations, transparency, good faith, and non-discrimination are not component elements of "fair and equitable treatment" under customary international law that give rise to independent host State obligations.

Legitimate Expectations

33. The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

Transparency

34. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host State transparency under the minimum standard of treatment.

Good Faith

35. It is well-established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist." As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability. Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.

Non-Discrimination

36. Similarly, the customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife. Accordingly, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject, and not Article 10.5.1.

* * * *

b. U.S.-Peru TPA

Renco v. Peru

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 June 7, 2022, the United States made the following submission to the tribunal in *Renco Group, Inc. v. Peru*, PCA Case No. 2019-46. See also *Digest 2020* at 448-50. The submission is excerpted below (with most footnotes omitted).

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Article 10.1.3 (Non-Retroactivity)

2. Article 10.1.3 states: "[f]or greater certainty, this Chapter does not bind any 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 Agreement."[2] Whereas a host State's conduct prior to the entry into force of an obligation may be relevant to determining whether the State subsequently breached that obligation, under the rule against retroactivity, there must exist "conduct of the State after that date which is itself a breach."[3] To that effect, the *Carrizosa v. Colombia* tribunal recently observed with respect to the identical provision of the U.S.-Colombia TPA, "unless the post-treaty conduct . . . is itself capable of constituting a breach of the [treaty], independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction."[4] This echoes the *Berkowitz v. Costa Rica* tribunal's earlier holding that "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."[5]

* * * *

Article 10.11 (Investment and Environment)

6. Article 10.11 provides:

> 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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[2] The phrase "for greater certainty" signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 115 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 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) ("*Feldman* Interim Decision") ("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.").

[3] *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.").

[4] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award ¶ 153 (Apr. 19, 2021) (finding "no jurisdiction to assess the lawfulness of the [respondent's] pre-treaty conduct, be it under the [treaty] or under any other source, such as customary international law").

[5] *Spence Int'l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 217 (May 30, 2017) ("*Berkowitz* Interim Award").

7. Article 10.11 informs the interpretation of other provisions of Chapter 10, including Articles 10.5 and 10.7, and provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is undertaken in a manner sensitive to environmental concerns.[10] Chapter 10 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.

Article 10.5 (Minimum Standard of Treatment)

8. Article 10.5.1 provides that "[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[11] "[F]or greater certainty," this provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments."[12] Specifically, "'fair and equitable treatment' 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."[13]

9. The above provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[14]

Methodology for determining the content of customary international law

10. Annex 10-A to the Agreement addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 has crystalized. The Annex expresses the Parties' "shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation." Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.[15]

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[10] *See, e.g.*, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, U.S.-Oman FTA/ICSID Case No. ARB/11/33, Award ¶ 387 (Nov. 3, 2015) (observing that the analogous provision of the U.S.-Oman Free Trade Agreement "provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is undertaken in a manner sensitive to environmental concerns, provided it is not otherwise inconsistent with the express provisions") (internal quotation marks omitted); *see also David R. Aven and others v. The Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/15/3, Final Award ¶ 412 (Sept. 18, 2018).

[11] U.S.-Peru TPA, art. 10.5.1.

[12] *Id.*, art. 10.5.2.

[13] *Id.*, art. 10.5.2(a).

[14] *.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000) ("*S.D. Myers* First Partial Award"); *see also Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) ("*Glamis* Award") ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L PROC. 51, 58 (1939).

[15] *See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, 122 (Feb. 3) ("In particular . . . the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*.") (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3, 44, ¶ 77 (Feb. 20)); *Continental Shelf (Libyan Arab*

11. The International Court of Justice has articulated examples of the types of evidence that can be used to demonstrate, under this two-element approach, that a rule of customary international law exists. In its decision on *Jurisdictional Immunities of the State (Germany v. Italy)*,[16] the ICJ emphasized that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States," and noted as examples of State practice relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[17]

12. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law.[18] The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5 in which "fair and equitable treatment" and "full protection and security" are expressly tied to the customary international law minimum standard of treatment.[19] Thus, arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.[20]

13. Moreover, decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves

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Jamahiriya/Malta), 1985 I.C.J. 13, ¶ 29-30 (June 3) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . .").

[16] *Jurisdictional Immunities of the State*, 2012 I.C.J. at 99.

[17] *Id.* at 122-23 (discussing relevant materials that can serve as evidence of State practice and *opinio juris* in the context of jurisdictional immunity in foreign courts); *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Conclusion 6 ("Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.").

[18] *See Ahmadou Sadia Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 I.C.J. 582, 615, ¶ 90 (May 24) ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.").

[19] U.S.-Peru TPA, art. 10.5.1, 10.5.2 ("[P]aragraph 1 prescribes the customary international law minimum standard of treatment . . . ."); *see also Grand River Enterprises Six Nations Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 176 (Jan. 12, 2011) ("*Grand River* Award") (noting that an obligation under Article 1105 of the NAFTA (which also prescribes the customary international law minimum standard of treatment) "must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law"). While there may be overlap in the substantive protections ensured by the U.S.-Peru TPA and other treaties, a claimant submitting a claim under the U.S.-Peru TPA, in which fair and equitable treatment is defined by the customary international law minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

[20] *See, e.g., Glamis* Award ¶ 608 (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB/(AF)/05/2, Award ¶ 278 (Sept. 18, 2009) ("*Cargill* Award") (noting that arbitral "decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language").

instances of "State practice" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.[21] A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.

14. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[22] "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[23] Tribunals applying the minimum standard of treatment obligation in Article 1105 of NAFTA Chapter 11, which likewise affixes the standard to customary international law,[24] have confirmed that the party seeking to rely on a rule of customary international law must establish its existence. The tribunal in *Cargill, Inc. v. Mexico*, for example, acknowledged that:

> [T]he proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[25]

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[21] *See, e.g., Glamis* Award ¶ 605 ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.") (footnote omitted); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgment, 2018 I.C.J. 507, 559, ¶ 162 (Oct. 1) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.").

[22] *Asylum (Colombia v. Peru),* 1950 I.C.J. 266, 276 (Nov. 20); *see also North Sea Continental Shelf*, 1969 I.CJ. at 43; *Glamis* Award, ¶¶ 601-602 (noting that the claimant bears the burden of establishing a change in customary international law, by showing "(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)") (citations and internal quotation marks omitted).

[23] *Rights of Nationals of the United States of America in Morocco (France v. United States),* 1952 I.C.J. 176, 200 (Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation and internal quotation marks omitted); *Case of the S.S. "Lotus" (France v. Turkey),* 1927 P.C.I.J. (ser. A) No. 10, at 25-26, ¶ 66-67 (Sept. 7) (holding that the claimant had failed to "conclusively prove" the existence of a rule of customary international law).

[24] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, ¶ B.1 (July 31, 2001).

[25] *Cargill* Award ¶ 273. The *ADF*, *Glamis*, and *Methanex* tribunals likewise placed on the claimant the burden of establishing the content of customary international law. *See ADF Group, Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 185 (Jan. 9, 2003) ("*ADF* Award") ("The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts."); *Glamis* Award ¶ 601 (noting "[a]s a threshold issue . . . that it is Claimant's burden to sufficiently" show the content of the customary international law minimum standard of treatment); *Methanex Corp. v. United States of America*, Final Award, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005) (citing *Asylum* for placing burden on claimant to establish the content of customary international law and finding that claimant, which "cited only one case," had not discharged its burden).

15. Once a rule of customary international law has been established, a claimant must then show that the respondent State has engaged in conduct that violates that rule.[26]

Obligations that have crystallized into the minimum standard of treatment

16. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2(a), concerns the obligation to provide "fair and equitable treatment," which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." This obligation is discussed in more detail below.

17. Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, which is also discussed below, and the obligation to provide "full protection and security," which, as expressly stated in Article 10.5.2(b), "requires each Party to provide the level of police protection required under customary international law."

Claims for judicial measures

18. As noted in paragraph 8 above, the obligation to provide "fair and equitable treatment" under Article 10.5.1 includes, for example, the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms to "a reasonable standard of civilized justice" and is fairly administered. "Civilized justice" has been described as requiring "[f]air courts, readily open to aliens, administering justice honestly, impartially, [and] without bias or political control."

19. A denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." More specifically, a denial of justice exists where there is, for example, an "obstruction of access to courts," "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment." Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law. Similarly, neither the evolution nor development of "new" judge-made law that departs from previous jurisprudence within the confines of common law adjudication implicates a denial of justice.

20. The international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater

[26] *Feldman* Award ¶ 177 ("[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.") (citation omitted).

presumption of regularity under international law than are legislative or administrative acts. Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.

21. In this connection, it is well-established that international tribunals, such as U.S.-Peru TPA Chapter 10 tribunals, are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.

22. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter 10 tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.

Obligations that have not crystallized into the minimum standard of treatment

23. As noted, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. In contrast, the concepts of legitimate expectations, consistency, good faith, non-discrimination, transparency, and proportionality are not component elements of "fair and equitable treatment" under customary international law and do not give rise to independent host State obligations.

Legitimate Expectations

24. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.

Consistency

25. The customary international law minimum standard of treatment incorporated in Article 10.5 does not impose an independent obligation on host States to act "consistently." To the contrary, a State retains the general latitude "to adapt to changing economic, political and legal circumstances" through regulatory actions, and under the customary international law minimum standard of treatment, a State's right to regulate is not constrained by an investor's expectations, including a general expectation that governing regulations will remain static.

26. Moreover, inconsistent State action cannot, in and of itself, sustain a violation of Article 10.5. State conduct that exhibits "simple illegality or lack of authority under the domestic law," for example, will be "inconsistent" with conduct that complies with domestic law. Yet, as set out in paragraphs 18-22, a State's failure to satisfy requirements of domestic law does not necessarily violate international law. Rather, "something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements." Furthermore, any such determination "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own

borders." *A fortiori*, State action that is merely "inconsistent" with other State action without also being illegal or without authority under domestic law cannot violate Article 10.5.

Good Faith

27. It is well-established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist." As such, customary international law does not impose a free-standing, substantive obligation of "good faith" that, if breached, can result in State liability. Similarly, a claimant "may not justifiably rely upon the principle of good faith" to support a claim, absent a specific treaty obligation.

Non-Discrimination

28. The customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife. Accordingly, general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter 10 that specifically address that subject, and not Article 10.5.1.

Transparency

29. The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host State transparency under the minimum standard of treatment.

Proportionality

The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States. To the contrary, the minimum standard of treatment affords every State "wide discretion with respect to how it carries out [its] policies by regulation and administrative conduct" and tribunals do "not have an open-ended mandate to second-guess government decision-making."

* * * *

Worth Capital v. Peru

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 December 5, 2022, the United States made a submission to the tribunal in *Worth Capital Holdings 27 LLC v. Peru*, ICSID Case No. ARB/20/51. The submission is excerpted below (with footnotes omitted).

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* * * *

Article 10.1.2 (Attribution)

2. Article 10.1.2 provides that:

> A Party's obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party, such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

3. Pursuant to Article 10.1.2, attribution of conduct of a state enterprise to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the state enterprise are undertaken "when it exercises . . . [the] authority *delegated* to it by" that Party. (Emphasis added.) If the conduct of a state enterprise falls outside the scope of the relevant delegation of authority, such conduct is not the subject of a Party's obligations under Article 10.1.2.

4. A state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, "such as the authority to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges." These examples illustrate circumstances in which a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

Article 10.16 (Submission of a Claim to Arbitration)

5. Article 10.16 provides in relevant part (emphases added):

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> a. the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant <u>has incurred loss or damage by reason of, or arising out of, that breach</u>; and
>
> b. 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 [a relevant obligation] and (ii) that the enterprise <u>has incurred loss or damage by reason of, or arising out of, that breach</u>[.]

6. As the United States has previously explained with respect to substantively identical language in NAFTA Article 1116(1), to submit a claim to arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach. As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party "*has* breached" a relevant obligation, and also once "*the claimant* has incurred loss or damage by reason of, or arising out of" (*i.e.*, caused by) that breach. (Emphasis added.)

7. Article 10.16 does not authorize a claimant to bring a claim on behalf of a different investor who suffered the loss or damage as a result of the alleged breach. Thus, a claimant must be the same investor who sought to make, was making, or made the investment at the time of the alleged breach, and who incurred loss or damage thereby. There is no provision

in Chapter Ten which authorizes a claimant to bring a claim for an alleged breach relating to a different investor.

8. Other provisions in Chapter Ten serve as context for the interpretation of Article 10.16 and further confirm that the claimant must be the same investor that incurred loss or damage by reason of the alleged breach.

9. Article 10.18.2 requires that a claimant submitting a claim to arbitration under Article 10.16 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 any measure alleged to constitute a breach referred to in Article 10.16." 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)."

10. This provision could be rendered meaningless if the claimant 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 10.18.2(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 10.18.2(b).

Article 10.18.1 (Limitations Period)

11. Article 10.18.1 of the U.S.-Peru TPA provides:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

12. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute. As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1, the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

13. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification." An investor *first* acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the analogous limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.

14. Thus, where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series. To allow a claimant to do so would "render the limitations provisions ineffective[.]" An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the State party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

15. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date. Moreover, the term "incur" broadly means "to become liable or subject to." Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.

16. As noted, Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, *or should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the claimant. (Emphasis added.) For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* Tribunal: "a fact is imputed to [*sic*] person if by exercise of reasonable care or diligence, the person would have known of that fact." As that Tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal." Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the analogous limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."

* * * *

C. WORLD TRADE ORGANIZATION

The following discussion of developments in 2022 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 2023 and available at https://ustr.gov/sites/default/files/2023-05/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL.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

European Union – Additional Duties on Certain Products from the United States (DS559)

As discussed in *Digest 2021* at 478-79, 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. In 2021, the United States and EU announced arrangements resolving the matter. In 2022, the United States and EU announced that they were terminating the dispute, as discussed in the Annual Report at page 76:

> On January 17, 2022, the United States and the European Union notified the DSB that they were terminating this dispute before the panel in light of the agreed procedures for arbitration under Article 25 of the DSU. On January 20, 2022, the Chair of the panel informed the DSB that it had ceased all work in these proceedings.
>
> On January 17, 2022, the United States and the European Union notified the DSB that they had agreed, pursuant to Article 25.2 of the DSU, to resort to arbitration on the matter pending before the panel in this dispute. The arbitrator was composed on January 20, 2022 with the same persons who served as members of the Panel. As provided in the Parties' communication of January 17, 2022, the arbitration was suspended.

A related challenge brought by the EU—*Certain Measures on Steel and Aluminum Products* (DS548)—was also terminated.

2. Disputes brought against the United States

a. Countervailing Duty Measures on Certain Products from China (DS437)

As discussed in *Digest 2019* at 398-99, *Digest 2018* at 458, and *Digest 2014* at 475, in 2012 China challenged certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM agreement. Subsequent Panel and Appellate Body proceedings resulted in a determination that certain of Commerce's determinations were inconsistent with the SCM Agreement. The United States undertook to implement certain recommendations in compliance with its WTO obligations, but indicated it would need a reasonable period of time to do so. In 2016, China requested consultations regarding the United States' implementation. A subsequent compliance panel issued its report in 2018. Both the United States and China appealed some of the findings in the compliance panel's report. An arbitration panel held a virtual hearing with the parties in November 2020. In January 2022, the Arbitrator decided that the level of suspension of

concessions or other obligations should be no more than $645.121 million annually. See the Annual Report at page 94.

b. Safeguard Measure on Imports of Large Residential Washers (DS546)

In 2018, Korea requested consultations with the United States concerning definitive safeguard measures imposed by the United States on imports of large residential washers. In 2022, the Panel established for this dispute circulated its report, as discussed in the Annual Report at page 107:[*]

> On February 8, 2022, the panel rejected certain of Korea's claims, including against aspects of the ITC's serious injury investigation, the President's chosen form of the safeguard measure, and whether the United States timely notified key decisional points in the safeguard investigation. However, the panel found certain aspects of the ITC's serious injury determination were WTO-inconsistent. The panel also found that the United States acted inconsistently with the WTO Agreement on Safeguards by not providing Korea with sufficient time to allow for the possibility, through consultations, for meaningful consultations between announcement of the final safeguard measure and the date it took effect.

c. Certain Measures on Steel and Aluminum Products (Norway) (DS552)

In 2018, Norway requested consultations with the United States 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. In 2022, the panel established for this dispute circulated its report, as discussed in the Annual Report at 108:[**]

> The Panel circulated its final report on December 9, 2022. The Panel concluded that the Section 232 measures are inconsistent with Article I of the GATT 1994, because exemptions for certain countries from Section 232 tariffs confer an advantage to products from those countries that has not been accorded immediately and unconditionally to like products from all other Members, and with Article II:1(a) and Article II:1(b) of the GATT 1994 because the Section 232 duties do not accord the treatment provided for in the United States' Schedule. The Panel also concluded that the Section 232 measures were inconsistent with Article XI:1 of the GATT 1994 because by imposing import quotas on steel and aluminum from certain countries, the United States has instituted prohibitions or

[*] Editor's note: On April 28, 2023, the United States and Korea informed the WTO Dispute Settlement Body that they had reached a mutually agreed solution to this dispute.

[**] Editor's note: On January 26, 2023, the United States notified the WTO Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report.

restrictions other than duties, taxes or other charges on the importation of those products of the territory of those members. The Panel rejected the complainant's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards because the measures at issue are not safeguard measures, as they were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, namely Article XXI of the GATT 1994.

The Panel disagreed with the long-standing U.S. interpretation that the essential security exception is self-judging and concluded that the measures at issue were not "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii). Accordingly, the Panel found that the Section 232 measures were not justified under Article XXI(b)(iii) of the GATT 1994. In response to the reports, the United States rejected the Panel's flawed interpretation and conclusions and reiterated that the United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security.

d. Certain Measures on Steel and Aluminum Products (Russia) (DS554)

In 2018, Russia 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. After consultations between Russia and the United States failed to resolve the dispute, Russia requested a panel. The panel was composed in 2019. In 2022, the United States suspended permanent trade relations with Russia, as discussed in the Annual Report at pages 108-09:[***]

> In April 2022, following Russia's premeditated and unprovoked full-scale invasion of Ukraine in violation of international law, the United States suspended permanent normal trade relations with Russia and will continue to partner with other WTO Members to isolate and ostracize Russia in the WTO and other multilateral institutions.

e. Certain Measures on Steel and Aluminum Products (Switzerland) (DS556)

In 2018, Switzerland requested consultations with the United States 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

[***] Editor's note: On June 23, 2023, the panel granted Russia's request—objected to by the United States—that the panel suspend its work pursuant to Article 12.12 of the Dispute Settlement Understanding.

impair U.S. national security. In 2022, the panel established for this dispute circulated its report, as discussed in the Annual Report at 109:[****]

> The Panel circulated its final report on December 9, 2022. The Panel concluded that the Section 232 measures are inconsistent with Article I of the GATT 1994, because exemptions for certain countries from Section 232 tariffs confer an advantage to products from those countries that has not been accorded immediately and unconditionally to like products from all other Members, and with Article II:1(a) and Article II:1(b) of the GATT 1994 because the Section 232 duties do not accord the treatment provided for in the United States' Schedule. The Panel also concluded that the Section 232 measures were inconsistent with Article XI:1 of the GATT 1994 because by imposing import quotas on steel and aluminum from certain countries, the United States has instituted prohibitions or restrictions other than duties, taxes or other charges on the importation of those products of the territory of those members. The Panel rejected the complainant's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards because the measures at issue are not safeguard measures, as they were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, namely Article XXI of the GATT 1994.
>
> The Panel disagreed with the long-standing U.S. interpretation that the essential security exception is self-judging and concluded that the measures at issue were not "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii). Accordingly, the Panel found that the Section 232 measures were not justified under Article XXI(b)(iii) of the GATT 1994. In response to the reports, the United States rejected the Panel's flawed interpretation and conclusions and reiterated that the United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to a wide-range of threats to its security.

f. Anti-Dumping and Countervailing Duties on Ripe Olives from Spain (EU) (DS577)

In 2019, the EU requested consultations with the United States concerning the imposition of countervailing and antidumping duties on ripe olives from Spain, as well as the legislation that was the basis for the imposition of those duties. As discussed in *Digest 2021* at 480, the panel established for this dispute circulated its report in 2021.

[****] Editor's note: On January 26, 2023, the United States notified the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report.

United States efforts to implement the recommendations of the DSB are discussed in the Annual Report at 111:[*****]

> On January 19, 2022, the United States stated that it intended to implement the recommendations of the DSB in this dispute in a manner that respects U.S. WTO obligations, and that it will need a reasonable period of time in which to do so. On July 1, 2022, the United States and the EU informed the DSB that they had agreed that the reasonable period of time to implement the DSB's recommendations and rulings would be 12 months and 25 days, expiring on January 14, 2023. In July 2022, Commerce initiated an administrative proceeding pursuant to Section 129 of the Uruguay Round Agreement Act to reexamine Commerce's original countervailing duty determination.
>
> Commerce issued its preliminary Section 129 determination on September 26, 2022, and its final Section 129 determination on December 20, 2022. In its final Section 129 determination Commerce: (1) reconsidered its specificity analysis of the basic payment scheme (BPS) program and found that the program is de facto specific under Section 771(5A)(D)(iii)(III) of the Tariff Act of 1930, as amended; (2) modified its definition of the "prior stage product" from all raw olives to four biologically distinct table and dual-use olive varietals and found that 55.28 percent of these varietals were processed into table olives; and, (3) revised Aceitunas Guadalquivir S.L.U.'s total subsidy rate from 27.02 percent to 11.63 percent and the all-others rate from 14.97 percent to 11.08 percent.

g. Origin Marking Requirement (DS597)

In 2020, Hong Kong, China requested consultations with the United States regarding certain measures concerning the origin marking requirement applicable to goods produced in Hong Kong, China. In 2022, the panel established for this dispute circulated its report, as discussed in the Annual Report at 112:[******]

> On December 21, 2022, the Panel circulated its report. The Panel found that the marking requirement is inconsistent with Article IX:1 of the GATT 1994 because it accords products of Hong Kong, China, less favorable treatment with respect to marking requirements than the treatment accorded to like products of other countries, and exercised judicial economy with respect to the claims under Article I:1 of the GATT 1994, Article 2(c) and 2(d) of the Agreement on Rules of Origin, and Article 2.1 of the Agreement on Technical Barriers to Trade. The Panel disagreed with the long-standing U.S. interpretation that the essential

[*****] Editor's note: On January 16, 2023, the United States informed the Dispute Settlement Body of its compliance with its recommendations.

[******] Editor's note: On January 26, 2023, the United States notified the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report.

> security exception is self-judging and concluded that the situation with respect to Hong Kong, China is not "an emergency in international relations" within the meaning of Article XXI(b)(iii). The Panel therefore concluded that the measure at issue is not justified under Article XXI(b) of the GATT 1994. In response to the reports, the United States rejected the Panel's flawed interpretation and conclusions and reiterated that the United States has held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement and the WTO has no authority to second-guess the ability of a WTO Member to respond to what it considers a threat to its security.

D. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Africa Growth and Opportunity Act ("AGOA")

On January 1, 2022, the Office of the United States Trade Representative ("USTR") terminated Ethiopia, Guinea, and Mali from the African Growth and Opportunity Act ("AGOA") trade preference program, consistent with President Biden's November 2, 2021 notice to Congress. The USTR January 1, 2022 press release follows and is available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/january/us-terminates-agoa-trade-preference-program-ethiopia-mali-and-guinea.

> The United States today terminated Ethiopia, Mali and Guinea from the AGOA trade preference program due to actions taken by each of their governments in violation of the AGOA Statute. The Biden-Harris Administration is deeply concerned by the unconstitutional change in governments in both Guinea and Mali, and by the gross violations of internationally recognized human rights being perpetrated by the Government of Ethiopia and other parties amid the widening conflict in northern Ethiopia. Each country has clear benchmarks for a pathway toward reinstatement and the Administration will work with their governments to achieve that objective.

2. United States-Mexico-Canada Agreement ("USMCA")

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 has initiated thirteen such actions since ratification of the USMCA, including four actions in 2022. See https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/fta-dispute-

settlement/usmca/chapter-31-annex-facility-specific-rapid-response-labor-mechanism.*******

3. U.S.-EU Trade and Technology Council ("TTC")

On May 16, 2022, the U.S.-EU Trade and Technology Council ("TTC") released a joint statement following the second meeting of the TTC in Paris-Saclay. The statement is available at https://www.commerce.gov/news/press-releases/2022/05/us-eu-joint-statement-trade-and-technology-council and excerpted below.

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* * * *

6. We embrace the vision articulated in the Declaration of the Future of the Internet and intend to translate its principles into practice, including those concerning universal access, human rights, openness, and fair competition. We strongly condemn the Russian government's actions to partially shut down, restrict, or degrade Internet connectivity, to censor content, and to intimidate and arrest independent media. These actions are limiting the ability of people in Russia to access credible and independent information and are undermining the exercise of freedoms of expression, peaceful assembly, and association. Russia has repeatedly used the veil of disinformation to obscure war crimes and other atrocities committed by Russian forces, despite horrifying images and reports of torture, sexual violence, and the execution of Ukrainians. We also believe that it is important to combat Russian disinformation in third countries, including with regard to food security, including with our G7 partners. We plan to continue coordination to protect freedom of expression and the integrity of information and to better understand the information ecosystem to advance these goals.

7. We are convinced that the shared transatlantic, democratic, rights-respecting approach that puts individuals at the center is the best way to address global challenges and opportunities presented by both the digital transformation and the green transition. We seek in the TTC to benefit our citizens, workers, businesses, and consumers by pursuing an open global market based on fair competition and contestable digital markets.

8. We intend to continue to use the TTC to collaborate closely to further our values, foster participation in international standardization organizations for civil society organizations, start-ups, small and medium-sized enterprises, and to protect our joint interests in international standardization activities underpinned by core World Trade Organization ("WTO") principles. We also intend to engage in relevant international organizations and use other tools at our disposal to protect our interests.

9. We recognize the importance of an open and fair multilateral rules-based system and the need to reform the WTO, including its negotiating, monitoring and dispute settlement function, to build a more durable and viable trading system. We share a desire to work together to ensure

******* Editor's note: The U.S. Government initiated eight actions in 2023, as of August 30. Recent actions reviewed labor rights concerns reported at a Grupo Mexico mine and a Grupo Yazaki Auto Components Factory, as well as an alleged denial of workers' rights at Mas Air, a Mexican airline.

concrete progress in this regard at the 12th WTO Ministerial Conference. We resolve to take effective action to address trade-distortive non-market policies and practices, including through our trilateral cooperation with Japan, by identifying problems due to non-market policies and practices; identifying gaps in existing enforcement tools and where further work is needed to develop new tools, discussing cooperation in utilizing existing tools, and identifying areas where further work is needed to develop rules to address such practices.

* * * *

On December 5, 2022, the TTC released a joint statement following a third meeting outside Washington, D.C. The joint statement summarizing key outcomes is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/05/u-s-eu-joint-statement-of-the-trade-and-technology-council/.

4. Indo-Pacific Economic Framework

In May 2022, President Biden launched the Indo-Pacific Economic Framework (IPEF) for Prosperity (IPEF) with thirteen partners: Australia, Brunei, Fiji, India, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, and Vietnam. The framework was formed for the purpose of negotiating high-standard commitments under four pillars related to (1) trade; (2) supply chains; (3) clean energy, decarbonization, and infrastructure; and (4) tax and anti-corruption. The May 23, 2022, White House launch statement is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/statement-on-indo-pacific-economic-framework-for-prosperity/, and a fact sheet is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/.

Also on May 23, 2022, the White House hosted an on-the-record press call on the launch of the IPEF, available at https://www.whitehouse.gov/briefing-room/press-briefings/2022/05/23/on-the-record-press-call-on-the-launch-of-the-indo-pacific-economic-framework/. President Biden's remarks at the May 23, 2022 launch event in Tokyo are excerpted below and available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/23/remarks-by-president-biden-at-indo-pacific-economic-framework-for-prosperity-launch-event/.

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And we're here today for one simple purpose: The future of the 21st century economy is going to be largely written in the Indo-Pacific — in our region.

The Indo-Pacific covers half the population of the world and more than 60 percent of the global GDP. And the nations represented here today, and those who will join this framework in the future, are signing up to work toward an economic vision that will deliver for all peoples —

all our peoples: the vision for an Indo-Pacific that is free and open, connected and prosperous, and secure as well as resilient, where our economic — where economic growth is sustainable and is inclusive.

We're writing the new rules for the 21st century economy that are going to help all of our countries' economies grow faster and fairer.

We'll do that by taking on some of the most acute challenges that drag down growth and by maximizing the potential of our strongest growth engines.

Let's start with new rules governing trade in digital goods and services so companies don't have to hand over the proprietary technology to do business in a country.

Let's create a first-of-its-kind supply chain commitments to eliminate bottlenecks in critical supply chains and develop early warning systems so we can identify problems before they occur.

And let's — let's pursue other first-of-its-kind commitments to clean energy and decarbonization.

The climate crisis is an existential threat that is costing us trillions in economic damage, but there's also incredible potential and opportunity to solve problems and create good jobs by transitioning to a clean energy economies.

Let's choke off the loopholes that get at the corruption that steals our public resources. It's — it's estimated that corruption saps between 2 to 5 percent of global GDP. It exacerbates inequality. It hollows out a country's ability to deliver for its citizens.

And tax and trade belongs in the same framework, because if companies aren't paying their fair share, it's harder for governments to pay for Trade Adjustment Assistance or to fund education or health services, or a range of public investments — that make it so hard for families, it feels like they can't raise their children and give them a better life.

That's ultimately my economic policy and — and foreign and domestic — what our foreign and domestic policy is about. And that's what this framework is about as well.

So, starting today with 13 economies — economies that represent diverse sets of perspectives as we work on pursuing our common goals.

That's critical because a key to our success will be the framework's emphasis on high standards and inclusivity. This framework should drive a race to the top among the nations in the Indo-Pacific region.

And I want to be clear that the framework will be open to others who wish to join in the future if they sign up and meet the goals and work to achieve those goals.

I'm glad to have seen so many of you in person this — the past two weeks. At the U.S.-ASEAN Summit, I saw many of you in Washington, and during my travels to Asia. And I'm eager to hear from each of you today.

I thank you for taking the time to be part of this framework launch.

And let me close by saying the United States is deeply invested in the Indo-Pacific. We're committed for the long haul, ready to champion our vision for a positive future for the region together with friends and partners, including the nations in this room and on the screen.

It's a priority in our agenda, and we're going to keep working to make progress with all of you every day so that we can deliver real, concrete benefits for all our people.

That's how I believe we will win the competition of the 21st century together.

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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 congressionally-mandated 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 2022 Special 301 Report in April 2022. The Report is available at https://ustr.gov/issue-areas/intellectual-property/special-301/2022-special-301-review. The 2022 Report lists the following seven countries on the Priority Watch List: Argentina, Chile, China, India, Indonesia, Russia, and Venezuela. Ukraine was placed on the Priority Watch List in 2021. However, due to Russia's invasion of Ukraine in February 2022, the Special 301 review of Ukraine was suspended. See *2022 Special 301 Report* at 39. It lists the following on the Watch List: Algeria, Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala Mexico, Pakistan, Paraguay, Peru, Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam. See *Digest 2007* at 605-11 and the *2022 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 2022, which is available at https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20(final).pdf. The 2022 Notorious Markets List identifies 39 online markets and 33 physical markets that are reported to engage in or facilitate substantial trademark counterfeiting or copyright piracy. This includes continuing to identify the WeChat e-commerce ecosystem as one of the largest platforms for counterfeit goods in China. Also, China-based online markets Aliexpress, Baidu Wangpan, DHGate, Pinduoduo, and Taobao were listed again, as well as seven physical markets located within China that are known for trade in counterfeit and pirated goods. See January 31, 2023 USTR press release, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/ustr-releases-2022-review-notorious-markets-counterfeiting-and-piracy.

2. Investigation of Digital Services Taxes

As discussed in *Digest 2019* at 409, *Digest 2020* at 461, and *Digest 2021* at 486-87, USTR previously investigated digital services taxes ("DST") under consideration by several governments. In 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 Organization for Economic Cooperation and Development ("OECD") /Group of 20 ("G20") Inclusive Framework on Base Erosion and Profit Shifting issued a statement setting forth a two-pillar solution to address tax challenges arising from the digitalization of the world economy.

On November 23, 2022, Rose Marks, U.S. Adviser to the Second Committee, delivered the U.S. explanation of position on a UN General Assembly Second Committee resolution on the promotion of inclusive and effective international tax cooperation. The explanation is available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-the-promotion-of-inclusive-and-effective-international-tax-cooperation/ and excerpted below.

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The United States sincerely thanks the facilitator for his crucial role in bringing this resolution to consensus. We wish to clarify our position on critical issues related to this resolution.

The United States strongly supports the political commitment made by 137 jurisdictions little more than a year ago to reform the international tax architecture and stabilize the international tax system using a two-pillar approach spearheaded by the OECD and outlined in detail in the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy on October 8, 2021. We firmly believe that approach will, if implemented, make the international tax system both fairer and better fit for the 21st century economy. We also reaffirm our 2015 commitment to the Addis Ababa Action Agenda of the Third International Conference on Financing for Development.

The October 2021 OECD/G20 Inclusive Framework's Two-Pillar Solution for resolving the key outstanding questions on international taxation is a once-in-a-generation accomplishment for economic diplomacy. If implemented, it will end the race to the bottom on corporate tax rates and inbound investment incentives being offered by developing countries, level the playing field for business, and improve fairness for workers around the world.

The Two-Pillar Solution on which consensus was reached in October 2021 by 137 jurisdictions collectively representing almost 95 percent of global GDP followed years of detailed and intensive work and negotiations. Those negotiations occurred in an inclusive setting in which jurisdictions around the world provided input. We disagree with the notion implied by this resolution that there is not presently a highly inclusive forum working to strengthen international cooperation on tax.

It is simply not consistent with implementation of the Two-Pillar Solution to decide to begin intergovernmental discussions at the United Nations on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is not the multilateral convention contemplated under Pillar 1 of the Two-Pillar Solution, but instead is developed and agreed upon through a United Nations intergovernmental process. Rather, OP2 proposes a process that will tear down much of the progress that has been made in international tax cooperation since the 2008-2009 financial crisis and will undermine the

Inclusive Framework at the OECD through which so much progress is being made. For that reason, the United States must dissociate itself from OP2.

OP3 similarly undermines our ability to work together constructively to improve international tax cooperation. Calls for a new report by the UNGA Secretary General at this time are inappropriate. Establishing a UN-headquartered, open-ended ad hoc intergovernmental

committee to recommend new actions before completion of the implementation of the Two-Pillar Solution will undermine efforts both to stabilize the international tax system and help it become fit for purpose for the 21st century.

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F. OTHER ISSUES

1. Committee on Foreign Investment in the United States ("CFIUS")

On September 15, 2022, President Biden issued the new Executive Order (E.O.) 14083, "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States." 87 Fed. Reg. 57,369 (Sept. 2015, 2022). E.O. 14083 is the "first-ever presidential directive defining additional national security factors for CFIUS [Committee on Foreign Investment in the United States] to consider in evaluating transactions." The additional factors are aggregate industry investment trends, cybersecurity, and sensitive data. See September 15, 2022 White House fact sheet, available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/. Section one of E.O. 14083 is excerpted below and available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/.

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Section 1. Policy. The United States welcomes and supports foreign investment, consistent with the protection of national security. The United States commitment to open investment is a cornerstone of our economic policy and provides the United States with substantial economic benefits, including "the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security," as the Congress recognized in section 1702(b)(1) of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Subtitle A of Title XVII of Public Law 115-232). Some investments in the United States by foreign persons, however, present risks to the national security of the United States, and it is for this reason that the United States maintains a robust foreign investment review process focused on identifying and addressing such risks.

It is important to ensure that the foreign investment review process remains responsive to an evolving national security landscape and the nature of the investments that pose related risks to national security, as the Congress recognized in section 1702(b)(4) of FIRRMA. One factor for the Committee on Foreign Investment in the United States (Committee) to consider, as the Congress highlighted in section 1702(c)(1) of FIRRMA, is that national security risks may arise

from foreign investments involving "a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security." Along these lines, I previously underscored in Executive Order 14034 of June 9, 2021 (Protecting Americans' Sensitive Data From Foreign Adversaries), and emphasize in this order the risks presented by foreign adversaries' access to data of United States persons. With respect to investments directly or indirectly involving foreign adversaries or other countries of special concern, what may otherwise appear to be an economic transaction undertaken for commercial purposes may actually present an unacceptable risk to United States national security due to the legal environment, intentions, or capabilities of the foreign person, including foreign governments, involved in the transaction. It is the policy of the United States Government to continue to respond to these risks as they evolve, including through a robust review of foreign investments in United States businesses.

In light of these risks, this order provides direction to the Committee to ensure that, in reviewing transactions within its jurisdiction (covered transactions), the Committee's review remains responsive to evolving national security risks, including by elaborating and expanding on the factors identified in subsections (f)(1)-(10) of section 721. This order shall be implemented consistent with the Committee's statutory mandate to determine the effects of each covered transaction reviewed by the Committee on the national security of the United States.

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2. Global Minimum Tax

On December 16, 2022, Secretary of Treasury Janet L. Yellen issued a statement on the December 2022 European Union directive implementing a global minimum tax. The statement is available at https://home.treasury.gov/news/press-releases/jy1170 and excerpted below.

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I welcome the decision by all 27 member states of the European Union to adopt a Directive implementing a global minimum tax on corporations. This momentous act means that the OECD/G20 Inclusive Framework political agreement on international tax will be implemented by one of the world's leading economic groupings.

The rules we agreed on last year at the OECD/G20 Inclusive Framework will reform the international tax system and make it fit for purpose for the 21st century. The United States led the world in being the first to adopt a minimum tax on the foreign earnings of domestically parented multinational enterprises, and both I and the President remain deeply committed to take the additional steps needed to implement this agreement, too. This historic agreement helps level the playing field for U.S. business while protecting U.S. workers.

Crucially, implementing this international tax deal will change the world's corporate tax system to benefit American workers and middle-class families. In the United States, rather than

being rewarded for moving operations overseas, companies will be incentivized to keep jobs and headquarters at home. And rather than tax havens keeping the profits of U.S. companies, those profits can instead flow back to the United States, allowing us to further invest in our infrastructure, our economy, and our people.

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3. Tax Treaties

On December 7, 2022, the United States and Croatia signed a treaty for the avoidance of double taxation. See December 7, 2022 State Department media note available at https://www.state.gov/united-states-and-croatia-sign-the-treaty-for-the-avoidance-of-double-taxation-in-washington/ and includes the following:

> A long-term and shared goal for the two countries, this treaty, subject to advice and consent to ratification by the U.S. Senate and by the Croatian Parliament, will help both Americans and Croatians avoid double taxation. Avoiding double taxation will enable Croatian firms to engage in the U.S. market more fluidly, enhancing U.S.-Croatia economic cooperation and bolstering private-sector innovation between the countries.

See also, December 7, 2022 Treasury Department press release summarizing key aspects of the treaty, available at https://home.treasury.gov/news/press-releases/jy1148. The State Department issued a fact sheet on December 13, 2022 available at https://www.state.gov/u-s-croatia-treaty-for-the-avoidance-of-double-taxation/. The agreement is available at https://home.treasury.gov/system/files/131/Treaty-Croatia-12-7-2022.pdf.

4. Ensuring Responsible Development of Digital Assets

On March 9, 2022, President Biden issued the new E.O. 14067, "Ensuring Responsible Development of Digital Assets." 87 Fed. Reg. 14,143 (Mar. 14, 2022). Secretary Blinken's March 9, 2022 press statement is available at https://www.state.gov/ensuring-the-responsible-development-of-digital-assets/. The White House issued a fact sheet on September 16, 2022, which is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets/. Section one of E.O. 14067 follows.

> Section 1. Policy. Advances in digital and distributed ledger technology for financial services have led to dramatic growth in markets for digital assets, with profound implications for the protection of consumers, investors, and businesses, including data privacy and security; financial stability and systemic

risk; crime; national security; the ability to exercise human rights; financial inclusion and equity; and energy demand and climate change. In November 2021, non-state issued digital assets reached a combined market capitalization of $3 trillion, up from approximately $14 billion in early November 2016. Monetary authorities globally are also exploring, and in some cases introducing, central bank digital currencies (CBDCs).

While many activities involving digital assets are within the scope of existing domestic laws and regulations, an area where the United States has been a global leader, growing development and adoption of digital assets and related innovations, as well as inconsistent controls to defend against certain key risks, necessitate an evolution and alignment of the United States Government approach to digital assets. The United States has an interest in responsible financial innovation, expanding access to safe and affordable financial services, and reducing the cost of domestic and cross-border funds transfers and payments, including through the continued modernization of public payment systems. We must take strong steps to reduce the risks that digital assets could pose to consumers, investors, and business protections; financial stability and financial system integrity; combating and preventing crime and illicit finance; national security; the ability to exercise human rights; financial inclusion and equity; and climate change and pollution.

5. Data Privacy

On April 28, 2022, the White House hosted a minister-level launch of the Declaration of the Future of the Internet. The Declaration is a political commitment to advance a shared vision for the Internet and digital technologies among the partners. A transcript of an April 28, 2022, Foreign Press Center briefing on the launch is available at https://www.state.gov/briefings-foreign-press-centers/launch-of-the-declaration-for-the-future-of-the-internet. The State Department issued a fact sheet available at https://www.state.gov/declaration-for-the-future-of-the-internet and excerpted below. The Declaration is available at https://www.state.gov/wp-content/uploads/2022/04/Declaration-for-the-Future-for-the-Internet.pdf.

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The Declaration's principles include commitments to:

- Protect human rights and fundamental freedoms of all people;
- Promote a global Internet that advances the free flow of information;
- Advance inclusive and affordable connectivity so that all people can benefit from the digital economy;
- Promote trust in the global digital ecosystem, including through protection of privacy; and

- Protect and strengthen the multi-stakeholder approach to governance that keeps the Internet running for the benefit of all.

In signing this Declaration, the United States and partners will work together to promote this vision and its principles globally, while respecting each other's regulatory autonomy within our own jurisdictions and in accordance with our respective domestic laws and international legal obligations.

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On October 7, 2022, President Biden issued the new E.O. 14086, "Enhancing Safeguards for United States Signals Intelligence Activities," to implement the European Union-U.S. Data Privacy Framework. 87 Fed. Reg. 62,283 (Oct. 14. 2022). The October 7, 2022 White House issued a fact sheet is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/. Section one of E.O. 14086 follows:

> **Section 1**. *Purpose.* The United States collects signals intelligence so that its national security decisionmakers have access to the timely, accurate, and insightful information necessary to advance the national security interests of the United States and to protect its citizens and the citizens of its allies and partners from harm. Signals intelligence capabilities are a major reason we have been able to adapt to a dynamic and challenging security environment, and the United States must preserve and continue to develop robust and technologically advanced signals intelligence capabilities to protect our security and that of our allies and partners. At the same time, the United States recognizes that signals intelligence activities must take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information. Therefore, this order establishes safeguards for such signals intelligence activities.

In October 2022, the White House Office of Science and Technology Policy published a paper entitled "The Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People." The paper is available at https://www.whitehouse.gov/ostp/ai-bill-of-rights/. The Blueprint, which provides guidance on the design, development, and deployment of artificial intelligence and other automated systems so that they protect the rights of the American public, includes a legal disclaimer explaining its relationship to existing law and policy, excerpted below.

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The Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People is a white paper published by the White House Office of Science and Technology Policy. It is intended to support the development of policies and practices that protect civil rights and promote democratic values in the building, deployment, and governance of automated systems.

The *Blueprint for an AI Bill of Rights* is non-binding and does not constitute U.S. government policy. It does not supersede, modify, or direct an interpretation of any existing statute, regulation, policy, or international instrument. It does not constitute binding guidance for the public or Federal agencies and therefore does not require compliance with the principles described herein. It also is not determinative of what the U.S. government's position will be in any international negotiation. Adoption of these principles may not meet the requirements of existing statutes, regulations, policies, or international instruments, or the requirements of the Federal agencies that enforce them. These principles are not intended to, and do not, prohibit or limit any lawful activity of a government agency, including law enforcement, national security, or intelligence activities.

The appropriate application of the principles set forth in this white paper depends significantly on the context in which automated systems are being utilized. In some circumstances, application of these principles in whole or in part may not be appropriate given the intended use of automated systems to achieve government agency missions. Future sector-specific guidance will likely be necessary and important for guiding the use of automated systems in certain settings such as AI systems used as part of school building security or automated health diagnostic systems.

The *Blueprint for an AI Bill of Rights* recognizes that law enforcement activities require a balancing of equities, for example, between the protection of sensitive law enforcement information and the principle of notice; as such, notice may not be appropriate, or may need to be adjusted to protect sources, methods, and other law enforcement equities. Even in contexts where these principles may not apply in whole or in part, federal departments and agencies remain subject to judicial, privacy, and civil liberties oversight as well as existing policies and safeguards that govern automated systems, including, for example, Executive Order 13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government (December 2020).

This white paper recognizes that national security (which includes certain law enforcement and homeland security activities) and defense activities are of increased sensitivity and interest to our nation's adversaries and are often subject to special requirements, such as those governing classified information and other protected data. Such activities require alternative, compatible safeguards through existing policies that govern automated systems and AI, such as the Department of Defense (DOD) AI Ethical Principles and Responsible AI Implementation Pathway and the Intelligence Community (IC) AI Ethics Principles and Framework. The implementation of these policies to national security and defense activities can be informed by the *Blueprint for an AI Bill of Rights* where feasible.

The *Blueprint for an AI Bill of Rights* is not intended to, and does not, create any legal right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does it constitute a waiver of sovereign immunity.

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The OECD adopted a "Declaration on Government Access to Personal Data held by Private Sector Entities" at the OECD Digital Economy Ministerial 2022 held in Gran Canaria, Spain from December 14-15, 2022. The Declaration is available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0487. See also the OECD press release available at https://www.oecd.org/newsroom/landmark-agreement-adopted-on-safeguarding-privacy-in-law-enforcement-and-national-security-data-access.htm.

6. Telecommunications

On September 29, 2022, Secretary Blinken issued a statement on the election of Doreen Bogdan-Martin as Secretary General of the International Telecommunication Union ("ITU"). The statement is excerpted below and available at https://geneva.usmission.gov/2022/09/29/the-election-of-doreen-bogdan-martin-as-new-itu-secretary-general/.

> I congratulate Doreen Bogdan-Martin on her historic election to serve as the next Secretary General of the International Telecommunication Union (ITU). This outcome reflects a broad endorsement by member states of Ms. Bogdan-Martin's vision for universal connectivity, digital empowerment, and leadership at the ITU that is innovative, collaborative, and inclusive. With her election, the ITU itself has become more inclusive and representative, as Ms. Bogdan-Martin is the first woman elected as Secretary-General in the Union's 157-year history.
>
> The United States strongly supports the ITU's vision and looks forward to working with Ms. Bogdan-Martin to close the digital divides, connect the 2.7 billion people who remain without reliable access to the Internet, and chart a course for the ITU that expands cooperation among all relevant stakeholders. That kind of cooperation is the central purpose of the ITU, and it is vital to fostering the connectivity and interoperability of the world's telecommunications networks.
>
> U.S. support for Ms. Bogdan-Martin's campaign reflects a renewed determination by the United States to ensure that international organizations are well-run, responsive to their memberships, and accountable for their performances. We have made clear since the earliest days of the Administration that American leadership in multilateral venues, including the United Nations, is crucial to ensuring the international community is best positioned to address our shared challenges. Today's outcome at the International Telecommunication Union supports that objective.

7. 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.

On April 6, 2022, 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 January 8, 2021, to reflect the addition of the Kyrgyz Republic, Mozambique, and Qatar as Participants. 87 Fed. Reg. 20,028 (Apr. 6, 2022).

On November 10, 2022, the State Department issued a media note on U.S. views on the annual Kimberley Process Plenary, which was held in a hybrid virtual and in-person format in Gaborone, Botswana, from November 1-4, 2022. The media note, available at https://www.state.gov/u-s-views-on-the-2022-kimberley-process-plenary/, is excerpted below.

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The United States was pleased to support Botswana's bid to host the Kimberley Process Permanent Secretariat, which was approved during the 2022 Kimberley Process Plenary meetings. Botswana's legacy of mining good governance makes it a welcome champion for transparency and accountability in the rough diamond trade.

During the Plenary, Russia and Belarus abused the consensus-based rules to block participants from discussing the implications for the Kimberley Process of Russia's war in Ukraine and Russia's diamond production. The United States and like-minded countries urged Kimberley Process participants, first in letters to the Kimberley Process chair and again during Plenary meetings, to include this issue in the agenda. The final Plenary communique formally included these letters criticizing Russia's aggression towards Ukraine and calling for action within the Kimberley Process.

The United States is committed to a responsible, and sustainable diamond industry and is concerned that the Kimberley Process definition of a conflict diamond does not sufficiently address human rights and other important standards. The United States will advocate to expand the definition of a conflict diamond in the Kimberley Process, including during the formal review of the Kimberley Process Certification Scheme in 2023.

The United States remains gravely concerned with the ongoing conflict in the Central African Republic (CAR) and the impact on its rough diamond exports. The CAR is the only country in the world where conflict diamonds, as defined by the Kimberley Process, are produced. The United States remains committed to working with the CAR government and

continues to work tirelessly to balance the need for legitimate exports with the Kimberley Process mandate to prevent conflict diamonds from entering the commercial supply chain.

The United States looks forward to participating in Kimberley Process meetings in 2023 with Zimbabwe as the new chair.

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The Final Communiqué of the 2022 Kimberly Process Plenary is available at https://www.kimberleyprocess.com/en/2022-final-communiqu%C3%A9-gaborone-botswana. The letter from the U.S. to the Chair of the Kimberly Process calling for action on Russia's aggression toward Russia is excerpted below.

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Thank you for serving as Chair of the Kimberley Process (KP) this year. The United States delegation looks forward to traveling to Gaborone for the KP Plenary meeting in November and working constructively.

We are writing to request that the KP plenary agenda include an item examining the implications for the Kimberley Process arising from the Russian Federation's aggression towards Ukraine, with support from Belarus. We believe this is vital to the credibility of the KP and the Kimberley Process Certification Scheme.

This letter reiterates a similar request the United States made in advance of the KP Intersessional meeting in June. Since that time, the United Nations General Assembly passed a resolution condemning Russia's attempted annexation of Ukrainian territory, an effort that underscores how the Kremlin and its supporters are seeking to undermine the legitimate government of another Participant. It is important to note that most KP Participants declined to support Russia's attempt to block this resolution.

The Russian Federation's premeditated, unprovoked and unjustified war against the people and government of a fellow KP Participant cannot be ignored. The KP must assess Russia's compliance with the Kimberley Process Minimum Requirements, including the fundamental requirement that no conflict diamonds be exported from its territory. The KP should also assess the Participant's noncompliance to date with submitting the required KP statistics to the Chair of the Working Group on Statistics in 2022.

Based on this context, the KP should also consider the Russian Federation's standing in the Kimberley Process, including whether it should retain its position as Chair of two Working Groups. Even if the KP does not reach consensus on the question of whether there are conflict diamonds in Russia, we believe that neither Russia nor its supporters should hold positions of responsibility within the KP due to the ongoing aggression towards Ukraine. We are also opposed to Belarus serving as vice-chair of the KP in 2023.

The United States remains committed to the Kimberley Process. We wish to safeguard its credibility and legitimacy, and we respectfully reiterate our request that KP participants and observers be able to examine these fundamental and existential issues during the Plenary meetings in Gaborone.

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b. Minerals Security Partnership

On June 14, 2022, the United States announced the establishment of the Minerals Security Partnership ("MSP"), "an ambitious new initiative to bolster critical mineral supply chains." The State Department media note announcing the MSP is available at https://www.state.gov/minerals-security-partnership-june-14-2022/ and includes the following:

> The goal of the MSP is to ensure that critical minerals are produced, processed, and recycled in a manner that supports the ability of countries to realize the full economic development benefit of their geological endowments. Demand for critical minerals, which are essential for clean energy and other technologies, is projected to expand significantly in the coming decades. The MSP will help catalyze investment from governments and the private sector for strategic opportunities —across the full value chain —that adhere to the highest environmental, social, and governance standards.
>
> MSP partners – including Australia, Canada, Finland, France, Germany, Japan, the Republic of Korea, Sweden, the United Kingdom, the United States, and the European Commission – are committed to building robust, responsible critical mineral supply chains to support economic prosperity and climate objectives.

The U.S. convened MSP partners and key-mineral rich countries on the margins of the United Nations General Assembly High-Level Week to "discuss priorities, challenges, and opportunities in responsible mining, processing, and recycling of critical minerals." See the September 22, 2022 State Department media note, which is available at https://www.state.gov/minerals-security-partnership-convening-supports-robust-supply-chains-for-clean-energy-technologies/, and includes the following:

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First announced in June 2022, the MSP is a new multilateral initiative to bolster critical mineral supply chains essential for the clean energy transition. The MSP aims to ensure that critical minerals are produced, processed, and recycled in a manner that supports countries in realizing the full economic development potential of their mineral resources. The MSP will attract public and private investment, increase transparency, and promote high Environmental, Social, and Governance (ESG) standards throughout critical minerals supply chains.

MSP partners participating in the meeting included: Australia, Canada, Finland, France, Japan, the Republic of Korea, Norway, Sweden, the United Kingdom, the United States, and the European Union. Additional minerals-rich countries in attendance included Argentina, Brazil, the Democratic Republic of the Congo, Mongolia, Mozambique, Namibia, Tanzania, and Zambia.

The MSP is currently considering promising critical minerals projects that could be of interest to one or more MSP partners, promoting innovation, developing a joint approach on ESG standards, and engaging both project operators and minerals-producing countries.

Demand for critical minerals, which are essential for clean energy and other technologies, is projected to expand significantly in the coming decades. Transparent, open, predictable, secure, and sustainable supply chains for critical minerals are vital to deploying these technologies at the speed and scale necessary to combat climate change effectively.

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c. *Business and Human Rights*

See Chapter 6.

8. Afghan Fund

On September 14, 2022, the State Department and the Department of the Treasury issued a joint statement announcing the establishment of a "Fund for the People of Afghanistan" or the "Afghan Fund." The joint statement is excerpted below and available at https://www.state.gov/the-united-states-and-partners-announce-establishment-of-fund-for-the-people-of-afghanistan/.

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The United States, through the Department of the Treasury and the Department of State, and in coordination with international partners including the government of Switzerland and Afghan economic experts, today announced the establishment of a fund to benefit the people of Afghanistan, or the "Afghan Fund."

The United States remains committed to supporting the people of Afghanistan amidst ongoing economic and humanitarian crises. Pursuant to Executive Order (E.O.) 14064, President Biden set a policy of enabling $3.5 billion of Afghan central bank reserves to be used for the benefit of the people of Afghanistan while keeping them out of the hands of the Taliban and other malign actors. The Afghan Fund will protect, preserve, and make targeted disbursements of that $3.5 billion to help provide greater stability to the Afghan economy.

The Taliban are not a part of the Afghan Fund, and robust safeguards have been put in place to prevent the funds from being used for illicit activity. The Afghan Fund will maintain its account with the Bank for International Settlements (BIS) based in Switzerland. The BIS is an international financial organization that provides a range of financial services, including banking services to central banks, monetary authorities and international financial institutions (see www.bis.org). An external auditor will monitor and audit the Afghan Fund as required by Swiss law.

"The people of Afghanistan face humanitarian and economic crises born of decades of conflict, severe drought, COVID-19, and endemic corruption," said Wendy Sherman, United States Deputy Secretary of State. "Today, the United States and its partners take an important, concrete step forward in ensuring that additional resources can be brought to bear to reduce suffering and improve economic stability for the people of Afghanistan while continuing to hold the Taliban accountable."

"The Afghan Fund will help mitigate the economic challenges facing Afghanistan while protecting and preserving $3.5 billion in reserves from Da Afghanistan Bank (DAB), Afghanistan's central bank, for the benefit of the people of Afghanistan," said Wally Adeyemo, United States Deputy Secretary of the Treasury. "The Taliban's repression and economic mismanagement have exacerbated longstanding economic challenges for Afghanistan, including through actions that have diminished the capacity of key Afghan economic institutions and made the return of these funds to Afghanistan untenable. Through this Fund, the United States will work closely with our international partners to facilitate use of these assets to improve the lives of ordinary people in Afghanistan."

"In response to the critical challenges facing the people of Afghanistan, the United States is already the largest donor of humanitarian assistance," Sherman also noted. "We have worked with the World Bank and Asian Development Bank to make available more than $1 billion in assistance for basic services and other urgent needs, in addition to providing over $814 million in U.S. humanitarian aid directly to implementing partners to support the Afghan people while preventing funds from benefiting the Taliban. Now, the Afghan Fund will be part of our ongoing diplomatic and humanitarian efforts on behalf of the people of Afghanistan."

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ADDITIONAL BACKGROUND

Central Bank of Afghanistan (DAB)

When the Taliban took over Kabul, Afghanistan's central bank, DAB, lost access to its accounts at financial institutions around the world—not just in the United States—because of the uncertainty regarding who could authorize transactions on DAB's accounts. Since then, the economic situation in Afghanistan has continued to deteriorate due to the Taliban's poor economic management and failure to restore critical capabilities to DAB, such as adequate anti-money laundering and countering terrorist finance (AML/CFT) controls.

To rebuild confidence among the international financial community, DAB must demonstrate that it has the expertise, capacity, and independence to responsibly perform the duties of a central bank. To move toward that goal, DAB must demonstrate that it is free from political interference, has appropriate AML/CFT controls in place, and has undertaken a third-party needs assessment and onboarded a third-party monitor.

The Afghan Fund

The Afghan Fund is incorporated as a Swiss foundation established to protect, preserve, and—on a targeted basis—disburse $3.5 billion for the benefit of the Afghan people. The Afghan Fund can also serve as a vehicle to protect and disburse other Afghan central bank foreign reserves currently held in additional countries. These disbursements are intended to help address the acute effects of Afghanistan's economic and humanitarian crises by supporting Afghanistan's macroeconomic and financial stability.

Location of Assets

The Afghan Fund will maintain its account with the Bank for International Settlements (BIS). The BIS is an established international financial organization that provides a range of financial services, including banking services to central banks, monetary authorities and international financial institutions. See www.bis.org.

The BIS will act as intermediary bank and will not be involved in the governance of the Afghan Fund or perform any related functions such as approving disbursements.

Use of the Funds

In the short-term, the Board of Trustees of the Afghan Fund will have the ability to authorize targeted disbursements to promote monetary and macroeconomic stability and benefit the Afghan people. This could include paying for critical imports like electricity, paying Afghanistan's arrears at international financial institutions to preserve their eligibility for financial support, paying for essential central banking services like SWIFT payments, and others.

In the long-term, the goal is for funds not used for these limited purposes to be preserved to return to DAB. The United States has made clear that we will not support the return of these funds until DAB: (1) Demonstrates its independence from political influence and interference; (2) Demonstrates it has instituted adequate anti-money laundering and countering-the-financing-of-terrorism (AML/CFT) controls; and (3) Completes a third-party needs assessment and onboards a reputable third-party monitor.

Afghan Fund Governance

The Afghan Fund is based in Geneva, Switzerland, and a Board of Trustees oversees the fund. The Board currently consists of two highly qualified Afghan economic experts with relevant macroeconomic and monetary policy experience, a U.S. government representative, and a Swiss government representative. The Afghan Fund has the support of international partners committed to supporting sustainable monetary and macroeconomic stability in Afghanistan. An external auditor will monitor and audit the Afghan Fund as required by Swiss law.

Legal Basis for the Transfer of the Afghan Central Bank's Assets

On February 11, 2022, the President signed E.O. 14064 to help enable certain assets belonging to DAB held in the United States to be used to benefit the Afghan people. Subsequently, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued a license authorizing the transfer of up to $3.5 billion of DAB funds for the benefit of the Afghan people.

Consistent with past practice and following the Taliban takeover, the Department of State certified two individuals pursuant to Section 25B of the Federal Reserve Act as having joint authority to receive, control, or dispose of property from the DAB's account. Those individuals founded the Afghan Fund as a legal entity in Switzerland.

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9. U.S.-Africa Leaders' Summit

The U.S. hosted the U.S.-Africa Leaders' Summit from December 13-15, 2022 in Washington, D.C., during which the Biden-Harris Administration announced a number of new initiatives across several issue areas. See the December 15, 2022 White House press release available at https://www.whitehouse.gov/briefing-room/statements-

releases/2022/12/15/u-s-africa-leaders-summit-strengthening-partnerships-to-meet-shared-priorities/. In the area of trade, investment, and economic growth, the Administration announced the following initiatives:

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- **Supporting African Resilience and Recovery**: President Biden highlighted that his Administration is committed to working closely with Congress to lend up to $21 billion through the International Monetary Fund for low and middle-income countries, which will support African resilience and recovery efforts. The Biden-Harris Administration is also calling for all bilateral and relevant private creditors to provide meaningful debt relief so countries can regain their footing after years of extreme stress.
- **Memorandum of Understanding between the United States Government and the African Continental Free Trade Area (AfCFTA) Secretariat:** The United States Government and the AfCFTA Secretariat signed a Memorandum of Understanding to expand engagement to promote equitable, sustainable, and inclusive trade; boost competitiveness; and attract investment to the continent. Once fully implemented, the Agreement Establishing the African Continental Free Trade Area will create a combined continent-wide market of 1.3 billion people and $3.4 trillion, which would be the fifth-largest economy in the world.
- **The First Regional Multi-Sectoral Millennium Challenge Corporation (MCC) Compacts:** MCC announced its first regional compacts, totaling $504 million, with the Governments of Benin and Niger, with additional contributions of $15 million from Benin and Niger. The compacts support regional economic integration, trade, and cross-border collaboration. Since the start of the Biden-Harris Administration, MCC has also signed agreements with the Governments of The Gambia, Lesotho, and Malawi totaling $675 million. The agency is currently working in 14 African countries with more than $3.0 billion in active compact and threshold programs and approximately $2.5 billion in the pipeline. On Tuesday, MCC announced that The Gambia and Togo are eligible to develop their first compacts, Senegal is eligible to develop a concurrent regional compact, and Mauritania is eligible for a threshold program.
- **U.S. International Development Finance Corporation (DFC)**: DFC announced $369 million in new investments across Africa in food security, renewable energy infrastructure, and health projects, including a $100 million transaction with Mirova SunFunder for the Mirova Gigaton Fund to support clean energy across Africa. DFC has more than $11 billion in commitments across Africa.

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Cross References

Termination of engagement with Russia under the Patent Cooperation Treaty, **Ch. 4.B.2**
Universal Postal Union, **Ch. 4.B.4**
HRC on trade, **Ch. 6.A.6**
Business and human rights, **Ch. 6.H**
Da Afghanistan Bank ("DAB") *litigation,* **Ch. 10.A.7.a**
UNCITRAL, **Ch. 15.A**
Saint-Gobain v. Venezuela *(Hague Service Convention),* **Ch. 15.C.1**
ZF Auto. US v. Luxshare, Ltd. and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States *(international arbitration),* **Ch. 15.C.2**
Sanctions relating to investments that finance Chinese military companies, **Ch. 16.A.3.b**
Sanctions relating to Nord Stream 2 pipeline, **Ch. 16.A.4.b**
Belarus sanctions, **Ch. 16.A.5**

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

On December 8, 2022, Monica Medina, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs delivered remarks on the 40th anniversary of the UN Convention on the Law of the Sea. The remarks are available at https://www.state.gov/assistant-secretary-monica-medina-remarks-un-convention-on-the-law-of-the-sea-40th-anniversary/, and follows.

* * * *

Thank you, Mr. President, Mr. Secretary-General, Excellencies, distinguished Delegates.

It is an honor for me to be with you today representing the United States as the host country for this most special occasion.

The Law of the Sea Convention is a monumental achievement in the field of international law. Its tenets are as important today as they have ever been.

The Convention sets forth a comprehensive legal framework governing uses of the ocean. And the institutions it established are functioning as envisioned.

The International Seabed Authority, the Commission on the Limits of the Continental Shelf, and the International Tribunal for the Law of the Sea contribute to the sustainable use of the ocean and its many resources, while helping to maintain international peace and security.

States have cooperated under the convention framework to implement specific Convention provisions through other agreements, including the agreement relating to the implementation of Part XI and the 1995 UN Fish Stocks Agreement.

These are among the convention's important legacies 40 years on. And progress under the Convention's framework continues today.

Delegations are currently negotiating a new international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction – the so-called BBNJ agreement.

This vital new agreement will provide an unprecedented opportunity to coordinate science-based conservation and sustainable use of high seas biodiversity It would provide, for the first time, a coordinated and cross-sectoral approach to establishing high seas marine protected areas, while also protecting high seas freedoms and promoting marine scientific research. And we know protecting these areas is more important now than ever.

We look forward to the successful conclusion of these negotiations in March of next year, when delegations will be celebrating yet another momentous achievement for the international law of the sea.

Among the foundations of the Law of the Sea Convention are the sovereign rights and jurisdiction afforded to coastal states in their maritime zones, including for conserving and managing natural resources.

As greenhouse gas emissions rise, our ocean is becoming warmer, more acidic, and less productive, with a cascade effect on communities and livelihoods around the world.

Among the most devastating impact is sea-level rise, which threatens the very existence of some island nations and the livelihoods of people from coastal states around the world.

The United States recognizes that new trends are developing in the practices and views of states on the need for stable maritime zones in the face of sea-level rise.

The United States is committed to preserving the legitimacy of maritime zones, and associated rights and entitlements, that have been established consistent with international law as reflected in the Convention and that are not subsequently updated despite sea-level rise caused by climate change.

We are confident that this and other challenges to our ocean can and will be addressed peacefully and sustainably on the basis of the convention's framework.

On this occasion marking the 40th anniversary of the Law of the Sea Convention, let me again reiterate the United States' continued view that much of the convention reflects customary international law, and our steadfast commitment to upholding the rights, freedoms, and obligations of all UN member states as reflected in the convention.

Mr. President, in closing, it gives us great pleasure to celebrate this important milestone. This is a time to reflect on the contributions to international peace, security, sustainability, and prosperity memorialized by this landmark convention.

We have a moral obligation to continue to protect the ocean. It is vital to the survival of humans – our children and grandchildren – and all life on our beloved blue planet.

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2. Freedom of Navigation, Overflight, and Maritime Claims

a. Freedom of Navigation

On April 1, 2022, the Department of Defense ("DoD") released the annual freedom of navigation ("FON") report for fiscal year 2021. The press release is available at https://www.defense.gov/News/Releases/Release/Article/2986974/dod-releases-fiscal-year-2021-freedom-of-navigation-report/ and excerpted below. The report is available at https://policy.defense.gov/OUSDP-Offices/FON/.

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Today, the Department of Defense (DoD) released its annual Freedom of Navigation (FON) Report for Fiscal Year 2021. During the period from October 1, 2020, through September 30, 2021, U.S. forces operationally challenged 37 different excessive maritime claims made by 26 different claimants throughout the world.

Excessive maritime claims are inconsistent with international law as reflected in the Law of the Sea Convention. They include a variety of restrictions on the exercise of navigation and overflight rights and other freedoms. Unlawful maritime claims – or incoherent theories of maritime entitlements – pose a threat to the legal foundation of the rules-based international order. If left unchallenged, excessive maritime claims could limit the rights and freedoms enjoyed by every nation.

Upholding freedom of navigation as a principle supports unimpeded lawful commerce and the global mobility of U.S. forces. DoD's freedom of navigation operations (FONOPs) demonstrate that the United States will fly, sail, and operate wherever international law allows.

DoD's regular and routine operational challenges complement diplomatic engagements by the U.S. State Department and supports the longstanding U.S. national interest in freedom of the seas worldwide.

Each year, DoD releases an unclassified summarized FON Report identifying the broad range of excessive maritime claims that are challenged by U.S. forces. It also includes general geographic information to describe the location of FON assertions while still maintaining operational security of U.S. military forces.

As long as restrictions on navigation and overflight rights and freedoms that exceed the authority provided under international law persist, the United States will continue to challenge such unlawful maritime claims.

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.

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b. Russia's intention to restrict navigation in the Black Sea

In 2021, Russia communicated its intention to restrict navigation in parts of the Black Sea. On July 29, 2021, the Russian Ministry of Foreign Affairs issued a note advising that foreign warships and other government vessels must provide notification prior to entering Russia's territorial sea. The United States replied with a diplomatic note we protested such notification requirement as an unlawful restriction on the right of innocent passage and inconsistent with international law. See *Digest 2021* at 501-02 for

the State Department April 19, 2021 press statement.* The U.S. diplomatic note is excerpted below.

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The United States recalls our prior exchanges about the exercise by foreign ships of the right of innocent passage in the territorial sea. Those exchanges reflect our mutual understanding that the relevant rules of international law governing innocent passage in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (the Convention), particularly in Part II, Section 3. These rules reflect that all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

Additionally, Article 19 of the Convention sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship that does not engage in any of those activities is in innocent passage.

A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of its passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

If a warship engages in conduct which renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention. In such case, the warship shall do so immediately.

Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

The United States continues to believe that this mutual understanding most accurately reflects the relevant rules of international law governing the exercise by foreign ships of the right of innocent passage in the territorial sea and firmly rejects coastal State requirements that are inconsistent with these rules. In this regard, the United States does not accept any requirements or practices described in the Ministry's note to the extent that they are inconsistent with the above understanding.

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c. Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports

On April 21, 2022, President Biden issued Proclamation 10371: "Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the

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* Editor's Note: The 2021 State Department diplomatic note replying to Russia, inadvertently omitted from *Digest 2021*, is included here.

Anchorage and Movement of Russian-Affiliated Vessels to United States Ports." 87 Fed. Reg. 24,265 (Apr. 22, 2022). Sections 1 and 2 of the Proclamation are excerpted below.

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* * * *

Section 1. I hereby prohibit Russian-affiliated vessels from entering into United States ports.
Sec. 2. The prohibition of section 1 of this proclamation applies except:

(a) to Russian-affiliated vessels used in the transport of source material, special nuclear material, and nuclear byproduct material for which, and for such time as, the Secretary of Energy, in consultation with the Secretary of State and the Secretary of Commerce, determines that no viable source of supply is available that would not require transport by Russian-affiliated vessels; and

(b) to Russian-affiliated vessels requesting only to enter United States ports due to force majeure, solely to allow seafarers of any nationality to disembark or embark for purposes of conducting crew changes, emergency medical care, or for other humanitarian need.

* * * *

Also on April 21, 2022, President Biden transmitted a letter to the Speaker of the House of Representatives and the President of the Senate on Proclamation 10371. The letter is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/21/letter-to-the-speaker-of-the-house-of-representatives-and-president-of-the-senate-on-the-declaration-of-national-emergency-and-invocation-of-emergency-authority-relating-to-the-regulation-of-the-ancho/?utm_source=link and excerpted below.

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Pursuant to the National Emergencies Act (50 U.S.C. 1601 *et seq*.) and section 1 of title II of Public Law 65-24, ch. 30, June 15, 1917, as amended (Magnuson Act) (*46 U.S.C. 70051),* I hereby report that I have issued a proclamation with respect to the policies and actions of the Government of the Russian Federation to continue the premeditated, unjustified, unprovoked, and brutal war against Ukraine, which constitute a national emergency by reason of a disturbance or threatened disturbance of international relations of the United States.

The proclamation prohibits Russian-affiliated vessels from entering into United States ports with limited exceptions for Russian-affiliated vessels used in the transport of source material, special nuclear material, and nuclear byproduct material for which, and for such time as, the Secretary of Energy, in consultation with the Secretary of State and the Secretary of Commerce, determines that no viable source of supply is available that would not require transport by Russian-affiliated vessels; and for Russian-affiliated vessels requesting only to enter United States ports due to *force majeure*-, solely to allow seafarers of any nationality to disembark or embark for purposes of conducting crew changes, emergency medical care, or for other humanitarian need. The proclamation also authorizes the Secretary of Homeland Security

to make and issue such rules and regulations as the Secretary may find appropriate to regulate the anchorage and movement of Russian-affiliated vessels, and delegates to the Secretary my authority to approve such rules and regulations, as authorized by the Magnuson Act.

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d. South China Sea

On January 12, 2022, the State Department announced in a media note the release of a *Limits in the Seas* study on the People's Republic of China's maritime claims in the South China Sea. The media note is available at https://www.state.gov/study-on-the-peoples-republic-of-chinas-south-china-sea-maritime-claims/ and excerpted below.

> Today, the Department of State released a Limits in the Seas study on the PRC's maritime claims in the South China Sea. The Department's Limits in the Seas studies are a longstanding legal and technical series that examine national maritime claims and boundaries and assess their consistency with international law. This most recent study, the 150th in the Limits in the Seas series, concludes that the PRC asserts unlawful maritime claims in most of the South China Sea, including an unlawful historic rights claim.
>
> This study builds on the Department's 2014 analysis of the PRC's ambiguous "dashed-line" claim in the South China Sea. Since 2014, the PRC has continued to assert claims to a wide swath of the South China Sea as well as to what the PRC has termed "internal waters" and "outlying archipelagos," all of which are inconsistent with international law as reflected in the 1982 Law of the Sea Convention.
>
> With the release of this latest study, the United States calls again on the PRC to conform its maritime claims to international law as reflected in the Law of the Sea Convention, to comply with the decision of the arbitral tribunal in its award of July 12, 2016, in The South China Sea Arbitration, and to cease its unlawful and coercive activities in the South China Sea.

The study, *No. 150*, *People's Republic of China: Maritime Claims in the South China Sea*, is available at https://www.state.gov/limits-in-the-seas/.The Executive Summary of Limits in the Seas No. 150 is excerpted below.

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This study examines the maritime claims of the People's Republic of China (PRC) in the South China Sea. The PRC's expansive maritime claims in the South China Sea are inconsistent with international law as reflected in the 1982 United Nations Convention on the Law of the Sea ("Convention").

The PRC asserts four categories of maritime claims* in the South China Sea:

• **Sovereignty claims over maritime features**. The PRC claims "sovereignty" over more than one hundred features in the South China Sea that are submerged below the sea surface at high tide and are beyond the lawful limits of any State's territorial sea. Such claims are in consistent with international law, under which such features are not subject to a lawful sovereignty claim or capable of generating maritime zones such as a territorial sea.

• **Straight baselines**. The PRC has either drawn, or asserts the right to draw, "straight baselines" that enclose the islands, waters, and submerged features within vast areas of ocean space in the South China Sea. None of the four "island groups" claimed by the PRCin the South China Sea ("Dongsha Qundao," "Xisha Qundao," "Zhongsha Qundao," and "Nansha Qundao") meet the geographic criteria for using straight baselines under the Convention. Additionally, there is no separate body of customary international law that supports the PRC position that it may enclose entire island groups within straight baselines.

• **Maritime zones**. The PRC asserts claims to internal waters, a territorial sea, an exclusive economic zone, and a continental shelf that are based on treating each claimed South China Sea island group "as a whole." This is not permitted by international law. The seaward extent of maritime zones must be measured from lawfully established baselines, which are normally the low-water line along the coast. Within its claimed maritime zones, the PRC also makes numerous jurisdictional claims that are inconsistent with international law.

• **Historic rights**. The PRC asserts that it has "historic rights" in the South China Sea. This claim has no legal basis and is asserted by the PRC without specificity as to the nature or geographic extent of the "historic rights" claimed.

The overall effect of these maritime claims is that the PRC unlawfully claims sovereignty or some form of exclusive jurisdiction over most of the South China Sea. These claims gravely undermine the rule of law in the oceans and numerous universally-recognized provisions of international law reflected in the Convention. For this reason, the United States and numerous other States have rejected these claims in favor of the rules-based international maritime order within the South China Sea and worldwide.

* Islands in the South China Sea over which the PRC claims sovereignty are also claimed by other States. This study examines only the maritime claims asserted by the PRC and does not examine the merits of sovereignty claims to islands in the South China Sea asserted by the PRC or other States. The United States takes no position as to which country has sovereignty over the islands in the South China Sea, which is not a matter governed by the law of the sea.

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On June 17, 2022, the State Department released a statement of support for the Philippines in the South China Sea. The statement is available at https://www.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea/ and follows.

> The United States supports the Philippines in calling on the PRC to end its provocative actions and to respect international law in the South China Sea. We

> share the Philippines' concerns regarding the PRC's provocative actions interfering with Philippine sovereign rights within the Philippine exclusive economic zone near Second Thomas Shoal and massing vessels near Whitsun Reef. These actions are part of a broader trend of PRC provocations against South China Sea claimants and other states lawfully operating in the region.
>
> The United States stands with our ally, the Philippines, in upholding the rules-based international order and freedom of navigation in the South China Sea, as guaranteed under international law.

On January 20, 2022 the USS Benfold 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 Paracel Islands, and also and also by challenging China's claim to straight baselines enclosing the Paracel Islands. (See release available at https://www.cpf.navy.mil/Newsroom/News/Article/2905894/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/.) Additional freedom of navigation operations were conducted in the South China Sea on several other occasions in 2021, including: July 16, 2022 (relating to the Spratly Islands, challenging innocent passage restrictions, see release, available at https://www.cpf.navy.mil/Newsroom/News/Article/3096748/7th-fleet-destroyer-conducts-freedom-of-navigation-operation-in-south-china-sea/); and November 29, 2022 (relating to the Spratly Islands, challenging innocent passage restrictions, see release available at https://www.cpf.navy.mil/Newsroom/News/Article/3233635/7th-fleet-cruiser-conducts-freedom-of-navigation-operation-in-south-china-sea/).

e. Panama's maritime claims

In September 2022, the State Department published a *Limits in the Seas* study *entitled No. 151, Panama: Maritime Claims and Boundaries*, which examined the Republic of Panama's maritime claims from a geographic and legal perspective, including for consistency with the international law of the sea. The study's Conclusion is excerpted below, and the full study is available at https://www.state.gov/limits-in-the-seas/.

> Panama has incorporated the [1982 UN Convention on the Law of the Sea] into its domestic law and established a domestic legal authority to promote compliance with the Convention. In most respects, this approach aligns Panama's maritime claims with the relevant provisions of the Convention. However, Panama's approach to baselines is not fully consistent with the Convention. Panama does not use the normal baseline in any areas along its coasts. Instead, Panama uses straight baselines in all locations, including in coastal areas that do not meet the geographic requirements of Article 7 of the Convention. Panama's baselines along its Pacific coast are particularly excessive

and lie seaward of the closing line claimed by Panama with respect to its historic claim to the Gulf of Panama, which the United States continues to not recognize.

3. Maritime Boundaries

See Chapter 17 for U.S. mediation of the maritime boundary negotiations between the Governments of Israel and Lebanon.

4. Maritime Drug Law Enforcement Act Litigation: *U.S. v. Dávila-Reyes and U.S. v. Reyes Valdiva*

On January 20, 2022, the U.S. Court of Appeals for the First Circuit issued an en banc opinion in the consolidated appeals of *U.S. v. Dávila-Reyes*, No. 16-2089 and *U.S. v. Reyes-Valdivia*, No. 16-2143, related to drug trafficking in violation of the Maritime Drug Law Enforcement Act ("MDLEA"). *United States v. Dávila-Reyes v. Reyes-Valdivia*¸ 23 F.4th 153 (2022). Dávila-Reyes and Reyes-Valdivia were charged with drug trafficking aboard a vessel subject to the jurisdiction of the United States, in violation of the MDLEA. In the district court, Dávila-Reyes and Reyes-Valdivia challenged the constitutionality of the MDLEA, arguing the statute exceeds Congress's authority under the Define and Punish Clause of the Constitution, Art. I, sec. 10, cl. 8. The district court denied the motion, and appellants pleaded guilty. On appeal, the appellants renewed their argument that their prosecution was unlawful because their vessel was not properly deemed stateless. The appellate panel did not reach that question and affirmed appellants' convictions. In March 2021, following the en banc decision in *United States v. Aybar-Ullaa*, 987 F.3d 1 (Jan. 25, 2021), the court granted rehearing en banc to address the appellant's contention that the government improperly deemed their vessel stateless. The en banc court ruled that Congress' definition of a "vessel without nationality" in the Maritime Drug Law Enforcement Act (MDLEA) is unconstitutional under the Constitution's Felonies Clause ("define and punish...felonies committed on the high seas") because the U.S. is extending "jurisdiction beyond the limits of international law and, hence, beyond the authority conferred under the Felonies Clause." 23 F.4th 157-58, 195. On July 5, 2022, the court granted the government's petition for rehearing en banc and withdrew the January 20, 2022, opinion and vacated the judgment. *United States v. Dávila-Reyes v. Reyes-Valdivia*¸ 38 F.4th 288 (2022) Excerpts from the government's supplemental en banc brief follow.

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Under international law, the nationality of a ship reflects the "legal connection between a ship and the flag State." Virginia Commentaries 106. "Whether a ship is entitled to claim attribution to a State is a matter in the first instance for the law of that State to determine." 2 D.P. O'Connell, *The International Law of the Sea* 756 (1984); *see* Sohn, *supra*, at 47. By "grant[ing]

its nationality" to a ship, a state "accept[s] responsibility for it and acquir[es] authority over it." *Lauritzen*, 345 U.S. at 584. It is entirely within the authority of a state to "fix the conditions for the grant of its nationality to ships." UNCLOS art. 91(1). Where no such connection between a vessel and a state exists, it is without nationality, *i.e.*, it is a stateless vessel.

It is consistent with international law for the United States to treat a vessel as stateless in the circumstances covered by § 70502(d)(1)(C)—when the master makes a claim of nationality and the United States provides the claimed state with an opportunity to confirm the nationality or registry of the vessel but the claimed state does not or cannot do so. In those circumstances, the claimed nation has not "accept[ed] responsibility for" the ship, *Lauritzen*, 345 U.S. at 584, and there does not exist a "legal connection between [the] ship and" that nation. Virginia Commentaries 106. To confer its nationality on a vessel, a state must "effectively exercise its jurisdiction and control" over the ship. UNCLOS art. 94(1). A ship possesses the nationality of a state when that state is willing and able to exercise authority over the vessel. *See* Meyers, *supra*, at 241-42, 244, 312, 320. In the circumstances covered by the definition of a "vessel without nationality" in § 70502(d)(1)(C)—when a nation cannot or is not willing to identify a legal connection with a vessel—those conditions are not present.

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B. OUTER SPACE

1. Artemis Accords

As discussed in *Digest 2020* at 492-94 and *Digest 2021* at 523-24, 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/artemis-accords/.

On March 1, 2022, the State Department announced in a media note, available at https://www.state.gov/romania-signs-the-artemis-accords/, that Romania had signed the Artemis Accords. Romania became the 16th nation to sign.

On March 7, 2022, the State Department announced in a media note, available at https://www.state.gov/kingdom-of-bahrain-signs-the-artemis-accords/, that the Kingdom of Bahrain had signed the Artemis Accords. Vice President Kamala Harris welcomed Bahrain's affirmation of the principles espoused in the Artemis Accords at a joint news conference with Crown Prince and Prime Minister Salman bin Hamad Al Khalif, following the U.S.-Bahrain Strategic Dialogue. The readout of Vice President Harris's meeting is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/04/readout-of-vice-president-harriss-meeting-with-crown-prince-salman-bin-hamad-al-khalifa-of-bahrain/.

On March 28, 2022, the State Department announced in a media note, available at https://www.state.gov/republic-of-singapore-signs-the-artemis-accords/, that Singapore had signed the Artemis Accords. The media note includes the following:

> In August 2021, as part of Vice President Kamala Harris's trip to Singapore, the United States and Singapore agreed on the importance of creating a safe and transparent environment that facilitates space exploration, science, and commercial activities for all of humanity to enjoy. Vice President Harris and Singaporean Prime Minister Lee Hsien Loong discussed opportunities to expand bilateral cooperation in the field of space.
>
> Today, as a product of that expanded dialogue and cooperation on space, Minister for Trade and Industry Gan Kim Yong signed the Artemis Accords on behalf of the Republic of Singapore in a ceremony in Washington, DC.

On June 7, 2022, the State Department announced in a media note, available at https://www.state.gov/france-becomes-twentieth-nation-to-sign-the-artemis-accords/, that France had signed the Artemis Accords. France became the 20th nation to sign the Artemis Accords.

On September 19, 2022, the State Department announced in a media note, available at https://www.state.gov/first-meeting-of-artemis-accords-signatories/, that representatives of Artemis Accords signatory nations met in Paris for the first in-person meeting since the launch of the Accords.

On December 13, 2022, the State Department announced in a media note, available at https://www.state.gov/nigeria-and-rwanda-first-african-nations-sign-the-artemis-accords/, that Nigeria and Rwanda signed the Artemis Accords at the first ever U.S.-Africa Space Forum, making them the first African nations to sign.

2. Norms of Responsible Behavior in Outer Space

On April 18, 2022, Vice President Kamala Harris delivered remarks on the Biden administration's ongoing work to establish norms in space and announced that the Biden administration pledged not to conduct destructive anti-satellite missile tests in space. The remarks are available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/18/remarks-by-vice-president-harris-on-the-ongoing-work-to-establish-norms-in-space/. See also White House Fact Sheet: Vice President Harris Advances National Security Norms in Space available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/18/fact-sheet-vice-president-harris-advances-national-security-norms-in-space/.

On September 9, 2022, Vice President Harris announced that the U.S. would introduce a resolution at the United Nations General Assembly to call on other nations to make the commitment not to conduct destructive, direct-assent, anti-satellite missile testing. The remarks are available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/09/remarks-by-vice-president-harris-at-national-space-council-meeting/. See also White House Fact Sheet: Vice President Harris Announces Commitments to Inspire, Prepare, and Employ the Space Workforce available at https://www.whitehouse.gov/briefing-room/statements-

releases/2022/09/09/fact-sheet-vice-president-harris-announces-commitments-to-inspire-prepare-and-employ-the-space-workforce/.

On September 13, 2022, U.S. Assistant Secretary of State for Arms Control, Verification, and Compliance Mallory Stewart presented a proposed resolution on destructive direct-ascent anti-satellite missile ("ASAT") testing to the UN open-ended working group on reducing space threats through norms, rules, and principles of responsible behavior. The statement follows and is available at https://geneva.usmission.gov/2022/09/13/u-s-statement-to-the-open-ended-working-group-on-reducing-space-threats-2/.

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Mr. Chairman, thank you for your leadership. I offer our delegation's deep appreciation and support for your work guiding this important working group. And I thank you for the opportunity to provide remarks on today's topic of Earth-to-space threats. The United States believes that the destructive testing of Earth-to-space anti-satellite missiles is one of the most pressing threats facing satellites, and, perhaps more urgently, one of the more pressing threats to humans in spacecraft in orbit, so we welcome the discussion today.

Continued destructive, direct-ascent anti-satellite missile tests will have a direct impact on all space activities that are essential for the advancement of humanity and to the prosperity of all States. The use of outer space advances our understanding of the Earth, the universe, and humankind; creates jobs and economic opportunity; inspires us; and drives innovation around the world. Information collected from space capabilities also contributes to international peace and security, including by providing data critical to verifying compliance with arms control treaties and by alerting national leaders about evolving threats, such as the buildup of military forces on a country's border. Because of this, access to and use of space is a vital interest of all States.

However, the irrefutable fact is that over the last two decades, we have seen a number of ground-based anti-satellite missile tests destroying satellites on orbit. One recent destructive, direct-ascent anti-satellite missile test created 1,785 pieces of debris that were trackable. It is likely that there were many more pieces created in this test that are too small to be tracked, but still dangerous to satellites.

And, although the risk to satellites is important, it pales in comparison to the ramifications that debris collisions have for human spaceflight. The "envoys of mankind" residing in low-Earth orbit are extremely vulnerable to space debris and must take major precautions to avoid collisions that likely would prove to be fatal. For example, on June 16, 2022, the International Space Station was forced to conduct an unscheduled maneuver to avoid a fragment from a satellite that was destroyed by a direct-ascent anti-satellite missile. The head of the Russian Space Agency (ROSCOSMOS) called the debris from this anti-satellite missile test "dangerous" when he announced that the maneuver had to be conducted.

In response to the testing of these anti-satellite missiles, U.S. Vice President Kamala Harris in April of this year announced that the United States commits not to conduct destructive anti-satellite missile tests. And now, just last week on September 9th, she further announced that the United States intends to submit a resolution to the UN First Committee at the 77th session of the UN General Assembly calling upon all countries to commit not to conduct destructive direct-

ascent anti-satellite missile tests. Such tests, one, increase the risk of miscommunication, misperception, and miscalculation that could potentially lead to conflict; two, are a threat to the long-term sustainability of the outer space environment; and, three, hinder all countries' ability to operate in, and benefit from, outer space. This resolution is our effort to multilateralize this U.S. commitment and contribute to the work we are doing here in this important group.

Paragraph 80 of the Resolutions and Decisions adopted by the General Assembly during its Tenth Special Session devoted to Disarmament (SSOD-1) (1978) states that, "In order to prevent an arms race in outer space, further measures should be taken and appropriate negotiations held in accordance with the spirit of the Outer Space treaty.

In furtherance of that objective, the United States seeks UNGA adoption of a resolution calling upon States to commit not to conduct destructive, direct-ascent anti-satellite missile testing. Destructive testing of these systems is reckless and irresponsible, jeopardizes the long-term sustainability of outer space, and imperils the exploration and use of space by all States.

The draft resolution calls for States to make voluntary commitments to refrain from conducting destructive, direct-ascent anti-satellite missile tests.

The precise language of the voluntary commitment that Operative Paragraph 1 of the draft resolution calls for is intended to meet the following objectives:

Meaningfully limit the deliberate creation of new orbital debris beyond what is generated through normal operations;

Be easily understandable without extensive new definitions; and

Address the greatest near-term threat to space security.

Importantly, the United States believes that the language in the voluntary commitment that this draft resolution calls for meets the criteria for a transparency and confidence-building measure (TCBM) as contained in the report of the 2013 Group of Governmental Experts on TCBMs in Outer Space Activities (A/68/189). Those criteria are that a TCBM must:

Be clear, practical and proven:

Be able to be effectively confirmed:

Reduce or even eliminate the causes of mistrust, misunderstanding and miscalculation:

The language used in this commitment and its goals are clear and proven – limited to destructive tests of direct-ascent anti-satellite missiles, which are the most pressing threat to space security. The text is easily understood and does not require the development of new definitions that have challenged efforts in the past to develop approaches to responding to the development of anti-satellite weapons.

Destructive testing of direct-ascent anti-satellite missiles is likely verifiable by many countries and commercial services, not just by the United States, and without the need for intrusive inspections. Such destructive testing would also likely be attributable.

Ceasing the destructive testing of direct-ascent anti-satellite missiles would reduce tension among countries given the threat these ASAT systems pose, while at the same time reducing the risk to all countries from debris generated by these deliberate tests.

We understand that for some countries this resolution may seem too limited – such countries may worry that the commitment is not contained in a proposed legally binding treaty text. However, we believe this is an important first step we can take right now to rein in the destructive testing of direct-ascent anti-satellite missiles, which have contributed to instability in outer space activities and raised the potential for conflict. We believe that ongoing work collectively in bodies like this one will make progress on developing further solutions to address other challenges resulting from State behavior that threaten the security of space systems.

Moreover, history has shown that first establishing a principle as a norm through a non-binding commitment can eventually lead to its inclusion in future legally binding agreements. In 1963, the UN General Assembly approved without a vote a resolution – A/RES 1884 (XVIII) – which "Solemnly calls upon all States: (a) to refrain from placing in orbit around the earth any objects carrying nuclear weapons…" Only four years later, in 1967, similar language was enshrined in the legally binding Outer Space Treaty.

The United States has long advocated for a comprehensive approach to address issues that could lead to conflict in outer space, including all issues related to the prevention of an arms race in outer space. Often times, we hear a challenging argument that if we are working on norms, then we are not working on arms control. That is incorrect. Norms are elements of risk reduction and risk reduction is an element of arms control.

The United States also recognizes that many countries do not intend to develop direct-ascent anti-satellite missile capabilities. However, the declaratory value of such a resolution is not dependent upon whether a country is developing or has developed such a capability. By making such a commitment and by backing this resolution, supporters contribute their voices to identifying this in the international community as an emerging norm of responsible behavior.

Therefore, the United States believes that this draft resolution on destructive direct-ascent anti-satellite missile tests would enhance international peace and security and is a first step towards preventing conflict from occurring in outer space. We have already heard from a number of countries that wish to join us in making this commitment, and we hope that others will as well.

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The U.S. circulated an aide-memoire on a proposed resolution on ASAT testing to the UN General Assembly. U.S. Mission Geneva released a statement on the aide-memoire, which is available at https://geneva.usmission.gov/2022/09/21/proposed-un-general-assembly-resolution-on-destructive-direct-ascent-anti-satellite-missile-testing/.

At the 77th session of the UN General Assembly in autumn 2022, the United States, along with 51 co-sponsors, proposed what became UNGA Resolution 77/41, in which the General Assembly "call[ed] upon all States to commit not to conduct destructive, direct-ascent anti-satellite missile tests." The resolution was adopted on December 7, 2022, with 155 votes in favor, 9 abstentions, and 9 votes against. U.N. Doc. A/RES/77/41, available at https://www.undocs.org/A/RES/77/41.[**]

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[**] Editor's note: As of September 2023, thirty-five states have made national commitments in line with the resolution.

Cross References

U.S. policy on sea-level rise and maritime zone, **Ch. 13.B.8**
Biological diversity of areas beyond national jurisdiction ("BBNJ"), **Ch. 13.C.4**
Israel-Lebanon maritime boundary dispute, **Ch. 17.A.2**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

1. Climate Change

a. Major Economies Forum

On January 27, 2022, Special Presidential Envoy for Climate John Kerry hosted a virtual Major Economies Forum on Energy and Climate ("MEF") meeting at the ministerial level. A readout of the meeting is available at https://usoecd.usmission.gov/major-economies-forum-on-energy-and-climate-012722/ and includes the following:

> The Forum provided an opportunity for Ministers to reflect on the outcomes of COP26 in Glasgow; set out priorities for COP27 and 2022 more broadly; identify their plans for implementing/enhancing climate action; and explore possible concrete initiatives on which MEF countries might work together to accelerate climate action.
>
> U.S. Secretary of State Antony J. Blinken opened the meeting by noting that Glasgow achieved significant progress and, importantly, that COP26 was not an endpoint but a starting point for accelerated climate action in this critical decade. Moving forward, Secretary Blinken urged an "implementation plus" approach, calling on countries and other actors to implement the goals/commitments they have undertaken, and to pursue significant further efforts to keep within reach a 1.5-degree C limit on temperature rise.

On June 17, 2022, President Biden convened the third leaders-level meeting of the MEF. The Chair's Summary is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/18/chairs-summary-of-the-major-economies-forum-on-energy-and-climate-held-by-president-joe-biden/.

b. Annual UN Climate Change Conference

The 27th UN Climate Change Conference ("COP27") was held in Sharm El-Sheikh, Egypt, November 6-18, 2022. The Conference consisted of meetings of the governing bodies of

the UN Framework Convention on Climate Change, Paris Agreement, and Kyoto Protocol, as well as of their subsidiary bodies. See November 2, 2022, State Department media note, available at https://www.state.gov/u-s-delegation-to-the-2022-un-climate-conference-cop27/.

On November 11, 2022, Secretary Blinken issued a press statement summarizing actions the United States has taken that demonstrate U.S. commitment to climate action at COP27. The statement is available at https://www.state.gov/demonstrating-the-u-s-commitment-to-climate-action-at-cop27/, which is excerpted below.

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At this year's COP, the United States is working with our host, Egypt, and countries around the world to advance climate ambition. We left Glasgow last year having kept alive the goal of limiting the earth temperature increase to 1.5 degrees Celsius, and we secured significant commitments to reduce emissions and enhance resilience, including substantial new efforts to mobilize climate finance.

At COP27, the United States is building on those outcomes to show we are on track to meet our ambitious target. At home, Congress passed the Inflation Reduction Act—the single most consequential piece of climate legislation in U.S. history. The IRA puts the United States on track to achieve President Biden's ambitious target to cut U.S. emissions by 50-52 percent below 2005 levels in 2030 and demonstrates that we will deliver on our climate commitments for years to come.

The United States also ratified the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, joining 139 other nations committed to reducing the consumption and production of hydrofluorocarbons. Global implementation of this amendment could avoid as much as half a degree Celsius of warming by the end of the century.

We also have made massive commitments to helping the world adapt to climate change through the President's Emergency Plan for Adaptation and Resilience (PREPARE), which will help more than half a billion people in developing countries adapt to and manage a changing climate this decade. We are working with partners to get early warning and climate information into people's hands so that they can become more resilient. We are helping countries and communities "climate proof" their infrastructure and their water, health, and food systems. And we are helping people access public and private finance to support these efforts.

The United States is focused on making COP27 responsive to the priorities and needs of the African continent. Seventeen of the world's 20 most climate-vulnerable countries are in Africa. That is why I joined President Biden today, in Sharm El-Sheikh, to announce further **U.S. climate adaptation investments on the continent**, which include doubling our multi-year commitment to the Adaptation Fund, increased investments in early-warning systems, improved access to disaster risk insurance for countries and farmers, and support for African-led capacity development programs to manage climate risks.

These actions demonstrate our commitment to proactive solutions. But the climate crisis cannot be resolved by efforts of the United States alone. We need every nation to implement its current climate commitments and enhance those commitments that are insufficient to avoid the

worst impacts of climate change. We cannot fail in this task. Our children and grandchildren are depending on us.

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President Biden delivered remarks at COP27 on November 14, 2022, which is excerpted below and available at https://geneva.usmission.gov/2022/11/14/president-biden-at-cop27/.

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From my first days in office, my administration has led with a bold agenda to address the climate crisis and increase energy security at home and around the world.

We immediately rejoined the Paris Agreement. We convened major climate summits and reestablished… [the] Major Economies Forum to spur countries around the world to …raise their climate ambitions.

Last year, at COP26 in Glasgow, the United States helped deliver critical commitments that will get two thirds of the world's GDP on track to limit warming to 1.5 degrees Celsius…

Over the past two years, the United States has delivered unprecedented progress at home.

Through a generational investment in upgrading our nation's infrastructure, we're making our power grid better able to transmit clean energy, expanding public ... transit and rail, building a nationwide network of electric vehicle charging stations — over 50,000.

And this summer, the United States Congress passed and I signed into law my proposal for the biggest, most important climate bill in the history of our country — the Inflation Reduction Act.

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At the conclusion of COP27, the conferences of the Parties to the Paris Agreement and the United Nations Framework Convention on Climate Change ("UNFCCC"), including the United States, decided to establish funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage associated with such adverse effects. See https://unfccc.int/documents/624440 for details on the funding arrangements. The closing statement delivered by Special Presidential Envoy for Climate John Kerry on November 20, 2022 is available https://eg.usembassy.gov/u-s-special-presidential-envoy-for-climate-john-kerry-cop27-closing-statement/ and includes the following:

> We are also pleased to join vulnerable countries in one of the major outcomes here in Sharm – a decision to establish funding arrangements related to loss and damage, including a fund as part of what many are calling a "mosaic" of responses.

c. 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 September 17, 2022, the United States ratified the Framework Agreement on the Establishment of the ISA. The agreement entered into force for the United States on October 16, 2022 and is available at https://www.isolaralliance.org/uploads/docs/b5d7ae740aa5b09a63d1be5d3d46f6.pdf.

2. Desertification

On November 21, 2022, Jason Lawrence, U.S. Adviser to the UN General Assembly Economic and Financial Committee, or Second Committee, delivered the U.S. explanation of vote on a Second Committee resolution on combatting sand and dust storms. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-a-second-committee-resolution-on-combating-sand-and-dust-storms/.

> The United States supports the efforts of various organizations to combat sand and dust storms, including the United Nations Convention to Combat Desertification (UNCCD), United Nations Environment Programme (UNEP), and the Global Coalition to Combat Sand and Dust Storms. Sand and dust storms have different causes, in different places, at different times, and thus regional, national, and local efforts are extremely important. We look forward to the UNCCD releasing its toolbox soon.
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> Unfortunately, due to language in the final text that reflects bias against a single UN Member State, the United States must vote against the adoption of this resolution.
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> Regarding references to the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, and the transfer of technology, we refer you to our general statement delivered earlier this afternoon.

On November 22, 2022, Jenni Kennedy, U.S. Adviser to the Second Committee, delivered the U.S. explanation of position on a Second Committee resolution on combatting desertification. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-combating-desertification/.

> The United States supports the UN Convention to Combat Desertification (UNCCD) in its global efforts to reduce land degradation, increase land

restoration, and build resilience to drought. We are working with the UNCCD, allies, and partners to prevent desertification, engage in reforestation, and tackle soil erosion. This includes investment in organizations that deploy technologies to protect natural resources and increase access to the knowledge necessary to protect natural resources. We support land restoration efforts internationally through USAID and through multilateral funds like the Global Environment Facility. Through the President's Emergency Plan for Adaptation and Resilience, PREPARE, the United States aims to help more than half a billion people in developing countries to adapt to and manage the impacts of climate change, including drought, by 2030.

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 21.

3. Ozone Depletion

On September 21, 2022, the U.S. Senate gave advice and consent to U.S. ratification of the Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. The amendment regulates the production and consumption of potent greenhouse gases known as hydrofluorocarbons ("HFCs"), which are alternatives to ozone-depleting substances being phased out under the Montreal Protocol. See *Digest 2021* at 554-55. The amendment is available at https://www.state.gov/wp-content/uploads/2023/04/23-129-Kigali-Amendment-to-the-Montreal-Protocol-on-Depletion-of-the-Ozone.pdf. President Biden issued a statement on U.S. ratification of the Kigali Amendment. The September 21, 2022 statement is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/21/statement-by-president-joe-biden-on-senate-ratification-of-the-kigali-amendment-to-the-montreal-protocol/ and excerpted below. See also September 21, 2022 State Department media note on the ratification available at https://www.state.gov/u-s-ratification-of-the-kigali-amendment/.

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Today, the Senate delivered a historic, bipartisan win for American workers and industry. Ratifying the Kigali Amendment will allow us to lead the clean technology markets of the future, by innovating and manufacturing those technologies here in America. Ratification will spur the growth of manufacturing jobs, strengthen U.S. competitiveness, and advance the global effort to combat the climate crisis.

The Kigali Amendment will phase down global production and consumption of hydrofluorocarbons (HFCs), super-polluting chemicals that are hundreds to thousands of times more powerful than carbon dioxide. American companies are already leading on innovation and manufacturing of HFC alternatives—and today's vote will help our nation unlock an estimated

33,000 new domestic manufacturing jobs, $4.8 billion each year in increased exports, and $12.5 billion each year in increased economic output. This builds on the steps my Administration is already taking to phase down these dangerous super pollutants, with the support of Democrats and Republicans, industry leaders, and environmental organizations.

The United States is back at the table leading the fight against climate change. As more countries join the United States in ratifying this amendment, we can prevent up to half a degree Celsius of warming this century, a significant contribution to fighting climate change and protecting communities from more extreme impacts.

I want to thank Chairman Menendez, Ranking Member Risch, and Senators Carper and Kennedy for their leadership to get this done. I look forward to signing the instrument of ratification for the Kigali Amendment, so that as we continue our domestic manufacturing resurgence, we will deliver economic and environmental progress on the world stage.

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B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Eastern Tropical Pacific Marine Corridor ("CMAR")

On March 22, the United States announced U.S. support for the Eastern Tropical Pacific Marine Corridor ("CMAR") at a high-level dialogue with the Governments of Colombia, Costa Rica, Ecuador, and Panama, in San José, Costa Rica. See the State Department media note available at https://www.state.gov/u-s-government-support-for-the-eastern-tropical-pacific-marine-corridor/ and includes the following.

> The CMAR, announced by the Presidents of Colombia, Costa Rica, Ecuador, and Panama at COP26, is an initiative to link several existing marine protected areas and create an uninterrupted, sustainably managed biological corridor spanning more than 500,000 square kilometers. The CMAR initiative comprises a world-renowned ecosystem and will connect the Cocos, Coiba, Galápagos, Gorgona, and Malpelo Islands in a marine biosphere reserve.
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> The CMAR initiative will contribute to the goal of conserving 30 percent of the global ocean by 2030; preserve migratory routes for sea turtles, whales, sharks, and rays; address ocean ecosystem degradation, overfishing, and illegal, unreported, and unregulated (IUU) fishing; enhance conservation of the marine habitat; and help protect marine biodiversity from the impacts of climate change.

Jose W. Fernandez, Under Secretary for Economic Growth, Energy, and the Environment, and Monica Medina, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, delivered opening remarks at the March 22, 2022 high-level dialogue on the CMAR. The remarks are available at https://www.state.gov/opening-remarks-at-the-high-level-dialogue-on-the-eastern-tropical-pacific-marine-corridor/.

The State Department issued a fact sheet on U.S. government activities in the Eastern Tropical Pacific Seascape on March 22, 2022, which is available at https://www.state.gov/u-s-government-activities-in-the-eastern-tropical-pacific-seascape/. Excerpted below are key U.S. activities in the region.

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- Signed in late 2021, the Partnership for Sustainably Managed Fisheries initiative from the U.S. Agency for International Development (USAID) and the National Oceanic and Atmospheric Administration (NOAA) will help train port authorities and strengthen the ability of Colombia, Ecuador, and Peru to address illegal, unreported, and unregulated (IUU) fishing. NOAA and other federal agencies are also beginning to engage with partners in the region to strengthen sustainable marine protected area management as well as conservation and restoration of blue carbon habitats.
- The U.S. Government has provided Colombia, Ecuador, and Panama with access to SeaVision, a Department of Transportation-led program that enables partner countries to access and share U.S. maritime domain awareness information and collaborate with maritime partners.
- U.S. Southern Command partnered with Florida International University is working with NGO Global Fishing Watch to advance awareness, detection, and deterrence of IUU fishing in the region and to further enable counter IUU fishing efforts through data sharing and subject matter exchanges.
- To operationalize the high seas boarding and inspection procedures from the 1995 United Nations Fish Stocks Agreement in the South Pacific Regional Fisheries Management Organization and to combat IUU fishing in the region, the U.S. Coast Guard (USCG) deployed the Cutter Stone last fall in Colombia, Costa Rica, Ecuador, and Panama, expanding regional interoperability and patrolling sovereign waters to deter illegal fishing.
- The USCG and State Department support Colombia's and Ecuador's Coast Guards with Mobile Training Teams. Mobile Training Teams offer host nations a variety of program specialties including search and rescue, law enforcement, boat operations, outboard motor maintenance, maritime operations and planning, and IUU fishing.
- The Department of Labor awarded a $5 million grant in December 2021 for an International Labour Organization project in Ecuador and Peru to strengthen working conditions and combat IUU fishing in coastal communities.
- In Fiscal Year 2021, the U.S. Customs and Border Protection (CBP) flew 6,590 maritime patrol hours with Colombian, Costa Rican, Ecuadorian, and Panamanian partners. These efforts resulted in the interdiction of approximately 201,450 pounds of cocaine and 49,820 pounds of marijuana.

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On June 7, 2022, the United States, Colombia, Costa Rica, Ecuador, and Panama signed a Memorandum of Understanding in Support of CMAR on the margins of the Summit of the Americas. See the State Department media note available at

https://www.state.gov/the-united-states-colombia-costa-rica-ecuador-and-panama-sign-a-memorandum-of-understanding-in-support-of-the-eastern-tropical-pacific-marine-corridor-cmar/ and includes the following:

> CMAR is a precedent-setting regional ocean conservation effort that spans more than 500,000 square kilometers, covering one of the most highly productive and biologically diverse areas in the ocean. It is also home to the world-renowned Cocos, Coiba, Galápagos, Gorgona, and Malpelo Islands, harbors unique and vulnerable habitats, and supports a rich diversity of flora and fauna. The region is widely recognized as one of the most important areas for the protection, conservation, and management of biodiversity in the Eastern Tropical Pacific Ocean.
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> Through the Memorandum of Understanding, the United States and the CMAR countries will work together to strengthen marine governance, maritime security, and marine conservation finance, contribute to the goal of effectively conserving or protecting at least 30 percent of the global ocean by 2030, and preserve migratory routes for sea turtles, whales, sharks, and rays. The United States and the CMAR countries will also collaborate to address the challenges that threaten CMAR, including illegal, unreported, and unregulated fishing, and to protect marine biodiversity and other ocean resources from the impacts of climate change.

2. Our Ocean Conference Commitments

The United States and the Republic of Palau co-hosted the Our Ocean Conference in Koror from April 13-14, 2022. During the conference the U.S., led by Special Presidential Envoy for Climate John Kerry, announced more than 110 commitments, from 14 agencies and offices, worth nearly $2.64 billion on climate change, sustainable fisheries, sustainable blue economies, marine protected areas, maritime security, and marine pollution. On April 21, 2022, the State Department issued a fact sheet listing the titles of the commitments, which is available at https://www.state.gov/united-states-announces-commitments-at-seventh-our-ocean-conference/. Details on individual commitments are available at https://web.archive.org/web/20230131040315/https://ourocean2022.pw/commitments/. Some of these commitments and key remarks from the Our Ocean Conference are below.

On April 13, 2022, Special Presidential Envoy for Climate Kerry delivered keynote remarks at the Our Ocean Conference. The remarks are available at https://www.state.gov/our-ocean-conference-keynote-remarks-by-special-presidential-envoy-for-climate-john-kerry/. Mr. Kerry's April 14, 2022 closing remarks are excerpted below and available at https://www.state.gov/our-ocean-conference-closing-remarks-by-special-presidential-envoy-for-climate-john-kerry/.

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Our goal this week was to shine a spotlight on what is happening to our ocean – not just talk, but make real commitments to take real actions and make a real difference.

We know the status quo is not good enough. We know we have to do more and do it faster. This week's calling to ROCK THE BOAT implored us all to take action.

I am proud to say: that's what we did.

Together, we realized extraordinary new commitments and ambition across many sectors. That includes commitments not just from countries but also from the private sector and non-governmental organizations – all of which are critical to winning this fight.

These commitments tackled some of the greatest threats to the ocean of our time. They addressed plastic pollution. They addressed illegal, unreported, and unregulated fishing. They addressed the climate crisis. Not just words, but actions.

Actions from Denmark, the United States, and the Marshall Islands, for example, who succeeded in more than doubling the number of signatories to the Declaration on Zero Emission Shipping by 2050. Actions in the form of new plans to develop zero-emission shipping routes in Europe, Latin America, and Asia.

Actions from many nations to commit serious new resources to the fight against IUU fishing, with nearly $250 million pledged via policy, governance, on-the-water assets, technical assistance, and innovative forms of monitoring and traceability. And in the United States, we are bringing together 21 agencies with an integrated, government-wide response to IUU fishing globally under the Maritime Security and Fisheries Enforcement Act.

Actions from the United Kingdom, who increased their target for offshore wind deployment to deliver 50 GW by 2030, with an ambition for 5 GW to be from floating offshore wind. There is more than 11 GW of offshore wind already producing electricity in Great Britain – enough to power nearly 10 million homes, with another 8 GW in construction.

Actions to support the development of upgraded fisheries and aquaculture value chains, with the European Union and the United Kingdom both committing more than $130 million each to domestic improvements, while the UN Food and Agriculture Organization alone is providing $53 million to fund such work with a focus on Small Island Developing States.

The list goes on.

Australia announced $700 million to protect the Great Barrier Reef.

The Green Climate Fund announced an anchor commitment of up to $125 million, to be implemented by Pegasus Capital Advisors, to fight coral reef degradation.

The Republic of Korea announced $100 million per year to address the scourge of plastic pollution.

The United States announced more than $160 million to support coastal resilience through the National Coastal Resilience Fund.

In fact, altogether the United States announced more than 100 commitments, worth more than $2.6 billion, including contributions from at least 13 departments and agencies. Because protecting our ocean is an "all-hands-on-deck" effort.

The message from this week was clear: We recognize the stakes, and we are starting to act with the urgency this moment demands.

We still do have time to avoid the worst consequences of the climate crisis. We can still secure a healthy ocean. We can create millions of jobs and trillion-dollar new industries. And we can still reach a cleaner, safer, less polluted planet for all of us.

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On May 10, 2022, the State Department issued a fact sheet highlighting Indigenous-led initiatives announced at the Our Ocean Conference. The fact sheet is available at https://www.state.gov/united-states-announces-indigenous-led-commitments-at-our-ocean-conference-2022/ and excerpted below.

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- **The United States Announced the Initiation of Three National Marine Sanctuary Designations:** The United States is working with local communities, Indigenous Peoples, and states on the potential designation of three new national marine sanctuaries (NMS), including the proposed Chumash Heritage NMS, the proposed Lake Ontario NMS, as well as providing additional protection to Papahānaumokuākea Marine National Monument by designating it as a national marine sanctuary.
- **The United States Announced the Establishment and Development of the Northern Bering Sea Climate Resilience Area** (NBSCRA)**:** President Biden re-established the NBSCRA on his first day in office. Implementation will proceed on the basis of a unique partnership between the U.S. federal government and Indigenous Peoples of the region through the joint work of the Task Force and Tribal Advisory Council, in recognition of Tribal sovereignty and self-governance, and will include Indigenous Knowledge in decision-making.
- **The United States Announced the Signing of an Indo-Pacific Marine Protected Area (MPA) Partnership with the Republic of Palau:** The United States has signed a Memorandum of Understanding with the Republic of Palau to collaborate on and strengthen the conservation, management, and engagement of marine protected areas in the Pacific Islands Region, establishing a Sister Site Agreement between the National Marine Sanctuary of American Samoa and the Palau National Marine Sanctuary, as well as a framework for broader Indo-Pacific regional cooperation on MPA issues.
- **The United States Announced That It Will Launch a Working Group or Commission to Evaluate Naming Practices for Existing and Future Marine National Monuments and National Marine Sanctuaries:** The United States will launch a working group or commission to evaluate naming practices for existing and future marine national monuments and national marine sanctuaries, with particular emphasis on the Pacific Remote Islands Marine National Monument.

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During the Our Ocean Conference, the United States announced the Ocean Conservation Pledge "to encourage countries to commit to conserve or protect at least 30 percent of ocean waters under their national jurisdiction by 2030." See November

16, 2022 State Department media note available at https://www.state.gov/the-united-states-announces-the-first-cohort-of-countries-to-endorse-the-ocean-conservation-pledge-at-cop27/. At COP27, the U.S. announced the first cohort of countries to endorse the pledge. The November 16, 2022 media note includes the following.

> The pledge is a critical step for conserving or protecting 30 percent of the global ocean by 2030 – with benefits for people, climate, and biodiversity. By mobilizing countries around the world to enhance marine conservation efforts within waters under their jurisdiction we will bolster efforts to successfully achieve the "30×30" target in the global ocean.
>
> Countries endorsing the Ocean Conservation Pledge recognize the importance of ocean stewardship in support of sustainable ocean ecosystems and the communities that depend on them. Growing scientific evidence demonstrates that enhanced ocean conservation can deliver lasting benefits to biodiversity, climate mitigation, coastal resilience, and food security. Endorsing countries affirm their resolve to take ambitious actions within their ocean waters to help avert the biodiversity and climate crises. The pledge recognizes that conservation efforts are most effective when they include and, to the extent possible, are co-developed by relevant stakeholders, particularly Indigenous Peoples and local communities.

3. Illegal, Unreported, and Unregulated Fishing

On June 27, 2022, the President Biden signed a National Security Memorandum ("NSM") on Combating Illegal, Unreported, and Unregulated Fishing ("IUU") and Associated Labor Abuses. The memorandum is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/27/memorandum-on-combating-illegal-unreported-and-unregulated-fishing-and-associated-labor-abuses/ and excerpted below.

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Illegal, unreported, and unregulated (IUU) fishing and related harmful fishing practices are among the greatest threats to ocean health and are significant causes of global overfishing, contributing to the collapse or decline of fisheries that are critical to the economic growth, food systems, and ecosystems of numerous countries around the world. Distant water fishing vessels, which engage in industrial-scale fishing operations on the high seas and in waters under other states' jurisdictions, can be significant perpetrators of IUU fishing and related harmful fishing practices. IUU fishing often involves forced labor, a form of human trafficking, and other crimes and human rights abuses. Left unchecked, IUU fishing and associated labor abuses undermine U.S. economic competitiveness, national security, fishery sustainability, and the livelihoods and human rights of fishers around the world and will exacerbate the environmental and socioeconomic effects of climate change.

Section 1. Policy. It is the policy of my Administration to address the problem of IUU fishing, including by distant water fishing vessels, and associated labor abuses, including the use of forced labor in the seafood supply chain. I hereby direct executive departments and agencies (agencies) to work toward ending forced labor and other crimes or abuses in IUU fishing; promote sustainable use of the oceans in partnership with other nations and the private sector; and advance foreign and trade policies that benefit U.S. seafood workers. No nation, government entity, or non-governmental organization can address IUU fishing and associated labor abuses single-handedly. I therefore direct agencies to increase coordination among themselves and with diverse stakeholders — public and private, foreign and domestic — to address these challenges comprehensively. With this memorandum, I direct agencies to use the full range of existing conservation, labor, trade, economic, diplomatic, law enforcement, and national security authorities to address these challenges. Where applicable, activities will be carried out through or in coordination with the Interagency Working Group on IUU Fishing established pursuant to section 3551 of the Maritime Security and Fisheries Enforcement (SAFE) Act (16 U.S.C. 8031), the Forced Labor Enforcement Task Force established pursuant to section 741 of the United States-Mexico-Canada Agreement Implementation Act (19 U.S.C. 4681), and as appropriate the President's Interagency Task Force to Monitor and Combat Trafficking in Persons established pursuant to section 105 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7103).

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Also on June 27, 2022, the White House issued a fact sheet on the NSM on IUU. The fact sheet is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/27/fact-sheet-president-biden-signs-national-security-memorandum-to-combat-illegal-unreported-and-unregulated-fishing-and-associated-labor-abuses/ and excerpted below.

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The Biden Administration will address IUU fishing by increasing coordination with diverse stakeholders — public and private, foreign and domestic. The United States Government will use the full range of existing conservation, labor, trade, economic, diplomatic, law enforcement, and national security authorities to address these challenges, including:

- Promoting labor rights, human rights, and fundamental freedoms through worker-centered trade policies and working to ensure that supply chains are free from forced labor, including by engaging with international institutions and trade partners to address forced labor and other abusive labor practices in IUU fishing;
- Collaborating within international organizations, including regional bodies, and partnering with stakeholders from governments, civil society, and the private sector, to increase global attention on the challenges of IUU fishing, including by distant water fishing vessels, and related abusive labor practices, such as the use of forced labor in seafood supply chains; and

- Combatting abuses and strengthening incentives for ethical behavior in the global seafood industry, including by limiting the market for products derived from IUU fishing, forced labor, or other abusive labor practices.

The Biden-Harris Administration is also taking the following actions to combat IUU fishing, which will be announced throughout this week's U.N. Ocean Conference.

- The United States, the UK, and Canada will launch an **IUU Fishing Action Alliance** aimed at increasing ambition and momentum in the fight against IUU fishing, including **a pledge to take urgent action** to improve the monitoring, control, and surveillance of fisheries, increase transparency in fishing fleets and in the seafood market, and build new partnerships that will hold bad actors accountable.
- The **U.S. Interagency Working Group on Illegal, Unreported, and Unregulated Fishing**, comprising 21 Federal agencies, will release its *National Five-Year Strategy for Combating Illegal, Unreported, and Unregulated Fishing (2022-2026)* by the end of July. The strategy prioritizes the Working Group's efforts to combat IUU fishing, curtail the global trade of IUU fish and fish products, and promote global maritime security, while working in partnership with other governments and authorities, the seafood industry, academia, and non-governmental stakeholders. The United States will engage with priority partners, including Ecuador, Panama, Senegal, Taiwan, and Vietnam. Information on the member agencies and activities of the Working Group can be found here.
- NOAA will also issue a **proposed rule to enhance and strengthen its ability to address IUU fishing activities and combat forced labor in the seafood supply chain**. Specifically, the rule will enhance NOAA's ability to implement the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the High Seas Driftnet Fishing Moratorium Protection Act. The rule proposes to broaden the scope of activities that NOAA can consider when identifying nations that engage in IUU fishing to include fishing in waters under the jurisdiction of a nation, without the permission of that nation, or in violation of its laws and regulations. This will ensure consistency with the United Nations Food and Agriculture Organization's *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*.

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On June 28, 2022, Monica Medina, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, delivered remarks at the UN Ocean Conference in Lisbon, Portugal on transparency, technology, and IUU fishing and announcing the launch of a new IUU Fishing Action Alliance with Canada and the United Kingdom. The remarks are available at https://www.state.gov/remarks-at-the-un-oceans-conference-side-event-on-transparency-technology-and-iuu-fishing/ and includes the following:

> Through the IUU Fishing Action Alliance, we can pledge to take urgent action to improve the monitoring, control, and surveillance of fisheries, increase transparency in fishing fleets and in the seafood market, and build new partnerships that will close the net on bad actors.

> We call on all nations- those who are able to help take the boats out of the water and those who are being stolen from or need help to better manage fishing- to join. We need you.
>
> We can build upon previous international commitments and agreements to create new networks and avenues for combatting IUU fishing and related maritime security challenges. We can innovate and mobilize new tools in new ways to help us share knowledge and experience.

4. Protecting the Marine Environment

On June 8, 2022, Secretary Blinken issued a press statement on World Ocean Day, summarizing U.S. efforts to protect the marine environment. The statement is available at https://www.state.gov/world-ocean-day/ and included below.

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The health and productivity of our ocean is under threat. Greenhouse gas emissions are making our ocean warmer, higher, more acidic, and less productive. Meanwhile, illegal, unreported, and unregulated (IUU) fishing is threatening fish stocks and marine biodiversity, while plastic pollution is choking our ocean.

The ocean crisis is a climate crisis, and the United States is leading the world in efforts to confront these multifaceted threats. We continue to urge all countries — especially major emitters — whose 2030 Nationally Determined Contribution (NDC) targets are not yet aligned with a 1.5-degree Celsius pathway to increase the ambition of these 2030 targets ahead of COP27. Through President Biden's Emergency Plan for Adaptation and Resilience (PREPARE), we are focused on helping more than 500 million people in developing countries adapt to and manage climate impacts, including ocean-climate impacts. We are also working to leverage the power of ocean-based climate solutions, including green shipping, to help keep the 1.5-degree Celsius target within reach. For example, we are working with countries in the International Maritime Organization to adopt a goal of zero emissions from international shipping no later than 2050 and have announced a Green Shipping Challenge for COP27 to help spur concrete action this decade that will help put the sector on a credible pathway toward full decarbonization.

The United States co-hosted the Our Ocean Conference with Palau in April 2022, when we announced plans totaling nearly $250 million to combat IUU fishing through policy initiatives, strengthened governance, and innovative forms of monitoring and traceability. These measures are designed not only to protect marine biodiversity and fish stocks, but also the coastal communities that depend on them for their livelihoods. We are helping partners and allies implement the Port State Measures Agreement, the first binding international agreement to specifically target IUU fishing.

The United States is also leading the charge to combat the flow of an estimated 8 to 11 million tons of plastic waste into the ocean each year. At the second session of the fifth UN Environment Assembly in Nairobi in March 2022, the United States was proud to join other nations in adopting a resolution launching negotiations on a global agreement on plastic

pollution that would address the full lifecycle of plastics and take an ambitious, innovative, and country-driven approach. Such a global agreement will be a critical step in cleaning up our ocean and has been hailed as the most important step forward on the environment since the Paris Agreement. As we work with the rest of the world toward this global agreement, the United States is taking action now to combat plastic pollution—both domestically and internationally. For example, we are working with other countries to build capacity to improve environmentally-sound waste management and to reduce the amount of abandoned, lost, or otherwise discarded fishing gear in the ocean.

In the face of these challenges, we must continue to protect and enhance the resilience of fragile marine ecosystems. The United States has established nearly 1,000 marine protected areas in our ocean, estuaries, coastal waters, and Great Lakes, and we are continuing to work towards the goal of conserving 30 percent of our land and waters by 2030, as directed by President Biden. We encourage all countries to take equally ambitious action by committing to conserving or protecting 30 percent of their land and waters by 2030, including their national ocean waters, by joining the Ocean Conservation Pledge launched at the 2022 Our Ocean Conference.

Additionally, we look forward to supporting the Eastern Tropical Pacific Marine Corridor, a precedent-setting regional effort created by the governments of Colombia, Costa Rica, Ecuador, and Panama. We are also the current chair of the International Coral Reef Initiative, a unique partnership of governments, international organizations, scientific entities, and non-governmental organizations, where we are committed to increasing global efforts to protect and restore coral reefs.

We recognize that the decisions we make and the actions we take today will affect the health of our ocean for centuries to come. The United States will continue our efforts and work with our allies and partners to protect our ocean and secure a better future for the planet.

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5. Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR")

The annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR") was held from October 24, 2022 to November 4, 2022 in Hobart, Australia. For the first time since 2019, the meeting was held in-person. See discussion of Russia's blocking consensus on a conservation measure relating to the toothfish in *Digest 2021* at 557. On October 26, 2022, Monica Medina, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, delivered remarks at the CCAMLR. The remarks are available at https://au.usembassy.gov/remarks-assistant-secretarymedina-41st-meeting/ and included below.

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I am here to talk about what CCAMLR can do to advance conservation efforts in the Antarctic.

But I must first condemn the unprovoked war one member has waged against another member of this organization. Russia's unprovoked war on Ukraine is a direct affront against the

basic principles embodied in international law, including the United Nations Charter, and the principles of sovereignty and territorial integrity that underpin global security and stability.

The U.S. delegation cannot ignore the threat to the rules-based international order that Russia's brutal war of aggression against Ukraine presents.

In addition, we specifically condemn the heavy damage the Ukrainian Antarctic Scientific Center in Kyiv has sustained due to ongoing war.

As Secretary Blinken said recently, "Moscow can knock out the lights across Ukraine, but it cannot, it will not, extinguish the Ukrainian spirit. President Putin thought he could divide the transatlantic alliance. Instead, he's brought us even closer together."

Russia must withdraw its troops from Ukraine and immediately cease its aggression against Ukraine, a sovereign and independent state defending its internationally recognized borders.

I'm glad to be here as a demonstration of the United States' unwavering commitment to conserving and protecting the Antarctic – an increasingly fragile and precious part of our planet. And this is a pivotal moment for both Antarctica and for the world – climate change is changing this region faster than any of us thought possible. Which is why the actions we take at this meeting in Hobart and in future global meetings over the next six months will shape the health of the planet – and all its inhabitants — for generations.

It is important to meet in person – for the first time in three years – to re-invigorate the collaborative spirit that has characterized CCAMLR and the Antarctic Treaty system. But that cooperation is crumbling and so I urge that we come together now and reach consensus on the key issues, such as the creation of a system of marine protected areas, that have been languishing for far too long.

The cooperation and open collaboration that is required by CCAMLR had been its strength. But frankly it is now holding back progress. Countries that have prioritized their individual needs have weakened our ability to meet the shared conservation objectives on which this body was founded.

For example, CCAMLR has adopted some of the most comprehensive fishery management measures for the toothfish fishery, setting a global standard and nearly eliminating IUU fishing in the area. Which is why it was extremely disappointing that CCAMLR was not able to reach consensus last year on catch limits in area for toothfish in area 48.3. CCAMLR has always managed this fishery based on precaution and sound science. This fishery is now a source of division among like-minded nations due to a Russian "conservation" objection that is not supported by this body's scientific committee.

We urge members to work together at this session to resolve this situation so that CCAMLR remains able to meet its conservation objectives while allowing limited, well-managed fishing for high value species. We must recommit to the "Hobart Spirit" of cooperation and consensus and find ways to come together as we have for more than 40 years. And in the face of climate change, we must renew this ethos of international cooperation here in Antarctica more than ever.

This past summer, NASA released a study showing that Antarctica is shedding icebergs faster than the ice can be replaced – doubling previous estimates of ice loss from 6 trillion metric tons to 12 million metric tons. To echo NASA scientist Chad Greene, Antarctica truly is "crumbling at its edges." And these "edges" have a real effect on the rate of global sea-level rise. If emissions continue at their current pace, the Antarctic ice sheet will have crossed a critical

threshold by about 2060, committing the world to a sea level rise that is not reversible on human timescales.

In the face of this new data, we need to act to protect Antarctica to conserves its biodiversity and do our best to mitigate the effects of climate change on the Antarctic ecosystem.

We have a clear path forward. CCAMLR should now – at this meeting – establish a representative system of marine protected areas in the Southern Ocean. We have less than a decade to conserve or protect at least 30 percent of the global ocean, and MPAs in the Southern Ocean are a critical piece of our meeting that goal. A series of MPAs will help create a nature positive world and support ecosystems, migratory pathways, and endemic ocean species. CCAMLR's decision in 2016 to establish the Ross Seas region Marine Protected Area proves this institution has the wherewithal to implement this type of meaningful, positive change. And for those with questions, I would point to our members reporting on research activity that demonstrates the resounding success of the Ross Sea region MPA. This research includes more than 460 projects by 20 CCAMLR Members, 2 acceding states, and 7 cooperating parties, related to 11 MPA objectives.

This is what a collective effort can achieve. So, I want to urge any nations with objections to drop them before it is too late to save what we can of this precious place – and its penguins, whales, and sea birds. The proposed MPAs are essential to delivering on our treaty objective to conserve Antarctic marine living resources and to furthering our understanding of climate change impacts in the Southern Ocean.

This year's Convention on Biological Diversity COP will hopefully adopt an ambitious framework that include the goal of conserving at least 30% of the planet by 2030, under the chairmanship of the Chinese and now Canada as hosts. But to reach that ambitious target we must conserve more of Antarctica in MPAs. If we cannot come to agreement now, then the United States is willing to provide a voluntary contribution of $75,000 to offset the cost of hosting a special meeting on MPAs early next year.

This is also the time to modernize the management of the krill fishery. CCAMLR has already set precautionary catch limits for krill. There are clear steps such as requiring port inspections for 100 percent of vessels carrying krill or krill products. Krill fishing effort could also be updated as well as the dispersion of fishing to ensure that it is not too highly concentrated.

As I mentioned, we are entering a critically important stretch of international engagement on the ocean, climate change, biodiversity, plastic pollution, and more. The actions we take here at CCAMLR can build on the momentum we have seen so far this year, and drive action at COP27, CITES, the launch of the plastic pollution agreement, CBD COP15, the completion of BBNJ negotiations, and the 8th Our Ocean conference in Panama, to name just a few.

It's time to move from ambition to action. Let's make Hobart 2022 an historic moment for the conservation of the Antarctic living marine resources.

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On November 4, 2022, at the conclusion of the 41st CCAMLR meeting, the State Department issued a statement in a media note. The statement is available at https://www.state.gov/conclusion-of-41st-ccamlr-meeting/ and included below.

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At the conclusion of the 41st meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the United States underscores its commitment to conserving Antarctic marine living resources.

We welcome CCAMLR's many important achievements over the past four decades, including substantially decreasing illegal, unreported, and unregulated (IUU) fishing in the Convention Area, significantly reducing mortality of seabirds during fishing, and adopting an impressive suite of conservation measures to conserve unique marine ecosystems and to ensure fisheries are sustainably managed. CCAMLR is also responding to the increasing impacts of climate change on the Convention Area and the marine living resources and ecosystems within it.

These achievements underscore the ongoing need for this unique international organization. CCAMLR, members have demonstrated they can cooperate to conserve Antarctic marine living resources effectively.

It is in this context that we express our serious concern with the approach of the Russian Federation to the discussions at this meeting. As an original signatory of the CAMLR Convention, Russia has committed to utilizing the best available scientific evidence to conserve Antarctic marine living resources.

However, Russia has repeatedly ignored scientific information provided to inform key management decisions to achieve political objectives. These decisions relate to a range of important issues such as climate change, Marine Protected Areas, Vulnerable Marine Ecosystem protections, and fisheries management and research.

Russia's repeated rejection of the best available scientific information amounts to an abuse of its commitment to participate in consensus-based decision-making. Russia's actions undermine the integrity of CCAMLR's decision-making processes and our collective ability and responsibility to achieve the objective of the Convention.

We call on Russia to return to respecting the imperative of science-based decision-making and the ecosystem approach, which underpin CCAMLR's work. We also call on Russia to respect the rules-based international order, end its war of aggression, and fully withdraw from the sovereign territory of Ukraine.

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6. Antarctic Treaty Consultative Meeting ("ATCM")

The 44th Antarctic Treaty Consultative Meeting ("ATCM") was held from May 23 - June 2, 2022 in a hybrid format. Delegations included representatives participating in person in Berlin and others participating remotely from capitals. The delegates applied Ad Hoc Guidelines for ATCM XLIV-CEP XXIV Hybrid Meeting, which the Consultative Parties adopted to complement the ATCM's extant Rules of Procedure. The ad hoc guidelines are included as Appendix 1 of the Final Report available at https://www.ats.aq/devAS/Info/FinalReports?lang=e.

Discussion of Russia's full-scale invasion of Ukraine raised numerous procedural issues. Ukraine presented an Information Paper to the ATCM regarding the impacts of Russia's war on Ukraine's national Antarctic Program. Most of the Consultative Parties offered statements in support of Ukraine and the Final Report of the meeting summarizes those statements. Russia condemned the paper, called on other Consultative Parties to ignore it, and requested that Consultative Parties refrain from accusatory rhetoric. Paragraph 39 of the Final Report notes that "a substantial number of Parties stood and walked out of the meeting room for the duration of the intervention of the Russian Federation." The ATCM's Rule of Procedure 25 provides that the final report of its meetings "shall . . . contain a brief account of the proceedings of the Meeting." The ATCM adopted the Final Report by majority and noted that consensus was not reached on the paragraphs of the report that were critical of Russia. On this basis, and as allowed by Rule 25, the paragraphs that were not adopted by consensus were approved by a majority of the representatives of Consultative Parties present at the ATCM.

The ATCM decided to hold a full-day joint session with the Committee on Environmental Protection ("CEP") in 2023 to consider the implementation of the recommendations contained in a report by the Scientific Committee on Antarctic Research regarding Antarctic climate change and the environment. A joint session of the ATCM and CEP was unprecedented and not anticipated by the Rules of Procedure and the decision was taken by consensus.

7. Arctic Council

On March 3, 2022, Canada, the Kingdom of Denmark, Finland, Iceland, Norway, Sweden, and the United States announced a pause in their participation in the Arctic Council in light of Russia's invasion of Ukraine in violation of principles of international law. The joint statement is available at https://www.state.gov/joint-statement-on-arctic-council-cooperation-following-russias-invasion-of-ukraine/, and included below.

> Canada, the Kingdom of Denmark, Finland, Iceland, Norway, Sweden, and the United States condemn Russia's unprovoked invasion of Ukraine and note the grave impediments to international cooperation, including in the Arctic, that Russia's actions have caused.
>
> We remain convinced of the enduring value of the Arctic Council for circumpolar cooperation and reiterate our support for this institution and its work. We hold a responsibility to the people of the Arctic, including the indigenous peoples, who contribute to and benefit from the important work undertaken in the Council.
>
> The core principles of sovereignty and territorial integrity, based on international law, have long underpinned the work of the Arctic Council, a forum which Russia currently chairs. In light of Russia's flagrant violation of these principles, our representatives will not travel to Russia for meetings of the Arctic

> Council. Additionally, our states are temporarily pausing participation in all meetings of the Council and its subsidiary bodies, pending consideration of the necessary modalities that can allow us to continue the Council's important work in view of the current circumstances.

On June 8, 2022, the governments of Canada, the Kingdom of Denmark, Finland, Iceland, Norway, Sweden, and the United States announced a limited resumption of Arctic Council cooperation. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-on-limited-resumption-of-arctic-council-cooperation/ and included below.

> In response to Russia's full-scale invasion of Ukraine, a flagrant violation of the principles of sovereignty and territorial integrity, based on international law, the other Arctic Council founding states – Canada, Finland, Iceland, the Kingdom of Denmark, Norway, Sweden, and the United States – on March 3 announced a pause in their participation in the Arctic Council. Since March 3, representatives from these States have examined modalities to allow a resumption of the work in the Arctic Council.
>
> We remain convinced of the enduring value of the Arctic Council for circumpolar cooperation and reiterate our support for this forum and its important work.
>
> We intend to implement a limited resumption of our work in the Arctic Council, in projects that do not involve the participation of the Russian Federation. These projects, contained in the workplan approved by all eight Arctic States at the Reykjavik ministerial, are a vital component of our responsibility to the people of the Arctic, including Indigenous Peoples.
>
> We continue to examine additional modalities to allow us to further continue the Council's important work.

8. U.S.-Pacific Island Partnership

On September 28-29, 2022, the White House hosted the first-ever United States-Pacific Island Country Summit. President Biden's remarks at the summit are available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/29/remarks-by-president-biden-at-the-u-s-pacific-island-country-summit/ and excerpted below.

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This year, we also launched the Partners in the Blue Pacific initiative — kind of poetic, isn't it? — the Partners in the Blue Pacific — but it's an initiative we really care about — to more effectively coordinate with our allies and partners around the world to better meet the needs of the people across the Pacific.

That's why this historic summit — at this historic summit we're making additional and concrete commitments. And we're launching our Pacific Partnership Strategy, the first national U.S. strategy for Pacific Islands, which is a key component to our broader Indo-Pac- — Indo-Pacific strategy.

We're also announcing more than ~~$110 million~~ [$810 million] in ~~expended~~ [expanded] U.S. programs to improve the lives of Pacific Islanders, which includes more than $130 million in new investments to support climate resilience and to build sustainable blue economies in the Pacific Islands; prepare for climate impacts on public health and food security, and to strengthen sustainable development; and also to build a better early warning capacity to predict, prepare for, and respond to climate hazards.

This is going to build on approximately $375 million in climate programs we currently have in the region.

We're also taking several important diplomatic steps. And I'm proud to announce that, following appropriate consultations, we will recognize the Cook Islands and Niue as sovereign states.

And we look forward to successfully concluding negotiations for a Compact of Free Association with three of our closest partners in the region — the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

The United States is committed to consulting with all of you and engaging collaboratively at every turn, because it's very much in our interest as well as, I hope, yours. That's what this summit is all about.

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As an outcome of the summit, the U.S. and the Pacific leaders issued the Declaration on U.S.-Pacific Partnership, reflecting shared commitments and cooperation. The U.S. also announced additional initiatives to meet Pacific priorities. See the September 29, 2022 White House fact sheet available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/fact-sheet-roadmap-for-a-21st-century-u-s-pacific-island-partnership/. The September 29, 2022 declaration is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/declaration-on-u-s-pacific-partnership/.

The September 29, 2022 White House fact sheet noted that "[t]he United States is adopting a new policy on sea-level rise and maritime zones." The full text of the U.S. Policy on Sea-level Rise and Maritime Zones is available at https://www.state.gov/marine-environment/#sea-level-rise and included below.

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Sea-level rise due to climate change poses substantial threats to coastal communities and island nations around the world. The United States believes that sea-level rise driven by human-induced climate change should not diminish the maritime zones on which island States and other coastal States rely, including for food and livelihoods. States should adopt practices that will facilitate the avoidance of such an outcome. The United States recognizes that new trends are developing in the practices and views of States on the need for stable maritime zones in the face of sea-level rise. This is reflected in the approach taken by the members of the Pacific Islands Forum and the Alliance of Small Island States. The United States encourages all States to adopt practices consistent with this approach. The United States applauds the Pacific Island States' initiative to take steps now to determine, memorialize, and publish their coastal baselines in accordance with the international law of the sea as set out in the United Nations Convention on the Law of the Sea.

In support of this important initiative and bearing in mind the Pacific Islands Forum's Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, the United States is committed to preserving the legitimacy of maritime zones, and associated rights and entitlements, that have been established consistent with international law as reflected in the Convention and that are not subsequently updated despite sea-level rise caused by climate change. The United States will work with Pacific Island States and other countries toward the goal of lawfully establishing and maintaining baselines and maritime zone limits and will not challenge such baselines and maritime zone limits that are not subsequently updated despite sea-level rise caused by climate change. We urge other countries to do the same in order to promote the stability, security, certainty, and predictability of maritime entitlements that are vulnerable to sea-level rise.

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9. International legally binding instrument on plastic pollution, including in the marine environment

On March 2, 2022, the United Nations Environment Assembly ("UNEA") adopted a resolution initiating negotiations on a new international legally binding instrument on plastic pollution. Among other things, the resolution established an intergovernmental negotiating committee tasked with developing an instrument that could include both binding and voluntary approaches and would be based on a comprehensive approach that addresses the full life cycle of plastic. The United States was a strong supporter of the resolution and played a key role in building consensus within UNEA for its adoption. The resolution, U.N. Doc. UNEP/EA.5/Res.14, is available at https://digitallibrary.un.org/record/3999257?ln=en.

Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Monica Medina led the U.S. delegation to the first session of the Intergovernmental Negotiating Committee on Plastic Pollution ("INC-1"), November 26-28, 2022 in Punta Del Este, Uruguay. See State Department media note at https://www.state.gov/first-session-of-the-intergovernmental-negotiating-committee-on-plastic-pollution-2/.

10. 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 May 16, 2022, the State Department announced in a media note, available at https://www.state.gov/sea-turtle-conservation-and-shrimp-imports-into-the-united-states-2/, that it had notified Congress on May 13, 2022 of the certification 37 nations and one economy, and granted determinations for thirteen fisheries as having adequate measures in place to protect sea turtles while harvesting wild-caught shrimp under Section 609. 87 Fed. Reg. 29,425 (May 13, 2022). The media note explains:

> Annual certifications and determinations are based in part on overseas verification visits by a team composed of Department of State and NOAA Fisheries representatives.
>
> Six of the world's seven species of marine turtles are listed as endangered or threatened under the Endangered Species Act. The U.S. government is currently providing technology and capacity-building assistance to other nations to help them meet the standard for certification under Section 609 and to contribute to the recovery of sea turtle species. The U.S. government also encourages legislation like Section 609 in other nations to prevent the importation of shrimp harvested in a manner harmful to protected sea turtles.

C. OTHER ISSUES

1. Policy Limits on Bilateral Scientific and Technical Cooperation with Russia

On June 11, 2022, the White House announced a policy to wind down bilateral cooperation and collaborations in the field of science and technology with Russian government-affiliated research institutions and individuals who work under the direction of Russian institutions until Russia ends its war against Ukraine. The statement is available at https://www.whitehouse.gov/ostp/news-updates/2022/06/11/guidance-on-scientific-and-technological-cooperation-with-the-russian-federation-for-u-s-government-and-u-s-government-affiliated-organizations/ and included below.

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The United States is committed to international scientific cooperation that flows from the mutual recognition of shared values, including scientific freedom, openness, transparency, honesty, equity, fair competition, objectivity, and democratic principles. The Kremlin's unlawful and unprovoked full-scale invasion of Ukraine is an affront to the principles we seek to affirm and

our efforts to advance international science, technology, and innovation for development. We remain concerned that the Kremlin continues to leverage state-controlled institutions to aid in its disinformation campaign against Ukraine. In response to Putin's aggression, the U.S. government has taken active measures to limit bilateral science and technology research cooperation with the Russian government.

Consistent with U.S. domestic and international law, we will wind down institutional, administrative, funding, and personnel relationships and research collaborations in the fields of science and technology with Russian government-affiliated research institutions and individuals who continue to be employed by or work under the direction of those institutions.

Such projects and programs that commenced and/or were funded prior to Russia's further invasion of Ukraine in February 2022 may be concluded, but new projects in affected subject areas will not be initiated. Applicable Departments and Agencies have been advised to curtail interaction with the leadership of Russian government-affiliated universities and research institutions, as well as those who have publicly expressed support for the invasion of Ukraine.

U.S. Government-affiliated organizations, such as Federally Funded Research and Development Centers (FFRDCs) and other similar institutions with grants, contracts, or cooperative agreements doing work with the Russian Federation should contact their supporting agency for further guidance.

Non-government institutions should make their own determinations regarding how to proceed with contact and collaboration between the United States and Russian scientific communities, in furtherance of an open exchange of ideas within the international science and technology community.

The United States recognizes that many Russians – inside and outside of Russia – are opposed to Putin's war of choice in Ukraine. While some – including in the scientific community – have bravely stood up in defiance, the Russian government's measures to restrict freedom of expression have made it far more difficult for Russians to express their opposition to this unjust war without fear of retribution.

We will continue to denounce all perpetrators of xenophobia and seek to ensure that Russian scientists who have chosen to leave Russia and/or remain in the United States due to their convictions are supported and not discriminated against or stigmatized. We encourage the broader U.S. and international community to do the same.

In coordination with our allies and partners, we will uphold our commitments to ensuring the sustainment of international scientific and technical fora, infrastructure, and venues dedicated to fostering peaceful international collaboration. Nevertheless, until Russia ends its war against Ukraine, the United States government will seek to limit engagement with the Russian government in various international projects and initiatives related to science and technology, except where required by our obligations under international law.

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2. Transboundary Environmental Issues

a. Mining Pollution

On June 7, 2022, representatives from the State Department released a statement, the U.S. Environmental Protection Agency, and the U.S. Geological Survey met with Council members from the six governments of the transboundary Ktunaxa Nation to discuss pollution from mining in British Columbia that affects the United States and Canada. The June 8, 2022 State Department media note is available at https://www.state.gov/support-for-international-joint-commission-recommendations-to-address-transboundary-pollution-from-mining/ and includes the following:

> The meeting underscored the Biden-Harris Administration's commitment to strengthening Nation-to-Nation relationships by listening to Tribal priorities and respecting Tribal sovereignty. During the meeting, the Department reaffirmed the Administration's support for a joint reference to the International Joint Commission (IJC) under the Boundary Waters Treaty of 1909 for the Kootenai Basin regarding the transboundary impacts of mining. A joint reference would respond to the need for impartial recommendations and transparent communication, build trust, and forge a common understanding of this issue among local, Indigenous, state, provincial, and federal governments as well as stakeholders and the public in both countries.
>
> Support for a joint IJC reference reflects the Biden-Harris Administration's commitment to protect public health; conserve our lands, waters, and biodiversity; and deliver environmental justice to communities overburdened by pollution.

b. Aquifers

On October 19, 2022, Attorney-Adviser David Bigge delivered a statement for the United States on the law of transboundary aquifers at a meeting of the UN General Assembly Sixth Committee on agenda item 86. Mr. Bigge's remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-86-the-law-of-transboundary-aquifers/.

> The International Law Commission's work on transboundary aquifers constituted an important advance in providing a possible framework for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations.
>
> The issues arising from transboundary aquifers are highly context specific, and state practices vary widely. The United States continues to believe that context-specific arrangements provide the best way to address pressures on transboundary groundwaters in aquifers, as opposed to refashioning the draft articles into a global framework treaty or into principles. States concerned

should take into account the provisions of these draft articles when negotiating appropriate bilateral or regional arrangements for the proper management of transboundary aquifers. With respect to this agenda item, the United States position has not changed since its last statement.

c. Harm from hazardous activities

Also on October 19, 2022, Attorney Adviser Bigge delivered the U.S. statement on the prevention of transboundary harm from hazardous activities at a meeting of the UN General Assembly Sixth Committee. That statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-80-consideration-of-prevention-of-transboundary-harm-from-hazardous-activities/.

> As we have previously stated, the United States regards the International Law Commission's draft articles on prevention of transboundary harm from hazardous activities, as well as the related draft principles on allocation of loss, as positive, innovative steps toward addressing transboundary harm.
>
> Both documents were designed as resources to encourage national and international action in specific contexts, rather than to form the basis of a global treaty. We therefore strongly support retaining these products in their current form. With respect to the draft articles in particular, we continue to believe it is most appropriate that they be regarded as non-binding standards to guide the conduct and practice of states. With respect to this agenda item, the United States' position has not changed since our last statement.

3. The Global Health Response to the COVID-19 Pandemic

a. Negotiations of a pandemic instrument

On September 2, 2022, Dan Fogarty, Advisor for Economic and Social Affairs, delivered the U.S. explanation of position on the adoption of the UN General Assembly resolution on pandemic prevention, preparedness, and response. The statement is available at https://usun.usmission.gov/explanation-of-position-on-the-adoption-of-the-un-general-assembly-resolution-on-pandemic-prevention-preparedness-and-response/ and excerpted below.

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The United States would like to express support for the intention of the Resolution to maintain and strengthen political attention on pandemic preparedness and response. This is a shared global priority and a major focus for the United States. The special session proposed as part of this

Resolution has the ability to support these goals in New York, while reinforcing the critical work taking place in Geneva, Washington, and in capitals around the world.

The timing of the special session must be planned – and scoped accordingly – with a solid appreciation of the complementary processes, negotiations, and efforts taking place in other fora including ongoing discussions on pandemic-related issues occurring at the World Health Organization on International Health Regulations amendments and the Intergovernmental Negotiating Body on developing a pandemic prevention, preparedness, and response instrument, at the WHO, and elsewhere. It will be critical that a future special session be informed by and help to support those concurrent efforts while being respectful of their distinct processes.

While we support the goals of the resolution to increase commitment across the UN system on this important issue, we would like to register concerns with the process on this short, procedural text. The text was not properly negotiated or placed under silence procedure. Many delegations across regions expressed concerns with the process and timing of the special session during the only two brief informational meetings that were held, which were not addressed in any subsequent drafts of this text.

As we approach UNGA high-level week in 2023, we will want to ensure that any additional events on global health priorities provide a strong value-add to the packed agenda. We are looking forward to the high-level meeting on universal health coverage, the outcome of which would also add to the pandemic preparedness architecture we are all seeking to strengthen and solidify. The United States will be engaging constructively and proactively in the upcoming modalities negotiations for this special session in order to ensure that the timing and scope of this special session amplifies, complements, and does not duplicate existing processes. Pandemic preparedness and response requires ongoing political attention and mobilization, as well as commitment across the UN system and sectors to help reinforce the work taking place in Geneva and elsewhere. We welcome the opportunity to reflect on this special session as we look ahead to next steps.

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On October 12, 2022, Secretary Blinken and Secretary of Health and Human Services Xavier Becerra announced Ambassador Pamela K. Hamamoto as U.S. Negotiator for the Pandemic Accord. The October 12, 2022 State Department media note is available at https://geneva.usmission.gov/2022/10/12/pamela-k-hamamoto-named-u-s-negotiator-for-the-pandemic-accord/ and includes the following:

> This announcement reflects the commitment by the United States to take a whole-of-government approach to the negotiating process by putting into place a strong team, led by the Departments of State and Health and Human Services, with active engagement across U.S. departments and agencies responsible for development, security, economic, and other issues.
>
> As lead U.S. Pandemic Negotiator, Ambassador Hamamoto will assume management and oversight of U.S. engagement in these important discussions, which we believe must yield an accord that effectively strengthens global health collaboration, improves systems for monitoring disease or pandemic outbreaks,

bolsters national health security capacities, and enhances equity in pandemic preparedness and responses.

The third meeting of the World Health Assembly ("WHO") intergovernmental negotiating body ("INB-3") took place from December 5-7, 2022, during which the INB considered the Conceptual Zero Draft of the instrument on pandemic prevention, preparedness, and response. The zero draft is available at https://apps.who.int/gb/inb/pdf_files/inb3/A_INB3_3-en.pdf.

b. Proposed amendments to the International Health Regulations

In 2022, the United States continued to advocate for targeted amendments to the International Health Regulations ("IHR"). On January 26, 2022, Loyce Pace, Assistant Secretary for Global Affairs for the Department of Health and Human Services delivered a statement at the 150th session of the Executive Board at the WHO. On behalf of more than 40 Member States, the United States proposed a decision for the executive board to discuss targeted amendments to the IHR. The statement is available at https://geneva.usmission.gov/2022/01/26/strengthening-who-preparedness-for-and-response-to-health-emergencies/, and excerpted below.

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The United States strongly supports the ongoing efforts to strengthen WHO and make it more agile, transparent, and efficient.

On behalf of more than 40 Member States, we are pleased to propose a Decision for the Executive Board, asking Member States of WHO and States Parties of the International Health Regulations (IHR) of 2005, to discuss targeted amendments to the IHR (2005) and address specific issues, challenges, or gaps that are crucial to their effective implementation. The draft decision also requests the Working Group on Preparedness & Response (WGPR) establish a dedicated process for in-depth discussions of targeted amendments to the IHR and facilitate a transparent, Member State-led process.

The decision also notes the importance of equity and equitable access to medical countermeasures and the negative impacts of misinformation and disinformation related to the pandemic. We agree that we must all do better.

The United States led an inclusive and transparent process to develop this decision, as we are mindful that updating and modernizing the IHR are critical to ensuring the world is better prepared for and can respond to, the next pandemic.

Finally, the United States formally transmitted its proposals for targeted amendments to the IHR (2005) to the Director General consistent with IHR Article 55 for circulation to States Parties at least four months in advance of WHA 75.

We are confident of continued progress on the various complementary WHO strengthening work streams: (1) targeted amendments to the International Health Regulations (IHR) (2005), (2) a full review of by the WGPR (3) an intergovernmental negotiating body

(INB) to develop a new international instrument on pandemic preparedness and response, and (4) governance improvements at WHO, starting with an informal group and then establishing a Task Team of Member States to work with the Secretariat.

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4. 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 March 7-18, 2022, 87 Fed. Reg. 9784 (Feb. 22, 2022). The fourth session, which was postponed in 2021 due to the COVID-19 pandemic, was convened from March 7-18, 2022. A fifth session of the Conference was convened from August 15-26, 2022. On the last day of that session, the IGC decided to suspend the fifth session and resume it at a later date.[*] Additional information on the BBNJ process is available at https://www.un.org/bbnj/.

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On November 22, 2022, Nina Horowitz, U.S. Adviser to the UN General Assembly Second Committee delivered the U.S. explanation of position on a Second Committee resolution on the Convention on Biological Diversity. The remarks are available at https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-the-convention-on-biological-diversity-2/ and includes the following.

> The United States thanks the facilitator for their efforts and persistence in guiding this resolution over the last several weeks. We are pleased to join consensus in support of the Convention on Biological Diversity and its contribution to sustainable development. The United States is supportive of an ambitious Global Biodiversity Framework and looks forward to COP15 this December. We appreciate Canada serving as host of this important event.

[*] Editor's note: The fifth session resumed on February 20, 2023 and the draft Agreement text was finalized, in principle, on March 4, 2023. After a lengthy process to scrub and translate the text into the other five UN languages, the Agreement was adopted by consensus on June 19, 2023. The Agreement will open for signature on September 20, 2023.

> Regrettably, the United States must dissociate from Operative Paragraph 2. Our strongly held view is well-known that any reference to the Kunming Declaration is unacceptable, as this document was not transparently negotiated by all Member States and, therefore, should not be noted.
>
> We also reiterate the position of the United States, delivered in our General Statement, with regard to this resolution's references to the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, and the transfer of technology.
>
> We look forward to continued work with all member states on the critical issue of climate change.

The fifteenth meeting of the Conference of the Parties ("CoP15") to the UN Convention on Biological Diversity ("CBD"), which took place in two phases, the first in October 2021 and the second from December 7-19, 2022 in Montreal, Canada. Following COP15, the delegates to the CBD adopted a Global Biodiversity Framework and committed "for the first time, to conserving or protecting at least 30 percent of global lands and waters by 2030." See December 20, 2022 State Department media note available at https://www.state.gov/convention-on-biological-diversity-adopts-landmark-global-biodiversity-framework-to-protect-nature/ and excerpted below.

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U.S. Special Envoy for Biodiversity and Water Resources Monica Medina celebrated the framework as a win for nature, biodiversity, and humanity, noting that by conserving at least 30 percent of global lands, fresh water, and ocean by 2030 we are acting on what the science demands to address the precipitous decline in biodiversity worldwide.

More than one million species are at risk of extinction – many within decades – and more than ever before in our history. This drop in biodiversity endangers all life on our planet. Scientists in both the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) and the Intergovernmental Panel on Climate Change (IPCC), concluded that biodiversity is declining at a catastrophic rate and that the effective conservation of 30-50 percent of global lands and waters could preserve nature's ability to sustain people and the planet.

To further address the loss of species, parties at COP15 adopted ambitious targets on ecosystem restoration, sustainable use of biodiversity, reductions in harmful pollutants, and inclusion of Indigenous peoples and local communities in conservation efforts.

The framework also calls for a substantial increase in resources from all sources devoted to nature conservation. The United States has already been making progress towards supporting such efforts in the first two years of the Biden-Harris Administration, with for the U.S.'s largest pledge ever to the Global Environment Facility and a 20 percent increase in its spending on biodiversity foreign assistance.

With the adoption of the Global Biodiversity Framework, governments at all levels and all of society have a common set of goals to address the biodiversity crisis – for people and the planet.

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5. Sustainable Development

On July 15, 2022, Deputy U.S. Representative to the Economic and Social Affairs Council Nicholas M. Hill delivered the U.S. explanation of position at the High-Level Political Forum on Sustainable Development. The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-position-at-the-high-level-political-forum-on-sustainable-development-full/.

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The United States is pleased to join consensus on today's Ministerial Declaration. We are deeply appreciative of the commitment and creativity brought by Italy and Nauru to reach agreement on this important document, as well as the spirit of consensus upheld by all delegations.

The United States strongly supports the 2030 Agenda and is committed to its full implementation. One of the key insights of the 2030 Agenda is the interrelated nature of the 17 goals; each of the 17 Sustainable Development Goals (SDGs) influences the others, demonstrating the need for a comprehensive approach to development. We also note that the five goals currently under review – those related to quality education (SDG 4), gender equality (SDG 5), life below water (SDG 14), life on land (SDG 15), and means of implementation (SDG 17) – appear particularly pressing in the context of the dynamic challenges we collectively face.

Promoting gender equality is a matter of human rights, justice, and fairness – and a strategic imperative that promotes economic growth, inclusion, and strong institutions. Similarly, education is a mutually reinforcing goal: a quality education benefits the individual and contributes to other national development objectives such as economic growth, industry and innovation, and health and well-being. Taken together, SDGs 4 and 5 will advance political stability and foster democracy.

The 2020s are a defining decade for global climate action and environmental preservation and we are glad to see strong language in the Ministerial Document on SDGs 14 and 15. The United States is working tirelessly at home and internationally to address the climate crisis, including promoting ambitious action to keep a 1.5 degrees Celsius limit on temperature rise within reach and supporting vulnerable communities to increase their resilience and adapt to the impacts of climate change.

We underscore that the Ministerial Declaration is a non-binding document. We stress our position that, in accordance with established norms, the outcome document should only refer to transparent, Member State negotiated documents, and we therefore disassociate from paragraph 74's mention of the Kunming Declaration, which was not a negotiated document that reflects consensus. The inclusion of paragraph 35 from the 2030 Agenda does not contribute to this declaration, and it represents an attempt to politicize the important work that Member States undertake in the HLPF. We have consequently voted against its inclusion, and we dissociate from paragraph 131 in this year's text.

The United States would like to take this opportunity to clarify some concerns with and positions on the declaration as adopted. We underscore that the HLPF Declaration is non-binding and does not create new or affect existing rights or obligations under international law, nor does it create any new financial commitments. We appreciate the opportunity to register our position on these issues below.

SDG5 - Gender Equality: U.S. policy understands gender-based violence to be inclusive of sexual violence, and we support references to "gender-based violence" or "sexual and gender-based violence," as more inclusive terms than the binary "violence against women and girls." We regret the omission of the term "intimate partner violence" in the Ministerial Document. It is important to recognize that violence takes place within families and intimate relationships, including in situations in which individuals in a relationship live together in close quarters. We welcome references to eliminating, preventing, and responding to all forms of violence, and note that U.S. policy considers female genital mutilation/cutting, as well as child, early and forced marriage to be forms of gender-based violence.

We are pleased that the HLPF was able to unequivocally reaffirm SDG target 5.6 as critical to accelerating progress towards advancing sexual and reproductive health and rights for all. However, we regret that the final resolution did not more explicitly address themes related to the Beijing Platform of Action and SDG target 3.7 or the linkages between human rights, gender equality, sexual, reproductive, and maternal health, and critical health services, all directly relevant to achieving SDG target 5.6.

SDG 4 - Education: The United States strongly supports the realization of the right to education as outlined in article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and consistent with the scope of that right as recognized under international human rights law. We strongly support the goal of quality education for all. 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 infrastructure and with respect to "quality education," this is done in terms consistent with our respective federal, state, and local authorities.

Right to Development: While the United States strongly supports sustainable development, we do not recognize a "right to development," as we note that it has no internationally agreed upon meaning and that it is not recognized in any of the core UN human rights conventions. While the United States supports development as a commendable goal, further work is required to ensure that such a so-called right is consistent with fundamental principles of international human rights law.

Right to Water: The United States understands abbreviated references to certain human rights, including the human right to safe drinking water and sanitation, to be shorthand references for the more accurate and widely accepted terms used in the applicable treaties, the Universal Declaration of Human Rights, and other international human rights instruments, and we maintain our long-standing positions on those rights. We further note that while the human right to safe drinking water and sanitation is not explicitly mentioned in any of the core UN human rights instruments, we understand it to be derived from the human right to an adequate standard of living, recognized in the ICESCR, which is to be progressively realized.

Climate, the Paris Agreement, and the Glasgow Climate Pact: The United States is working tirelessly at home and internationally to address the climate crisis, including promoting ambitious action to keep a 1.5 degrees Celsius limit on temperature rise within reach and supporting vulnerable communities to increase their resilience and adapt to the impacts of

climate change. Much of this resolution simply repeats previously agreed language from decisions of the Paris Agreement – in particular, the Glasgow Climate Pact – or United Nations Framework Convention on Climate Change (UNFCCC). The Paris Agreement and UNFCCC are the appropriate forums to address such issues. Moreover, in certain instances, this resolution distorts the meaning of previously agreed language in a confusing and unhelpful manner, in particular paragraph 122(a).

Planetary Boundaries: It is our strong position that the phrase "fully respecting planetary boundaries" is vague and ill-defined in the text. The United States has opposed this idea since its inception in 2009, given our continued emphasis on science-based decision making. Further, planetary boundaries references are not contained in the instruments referenced in the resolution such as the Paris Agreement, the UNFCCC, or the Convention of Biological Diversity.

SDG Measurement: Regarding paragraph 87, the United States regards the approval in February 2022 by the UN Statistics Commission of the new indicator to have been final, so that it is inappropriate to refer to SDG indicator 17.3.1 as "proposed." We call on Member States to use the relevant UNGA77 Second Committee resolution to affirm the new indicator as fully approved to enable immediate use of the indicator to provide valuable information on finance for developing countries from all sources.

Trade: The United States supports a multilateral trading system that is open, fair, rules-based, predictable, transparent, and non-discriminatory, recognizing it as an important factor in facilitating sustainable development. We underscore our position that trade language, negotiated or adopted by the General Assembly and the Economic and Social Council or under their auspices, has no relevance for U.S. trade policy, for our trade obligations or commitments, or for the agenda at the World Trade Organization, including discussions or negotiations in that forum. While the UN and WTO share common interests, they have different roles, rules, and memberships.

Regarding paragraph 75 on the impact of policies, including subsidies, on biodiversity, the United States encourages the development and application of incentives for the conservation of natural resources including biodiversity. However, the United States cannot support blanket calls for the elimination, phasing out, or reform of particular subsidies without a rigorous evaluation of potential trade-offs, including with respect to food security implications.

Intellectual Property: The United States understands with respect to this resolution, including paragraphs 98 and 101, that references to knowledge-sharing and transfer of technology and know-how are to voluntary knowledge-sharing and voluntary transfer of technology and know-how on mutually agreed terms. Additionally, this resolution, including paragraph 21(b), does not capture all the carefully negotiated and balanced language in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Doha Declaration on the TRIPS Agreement and Public Health, and instead presents an unbalanced and incomplete picture of that language.

Illicit Financial Flows: While the United States acknowledges the UN system increasingly uses the term "illicit financial flows," we continue to have concerns that this term lacks an agreed-upon international definition. Without an agreed-upon definition, resolutions should be clearer about the specific underlying illegal activities, such as embezzlement, bribery, money laundering, other corrupt practices, and other crimes that produce or contribute to the generation and movement of illicit finance. Equally, all Member States should focus more concretely on preventing and combating these crimes at home.

Consensus Documents: The United States dissociates from paragraph 74 and stands by the commonly agreed norms that have upheld the integrity and effectiveness of the United Nations and multilateral system. The HLPF Declaration should only reference transparent, Member State-negotiated outcome documents from UN conferences. The United States does not support references to the Kunming Declaration, which was a conference host statement and not a negotiated UN declaration or document adopted by consensus.

2030 Agenda: Finally, the United States reaffirms its position on the 2030 Agenda as detailed in its Explanation of Position delivered on September 1, 2015.

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The November 21, 2022 U.S. statement regarding the 2030 Agenda for Sustainable Development, among other issues, which was referenced in Nicholas Hill, U.S. Deputy Representative to the Economic and Social Council, which was referenced in remarks excerpted, *supra*, is excerpted below and available at https://usun.usmission.gov/general-explanation-of-position-on-second-committee-resolutions-in-the-77th-session-of-the-un-general-assembly/. U.S. Deputy Representative to the Economic and Social Council Nicholas Hill delivered the statement as a general explanation of position at the UN General Assembly Second Committee.

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2030 Agenda for Sustainable Development: The United States remains committed to advancing the Sustainable Development Goals (SDGs) and the 2030 Agenda for Sustainable Development. We welcome international collaboration to pursue more inclusive development partnerships, especially by putting local partners in the driver's seat. At their heart, the SDGs are about expanding economic opportunity, social justice, caring for our planet, good governance, and ensuring no one is left behind. That is the American mission at its core, as illustrated by President Biden's focus on equity and justice both at home and abroad. We strongly support this year's 2C resolutions that emphasize the interests of marginalized communities — as we see throughout the 17 SDGs, human rights and equity are what make development truly sustainable.

We reaffirm our position on the 2030 Agenda as detailed in our Explanation of Position delivered on September 1, 2015. As the Agenda itself recognizes in paragraph 18, it is non-binding and does not create new or affect existing rights or obligations under international law, nor does it create any new financial commitments. As we support the 2030 Agenda, the United States takes care to uphold and respect the authority, independent mandates, and role of other processes and institutions outside the UN system. We call on all other Member States to do the same. We highlight our mutual recognition, in paragraph 58 of the 2030 Agenda, that implementation must respect and be without prejudice to the independent mandates of other processes and institutions and cannot prejudge or serve as precedent for decisions and actions underway in independent forums. Similarly, indicators, governance proposals, and language developed through this process have no precedential value for the International Financial Institutions, including the International Monetary Fund (IMF) and World Bank Group.

We underscore a central premise of the 2030 Agenda that the 17 SDGs are interconnected

and indivisible, and that truly sustainable development requires progress on all 17 SDGs, including those that emphasize citizen-responsive governance, human rights, government transparency, and the rule of law.

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6. Wildlife Trafficking

On September 22, 2022, the United States and Norway released a joint statement on nature crime at the Nature Crime Roundtable. The joint statement, which is available as a State Department media note, which is available at https://www.state.gov/joint-statement-on-nature-crime/ and included below, contains remarks on wildlife trade.

> We welcome the active participation today by our colleagues at the Nature Crime Roundtable: Raising Ambition to Combat Nature Crime and thank all the participants for their important contributions and insights. As we heard today, nature crime – *criminal forms of logging, mining, wildlife trade, land conversion, and associated criminal activities, as well as crimes associated with fishing* – gives rise to one of the largest illicit economies in the world, valued at hundreds of billions of dollars annually. These crimes harm ecosystems and local communities, hamper development and pose significant long-term consequences for future generations.
>
> The United States and Norway are close partners in combating these direct threats to nature and people. Nature is but the first victim in this organized, international criminal chain of exploitation. The syndicates who perpetrate these crimes fuel corruption, financial crimes, including tax evasion and money laundering, and sow destruction everywhere they operate. No country, no land, no waters, no people are safe from their illegal, often brutal activities. We look forward to working with those who joined us today as we further develop a new collaborative initiative – the Nature Crime Alliance.

At the 19th Conference of the Parties ("CoP19") to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") which took place from November 14 to November 25, 2022 in Panama City, Panama, consistent with its practice since CoP17 detailed in *Digest 2016* at 573-576, the United States again reinforced its agreement with the European Union that it could only exercise the number of votes of its Member States present and accredited at the time of the vote.

At CoP19, the United States spearheaded an effort to update Resolution Conf. 4.25 on Reservations to close some potential loopholes in how reservations are taken with regard to certain species listed in the Appendices. The treaty allows for reservations to new listings within 90 days of the listing. However, the treaty is silent on whether and how reservations may be taken when a species is uplisted (moved from Appendix II to Appendix I) or downlisted (the reverse). This ambiguity has created some

implementation challenges. The US proposed several recommendations to amend the resolution on reservations to make clear that the scope of a reservation must match the scope of the proposed amendment, preserving a Party's ability to take a reservation, while ensuring maximum protections of the species itself. These proposals were accepted by the CoP and have been incorporated into Resolution Conf. 4.25 (Rev. CoP19), which is available at https://cites.org/sites/default/files/documents/COP/19/resolution/E-Res-04-25-R19.pdf and excerpted below.

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RECOGNIZING that, in accordance with Article XXIII of the Convention, a State may, when it becomes a Party to CITES, enter a reservation with respect to any species included in Appendix I, II or III, or any parts or derivatives specified in relation to a species included in Appendix III, and that, in this case, it shall be treated as a State not a Party to the Convention with respect to trade in the specified species or parts or derivatives until it withdraws such reservation;

RECOGNIZING that, when Appendix I or II is amended in accordance with Article XV of the Convention, any Party may, within 90 days, make a reservation with respect to the amendment, and that, in this case, it shall be treated as a State not a Party to the Convention with respect to trade in the species concerned until such reservation is withdrawn;

NOTING that for the effective application of the Convention, clarity on the deadline for the submission of a reservation, treatment of a late reservation and effective date of the withdrawal of a reservation is critical;

RECOGNIZING FURTHER that, in accordance with Article XVI of the Convention, any Party may at any time enter a reservation with respect to a species included in Appendix III or any specified parts or derivatives, and that, in this case, the State shall be treated as a State not a Party to the Convention with respect to trade in the species or part or derivative concerned until such reservation is withdrawn;

NOTING that there have been different interpretations of these provisions of the Convention by Parties;

BELIEVING that the transfer of a species from one Appendix of the Convention to another must be viewed as a deletion from one Appendix and its simultaneous inclusion in the other;

CONSIDERING that, if a species is deleted from the Appendices, any reservation entered in relation to that species ceases to be valid;

CONSIDERING also that all Parties should interpret the Convention in a uniform manner;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

1. RECOMMENDS that any Party having entered a reservation with regard to any species included in Appendix I treat that species as if it were included in Appendix II for all purposes, including documentation and control l, except as provided by paragraph 2;

2. AGREES that the scope and effect of a reservation entered in accordance with Article XV, paragraph 3 is the same as the scope and effect of the amendment. For example, where an annotation to a species listed in Appendix I or II is amended, a Party may enter a reservation in accordance with Article XV, paragraph 3. The effect of such reservation is limited to excluding

the amendment from applying to the reserving Party until the reservation is withdrawn. The reserving Party remains bound by the annotation in effect prior to the amendment;

3. DIRECTS the Secretariat to maintain on the CITES website, in the table on Reservations entered by Parties, reference to the requirements for international trade that apply to each Party having entered a reservation in accordance with Article XV, paragraph 3;

4. AGREES that, if a species is deleted from one Appendix of the Convention and simultaneously included in another, the deletion shall render invalid any reservation that was in effect in relation to the species and, consequently, any Party that wishes to maintain a reservation in relation to the species must enter a new reservation in accordance with Article XV, paragraph 3, or Article XVI, paragraph 2;

5. CALLS on the Parties having entered reservations to nevertheless maintain and communicate statistical records on trade in the species concerned, as part of their annual reports, so that international trade in specimens of these species may be properly monitored;

6. INSTRUCTS the Secretariat to remind affected Parties explicitly of the reservations that will be rendered invalid, in time for the Parties to renew their reservations if they so desire;

7. REMINDS Parties of the requirement to notify the Depositary Government in writing of a reservation it wishes to make with respect to an amendment to Appendix I or II within 90 days after the meeting, in accordance with Article XV, paragraph 3, of the Convention;

8. REQUESTS the Depositary Government not to consider valid any reservation with respect to an amendment to Appendix I or II entered after the 90-day deadline; and

9. AGREES that the withdrawal of a reservation becomes operational on the date of the Depositary's notification to the Parties unless a later date has been set by the Party withdrawing the reservation.

* * * *

On November 22, 2022, Monica Medina, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, delivered remarks for a CITES COP19 side event on "Gaining Better Insights into Illegal Wildlife Trade: A Foundation for More Effective Action." The remarks are available at https://www.state.gov/assistant-secretary-medinas-remarks-for-cites-cop19-unodc-side-event-on-gaining-better-insights-into-illegal-wildlife-trade-a-foundation-for-more-effective-action/ and excerpted below.

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* * * *

It's important for governments, NGOs, academia, and other relevant stakeholders to come together and discuss ways we can support a holistic approach to combatting illegal wildlife trafficking.

We can all agree that nature is facing threats from numerous sources. Some of the most severe threats, with the widest range of impacts are nature crimes – criminal forms of logging, mining, wildlife trade, as well as crimes associated with fishing.

Today, we are discussing wildlife trafficking, which undermines the rule of law, fuels

corruption, drives species to the brink of extinction, and spreads zoonotic disease. As with other forms of transnational organized crime, wildlife trafficking does not respect national borders.

That means we must work together to identify who participates, where poaching occurs, where the transit routes reside, and where are the demand centers for the illegal wildlife and wildlife products.

We also know that wildlife trafficking and nature crimes often take place in conjunction with other illegal and criminal activities.

The United States firmly believes that accurate data and robust evidence-gathering are all essential to assess and understand the global scope of wildlife crime.

Better data can inform better policy approaches to tackling this challenge.

To that end, we are proud to support UNODC's World Wildlife Crime Report. This report continues to be important as a predictor of future species under threat from illegal trade and as guidance on preventing wildlife crime.

We cannot afford to lose this war to the perpetrators of these crimes.

We must join forces and raise ambition to tackle wildlife trafficking and other nature crimes, through fact-based informed decision-making, and we must act now. Thank you.

* * * *

7. 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; see *Digest 2021* at 570 regarding the eleventh round. In a January 11, 2022 State Department media note, available at https://www.state.gov/conclusion-of-the-twelfth-round-of-the-columbia-river-treaty-negotiations/, the Department noted the conclusion of the twelfth round of negotiations. Round thirteen of negotiations concluded on August 11, 2022. See August 15, 2022 State Department media note available at https://www.state.gov/conclusion-of-round-13-of-columbia-river-treaty-negotiations/. The United States hosted the fourteenth round of negotiations from October 4-5, 2022. See October 6, 2022 State Department media note, available at https://www.state.gov/conclusion-of-round-14-of-negotiations-to-modernize-the-columbia-river-treaty-regime/. The media note includes the following:

> …As a result of our discussions, we have been able to find common ground on aspects of flood risk management, hydropower coordination, ecosystem cooperation, and increased Canadian operational flexibility. We will continue to work to address outstanding issues in these areas the coming months.
>
> The United States is committed to working with Canada to achieve a modernized treaty regime that will support a healthy and prosperous Columbia

River Basin and reflect our country's commitment to the people who depend upon the natural resources of Columbia River Basin.

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 expert-advisors from the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, and the Kootenai Tribe of Idaho.

Following Round 14 negotiations, the Department of State and Global Affairs Canada hosted a workshop on Ecosystem and Indigenous and Tribal Cultural Values. Members of the U.S. and Canadian negotiating teams met with representatives invited from 15 Columbia Basin Tribes, Indigenous Nations, and related indigenous and tribal organizations. Workshop participants exchanged information about ecosystem needs and indigenous and tribal cultural values and discussed how system operations currently are coordinated. The workshop will inform future discussions on how we can improve coordination on these issues to benefit ecosystems and people on both sides of the border.

Cross references

UN 3C general statement on any right relating to the environment, **Ch. 6.A.5.a**
HRC on any right relating to the environment, **Ch. 6.A.6**
HRC resolution on inequalities in COVID-19 recovery, **Ch. 6.E.2**
Purported right to clean, healthy, and sustainable environment, **Ch. 6.N.4**
ILC work on protection of the environment in relation to armed conflicts, **Ch. 7.C.1**
IACHR Case: Eastern Navajo Dine against Uranium Mining*,* **Ch. 7.D.4.h**
IACHR Hearing on The Situation of Indigenous Peoples and Forced Displacement, **Ch. 7.C.1.k**
Minerals Security Partnership, **Ch. 11.F.8**
Comments related to the ILC's work on transboundary environmental issues, **Ch. 13.C.2.b&c**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2022, the United States entered into six 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, and 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 bilateral 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 2022 to protect the cultural property of Albania, Nigeria, Peru, Cyprus, Mali, Afghanistan, Guatemala, Cambodia, North Macedonia, and Uzbekistan, by entering into new cultural property agreements; by extending or considering proposals to extend existing agreements; by considering requests for import restrictions; and/or by imposing 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. Afghanistan

As discussed in *Digest* 2021 at 574, 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. On February 22, 2022, the Department of State determined that circumstances in Afghanistan warrant unilateral emergency import restrictions. See media note available at https://www.state.gov/united-states-takes-

unilateral-action-to-protect-the-cultural-heritage-of-the-people-of-afghanistan/. CBP provided notice that the emergency unilateral import restrictions took effect on February 18, 2022. 87 Fed. Reg. 9439 (Feb. 22, 2022).

2. Albania

As discussed in *Digest 2021* at 573, the United States and Albania signed an agreement to protect Albanian cultural property. The 2021 agreement, signed August 23, 2021, entered into force on February 28, 2022, and is available at https://www.state.gov/albania-22-228. CBP published notice of the imposition of import restrictions on certain categories of archaeological and ethnological material from the Republic of Albania pursuant to the agreement, effective March 17, 2022. 87 Fed. Reg. 15,079 (Mar. 17. 2022).

3. Nigeria

On January 20, 2022, the United States and Nigeria signed an agreement protecting Nigerian cultural property. The agreement is available at https://www.state.gov/nigeria-22-120. See media note, available at https://www.state.gov/united-states-and-nigeria-sign-cultural-property-agreement/. CBP published notice of the imposition of import restrictions on certain categories of archaeological and ethnological material from the Federal Republic of Nigeria pursuant to the MOU. 87 Fed. Reg. 15,084 (Mar. 17, 2022).

4. Pakistan

Pakistan 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 5, 2022. Pakistan's request seeks U.S. import restrictions on archaeological and ethnological material representing Pakistan's cultural patrimony. The State Department published notification of the request in the Federal Register. 87 Fed. Reg. 19,724 (Apr. 5, 2022).

5. Peru

On May 5 and 11, 2022, the United States and Peru agreed via exchange of diplomatic notes to further extend an agreement regarding import restrictions, originally signed on June 9, 1997. CBP extended import restrictions on certain archaeological and ethnological material of the Republic of Peru, effective June 9, 2022, pursuant to the agreement, as extended. 87 Fed. Reg. 34,775 (Jun. 8, 2022). The extension, which entered into force May 11, 2022, is available at https://www.state.gov/peru-22-511.1.

6. Cyprus

Cyprus and the United States entered into a new cultural property agreement recalling the agreement signed on July 16, 2002, as amended, and extended. The 2022

agreement with Cyprus, signed at Nicosia June 14, 2022, which entered into force July 14, 2022, is available at https://www.state.gov/cyprus-22-714. CBP extended import restrictions on certain archaeological and ethnological material from the Republic of Cyprus pursuant to the agreement. 87 Fed. Reg. 42,636 (Jul. 18, 2022).

7. Belize

On June 21, 2022, the State Department proposed to extend the agreement concerning the imposition of import restrictions on categories of archaeological materials between Belize and the United States. The State Department published notification of the proposal in the Federal Register. 87 Fed. Reg. 36,910 (Jun. 21, 2022).

8. Libya

On June 21, 2022, the State Department proposed to extend the agreement concerning the imposition of import restrictions on categories of archaeological materials between Libya and the United States. The State Department published notification of the proposal in the Federal Register. 87 Fed. Reg. 36,911 (Jun. 21, 2022).

9. Mali

Mali and the United States entered into a new cultural property agreement recalling the agreement signed on September 19, 1997, as amended, and extended. The 2022 agreement with Mali, signed at Bamako August 22, 2022, which entered into force September 14, 2022, is available at https://www.state.gov/mali-22-914. CBP extended import restrictions on certain archaeological and ethnological material from the Republic of Mali pursuant to the agreement. 87 Fed. Reg. 57,142 (Sep. 19, 2022).

10. Guatemala

On September 19, 2022, the United States and Guatemala entered into a new agreement concerning import restrictions, extending, and superseding the MOU signed on September 29, 1997, as extended and amended. The 2022 agreement with Guatemala, signed at Guatemala City, September 19, 2022, entered into force on September 29, 2022, and is available at https://www.state.gov/guatemala-22-929. CBP extended import restrictions on certain archaeological and ecclesiastical ethnological material of the Republic of Guatemala on September 29, 2022, pursuant to the agreement. 87 Fed. Reg. 58,727 (Sep. 28, 2022).

11. Cambodia

On December 21, 2022, the State Department proposed to extend and amend the agreement for import restrictions between the Kingdom of Cambodia and the United States. Cambodia has requested that the agreement be amended to include additional

categories of archaeological and ethnological materials. The State Department published notification of the proposal in the Federal Register. 87 Fed. Reg. 78,184 (Dec. 21, 2022).

12. North Macedonia

North Macedonia 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 December 21, 2022. North Macedonia's request seeks U.S. import restrictions on archaeological and ethnological material representing North Macedonia cultural patrimony. The State Department published notification of the request in the Federal Register. 87 Fed. Reg. 78,183 (Dec. 21, 2022).

13. Uzbekistan

Uzbekistan 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 December 21, 2022. Uzbekistan's request seeks U.S. import restrictions on archaeological and ethnological material representing Uzbekistan's cultural patrimony. The State Department published notification of the request in the Federal Register. 87 Fed. Reg. 78,183 (Dec. 21, 2022).

B. CULTURAL PROPERTY

On June 15, 2022, the State Department renewed the Charter of the Cultural Property Advisory Committee (CPAC). The Committee was established by the Convention on Cultural Property Implementation Act (Public Law 97-446) to provide recommendations regarding requests for assistance from foreign governments under the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. See media note at https://www.state.gov/renewal-of-the-charter-of-the-cultural-property-advisory-committee-2/.

C. EXCHANGE PROGRAMS

1. Fulbright Program in Indonesia

On September 13, 2022, the United States and Indonesia signed an arrangement implementing the Fulbright Program in Indonesia. The 2022 arrangement, which was signed at Magelang and entered into force September 13, 2022, is available at https://www.state.gov/indonesia-22-913. The arrangement refers to the MOU on

cooperation in the field of education signed on December 14, 2021 (see *Digest* 2021 at 576).

2. Fulbright Program in Slovenia

On March 2, 2022, the United States and Slovenia signed an MOU concerning the Fulbright Exchange Program. The MOU sets the terms for the exchange of graduate students, postdoctoral researchers, and lecturers under the auspices of the Fulbright exchange program. Signed at Ljubljana on March 2 and entered into force April 12, 2022, the MOU is available at https://www.state.gov/slovenia-22-412.

3. Special Student Relief Arrangement with Ukraine

On June 14, 2022, the United States proposed, and Ukraine accepted on August 18, via an exchange of diplomatic notes a Special Student Relief arrangement for J-1 visa Ukrainian post-secondary exchange students adversely impacted by the Russian invasion of Ukraine. The arrangement temporarily modifies the requirements of the Exchange Visitor Program regulations at 22 CFR 62.23 that govern the College/University Student category.*

4. Educational Cooperation Collaboration with Germany

On November 15, 2022, the U.S. Department of State and the Federal Foreign Office of the Federal Republic of Germany signed a joint declaration of intent on cooperation in the field of education through the Gilman Program. The collaboration is intended to support students who have traditionally been underrepresented in study abroad.

5. Au Pair Litigation: *Posada v. Cultural Care, Inc.*

On November 28, 2022, the United States filed a brief as amicus curiae in response to the request of the U.S. Court of Appeals for the First Circuit in a case involving the U.S. au pair exchange program. *Posada v. Cultural Care, Inc.*, No. 21-1676. Excerpts follow from the U.S. brief.

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* * * *

STATEMENT

A. Statutory And Regulatory Background

The Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (Fulbright-Hays Act or Act), authorized the Director of the United States Information

* Editor's note: The modifications to the Exchange Visitor Program regulations are outlined in the Federal Register. 88 Fed. Reg. 20,202 (Apr, 5, 2023).

Agency (USIA), "when he considers that it would strengthen international cooperative relations," to provide for "educational exchanges[] . . .between the United States and other countries of students, trainees, teachers, instructors, and professors." *See* 22 U.S.C. § 2452(a).[9] The resulting Exchange Visitor Program (EVP) furthers the Act's purposes of "increas[ing] mutual understanding between the people of the United States and the people of other countries," "strengthen[ing] the ties which unite us with other nations," "promot[ing] international cooperation for educational and cultural advancement," and "assist[ing] in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." *Id.* § 2451. Participants in the EVP enter and remain in the United States on a J visa, a type of nonimmigrant visa that was created for, and is specific to, the EVP. *See* 8 U.S.C. § 1101(a)(15)(J).

The State Department has administered the EVP since 1999, when the USIA and the State Department merged. The State Department's regulations establish different categories of exchange programs within the EVP—each of which uses the J visa—that delineate the different roles that exchange visitors may fill.

One such program category allows foreign nationals to enter the United States as au pairs. *See* 22 C.F.R. § 62.31. The au pair program is a cultural- and educational exchange program available only to foreigners between the ages of 18 and 26. Young people who qualify for this opportunity spend a year in the United States living with an American host family, providing childcare services within that family, and attending classes at an accredited college or university.

Although the State Department oversees the EVP, the exchange programs are conducted by entities known as "sponsors" that the State Department designates for that purpose. *See* 22 C.F.R. §§ 62.1(b), 62.3. The sponsors screen foreign nationals for eligibility, place them with host organizations or families, and monitor their participation in the EVP. In some categories of the EVP—including the au pair category—the sponsors are private-sector organizations, and they earn income from fees they charge to host organizations or families and exchange visitors. State Department regulations state that a sponsor "must[] . . . [n]ot represent that its exchange visitor program is endorsed, sponsored, or supported by the Department of State or the U.S. Government." 22 C.F.R. § 62.9(d)(5).

State Department regulations impose various requirements on sponsors. Among other things, sponsors in the au pair program "shall require that au pair participants . . . [a]re compensated at a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor." 22 C.F.R. § 62.31(j). Sponsors must also ensure that au pairs work no more than 10 hours per day and 45 hours per week, receive at least one-and-a-half days off per week, and are provided two-weeks paid vacation. *Id.*

* * * *

ARGUMENT

Cultural Care's interlocutory appeal should be dismissed for lack of appellate jurisdiction. Cultural Care argues that the district court's denial of the company's assertion of

[9] The Fulbright-Hays Act provided this authority to the President. Pursuant to subsequent Executive Order and reorganizations, the authority came to rest with the USIA Director.

"derivative sovereign immunity" is immediately appealable under the collateral order doctrine. That is incorrect. For the reasons explained below, the so called "derivative sovereign immunity" doctrine is not an immunity at all; it is merely a defense to liability. Moreover, a district court order rejecting the "derivative sovereign immunity" defense can be reviewed effectively following a final judgment and typically involves the resolution of issues that are intertwined with the merits of the plaintiffs' suit. Accordingly, such an order does not satisfy the requirements of the collateral order doctrine. This Court thus lacks jurisdiction over this interlocutory appeal, and the appeal should be dismissed.

I. "Derivative Sovereign Immunity" Is A Defense To Liability, Not An Immunity From Suit

Federal contractors and other private parties operating under the federal government's direction and authorization do not "share the Government's unqualified immunity from liability and litigation." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016). As Justice Holmes put it nearly a century ago, while the federal government generally "cannot be sued for a tort, … its immunity does not extend to those that acted in its name." *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258U.S. 549, 568 (1922); *see Brady v. Roosevelt S.S. Co*., 317 U.S. 575, 583 (1943) ("Immunity from suit … cannot be … obtained" through "a contract between [the defendant] and the [government].").

"Derivative sovereign immunity" is therefore a misnomer. The defense known by that name is not a derivative form of the federal government's own immunity; rather, it reflects the distinct principle articulated in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940): A private entity cannot be held liable for carrying out a "validly conferred" delegation of authority at the direction of the government. *Id.* At 20-21. A private company may be held liable for the exercise of delegated authority, by contrast, where it "exceeded [the] authority" conferred by the government or where the authority "was not validly conferred." *Id.* at 21; *see Campbell-Ewald*, 577 U.S. at 166 ("When a contractor violates both federal law and the Government's explicit instructions, … no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation."). Thus, the *Yearsley* doctrine affords private entities the opportunity to show that they cannot be held liable because they lawfully exercised lawfully delegated authority.

* * * *

The defense of so-called "derivative sovereign immunity" thus turns on (1) whether the government authorized a private entity to take actions that would be unlawful if committed by others; (2) whether the authorization was valid; and (3) whether the private entity's actions exceeded the scope of that authorization. Cultural Care is correct (Cultural Care Br. 25-30) that the federal government can grant the relevant authorization through a statute or regulation, as well as through contract. In this case, for example, if the State Department's regulations authorized Cultural Care to operate its exchange program exempt from state wage-and-hour laws, then Cultural Care would not have acted unlawfully in failing to comply with those laws. But that authorization would not mean, as Cultural Care contends (Cultural Care Br. 31-33), that the State Department had conferred the federal government's sovereign immunity on a private entity. It would simply mean that the State Department had authorized the conduct at issue and that Cultural Care had therefore acted lawfully in operating its exchange program.

The Supreme Court's decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), further supports the conclusion that the "derivative sovereign immunity" defense is not a form of the federal government's absolute sovereign immunity, as Cultural Care contends. In *Lewis*, the Supreme Court emphasized that sovereign immunity will bar a suit against an individual or entity only where "the sovereign is the real party in interest." *Id.* at 1290 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). In making that assessment, courts ask "whether the remedy sought is truly against the sovereign." *Id.*; *see also id.* at 1291 (the sovereign is not the real party in interest where the relief sought "will not require action by the sovereign or disturb the sovereign's property" (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949))). As noted above, the "derivative sovereign immunity" defense turns on whether the federal government authorized a private entity to take a certain action that would be unlawful if taken by others. It applies where the plaintiff seeks to hold a private defendant liable and where the judgment would operate against the private entity, not the United States. In other words, it provides a defense to liability for a private entity where the private entity is the real party in interest and would otherwise face liability.

* * * *

D. INTERNATIONAL EXPOSITIONS

As discussed in *Digest 2021* at 577, the Department announced the U.S. bid to host Expo 2027 in Minnesota. The vote to select the host city for Expo 2027 is expected in June 2023.

Cross References

Afghanistan, **Ch. 9.A.2**
Libya, **Ch. 9.A.5**
Mali, **Ch. 9.A.6**
Afghanistan, **Ch. 17.B.2**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

Dave Bigge, attorney adviser, delivered the U.S. statement at the UN General Assembly Sixth Committee on October 17, 2022, on the report of the UN Commission on International Trade Law on the work of its 55th 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-75-report-of-the-united-nations-commission-on-international-trade-law/.

* * * *

The United States welcomes the Report of the 55th session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL's Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

We welcomed the return to regular meetings this year, including a very productive Commission session at which UNCITRAL finalized and approved the draft convention on the international effects of judicial sales of ships. This convention, if adopted, will enhance legal certainty and transparency in international shipping through the use of uniform rules that promote the dissemination of information on prospective judicial sales to interested parties, and give international effect to judicial sales providing clean title to the purchaser. We are grateful for the excellent support of the Secretariat, as well as for the constructive engagement of UNCITRAL members and observers, that allowed this convention to be completed in a timely manner despite the significant challenges of multiple hybrid negotiating sessions during COVID.

UNCITRAL also adopted the Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services and recommendations to assist mediation centres under the UNCITRAL Mediation Rules. The Model Law seeks to overcome the obstacles to broader use of identity management and trust services by developing uniform legal rules that can improve efficiency in recognition, lower transaction costs, increase legal predictability, and increase global digital compatibility. Meanwhile, the recommendations to assist mediation centres should serve to complement and support the use of the legal framework on international mediation already developed by UNCITRAL.

We look forward to the initiation of a new normative project on negotiable multi-modal transport documents later this year, and to continued progress on the joint UNCITRAL-UNIDROIT project on warehouse receipts, which we hope can be assigned to a working group in the near future. We also look forward to continuing the productive work this coming year in Working Groups with on-going projects, including the expected completion of the Code of Conduct and its commentary by Working Group III, and the development of guidance by Working Group II on early dismissal and preliminary determination in international arbitration. Finally, we welcome the proposed colloquium, in close coordination with climate experts and other key private international law institutions, on the topic of climate change mitigation, adaption and resilience in the coming year.

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.

* * * *

On December 7, 2022, the UN General Assembly adopted the United Nations Convention on the International Effects of Judicial Sale of Ships. U.N. Doc. A/RES/77/100, available at https://digitallibrary.un.org/record/3998318?ln=en**.** The Convention will harmonize the "rules on the judicial sale of ships, which remain subject to widely varying domestic laws… [it] will enhance legal certainty by creating a uniform regime for the international effects of the judicial sale of ships." See https://unis.unvienna.org/unis/en/pressrels/2022/unisl335.html**.**

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 January 25, 2022, the U.S. Court of Appeals for the D.C. Circuit reversed the district court's grant of summary judgment to Saint-Gobain in *Saint-Gobain v. Venezuela*, 23 F.4th 1036 (D.C. Cir. 2022), a case concerning the Hague Service Convention. The U.S. amicus brief was excerpted in *Digest 2021* at 580-87. Sections of the court's opinion is excerpted below.

* * * *

The Hague Convention is an international agreement among the signatory sovereign states on service of judicial documents that the Preamble states is designed to "simplify[ ] and expedit[e] the procedure" for serving process abroad. It was ratified by the United States Senate on April 14, 1967. 113 CONG. REC. - SENATE, 9664-65 (1967). Article 2 requires signatory states to "designate a Central Authority which will undertake to receive requests for service coming from other Contracting States." Under Article 5, once the Central Authority receives a request for service, it must serve the documents "by a method prescribed by [the receiving state's] internal law" or "by a particular method requested by the applicant" that is compatible with that law. Article 6 requires the Central Authority to provide a certificate of service that conforms to a specified model. Paragraph 1 of Article 15, in turn, prohibits entry of a default judgment where the foreign defendant "has not appeared" until the document is served according to the receiving state's internal law or the documents are "actually delivered ... by another method provided for by this Convention." Paragraph 2 provides that in the absence of a certificate of service, the entry of a default is permitted where:

> (a) the document was transmitted by one of the methods provided for in [the] Convention,
> (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, [and]
> (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it ....

Saint-Gobain Performance Plastics Europe is a French corporation that held a 99.99% interest in NorPro Venezuela, C.A., a Venezuelan company that produced components for hydraulic fracturing. In March 2011, then-President Hugo Chávez of the Bolivarian Republic of Venezuela ordered expropriation of Saint-Gobain's interest. Based on protection against expropriation by the France-Venezuela Bilateral Investment Treaty of April 15, 2004, Saint-Gobain sought compensation and entered into arbitration with the Republic pursuant to the International Centre for Settlement of Investment Disputes ("ICSID") Convention. An arbitral tribunal found that the Republic had breached the Investment Treaty and in November 2017 awarded Saint-Gobain $42 million for the expropriation.

When the Republic failed to pay the award, Saint-Gobain in December 2018 filed a lawsuit in the United States District Court for the District of Delaware seeking to register and enforce the arbitral award pursuant to the ICSID Convention, specifically 22 U.S.C. § 1650(a), which grants federal district courts subject matter jurisdiction over actions to enforce ICSID arbitral awards. In the absence of a special arrangement for service by the parties, Saint-Gobain proceeded under the FSIA's second preferred service option and on December 14, 2018, as Venezuelan law required sent requests for service with copies of its complaint and summons to the Republic's designated Central Authority. T. Flores and I. Ruiz signed for delivery of the requests for service on December 21 and 27, respectively. Saint-Gobain sought no further response from the Central Authority and received none. In June 2019, Saint-Gobain moved for a default judgment against the Republic. The Republic moved to dismiss for lack of personal jurisdiction, on the ground it had not properly been served, and for improper venue in Delaware.

The Delaware district court found that it had jurisdiction inasmuch as the Hague Convention "does not permit a foreign sovereign to feign non-service by its own failure to complete and return the required certificate." D. Del. Slip Op. at 2. Saint-Gobain had served the

Republic pursuant to Article 15(1) when it "serv[ed] the appropriate documents directly to the Central Authority designated by the Republic." *Id*. at 22. Upon granting Venezuela's venue motion, the court transferred the case to the District of Columbia.

In the U.S. District Court for the District of Columbia, Saint-Gobain moved for summary judgment and the Republic moved to dismiss for lack of personal jurisdiction. The district court, treating the motion to dismiss as a motion for reconsideration of the Delaware district court's jurisdictional determination, denied the Republic's motion and granted summary judgment to Saint-Gobain. D.D.C. Slip Op. 2. The court agreed with the Delaware court that service was complete under Article 15 when Saint-Gobain submitted its requests for service because that interpretation was "reasonable and consistent with the findings of other courts." D.D.C. Slip Op. 19–20 (citing *Box v. Dall. Mex. Consulate Gen.*, 487 Fed. App'x 880, 886 (5th Cir. 2012); *Devengoechea v. Bolivarian Republic of Venez.*, No. 12-cv-23743, 2014 WL 12489848 at *1 (S.D. Fla. Apr. 25, 2014); *Scheck v. Republic of Arg.*, No. 10-cv-5167, 2011 WL 2118795 at *3 (S.D.N.Y. May 23, 2011)). It ruled that Article 15 properly applied "in the context of evaluating a motion for default," *id.* at 21, and that requesting service from the Central Authority was sufficient in cases against a foreign sovereign state. *Id.* at 22–23. Absent other objections, summary judgment was therefore appropriate. *Id.* at 7–8, 24.

The Republic appeals, and our review of the district court's determination that it had personal jurisdiction over the Republic is *de novo*. *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1036 (D.C. Cir. 2020); *Estate of Klieman v. Palestinian Auth.*, 923 F.3d 1115, 1123 (D.C. Cir. 2019).

II.

In cases of treaty interpretation, the Supreme Court has instructed that courts must "begin with the text," *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 699, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988) (internal quotations omitted), and that "[w]here the text is clear ... [the courts] have no power to insert an amendment," *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989). "To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial," the Court explained, "would be on our part an usurpation of power, and not an exercise of judicial functions." *Id.* at 135, 109 S.Ct. 1676 (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71, 5 L.Ed. 191 (1821)). Because the Hague Convention is a treaty, this law applies. *See Water Splash v. Menon*, ––– U.S. ––––, 137 S. Ct. 1504, 1508–09, 197 L.Ed.2d 826 (2017). Courts must also adhere to the plain text when interpreting the FSIA's requirements for service given the "sensitive diplomatic implications" of suits against foreign sovereigns. *Republic of Sudan v. Harrison*, ––– U.S. ––––, 139 S. Ct. 1048, 1062, 203 L.Ed.2d 433 (2019); *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994).

The plain text of Article 5 of the Hague Convention requires that the Central Authority serve the defendant "by a method prescribed by its internal law" or "by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." Convention, art. 5. Because Saint-Gobain did not propose its own method of service, this court looks to the method of service prescribed by the law of the Republic to determine whether Article 5's requirements were met.

Under Venezuelan law, lawsuits against the Republic must be served on the Attorney General of the Republic. Organic Law of the Attorney General's Office, art. 95, *published in* Official Extraordinary Gazette No. 6.210, at 66 (Dec. 30, 2015) (Venez.). The parties do not dispute either that the Attorney General was not served or that Saint-Gobain did not receive a

certificate of service from the Central Authority. Consequently, service was not completed under Article 5 of the Convention.

Saint-Gobain nonetheless contends that when the foreign defendant is a state, requesting service from the Central Authority suffices because the Central Authority is the state. Saint-Gobain Br. 26–27. This interpretation is unsupported by the plain text of the Convention. The Convention states in Article 2 that the Central Authority receives requests for service, not that this constitutes legal service, and under Articles 4 and 13, the Central Authority retains the power to object to requests that do not comply with the Convention or that infringe the receiving state's sovereignty. Viewing the Central Authority as legally equivalent to a sovereign defendant would amend the Convention by effectively rendering irrelevant the signatory state's law in determining whether service is complete. The Convention specifies that service must be made either by a "method prescribed by [the receiving state's] internal law," or by a "method requested by the applicant, unless ... incompatible with the law of the [receiving state]." Convention, art. 5. Because Venezuelan law requires service on the Attorney General in lawsuits filed against the Republic, that also is what the Convention requires. The interpretation of a treaty such as the Hague Convention is "governed by the text [of the Convention,] solemnly adopted by the governments of many separate nations," and the court has "no power to insert an amendment" where the "text is clear." *Chan*, 490 U.S. at 134, 109 S.Ct. 1676. Saint-Gobain does not cite contrary authority.

Article 15(1), on which Saint-Gobain relies, is not a basis for obtaining personal jurisdiction here. Article 15(1) states that "[where] the defendant has not appeared, judgment shall not be given until it is established that — (a) the document was served by a method prescribed by the internal law of the State addressed, or (b) the document was actually delivered to the defendant ... by another method provided for by this Convention." The Republic appeared before both the Delaware district court and the District of Columbia district court to challenge the personal jurisdiction of the courts. Saint-Gobain has neither completed service in compliance with Venezuelan law, which requires service on the Attorney General, nor identified another method of service under the Convention with which it complied. Therefore, Saint-Gobain has not satisfied the requirements of either Article 5 or Article 15(1).

* * * *

2. *ZF Auto. US v. Luxshare, Ltd. and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*

On January 31, 2022, the United States filed an *amicus* brief in the Supreme Court of the United States in the consolidated cases of *ZF Auto. US v. Luxshare, Ltd. and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*, Nos. 21-401, 21-518 on the question of whether 28 U.S.C. § 1782 can be used to obtain information and documents in aid of private international arbitrations conducted overseas. On June 13, 2022, the Supreme Court issued its opinion, holding that American law does not allow federal courts to order discovery for private commercial arbitration abroad, significantly narrowing the scope of foreign litigant's uses of U.S. discovery procedures. *ZF Auto. US v. Luxshare, Ltd.*

and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States, 596 U. S. ___, 142 S.Ct. 2078 (2022). Excerpts follow from the opinion (with footnotes omitted).

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* * * *

Congress has long allowed federal courts to assist foreign or international adjudicative bodies in evidence gathering. The current statute, 28 U.S.C. § 1782, permits district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal." These consolidated cases require us to decide whether private adjudicatory bodies count as "foreign or international tribunals." They do not. The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill.

I

Both cases before us involve a party seeking discovery in the United States for use in arbitration proceedings abroad. In both, the party seeking discovery invoked § 1782, which permits a district court to order the production of certain evidence "for use in a proceeding in a foreign or international tribunal." And in both, the party resisting discovery argued that the arbitral panel at issue did not qualify as a "foreign or international tribunal" under the statute.

* * * *

II

We begin with the question whether the phrase "foreign or international tribunal" in § 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies. If the former, all agree that § 1782 permits discovery to proceed in both cases. If the latter, we must determine whether the arbitral panels in these cases qualify as governmental or intergovernmental bodies.

A

Section 1782(a) provides:

"The district court of the district in which a person resides or is found may order him 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."

Standing alone, the word "tribunal" casts little light on the question. It can be used as a synonym for "court," in which case it carries a distinctively governmental flavor. See, *e.g.,* Black's Law Dictionary 1677 (4th ed. rev. 1968) ("[t]he seat of a judge" or "a judicial court; the jurisdiction which the judges exercise"). But it can also be used more broadly to refer to any adjudicatory body. See, *e.g.,* American Heritage Dictionary 1369 (1969) ("[a]nything having the power of determining or judging"). Here, statutory history indicates that Congress used "tribunal" in the broader sense. A prior version of § 1782 covered "any judicial proceeding" in "any court in a foreign country," 28 U.S.C. § 1782 (1958 ed.), but in 1964, Congress expanded the provision to cover proceedings in a "foreign or international tribunal." As we have previously observed, that shift created " 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.' " *Intel*, 542 U.S. at 258, 124 S.Ct. 2466 (alterations omitted). So a § 1782 "tribunal" need not be a formal "court," and the broad

meaning of "tribunal" does not itself exclude private adjudicatory bodies. If we had nothing but this single word to go on, there would be a good case for including private arbitral panels.

This is where context comes in. "Tribunal" does not stand alone—it belongs to the phrase "foreign or international tribunal." And attached to these modifiers, "tribunal" is best understood as an adjudicative body that exercises governmental authority. Cf. *FCC v. AT&T Inc.*, 562 U.S. 397, 406, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation").

Take "foreign tribunal" first. Congress could have used "foreign" in one of two ways here. It could mean something like "[b]elonging to another nation or country," which would support reading "foreign tribunal" as a governmental body. Black's Law Dictionary, at 775. Or it could more generally mean "from" another country, which would sweep in private adjudicative bodies too. See, *e.g.,* Random House Dictionary of the English Language 555 (1966) ("derived from another country or nation; not native"). The first meaning is the better fit.

The word "foreign" takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations. That is why "foreign" suggests something different in the phrase "foreign leader" than it does in "foreign films." Brief for Petitioners in No. 21–401, pp. 20–21; Brief for Respondent in No. 21–401, pp. 7–8. The phrase "foreign leader" brings to mind "an official of a foreign state, not a team captain of a European football club." Brief for United States as *Amicus Curiae* 17. So too with "foreign tribunal." "Tribunal" is a word with potential governmental or sovereign connotations, so "foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. See *id.,* at 14–15 (a governmental adjudicator is "one whose role in deciding the dispute rests on" a "nation's sovereign authority").

This reading of "foreign tribunal" is reinforced by the statutory defaults for discovery procedure. In addition to authorizing district courts to order testimony or the production of evidence, § 1782 permits them to "prescribe the practice and procedure, which may be in whole or part *the practice and procedure of the foreign country or the international tribunal*, for taking the testimony or statement or producing the document or other thing." § 1782(a) (emphasis added). The reference to the procedure of "the foreign country or the international tribunal" parallels the authorization for district courts to grant discovery for use in a "foreign or international tribunal" mentioned just before in § 1782. The statute thus presumes that a "foreign tribunal" follows "the practice and procedure of the foreign country." It is unremarkable for the statute to presume that a foreign court, quasi-judicial body, or any other governmental adjudicatory body follows the practice and procedures prescribed by the government that conferred authority on it. But that would be an odd assumption to make about a private adjudicatory body, which is typically the creature of an agreement between private parties who prescribe their own rules. See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). That the default discovery procedures for a "foreign tribunal" are governmental suggests that the body is governmental too.

Now for "international tribunal." "International" can mean either (1) involving or of two or more "nations," or (2) involving or of two or more "nationalities." American Heritage Dictionary, at 685 ("[o]f, relating to, or involving two or more nations or nationalities"); see also Random House Dictionary, at 743 ("between or among nations; involving two or more nations"; "of or pertaining to two or more nations or their citizens"). The latter definition is unlikely in this context because an adjudicative body would be "international" if it had adjudicators of different

nationalities—and it would be strange for the availability of discovery to turn on the national origin of the adjudicators. So no party argues that "international" carries that meaning here. A tribunal is "international" when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes. See Tr. of Oral Arg. 77 (the United States arguing that "the touchstone" is whether the body is "exercising official power on behalf of the two governments").

So understood, "foreign tribunal" and "international tribunal" complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.

B

Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

From the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign "courts." See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630; Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Act of Feb. 27, 1877, ch. 69, § 875, 19 Stat. 241; Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949; 28 U.S.C. § 1782 (1958 ed.). And before 1964, a separate strand of law covered assistance to " 'any international tribunal or commission ... in which the United States participate[d] as a party.' " Act of June 7, 1933, ch. 50, 48 Stat. 117. The process of combining these two statutory lines began when Congress established the Commission on International Rules of Judicial Procedure. See Act of Sept. 2, 1958, Pub. L. 85–906, §§ 1–2, 72 Stat. 1743. It charged the Commission with improving the process of judicial assistance, specifying that the "assistance and cooperation" was "*between the United States and foreign countries*" and that "the rendering of assistance *to foreign courts and quasi-judicial agencies*" should be improved. *Ibid.* (emphasis added). In 1964, Congress adopted the Commission's proposed legislation, which became the modern version of § 1782.

Interpreting § 1782 to reach only bodies exercising governmental authority is consistent with Congress' charge to the Commission. Seen in light of the statutory history, the amendment did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered. By broadening the range of governmental and intergovernmental bodies included in § 1782, Congress increased the "assistance and cooperation" rendered by the United States to those nations.

After all, the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end. Such a broad reading of § 1782 would open district court doors to any interested person seeking assistance for proceedings before any private adjudicative body—a category broad enough to include everything from a commercial arbitration panel to a university's student disciplinary tribunal. See Brief for Petitioners in No. 21–401, at 19. Why would Congress lend the resources of district courts to aid purely private bodies adjudicating purely private disputes abroad?

Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery, see 9 U.S.C. § 7, while district courts can entertain § 1782 requests from foreign or international tribunals or any "interested person," 28 U.S.C. § 1782(a). In addition, prearbitration

discovery is off the table under the FAA but broadly available under § 1782. See *Intel*, 542 U.S. at 259, 124 S.Ct. 2466 (holding that discovery is available for use in proceedings "within reasonable contemplation"). Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration. And as the Seventh Circuit observed, "[i]t's 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." *Rolls-Royce*, 975 F.3d at 695.

* * *

In sum, we hold that § 1782 requires a "foreign or international tribunal" to be governmental or intergovernmental. Thus, a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within § 1782.

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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 2022 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. UN Security Council resolutions

On December 9, 2022, the UN Security Council adopted resolution 2664 establishing a humanitarian carveout across UN sanctions regimes. See U.N. Doc. S/RES/2664, available at https://undocs.org/S/RES/2664(2022). The United States co-drafted the resolution with Ireland. Secretary Blinken's press statement is available at https://www.state.gov/un-security-council-adopts-resolution-establishing-humanitarian-carveout-across-un-sanctions-regimes/ and included below.

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* * * *

Today's adoption of UN Security Council Resolution 2664 is a critical step to enabling the unimpeded delivery of food, medicine, and humanitarian aid, while upholding robust sanctions – critical to driving our foreign policy goals. The UN Security Council adopted this Resolution, which the United States co-drafted with Ireland, to create a carveout across UN sanctions regimes that protects humanitarian assistance and other activities that meet basic human needs.

Through the adoption of the Resolution, the UN Security Council is sending a clear message that sanctions will not impede the delivery of critical humanitarian assistance by reputable humanitarian organizations. This Resolution includes safeguards to protect against abuse and evasion by sanctioned persons and entities, including by establishing reporting requirements to ensure detection and mitigation of possible aid diversion.

By providing exceptions for humanitarian activities across UN sanctions regimes, the Resolution provides much-needed clarity to the international community, humanitarian assistance providers, and critical commercial service providers, which will help facilitate the delivery of aid and goods that are critical to saving lives around the world. This goal is more important than ever as the world faces unprecedented levels of humanitarian need, with some 339 million people in need of humanitarian aid and nearly 50 million people on the verge of famine. We are committed to supporting life-saving humanitarian efforts, providing more than $17 billion in bilateral humanitarian assistance in FY 2022.

The adoption of this Resolution is a significant reform to UN targeted sanctions, and consistent implementation by Member States is key to its success. As I announced during the UN General Assembly High-Level Week in September, the United States will incorporate humanitarian authorizations across our domestic sanctions programs. We look forward to working with other Member States and humanitarian actors to ensure aid continues to reach those in need, while maintaining the integrity of sanctions that help promote global peace and security.

* * * *

On December 20, 2022, Secretary Blinken announced Treasury's release of general licenses to implement UN Security Council Resolution 2664. Secretary Blinken's press statement is available at https://www.state.gov/improving-humanitarian-aid-delivery-by-expanding-authorizations-across-u-s-sanctions/, which includes the following:

> Today, we are taking the next step with the U.S. Department of the Treasury's release of a package of general licenses (GLs) that create a baseline for humanitarian authorizations across U.S. sanctions programs. These GLs will establish consistent regulations, streamline compliance for humanitarian and commercial actors, and ultimately ensure sanctions do not unduly impact humanitarian conditions around the world. The GLs help implement UN Security Council Resolution 2664 and build upon the many authorizations this Administration has already incorporated across several U.S. sanctions programs to facilitate the conduct of humanitarian activity. This update will refine and strengthen our sanctions implementation by ensuring our measures impact the intended targets while enabling humanitarian organizations to help those in need.
>
> These licenses, which include safeguards to prevent abuse or diversion, make our sanctions clearer, stronger, and more effective and streamlined. We look forward to working with our allies and partners around the world, and with humanitarian actors and financial institutions, to ensure these licenses are

understood and implemented so that food, medicine, and humanitarian aid reach those most in need.

Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy1175.

In addition, on December 20, 2022, Ambassador Linda Thomas-Greenfield released a statement on UN Security Council Resolution 2664. The statement is available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield-on-improving-humanitarian-aid-delivery-by-expanding-authorizations-across-u-s-sanctions-programs/ and included below.

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* * * *

On December 9, the UN Security Council adopted Resolution 2664, a landmark resolution put forward by the United States and Ireland, that created a carveout for humanitarian efforts in all UN sanctions regimes. Today, the United States became the first country to implement Resolution 2664 to ease the delivery of humanitarian aid across a number of U.S. sanctions programs while ensuring the aid is not diverted or abused by malicious actors.

Specifically, the U.S. Department of the Treasury issued or amended general licenses to support the humanitarian community's lifesaving efforts that will ensure a baseline of consistent authorizations, streamline compliance for humanitarian and commercial actors, and remove impediments, including unintentional, second-order impacts, to the delivery of legitimate humanitarian aid around the world. Most importantly, this effort will help save lives by making it easier for humanitarian actors to spring into action when situations emerge that require food, medicine, shelter, and other urgent assistance.

Today's actions by the U.S. Department of the Treasury, combined with the actions taken by the UN Security Council, will help our partners deliver aid with greater speed and confidence, all while maintaining safeguards that ensure humanitarian aid gets to its intended recipients.

* * * *

2. Iran

a. General

On January 31, 2022, 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/senior-state-department-official-on-the-jcpoa-talks/ and excerpted below.

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* * * *

[SENIOR STATE DEPARTMENT OFFICIAL:] I'm sure you've heard a lot recently about people saying that this is the endgame, time for political decisions, that we were – one of my colleagues said that we are now in the ballpark. And I want to sort of deconstruct what all that means.

First, as a matter of timing, we are in the final stretch because, as we've said now for some time, this can't go on forever because of Iran's nuclear advances. This is not a prediction. It's not a threat. It's not an artificial deadline. It's just a requirement that we've conveyed indirectly to Iran and to all our P5+1 partners for some time, which is that given the pace of Iran's advances, its nuclear advances, we only have a handful of weeks left to get a deal, after which point it will unfortunately be no longer possible to return to the JCPOA and to recapture the nonproliferation benefits that the deal provided for us. So again, not an artificial deadline, not an ultimatum, but just a statement of fact that the Iranians have been aware of now for some time that we are reaching the final moment, after which we will no longer be in a position to come back to the JCPOA because it will no longer hold the value that we negotiated for. So that's one reason why we say that this – we're entering into the final – the endgame.

The second reason is substantive. We've been at this now for roughly 10 months, and the last – the last time we were in Vienna, the negotiations in January were among the most intensive that we've had to date. And we made progress narrowing down the list of differences to just the key priorities on all sides. And that's why now is a time for political decisions. Now is the time to decide whether – for Iran to decide whether it's prepared to make those decisions necessary for a mutual return to compliance with the JCPOA.

So that's the reason why negotiators have returned to – for consultations with their leadership to figure out whether they're prepared to make the tough political decisions that have to be made now if we want to be in a position to secure that mutual return to full implementation of the JCPOA. In other words, we will know sooner rather than later whether we are back in the – the U.S. is back in the JCPOA and Iran is back in fully implementing its obligations under the JCPOA, or whether we're going to have to face a different reality, a reality of mounting tensions and crisis.

I think it's been clear now for – since President Biden has been in office what the U.S. strong preference is and what we have devoted our efforts to over the past 10 months or so, and that's full return to the JCPOA. And that's because that would advance core U.S. national interests, it would end the current nuclear nonproliferation crisis, it would create an opportunity to depressurize the broader regional crisis. In other words, it would get us out of the situation that we inherited from the prior administration's catastrophic error of withdrawing from the JCPOA, which left us with an unconstrained Iran nuclear program and inadequate if not wholly unsatisfactory tools to address it.

So that would be one option, which would also in our view serve regional and international interests. I think you've all seen the strong support for the return to the JCPOA from our Gulf partners, including a joint statement that we and the GCC put out in November, and you've also seen – and we mentioned it in our last call – the growing list of seniormost former Israeli officials, in particular security leaders, who now regret the JCPOA withdrawal and call it a terrible mistake.

That's our preferred path. We know that it is very possible that Iran chooses not to go down that path, and we are ready to deal with that contingency. We hope that's not the decision that Iran makes, but we are prepared to deal with either one of them.
I think that's the message that all of the P5+1 have heard. I think they all are united on this notion that we have little time left, that tough decisions need to be made, and now's the time to make them. It's the message that our European partners in particular left the Iranian delegation in Vienna with last Friday, and it's our understanding that it's the message that President Macron conveyed to President Raisi when they spoke over the weekend, that there is an opportunity, that it is a significant opportunity, but there is also urgency. And if we all don't move with that urgency, that opportunity will very soon disappear.

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b. UN Security Council resolutions

As discussed in *Digest 2015* at 636, the UN Security Council unanimously adopted resolution 2231 on July 20, 2015. See U.N. Doc. S/RES/2231, available at https://undocs.org/S/RES/2231(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. In 2021, the U.S. Mission to the UN submitted a letter to the UN Security Council 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. See *Digest 2021* at 597-98.

On January 3, 2022, the United States submitted a letter to the UN Security Council calling attention to "an incident of Iranian activity in defiance of paragraph 3 of annex B to Security Council resolution 2231. The letter is excerpted below and available at https://digitallibrary.un.org/record/3953806?ln=en.

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Iran continues to develop its ballistic missile programme in defiance of resolution 2231 (2015). On 30 December, Iranian domestic media reported that Iran had launched a Simorgh space launch vehicle into low Earth orbit, but acknowledged that the three research payloads that the

vehicle carried did not enter a stable orbit. The Simorgh is a space launch vehicle manufactured and operated by the Defence Ministry on behalf of the Iranian Space Agency.

In paragraph 3 of annex B, it is stated in the relevant part that "Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology". Although not a ballistic missile, space launch vehicles incorporate technologies that are virtually identical to, and interchangeable with, those used in ballistic missiles designed to be capable of delivering nuclear weapons. The phrase "ballistic missiles designed to be capable of delivering nuclear weapons" in paragraph 3 of annex B includes Missile Technology Control Regime category I systems. By definition, ballistic missile systems designed to be category I systems, which are those capable of delivering a payload of at least 500 kg to a range of at least 300 km, are inherently capable of delivering nuclear weapons. Therefore, launches of space launch vehicles, which rely on technology interchangeable with that of category I ballistic missiles, are an activity that the Security Council has clearly called upon Iran not to undertake.

We once again urge the international community to hold Iran to account for its actions. Iran's further development of ballistic missile technology contributes to regional tension and poses a threat to international peace and security. When Iran chooses to defy the Security Council repeatedly without consequence, it undermines the fundamental credibility of the Council.

In addition, the Security Council must continue to insist on full implementation of the binding measures in annex B to resolution 2231 (2015) that restrict outside support for Iran's ballistic missile programme. All States Members of the United Nations have an obligation under that resolution not to supply, sell or transfer to Iran certain ballistic missile-related items, materials, equipment, goods and technology absent advance, case-by-case approval from the Security Council. They also may not provide Iran with any technology, technical assistance or training, financial assistance, investment, brokering or other services related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, or related to the supply, sale, manufacture or use of certain ballistic missile-related items, materials, equipment, goods and technology absent advance, case-by-case Security Council approval.

We ask that the Secretary-General take into account, in his next report on the implementation of resolution 2231 (2015), Iran's actions as described in the present letter. We also ask that you circulate the present letter as a document of the Security Council.

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On June 24, 2022, the United States submitted an identical letter to the UN Security Council again calling attention to Iran's continue development of its ballistic missile programme in defiance of paragragh 3 of annex B to Security Council resolution 2231. The letter is available at https://digitallibrary.un.org/record/3979110?ln=en and includes the following.

> Iran continues to develop its ballistic missile programme in defiance of resolution 2231 (2015). On 8 March, Iranian domestic media reported that the Islamic Revolutionary Guard Corps had launched a Qased space launch vehicle to place a satellite called Noor 2 into orbit.

On October 21, 2022, the United States submitted a letter to the UN Security Council regarding the transfer of unmanned aerial vehicles from Iran to Russia in violation of UN Security Council resolution 2231. The letter is excerpted below and available at https://digitallibrary.un.org/record/3992107?ln=en.

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Russia has procured Mohajer- and Shahed-series unmanned aerial vehicles from Iran in clear violation of resolution 2231 (2015). The United States urges the Security Council to take this matter seriously and insist on the full implementation of all obligations under relevant Security Council resolutions.

In late August 2022, Mohajer- and Shahed-series unmanned aerial vehicles were transferred from Iran to Russia. Russia has since used these Iranian-origin vehicles in multiple attacks against Ukraine, including the deplorable attacks on Ukrainian cities on 9 October, which targeted civilian infrastructure and resulted in numerous civilian casualties. Media outlets also report that, on 17 October, Russian air attacks using Iranian-supplied Shahed-136 unmanned aerial vehicles killed at least four people in Ukraine. Easily identifiable remnants of Iranian-origin unmanned aerial vehicles have since been recovered in Ukraine. There is significant publicly available documentation, including photographs and video, of Russia deploying these vehicles against Ukraine.

Paragraph 4 of annex B to resolution 2231 (2015) prohibits the transfer from Iran of all items, materials, equipment, goods and technology set out in S/2015/546, unless approved in advance by the Security Council on a case-by-case basis. Both Mohajer and Shahed unmanned aerial vehicles meet the parameters of S/2015/546 under category II because they are capable of a range equal to or greater than 300 km. Iran and Russia have clearly violated their obligations under resolution 2231 (2015) by participating in these transfers without seeking approval from the Security Council.

Additionally, Mohajer-series unmanned aerial vehicles are manufactured by Qods Aeronautics Industries, which is subject to the asset freeze provision of paragraph 6 (d) of annex B to Security Council resolution 2231 (2015). All States are required to ensure that funds or financial assets are prevented from being made available by their nationals to or for the benefit of designated entities. Financial transactions with this entity would constitute another violation of this resolution.

The United States requests that the United Nations Secretariat team responsible for monitoring the implementation of Security Council resolution 2231 (2015) conduct a technical and impartial investigation that assesses the type of unmanned aerial vehicles involved in these transfers in the light of the prohibitions contained in the resolution.

The United States offers its full cooperation with the Secretariat and the Security Council in reviewing these transfers in accordance with the requirements of Security Council resolution 2231 (2015).

Finally, the United States urges the Security Council to meet in its "2231 format" to review this information and determine an appropriate response. The United States stands ready to support the full and effective implementation of relevant Security Council resolutions.

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On December 19, 2022, Ambassador Robert Wood delivered remarks at a UN Security Council Briefing on Russia's use of Iranian drones in violation of resolution 2231. The remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-resolution-2231/ and excerpted below.

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Seven and a half years ago, this Council unanimously adopted Resolution 2231 as part of the diplomacy that produced the JCPOA. All Council members recognized the importance of retaining in place certain critical restrictions, including prohibitions on the transfer of certain nuclear and ballistic missile-related technology from Iran.

We are meeting at a time when Iran is taking increasingly provocative steps to enhance its nuclear program's capacity. The concerns of the international community are rising. The United States is fully committed to resolving these concerns through diplomacy. For months, we have been engaged in serious negotiations aimed at a mutual return to full implementation of the JCPOA.

Yet Iran's own actions and stances have been responsible for preventing that outcome. In September, a deal was within reach – one to which all other participants in the negotiations had agreed. Even Iran appeared prepared to say yes, until at the last minute, Iran made new demands that were extraneous to the JCPOA and that it knew could not be met. This was not the first time Iran's leaders had turned their backs on a deal that was on the table, approved by all. But this last instance dashed our collective hope for a swift, mutual return to full implementation of the JCPOA.

We have made clear that the door for diplomacy remains open. Unfortunately, Iran's actions suggest this goal is not their priority. Iran's conduct since September – notably its repeated and longstanding failure to cooperate with the IAEA and the expansion of its nuclear program for no legitimate civilian purpose – reinforce our skepticism about Iran's willingness and capability of reaching a deal and explains why there have been no active negotiations since then.

Given this context, the full and complete implementation of Resolution 2231 remains a priority. Yet we see a disturbing trend of this Council turning a blind eye to open violations of its provisions. Tolerating these violations undermines the authority of this Council – and gravely harms our ability to respond credibly to threats around the world.

We are grateful to the UN for its analysis and investigation into significant quantities of arms and ammunition being sent from ports in Iran to the Houthis in Yemen. Many of these – including anti-material rifles, RPG launchers, and anti-tank guided missiles – have been determined to be likely of Iranian origin. These shipments undermine international efforts to support a durable resolution to the conflict in Yemen and are a threat to regional security – issues we should all be taking seriously.

A few months ago, evidence arose of even more grave violations of Resolution 2231 – violations committed by a permanent member of this Council. Ukraine reported evidence of

Iranian-origin drones being used by Russia to attack civilian infrastructure. This report has been supported by ample evidence from multiple public sources. Tehran has acknowledged transferring UAVs to Russia, including in public statements on November 5 by Iran's foreign minister.

Let me state it clearly: Resolution 2231, Annex B, Paragraph 4, prohibits all countries – even permanent members of the UN Security Council – from transferring these types of drones from Iran without advance Security Council approval.

Russia's open violation of Resolution 2231 would be of serious concern under any circumstances. But we're exceptionally alarmed that Russia is using these drones to attack Ukraine's civilian infrastructure. What could be crueler than seeking to turn out the lights, cut off the heat, and shut down the water for millions of Ukrainian families?

Russia first started using Iranian drones toward the end of last summer. Ukraine duly reported the violation to the United Nations. Other countries, including the United States, have since supplied the UN with additional information and analysis regarding this violation.

We regret that the UN has not moved to carry out a normal investigation of this reported violation. For seven years, the UN's mandate to report on implementation of Resolution 2231 has been clear and unquestioned.

We are disappointed that the Secretariat, apparently yielding to Russian threats, has not carried out the investigatory mandate this Council has given it. We were also discouraged by the lack of coverage of these violations in the Facilitator's Report on the Implementation of Resolution 2231.

Now, months after that initial report, we learned last week that Russia has resumed using Iranian drones procured in violation of Resolution 2231. On December 14, Russia launched a swarm of Iranian-made drones against Kyiv. In light of these new developments, we renew our call on the UN Secretariat to document and analyze information related to this violation.

Given Iran's increasing integration into Russia's defense sector, we fear additional violations in the future. Russia may even be tempted to further violate Resolution 2231 by importing complete ballistic missiles from Iran.

This is not acceptable. There must be some degree of accountability for openly violating resolutions of this Council.

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c. U.S. sanctions and other controls

Further information on Iran sanctions is available at https://www.state.gov/iran-sanctions/ and https://ofac.treasury.gov/sanctions-programs-and-country-information/iran-sanctions.

(1) Section 1245 of FY-2012 NDAA and E.O. 13846

On May 12, 2022, the President determined 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 "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." 87 Fed. Reg. 30,383 (May 18, 2022). The determination is based on reports submitted to the U.S. Congress by the Energy Information Administration, and other relevant factors.

On June 16, 2022, OFAC imposed sanctions on a network supporting Iranian petrochemical sales pursuant to E.O. 13846, issued in 2018 and entitled, "Reimposing Certain Sanctions With Respect to Iran." Secretary Blinken's press statement is available at https://www.state.gov/targeting-a-sanctions-evasion-network-supporting-iranian-petrochemical-sales/ and includes the following:

> The United States is imposing sanctions on a network of Iranian petrochemical producers and front companies in the People's Republic of China (PRC), the United Arab Emirates, and Iran that support Triliance Petrochemical Co. Ltd. and Iran's Petrochemical Commercial Company (PCC), entities instrumental in brokering the sale of Iranian petrochemicals abroad. This network helps effectuate international transactions and evade sanctions, supporting the sale of Iranian petrochemical products to customers in the PRC and other parts of East Asia.
>
> The Biden Administration has been sincere and steadfast in pursuing a path of meaningful diplomacy to achieve a mutual return to full implementation of the Joint Comprehensive Plan of Action (JCPOA). Absent a deal, we will continue to use our sanctions authorities to limit exports of petroleum, petroleum products, and petrochemical products from Iran.

Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0819.

On July 6, 2022, Secretary Blinken announced in a press statement available at https://www.state.gov/targeting-irans-international-petroleum-trade/, the designations of 15 individuals and entities that engaged in illegal sales of petroleum products under E.O. 13846. The State Department designated five entities Truong Phat Loc Shipping Trading JSC, Everwin Ship Management Pte. Ltd., Zagros Tarabaran-E Arya, Persian Gulf Star Oil Company, and East Ocean Rashin Shipping Co. Ltd. Pursuant to E.O. 13846. At the same time, OFAC designated two individuals—Morteza RAJABIESLAMI and Mahdieh SANCHULI—and eight entities—ALI ALMUTAWA PETROLEUM AND PETROCHEMICAL TRADING L.L.C.; EDGAR COMMERCIAL SOLUTIONS FZE; EMERALD GLOBAL FZE; JAM PETROCHEMICAL COMPANY; LUSTRO INDUSTRY LIMITED; OLIGEI INTERNATIONAL TRADING CO., LIMITED; PETROGAT FZE; and PETROKICK LLC--that support the sale of Iranian petroleum and petroleum products abroad. 87 Fed. Reg. 43,944 (Jul. 22, Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0851.

On August 1, 2022, Secretary Blinken announced in a press statement available at https://www.state.gov/designation-of-entities-supporting-trade-of-iranian-petroleum-and-petrochemical-products/, the designation of six entities supporting the

trade of Iranian petroleum and petrochemical products under E.O. 13846. The State Department designated Pioneer Ship management PTE LTD and Golden Warrior Shipping, Co. Ltd. and its vessel Glory Harvest. At the same time, OFAC designated four entities: BLUE CACTUS HEAVY EQUIPMENT AND MACHINERY SPARE PARTS TRADING LLC, FARWELL CANYON HK LIMITED, PZNFR TRADING LIMITED, and SHEKUFEI INTERNATIONAL TRADING CO., LIMITED. 87 Fed. Reg. 48,771 (Aug. 10, 2022). Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0901.

On September 29, 2022, Secretary Blinken announced in a press statement available at https://www.state.gov/designating-iran-petroleum-and-petrochemical-sanctions-evaders/, the designation of two entities--Zhonggu Storage and Transportation Co. Ltd. and WS Shipping Co. Ltd.—supporting the sale of Iranian petroleum and petrochemical products under E.O. 13846. At the same time, OFAC designated eight entities--CLARA SHIPPING LLC, IRAN CHEMICAL INDUSTRIES INVESTMENT COMP ANY PUBLIC JOINT STOCK, MIDDLEEASTKIMIYAPARS CO. (a.k.a. KIMIAYEPARS KHAVARMIANEH PETROCHEMICAL CO., ML HOLDING GROUP LIMITED, SIERRA VISTA TRADING LIMITED, SOPHYCHEM HK LIMITED, TIBALAJI PETROCHEM PRN ATE LIMITED, and VIRGO MARINE—for their involvement in Iran's petrochemical trade. 87 Fed. Reg. 60,433 (Oct. 5, 2022).

On November 16, 2022, OFAC designated six individuals for their involvement in the Iranian government's censorship activities: Peyman JEBELLI, Ahmad NOROOZI, Mohsen BARMAHANI, Yoosef POURANVARI, Ali REZVANI, and Ameneh Sadat ZABIHPOUR. 87 Fed. Reg. 70,898 (Nov. 21, 2022). Secretary Blinken's press statement is available at https://www.state.gov/sanctioning-senior-officials-of-iranian-broadcaster/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy1109.

On November 17, 2022, the State Department announced sanctions on 13 entities (not listed herein) under E.O. 13846 on additional entities involved in petrochemical sales. 87 Fed. Reg. 72,585 (Nov. 25, 2022). Secretary Blinken's press statement is available at https://www.state.gov/designating-sanctions-evaders-involved-in-iranian-petrochemical-and-petroleum-trade/.

(2) Nonproliferation sanctions

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 30, 2022, the State Department announced in a press statement, available at https://www.state.gov/united-states-imposes-sanctions-on-irans-ballistic-missile-related-activities/, designations of the following five Iranian individuals and entities under E.O. 13382 for their involvement in Iran's ballistic missile-related activities:

> Iranian procurement agent Mohammad Ali Hosseini and four companies in his network, Iran-based Jestar Sanat Delijan, Sina Composite Delijan Company, Sayehban Sepehr Delijan, and P.B. Sadr Company, have been involved in efforts to procure equipment used to produce ballistic missile propellant and related materials in support of Iran's missile program.

See the Treasury Department press release available at https://home.treasury.gov/news/press-releases/jy0689#_blank.

On September 8, 2022, OFAC designated one individual—Rahmatollah HEIDARI—and three entities-- BAHARESTAN KISH COMPANY, DESIGN AND MANUFACTURING OF AERO-ENGINE COMPANY, and PARA VAR PARS COMPANY, under E.O. 13382. At the same time, OFAC designated entity SAFIRAN AIRPORT SERVICE under E.O. 14024. 87 Fed. Reg. 70,900 (Nov. 21, 2022).

(3) 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.12 *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 22, 2022, OFAC designated Iran's Morality Police and two senior security officials, Haj Ahmad Mirzaei and Mohammad Rostami Cheshmeh Gachi, in response to the death of Mahsa Amini and other human rights violations in Iran. See Secretary Blinken's press statement available at https://www.state.gov/designating-irans-morality-police-and-seven-officials-for-human-rights-abuses-in-iran/ and includes the following:

> The United States condemns the tragic and brutal death of Mahsa Amini, a 22-year-old Iranian woman who died in the custody of the Iranian Morality Police after being detained for purportedly wearing a hijab too loosely. We mourn with her loved ones and with the Iranian people.
>
> In response to this and other human rights violations in Iran—including the violent suppression of peaceful protests—the United States is imposing sanctions on Iran's Morality Police and senior security officials who have engaged in serious human rights abuses, pursuant to Executive Order 13553. The Morality Police, an element of Iran's Law Enforcement Forces (LEF), arrests women for wearing "inappropriate" hijab and enforces other restrictions on

> freedom of expression. The Treasury Department's Office of Foreign Assets Control (OFAC) is further designating Haj Ahmad Mirzaei and Mohammad Rostami Cheshmeh Gachi, both of whom are senior officials in the Morality Police.

At the same time, OFAC designated Esmail Khatib, Iran's Minister of Intelligence; Manouchehr Amanollahi, the LEF commander of the Chaharmahal and Bakhtiari province of Iran; Qasem Rezaei, the deputy commander of the LEF; KiyumarsHeidari, the commander of the Islamic Republic of Iran's Army Ground Forces; and Salar Abnoush, the deputy commander of the Basij, a paramilitary militia and a subsidiary force of the Islamic Revolutionary Guard Corps for their involvement in the suppression of non-violent protestors. Individuals: Salar ABNOUSH, Manouchehr AMANOLLAHI, Kiyumars HEIDARI, Esmail KHATIB, Haj Ahmad MIRZAEI, Qasem REZAEI, and Mohammad ROSTAMI CHESHMEH GACHI under E.O. 13553. Entity: IRAN'S MORALITY POLICE. 87 Fed. Reg. 70,893 (Nov. 21, 2022). Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0969.

On September 23, 2022, OFAC issued General License D-2 pursuant to the Iranian Transactions and Sanctions Regulations, 31 CFR part 560, authorizing the export of certain services, software, and hardware related to communications to advance the free flow of information online for the Iranian people. 87 Fed. Reg. 62,003 (Oct. 13, 2022). Secretary Blinken's September 23 press statement is available at https://www.state.gov/advancing-the-free-flow-of-information-for-the-iranian-people/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0974. A special briefing with senior State Department and Treasury Department officials on the Administration's efforts to advance the free flow of information for the Iranian people is available at https://www.state.gov/briefing-with-senior-administration-officials-on-the-administrations-efforts-to-advance-the-free-flow-of-information-for-the-iranian-people/. An excerpt is included below.

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SENIOR STATE DEPARTMENT OFFICIAL: Thank you very much. Hi, everybody. This is [Senior State Department Official]. Mahsa Amini is senselessly and tragically dead, and now the Government of Iran, rather than responding to the peaceful protesters rightly angry about her loss by addressing the fundamental problems that led to it, is simply violently suppressing protests. And as part of that, on Wednesday, the Iranian Government cut off access to the internet for most of its 80 million citizens to prevent them and the rest of the world from watching its violent crackdown.

While Iran's government is cutting off people's access to the global internet and to each other, today the United States is taking action to support the free flow of information to and among the Iranian people. Over the past few years, the U.S. has engaged intently with major U.S. technology companies to understand the issues they face in providing access to personal

communication tools for the people in Iran. I think we all know how quickly technology moves, and as hard as it is for each of us individually to keep up with it, imagine how difficult it is from the regulatory perspective to keep up with those changes and make sure that our policy objectives are met by the framework that we put in place.

So as a result of the coordination over the course of that last year, year and a half, today the Department of Treasury has issued General License D-2, updating its guidance to expand the range of internet services available to Iranians. The updated general license dramatically increases support for internet freedom in Iran by bringing U.S. sanctions guidance into line with changes in modern technology. The updated guidance will authorize technology companies to offer the Iranian people more options for secure, private, outside platform and services. With these changes, the Iranian people will be better equipped to counter the Iranian Government's efforts to surveil and censor them.

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On October 6, 2022, OFAC further designated Iranian leaders responsible for human rights abuses or censorship following the death of Mahsa Amini under E.O. 13553 and E.O. 13846. "The Iranian government has since cracked down on the right to freedom of expression and right of peaceful assembly, including by shutting down access to the Internet." The individuals include Iran's Minister of the Interior, Ahmad Vahidi, and Iran's Minister of Communications, Eisa Zarepour, as well as five other senior leaders of Iran's security apparatus for the continued violence against peaceful protesters and the shutdown of Iran's Internet access. Four individuals were designated under E.O. 13553: Yadollah JAVANI, Hossein SAJEDINIA, Ahmad VAHIDI, Hossein NEJAT, and Hossein RAHIMI. The two individuals designated under E.O. 13846: Vahid Mohammad Naser MAJID and Eisa ZAREPOUR under E.O. 13846. 87 Fed. Reg. 70,902 (Nov. 21, 2022).
87 Fed. Reg. 79,903 (Nov. 21, 2022). See Secretary Blinken's press statement available at https://www.state.gov/sanctioning-iranian-leaders-responsible-for-human-rights-abuses-or-censorship/. The Treasury Department's press statement is available at https://home.treasury.gov/news/press-releases/jy0994.

On October 26, 2022, OFAC imposed additional sanctions against six Iranian government officials responsible for or complicit in serious human rights abuses following the death of Mahsa Amini under E.O. 13553. The individuals include Hedayat Farzadi, Seyyed Heshmatollah Hayat al-Ghaib, Heidar Pasandideh, Murad Fathi, Morteza Piri, and Mohammad Hossein Khosravi. 87 Fed. Reg. 70,888 (Nov. 21, 2022). See Secretary Blinken's press statement available at https://www.state.gov/designation-of-iranian-officials-and-entities-connected-to-ongoing-protest-repression-censorship-and-prison-abuses/ and includes the following:

> It has been 40 days since the death of 22-year-old Mahsa Amini in the custody of Iran's so-called "Morality Police," and we join her family and the Iranian people for a day of mourning and reflection.

> The United States is committed to supporting the Iranian people and ensuring that those responsible for the brutal crackdown on the ongoing nationwide protests in Iran are held accountable. Today, we are announcing a joint action between the State and Treasury Departments designating 14 individuals and three entities using five different authorities, demonstrating our commitment to use all appropriate tools to hold all levels of the Iranian government to account.

At the same time, OFAC designated Hossein Modarres Khiabani, the governor of the Province of Sistan and Baluchistan, for his role in overseeing the violent response by security forces against peaceful protestors and Mohammad Kazemi, Abbas Nilforushan, and Ahmad Shafahi, who served as commanders in the Islamic Revolutionary Guard Corps (IRGC), under E.O. 13553. OFAC also designated individual Seyed Mojtaba Mostafaviand Farzin Karimi and entity The Ravin Academy under E.O. 13606 and the Samane Gostar Sahab Pardaz Private Limited Company for their involvement in "censorship, surveillance, and malicious cyber activity against the Iranian people." Further, the State Department designated the Iranian commander and chief of police in Isfahan Province, Mohammed Reza Mirheydary, under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022 and Bushehr Prison, Mohammed Reza Ostad, and Mohammed Reza Mirheydary under section 106 of Countering America's Adversaries Through Sanctions Act of 2017.

On November 23, 2022, OFAC designated Mohammad Taghi Osanloo, Alireza Moradi, and Hasan Asgari pursuant to E.O. 13553 following reports of Iranian authorities escalating violence against peaceful protestors. 87 Fed. Reg. 75,139 (Dec. 7, 2022). See Secretary Blinken's press statement available at https://www.state.gov/designating-iranian-officials-connected-to-serious-human-rights-abuses-in-irans-kurdistan-and-west-azerbaijan-provinces/.

Additionally, OFAC designated the following pursuant to E.O. 13553 on December 21, 2022: Individuals—Mohammad Jafar Montazeri, Moslem Moein, Hassan Hassanzadeh, Seyed Sadegh Hosseini, Hossein Maroufi—and entity—Imen Sanat Zaman Fara Company. 87 Fed. Reg. 80,259 (Dec. 29, 2022). See Secretary Blinken's press statement available at https://www.state.gov/sanctioning-iranian-officials-connected-to-serious-human-rights-abuses/.

3. People's Republic of China ("PRC")

On January 20, 2022, the United States determined, in accordance with section 73(a)(1) of the Arms Export Control Act [22 U.S.C. 2797b(a)(1)]; section 11B(b)(1) of the Export Administration Act of 1979 [(50 U.S.C. 4612)], as carried out under E.O. 13222 of August 17, 2001, that the following entities for engaging in missile technology. Sanctions were imposed against the following foreign persons (and their successors, sub-units, or subsidiaries): China Aerospace Science and Technology Corporation (CASC) First

Academy; China Aerospace Science and Industry Corporation (CASIC) Fourth Academy; and Poly Technologies Incorporated (PTI). 87 Fed. Reg. 3376 (Jan. 21, 2022).

a. Relating to human rights abuses, including in Xinjiang

See also section A.12 *infra* for discussion of designations relating to violations of human rights, including designations of PRC officials.

On March 21, 2022, Secretary Blinken announced action to place visa restrictions on PRC officials who are believed to be responsible for or complicit in human rights abuses in China and beyond. The statement is excerpted below and available at https://www.state.gov/promoting-accountability-for-transnational-repression-committed-by-peoples-republic-of-china-prc-officials/.

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The Department of State is taking action against PRC officials for their involvement in repressive acts against members of ethnic and religious minority groups and religious and spiritual practitioners inside and outside of China's borders, including within the United States.

The United States rejects efforts by PRC officials to harass, intimidate, surveil, and abduct members of ethnic and religious minority groups, including those who seek safety abroad, and U.S. citizens, who speak out on behalf of these vulnerable populations. We are committed to defending human rights around the world and will continue to use all diplomatic and economic measures to promote accountability.

Today's action imposes visa restrictions on PRC officials who are believed to be responsible for, or complicit in, policies or actions aimed at repressing religious and spiritual practitioners, members of ethnic minority groups, dissidents, human rights defenders, journalists, labor organizers, civil society organizers, and peaceful protestors in China and beyond.

We again call on the PRC government to cease its acts of transnational repression, including attempting to silence Uyghur American activists and other Uyghur individuals serving the American people by denying exit permission to their family members in China.

The United States reaffirms its support for those who bravely speak out despite the threat of retaliation. We call on the PRC government to end its ongoing genocide and crimes against humanity in Xinjiang, repressive policies in Tibet, crackdown on fundamental freedoms in Hong Kong, and human rights violations and abuses, including violations of religious freedom, elsewhere in the country.

We will continue to work with the international community to promote accountability for PRC officials responsible for atrocities and human rights violations and abuses wherever they occur,including within China, the United States, and elsewhere around the world.

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b. Relating to "securities investments that finance Chinese military companies"

Effective February 16, 2022, OFAC added regulations to implement a 2020 executive order related to security investments that finance Chinese military companies, as amended by a 2021 executive order related to the Chinese military-industrial complex and Chinese surveillance technology. 87 Fed. Reg. 8,735 (Feb. 16, 2022).
See *Digest 2020* at 574-75 and *Digest* 2021 at 609 for a discussion of both executive orders.

4. Russia

a. Orders Relating to Ukraine and CAATSA

On February 21, 2022, President Biden issued a new executive order, E.O. 14065, "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine." 87 Fed. Reg. 10,293 (Feb. 23, 2022). The portion of Section 1 of E.O. 14065 follows, describing the prohibitions.

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I, JOSEPH R. BIDEN JR., President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13660 of March 6, 2014, and expanded by Executive Order 13661 of March 16, 2014, and Executive Order 13662 of March 20, 2014, and relied on for additional steps taken in Executive Order 13685 of December 19, 2014, and Executive Order 13849 of September 20, 2018, finding that the Russian Federation's purported recognition of the so-called Donetsk People's Republic (DNR) or Luhansk People's Republic (LNR) regions of Ukraine contradicts Russia's commitments under the Minsk agreements and further threatens the peace, stability, sovereignty, and territorial integrity of Ukraine, and thereby constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States. Accordingly, I hereby order:

Section 1. (a) The following are prohibited:

(i) new investment in the so-called DNR or LNR regions of Ukraine or such other regions of Ukraine as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State (collectively, the ''Covered Regions''), by a United States person, wherever located;

(ii) the importation into the United States, directly or indirectly, of any goods, services, or technology from the Covered Regions;

(iii) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, services, or technology to the Covered Regions; and

(iv) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this section if performed by a United States person or within the United States.

(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 license or permit granted prior to the date of this order.

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On February 22, 2022, Secretary Blinken met with Ukrainian Foreign Minister Dmytro Kuleba at a joint press availability announced new sanctions on Russia in response to its aggression toward Ukraine. The remarks, including video recording, are available at https://www.state.gov/secretary-antony-j-blinken-and-ukrainian-foreign-minister-dmytro-kuleba-at-a-joint-press-availability-2/, and are excerpted below:

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This afternoon, the President announced the first round of sanctions on Russia in response to its actions. These have been closely coordinated with our allies and partners. We'll continue to escalate our sanctions if Russia escalates its aggression toward Ukraine.

Today, we're implementing full blocking sanctions on two large Russian financial institutions, VEB and Promsvyazbank, both of which have close links to the Kremlin and the Russian military. Collectively, they hold more than $80 billion in assets. These measures will freeze their assets in the United States, prohibit American individuals or businesses from doing any transactions with them, shut them out of the global financial system, and foreclose access to the U.S. dollar.

We're expanding our existing sanctions on Russian sovereign debt. We've already prohibited U.S. financial institutions from trading in Russian sovereign debt in the primary market; now we're extending that prohibition to the secondary market. These prohibitions will cut off the Russian Government from a key avenue by which it raises capital to fund its priorities and will increase future financing costs. They also deny Russia access to key U.S. markets and investors.

Starting today, we'll impose sanctions on members of the Russian elite and their family members, all of whom directly benefit from their connections with the Kremlin. Other Russian elites and their family members are on notice that additional actions could be taken against them.

These steps are in addition to the executive order President Biden issued yesterday to prohibit new investment, trade, and financing by Americans to, from, and in the so-called DNR and LNR regions.

And just as the President said we would do, today the Department of Defense announced that we would be sending additional forces to NATO's eastern flank to deter and defend against any Russian aggression directed at our allies.

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On March 14, 2022, Secretary Blinken commended New Zealand's new sanctions regime, which allows for the imposition of sanctions related to Russia's invasion of Ukraine. The press statement is available at https://www.state.gov/commending-new-zealands-new-sanctions-regime/ and included below.

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The United States welcomes the passage of New Zealand's new sanctions regime, which allows the imposition of sanctions on those responsible for, or associated with, Russia's invasion of Ukraine. It also gives the New Zealand government the power to sanction individuals and entities that are of economic or strategic relevance to Russia and will ensure Russia cannot use New Zealand to circumvent sanctions imposed by the international community. Additionally, the law authorizes the imposition of sanctions on those supporting Russia's invasion, including members of the regime in Belarus. For the first time, New Zealand has extended its sanctions authorities beyond its UN Security Council obligations.

New Zealand's announcement underscores its commitment to the freedom, territorial integrity, and sovereignty of Ukraine and illustrates New Zealand's lasting commitment to preserving the rules-based international order. Together with the international community, we will hold Russia to account for its aggression.

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On March 15, 2022, Secretary Blinken announced in a press statement actions to promote accountability for the Russian and Belarusian governments' human rights abuses and violations within and outside their border. See section A.5, *infra*, for a discussion of Belarus. The press statement making the announcement is available at https://www.state.gov/promoting-accountability-for-human-rights-abuses-perpetrated-by-the-governments-of-russia-and-belarus/ and excerpted below.

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…the Department of State is announcing a series of actions to promote accountability for the Russian Federation's and Government of Belarus's human rights abuses and violations. These include:

- Designation of 11 senior Russian defense officials by the Department of State pursuant to E.O. 14024. This includes Viktor Zolotov, the Head of the National Guard of Russia. Under Zolotov's leadership, the National Guard has cracked down on Russian citizens who have taken to the streets to protest their government's brutal campaign in Ukraine. In addition, Zolotov's troops are responsible for suppressing dissent in occupied areas of Ukraine. More broadly, the designation of these 11 senior Russian defense leaders continues our imposition of severe costs on Russia's Ministry of Defense as it pursues its

brutal military invasion of Ukraine, which has led to unnecessary casualties and suffering, including the deaths of children. List here: https://www.state.gov/u-s-announces-sanctions-on-key-members-of-russias-defense-enterprise/

- A new visa restriction policy under Section 212(a)(3)(C) of the Immigration and Nationality Act that applies to current and former Russian government officials believed to be involved in suppressing dissent in Russia and abroad. Family members of those who fall under the policy will also be ineligible for visas. We have taken our first action pursuant to this new visa authority against 38 individuals, and will continue to implement this policy to demonstrate solidarity with the victims of Russia's repression.
- Designation of two of Russia's Federal Security Service (FSB) officers in Crimea, Artur Shambazov and Andrey Tishenin, pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021. Shambazov and Tishenin were publicly designated for their involvement in a gross violation of human rights, namely torture.

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Additionally, the Department of the Treasury's Office of Foreign Assets Control (OFAC) is imposing sanctions on Kurchaloi District of the Chechen Republic Branch of the Ministry of Internal Affairs of the Russian Federation, two of its officers, a Kurchaloi District prosecutor, and a district court judge in Moscow, pursuant to the Sergei Magnitsky Rule of Law Accountability Act of 2012. OFAC is also re-designating Alyaksandr Lukashenka for his corrupt practices, and, pursuant to E.O. 13405, designating Galina Lukashenka as a member of Lukashenka's family.

Under President Putin, Russian authorities have repeatedly targeted human rights advocates, peaceful dissenters, and whistleblowers, and they continue to do so amidst their ruthless war on Ukraine. The Russian government has failed to take adequate steps to identify, investigate, prosecute, or punish most officials who committed abuses or violations, resulting in a climate of impunity. Likewise, the Lukashenka regime continues its brutal crackdown on peaceful activists while it intensifies its support to the invasion of Ukraine. We are taking action against this autocratic attack on democracy. The United States will continue to promote accountability for those who support, enable, and perpetrate human rights abuses in Russia, Ukraine, Belarus, and elsewhere.

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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 2021, 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. See *Digest 2021* at 610. These sanctions were published in the Federal Register in 2022. See 87 Fed. Reg. 26,385 (May 4, 2022).

On April 29, 2022, OFAC designated more than 250 individuals and entities (not listed herein) related to Ukraine and CAATSA under several authorities. 87 Fed. Reg. 34,378 (Jun. 6, 2022).

On June 28, 2022, OFAC designated 29 individuals and 68 entities (not listed herein) under E.O. 14024. At the same time, OFAC designated DONETSK PEOPLE'S REPUBLIC and LUHANSK PEOPLE'S REPUBLIC under 14065. 87 Fed. Reg. 39,901 (Jul. 5, 2022).

On July 13, 2022, the State Department released a statement welcoming the announcement of European Union sanctions on Russia. The statement, included below, is available at https://www.state.gov/eu-sanctions-on-russia-and-shipments-to-and-from-kaliningrad/.

> We welcome the announcement by the EU making clear how its member states will implement economic sanctions on Russia with respect to Kaliningrad. We appreciate the unprecedented economic measures that our Allies and partners, including Lithuania, have joined us in taking against Russia for its unprovoked war against Ukraine.
>
> We applaud European Union member states, including Lithuania, for enforcing sanctions measures fully in accordance with EU guidance.
>
> It is important to note that there is not now and there never has been a so-called "blockade" of Kaliningrad. Using a variety of routes, passengers continue to transit between mainland Russia and Kaliningrad, as do all humanitarian shipments and most other goods. We should also not forget why economic sanctions were put into place, which was in response to Russia's unprovoked and brutal war in Ukraine.

On August 2, 2022, United States took multiple sanctions measures under E.O. 14024 and other authorities in response to Russia's continued war against Ukraine. 87 Fed. Reg. 74,466 (Dec. 5, 2022). See press statement available at https://www.state.gov/imposing-additional-costs-on-russia-for-its-continued-war-against-ukraine-3/. The Treasury Department's press release is available at https://home.treasury.gov/news/press-releases/jy0905. The State Department fact sheet, providing an overview of the measures applied under multiple sanctions authorities, is available at https://www.state.gov/imposing-additional-costs-on-russia-for-its-continued-war-against-ukraine/, and excerpted below.

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VISA RESTRICTIONS

The Department of State is announcing a series of actions to promote accountability for actions by Russian Federation officials and others that implicate violations of Ukraine's sovereignty to include:

- Visa restrictions on 893 Russian Federation officials, including members of the Federation Council and members of Russia's military, pursuant to a policy under Section 212(a)(3)(C) of the Immigration and Nationality Act (INA) that restricts visa issuance to those who are believed to have supported, been actively complicit in, or been responsible for ordering or otherwise directing or authorizing actions that threaten or violate the sovereignty, territorial integrity, or political independence of Ukraine.
- Visa restrictions on 31 foreign government officials who have acted to support Russia's purported annexation of the Crimea region of Ukraine pursuant to a policy under Section 212(a)(3)(C) of INA that restricts visa issuance to those who are believed to have supported, been actively complicit in, or been responsible for ordering or otherwise directing or authorizing actions that threaten or violate the sovereignty, territorial integrity, or political independence of Ukraine.

DESIGNATION OF PUTIN ENABLERS

The Department of State is designating oligarchs **DMITRIY PUMPYANSKIY**, **ANDREY MELNICHENKO**, and **ALEXANDER PONOMARENKO**.

- **ALEXANDER ANATOLEVICH PONOMARENKO** is being designated pursuant to Section 1(a)(i) of Executive Order (E.O.) 14024 for operating or having operated in the aerospace sector of the Russian Federation economy. He is an oligarch with close ties to other oligarchs and the construction of Vladimir Putin's seaside palace. Ponomarenko has been previously designated by the U.K., E.U., Canada, Australia, and New Zealand.
- **DMITRIY ALEKSANDROVICH PUMPYANSKIY** is being designated pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy. Pumpyanskiy has been previously designated by the U.K., E.U., and New Zealand.
- The yacht **AXIOMA** is being identified as blocked property in which Dmitriy Aleksandrovich Pumpyanskiy has an interest.
- **ANDREY IGOREVICH MELNICHENKO** is being designated pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy. He has previously been designated by the U.K., E.U., and New Zealand.

The Department of State is designating four individuals and one entity that are or are enabling illegitimate, political leaders installed by Russia or its proxy forces to undermine political stability in Ukraine in support of Russia's further invasion of Ukraine. The four individuals and the entity are being designated pursuant to Section 1(a)(ii)(F) of E.O. 14024, for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners, for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation.

- **SALVATION COMMITTEE FOR PEACE AND ORDER** collaborates with the Government of Russia to support Russia's control of the Kherson region and discourage resistance.

- **KOSTYANTYN VOLODYMYROVYCH IVASHCHENKO** is the illegitimate mayor of Russia-controlled Mariupol. Pro-Russia separatist forces of the Donetsk People's Republic (DNR) installed Ivashchenko. According to Ukrainian authorities, Ivashchenko coordinated pro-Russia separatist efforts to destroy evidence of war crimes in Mariupol.
- **VOLODYMYR VASILYOVICH SALDO** is the head of the Russia-created Kherson Military-Civilian Administration. His self-declared aim is to move the Kherson region towards unification with Russia. He has previously been designated by the E.U. and Japan.
- **KYRYLO SERHIYOVYCH STREMOUSOV** is the deputy head of the Russia-created Kherson Military-Civilian Administration. He has acted to introduce the use of Russian Federation currency and laws in the Kherson region, in addition to the issuance of Russian Federation citizenship in the region. Stremousov has previously been designated by the E.U. and Japan.
- **SERGEY VLADIMIROVICH YELISEYEV** is the head of the Russia-installed Kherson regional government and has sought to move the Kherson region towards unification with Russia. Yesileyev was a Russian government official and member of the Russian security apparatus.

Pursuant to Section 1(a)(vii) of E.O. 14024, the Department of State is designating **JOINT STOCK COMPANY STATE TRANSPORTATION LEASING COMPANY (JSC GTLK)** for being owned, controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation. JSC GTLK is a Russian state-owned enterprise that the Russian Ministry of Transportation oversees. It is the largest transportation leasing company in Russia. JSC GTLK is an important part of Russia's transportation networks due to its leases of railroad cars, vessels, and aircraft on favorable terms to support Russia's development strategy. JSC GTLK has been previously designated by the U.K. and E.U.

Pursuant to Section 1(a)(vii) of E.O. 14024, the Department of State is designating the following four JSC GTLK subsidiaries for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, JSC GTLK. These companies leased JSC GTLK's transportation equipment outside of Russia and /or enabled JSC GTLK to access capital from western financial markets to fund its activities.

- **GTLK EUROPE DESIGNATED ACTIVITY COMPANY**
- **GTLK EUROPE CAPITAL DESIGNATED ACTIVITY COMPANY**
- **GTLK MIDDLE EAST FREE ZONE COMPANY**
- **GTLK ASIA LIMITED**

DESIGNATION OF DEFENSE AND HIGH-TECHNOLOGY ENTITIES

Under the leadership of U.S.-designated Russian President Vladimir Putin, the Russian Federation has systematically focused on exploiting high-technology research and innovations to advance Russia's defense capabilities. Putin has also repeatedly underscored his concerns about Russia's access to microelectronics. Advanced technologies such as microelectronics are used in numerous weapon systems used by Russia's military. Today, the Department of State is imposing sanctions on numerous Russian high-technology entities as a part of the United States' efforts to impose additional costs on Russia's war machine.

The Department of State is designating the **FEDERAL STATE INSTITUTION OF HIGHER VOCATIONAL EDUCATION MOSCOW INSTITUTE OF PHYSICS AND TECHNOLOGY (MOSCOW INSTITUTE OF PHYSICS AND TECHNOLOGY)**

(MIPT) pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the defense and related materiel sector of the Russian Federation economy. MIPT has developed drones for Russia's military that are intended to be used in direct contact with enemy forces, has won an award from Russia's Ministry of Defense for developing technologies in the interests of the Armed Forces of the Russian Federation, and promotes that it focuses on conducting innovative research and development in the defense and security fields. MIPT has worked with a leading Russian fighter aircraft developer to design a visualization system related to fighter aircraft and has a laboratory that supports Russia's military space sector. MIPT is also part of a consortium of Russian institutions involved in training specialists for Russia's defense-industrial complex and has collaborated on research projects with a Russian defense research organization.

The Department of State is designating the **SKOLKOVO FOUNDATION** pursuant to E.O. Section 1(a)(i) of 14024 for operating or having operated in the technology sector of the Russian Federation economy. The Skolkovo Foundation was established by a Russian Federation law in 2010 to manage the Skolkovo Innovation Center, which consists of the Technopark Skolkovo Limited Liability Company and the Skolkovo Institute of Science and Technology (Skoltech), which are also being designated as part of this action. Since its founding, the Skolkovo Foundation has focused on supporting the development of technologies to contribute to technology sectors prioritized by the Russian Federation government including strategic computer technologies, technologies for maintaining Russia's defense capabilities including with regard to advanced and sophisticated weapons, and space technologies related to Russia's national security. As additional information, the Skolkovo Innovation Center has hosted U.S.-designated Rosoboronexport, Russia's state-controlled arms export agency, as a part of Rosoboronexport's efforts to export weapons to foreign clients.

The Department of State is designating the **SKOLKOVO INSTITUTE OF SCIENCE AND TECHNOLOGY (SKOLTECH)** pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy. Skoltech is a pioneer in cutting-edge technologies and seeks to foster new technologies to address critical issues facing the Russian Federation. As additional information, for nearly a decade, Skoltech has had a close relationship with Russia's defense sector. Contributors to Skoltech's endowment include numerous sanctioned Russian weapon development entities including JSC Tactical Missiles Corporation, Uralvagonzavod (which makes Russian tanks), JSC MIC Mashinostroyenia (which manufactures Russian missiles), JSC United Aircraft Corporation (which manufactures Russia's combat aircraft), JSC Concern Sozvezdie (which produces electronic warfare systems for the Russian military), JSC Almaz-Antey (which manufactures Russia's surface-to-air missiles systems), and JSC Corporation Moscow Institute of Thermal Technology (which manufactures Russian missiles). Over the course of the last decade, Skoltech has had partnerships with numerous Russian defense enterprises – including Uralvagonzavod, United Engine Corporation, and United Aircraft Corporation – which have focused on developing composite materials for tanks, engines for ships, specialized materials for aircraft wings, and innovations for defense-related helicopters. Skoltech has also presented advanced robotics at the Russian Ministry of Defense's premier defense exhibition.

The Department of State is designating **TECHNOPARK SKOLKOVO LIMITED LIABILITY COMPANY** pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy. Technopark Skolkovo Limited Liability Company is one of the largest technology development parks in Eurasia and hosts events related to technology.

The Department of State is designating numerous additional Russian high-technology entities as a part of our effort to isolate Russia's technology sector in order to limit its contributions to Russia's war machine.

Specifically, the Department of State is designating the following entities pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy:

- **JOINT STOCK COMPANY PENZENSKY NAUCHNO ISSLEDOVATELSKY ELEKTROTEKHNICHESKY HIGHER EDUCATION INSTITUTION** is one of the largest Russian enterprises engaged in the development and production of cryptographic information protection technology. As additional information, Joint Stock Company Penzensky Nauchno Issledovatelsky Elektrotekhnichesky Higher Education Institution organized a technology-related symposium with a Russian weapons-related organization.
- **JSC ZELENOGRAD NANOTECHNOLOGY CENTER** conducts nanotechnology research, and develops manufacturing technologies and high-tech products, including developing and manufacturing products in the field of microelectronics and microsystems engineering.
- **JOINT STOCK COMPANY INSTITUTE OF ELECTRONIC CONTROL COMPUTERS NAMED AFTER I.S. BRUK** is involved in the development of Russian microprocessors, computing systems, and nanotechnology. As additional information, a microprocessor chip developed by entities including Joint Stock Company Institute of Electronic Control Computers Named After I.S. Bruk was promoted at a Russian military-industrial complex conference.
- **FEDERAL STATE INSTITUTION FEDERAL SCIENTIFIC CENTER SCIENTIFIC RESEARCH INSTITUTE FOR SYSTEM ANALYSIS OF THE RUSSIAN ACADEMY OF SCIENCES** conducts activities related to the development of nanotechnology, information technology, and computing, and is also involved in activities related to semiconductors.
- **SCIENTIFIC AND PRODUCTION ASSOCIATION OF MEASURING EQUIPMENT JSC** is involved in digital circuitry activities and microelectronics for space technologies.

The Department of State is designating the following entities pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy:

- **MITISHINSKIY SCIENTIFIC RESEARCH INSTITUTE OF RADIO MEASURING INSTRUMENTS** is a leader of Russia's radio-electronic industry; its staff has conducted research regarding components for electronics systems; and it has been involved in developing regulations for Russia related to specialized electronic components.
- **JOINT STOCK COMPANY RESEARCH INSTITUTE OF ELECTRONIC AND MECHANICAL DEVICES** specializes in the development and production of complex, high-technology electronic and mechanical devices and electrical measuring devices. As additional information, it has developed electronic components for Russia's Ministry of Defense.
- **JSC SVETLANA POLUPROVODNIKI** is a Russian electronics entity involved in the manufacture and design of integrated circuits and semiconductor devices (integrated

circuits are components of electronic devices and semiconductors are components involved in the manufacture of electronic devices).

- **JOINT STOCK COMPANY DESIGN CENTER SOYUZ** is a Russian electronics entity that specializes in the design and development of semiconductors and integrated circuits.
- **OJSC SCIENTIFIC RESEARCH INSTITUTE OF PRECISION MECHANICAL ENGINEERING** is a Russian electronics entity that develops process equipment for Russia's electronic industry, including for semiconductor production. OJSC Scientific Research Institute of Precision Mechanical Engineering provides services related to process implementation for nano- and micro-electronics activities.
- **PUBLIC JOINT STOCK COMPANY KREMNY** is a Russian electronics entity that produces components for power electronics as a part of the Russian Federation's import substitution program. As additional information, Public Joint Stock Company Kremny has been described by Russian authorities as a Russian defense industry enterprise.
- **JOINT STOCK COMPANY INSTITUTE FOR SCIENTIFIC RESEARCH MICROELECTRONIC EQUIPMENT PROGRESS** develops and manufactures microelectronic devices.
- **JOINT STOCK COMPANY VORONEZHSKY FACTORY POLUPROVODNIKOVYKH PRIBOROV SBORKA** is one of Russia's largest suppliers of electronic components.
- **OPEN JOINT STOCK COMPANY SCIENTIFIC AND PRODUCTION ENTERPRISE PULSAR** is a Russian electronics entity that develops electronic components including components related to semiconductors and microelectronics.
- **LLC SCIENTIFIC PRODUCTION ENTERPRISE DIGITAL SOLUTIONS** is a Russian electronics entity that specializes in electronic engineering.
- **JOINT STOCK COMPANY DESIGN TECHNOLOGY CENTER ELEKTRONIKA** specializes in the development, application, production, and delivery of electronic products, including for Russian government clients. One aspect of Joint Stock Company Design Technology Center Elektronika's business involves designing semiconductor devices. Joint Stock Company Design Technology Center Elektronika is part of a Russian radioelectronics technology competencies cluster formed on the basis of JSC Concern Sozvezdie, which specializes in developing electronic warfare systems and other specialized equipment for Russia's armed forces.
- **JOINT STOCK COMPANY VOLOGODSKY OPTIKO MEKHANICHESKY FACTORY** produces "special purpose" electronic products. The phrase "special purpose" is often used by Russian entities to distinguish items related to military matters as opposed to civil applications.

The Department of State is designating **FEDERAL STATE BUDGETARY SCIENTIFIC INSTITUTION RESEARCH AND PRODUCTION COMPLEX TECHNOLOGY CENTER** pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector and the electronics sector of the Russian Federation economy. Federal State Budgetary Scientific Institution Research and Production Complex Technology Center develops and produces integrated circuits including application specific-integrated circuits, which are a type of high-technology electronic component, and also is involved in Russia's semiconductor industry.

The Department of State is designating **JSC SCIENTIFIC RESEARCH INSTITUTE SUBMICRON** pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the aerospace sector of the Russian Federation economy. JSC Scientific Research Institute Submicron specializes in the design and development of components for computer systems for aviation and space control systems, as well as the development of other digital and data systems for aviation and space systems. As additional information, the main customers of JSC Scientific Research Institute Submicron are Russia's Ministry of Defense and Air Force.

The Department of State is designating **ACADEMICIAN A.L. MINTS RADIOTECHNICAL INSTITUTE JOINT STOCK COMPANY** pursuant to Section 1(a)(i) of E.O. 14024 for operating or having operated in the defense and related materiel sector of the Russian Federation economy. Academician A.L. Mints Radiotechnical Institute Joint Stock Company is involved in developing technologies and systems for Russian military air defense systems.

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On September 30, 2022, the State Department imposed sanctions on two individuals under E.O. 14024: Anna Sergeevna Ershova and Olga Sergeevna Sobyanina. 87 Fed. Reg. 74,465 (Dec. 5, 2022).

On September 30, 2022, United States took multiple sanctions measures under E.O. 14024 and other authorities in response to "Russia's fraudulent attempt to change Ukraine's internationally recognized borders, including by holding sham 'referenda' in Ukraine's Luhansk, Donetsk, Kherson, and Zaporizhzhya regions." See press statement available at https://www.state.gov/imposing-swift-and-severe-costs-in-response-to-russias-violations-of-ukraines-sovereignty/. The Treasury Department's press release is available at https://home.treasury.gov/news/press-releases/jy0981.

On October 20, 2022, the State Department released a fact sheet detailing the impact of sanctions and export controls on the Russian Federation since February 2022. The fact sheet is available at https://www.state.gov/the-impact-of-sanctions-and-export-controls-on-the-russian-federation/, and excerpted below.

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Sanctions and export controls are having significant and long-lasting consequences on Russia's defense industrial base. Since February 2022, the United States and our partners and Allies have coordinated to use export controls and sanctions to restrict **Russia's access to advanced technology**, which has **degraded** the Russian weapons industry's ability to produce and stockpile weapons to replace those that have been destroyed in the war.

A few effects include:

- Major supply shortages for Russian forces in Ukraine are forcing Russia to turn to less technologically advanced countries such as **Iran** and North Korea for supplies and equipment.

- Russia is struggling to import semiconductors and other key components. Export controls have forced Russia to cannibalize existing airline parts they can no longer access abroad.
- Russian hypersonic ballistic missile production has nearly ceased due to the lack of necessary semiconductors used in the manufacturing process.
- Russia's military aviation program has been cut off from resupply provided by global aviation trade.
- Russian media reports that production of its next-generation airborne early warning and control military aircraft has stalled due to lack of foreign components, including semiconductors.
- Mechanical plants, including those producing surface-to-air missiles, have been shut down due to shortages of foreign-origin components.
- Russia has reverted to Soviet-era defense stocks because our measures have interrupted Russian companies' abilities to replenish domestic supply chains.
- Exports on certain goods and services, including dollar-denominated banknotes, accounting, management consulting, quantum computing, and trust and corporate formation services to persons located in the Russian Federation are now prohibited.

In addition, since February 2022, the U.S. government has:

- Denied all [U.S.] exports, reexports to, and transfers of items subject to the Export Administration Regulations for military end uses or end users in the Russian Federation and Belarus.
- Targeted Russian and Belarusian military end users through their addition to the Department of Commerce's Entity List, which has effectively cut off these end users from nearly all items subject to the Export Administration Regulations.
- Denied exports to, reexports to, and transfer within Russia and Belarus of items needed for oil refining. Also imposed additional license requirements to further limit the Russian oil sector by restricting the export, reexport and transfer of additional items needed for oil refining.
- Targeted items useful for Russia's chemical and biological weapons production capabilities and other advanced manufacturing by imposing export controls.
- Targeted luxury goods to impose costs on certain Russian oligarchs who support the Russian government by imposing license requirements and denying licenses for the export and reexport of luxury goods for all end users within Russia.
- Used new foreign direct product rules targeted at Russia to prevent exports of foreign-origin items produced with U.S. advanced technologies, tools, and software. This prevents these items being transferred to support Russia's military capabilities.
- Formed a coalition of 37 countries that has amplified the impact of U.S. actions by applying substantially similar controls to those imposed by the United States. This robust global coalition reinforces U.S. efforts to isolate Russia from commodities, technologies, and software necessary for Putin's war.

Furthermore, sanctions (administered and enforced by the U.S. Department of Treasury) are having a significant impact on Russia's ability to wage its unjust war against Ukraine. Specifically, sanctions implemented by the United States along with Allies and partners and allies have immobilized about $300 billion worth of Russian Central Bank assets, limiting the central bank's ability to aid the war effort and mitigate sanctions impacts. Sanctioned Russian oligarchs and financial institutions have been forced to divest from

long-held assets outside Russia. Moreover, sanctions have prompted banks in several countries to curtail ties with the Russian financial sector. Despite benefiting from high energy prices, the IMF still expects Russia's economy will contract by over 3 percent this year. Lost investment, export controls, and constraints on Russia's real economy will create a drag on Russia's growth prospects for years to come. Significantly, U.S. sanctions and export controls have severed Russia's access to key technologies and industrial inputs that erode its military capability. Since February 2022, the United States has issued approximately 1,500 new and 750 amended sanctions listings, including:

- State Corporation Rostec, the cornerstone of Russia's defense-industrial base that includes more than 800 entities within the Russian military-industrial complex, such as Sukhoi, MiG, and Kalashnikov Concern.
- Joint Stock Company Mikron, Russia's largest manufacturer and exporter of microelectronics.
- Tactical Missiles Corporation JSC, a Russian state-owned enterprise that produces missiles used by the Russian Armed Forces in Ukraine.
- Individuals and entities located outside Russia who have sought to procure goods and technology for the Russian military-industrial complex and intelligence services
- Russia's largest financial institutions and restricted dealings with banks representing 80 percent of Russian banking sector assets.
- Rosoboronexport, which is Russia's sole state-controlled intermediary agency for exporting and importing the entire range of military, defense, and dual-use products, technologies, and services.
- Issued guidance emphasizing the sanctions and export control risk to individuals and entities inside and outside Russia that provide material support for Russia's sham referenda and purported annexation of the Kherson, Zaporizhzhya, Donetsk, and Luhansk regions of Ukraine.

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On October 24, 2022, the State Department led an interagency discussion with the U.S. diamond industry to discuss sanctions. The Department described the meeting in a media note available at https://www.state.gov/state-department-meets-with-u-s-diamond-industry-to-discuss-sanctions/, which is excerpted here:

> The State Department's Head of the Office of Sanctions Coordination, Ambassador James O'Brien, led an interagency discussion October 24 with the U.S. offices of leading diamond retailers, manufacturers, and laboratories. The meeting focused on the importance of the diamond industry's robust implementation of Russia-focused sanctions and broader due diligence standards, including as applicable to Russian-backed actors around the globe. The United States remains committed to imposing economic consequences on Russia for its unprovoked war in Ukraine and destabilizing activities across Africa.

b. PEESA, E.O. 14039, and the Nord Stream 2 pipeline

Executive Order 14039 of 2021, is entitled "Blocking Property With Respect to Certain Russian Energy Export Pipelines." See Digest 2021 at 618-19. 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 2021, the Department of State announced sanctions on eight persons and identified 17 vessels as blocked property pursuant to the Protecting Europe's Energy Security Act ("PEESA"), as amended, in connection with Nord Stream 2. These sanctions, effective in 2021, were published in the Federal Register in 2022. See 87 Fed. Reg. 26,386-87 (May 4, 2022) and 87 Fed. Reg. 31,929 (May 25, 2022).

In 2021, the State Department designated 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. At the same time, the Department determined that it was in the national interest of the United States to waive the applications of sanctions on Nord Stream 2 AG, its CEO Matthias Warnig, and Nord Stream 2 AG's corporate officers. See *2021 Digest* at 619. On February 23, 2022, the State Department determined that the waiver of sanctions on Nord Stream 2 AG, Matthias Warnig, and Nord Stream 2 AG corporate officers is no longer in the national interest of the United States and terminated the waivers. Nord Stream 2 AG and Matthias Warnig were added to the SDN List pursuant to PEESA and E.O. 13049. 87 Fed. Reg. 31,923 (May 25, 2022).

c. E.O. 14024

Executive Order ("E.O.") 14024, ''Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation,'' was issued in 2021. See *Digest 2021* at 619.

On January 20, 2022, the United States designated four individuals, Taras Kozak, Oleh Voloshyn, Volodymyr Oliynyk, and Vladimir Sivkovich, "connected to ongoing Russian intelligence service-directed influence activities designed to destabilize Ukraine." See Secretary Blinken's press statement available at https://www.state.gov/taking-action-to-expose-and-disrupt-russias-destabilization-campaign-in-ukraine/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0562.

On February 24, 2022, OFAC designated ten individuals and 60 entities (not listed herein), under E.O. 14024. 87 Fed. Reg. 11,818 (Mar. 2, 2022).

On February 25, 2022, OFAC designated Russian President Vladimir Vladimirovich PUTIN and Minister of Foreign Affairs Sergei Viktorovich LAVROV under E.O. 14024 for the invasion of Ukraine. 87 Fed. Reg. 12,215 (Mar. 3, 2022). Secretary Blinken's press statement is available at https://www.state.gov/imposing-sanctions-on-president-putin-and-three-other-senior-russian-officials/ and includes the following:

> The United States is inflicting unprecedented costs on President Putin and those around him for their brutal and unprovoked assault on the people of Ukraine. We are united with our allies and partners in our commitment to ensure the Russian government pays a severe economic and diplomatic price for its further invasion of Ukraine, a sovereign and democratic state.
>
> In coordination with allies and partners, we are imposing sanctions on President Putin and three members of Russia's Security Council directly responsible for the further invasion of Ukraine: Minister of Foreign Affairs Sergei Lavrov, Minister of Defense Sergei Shoigu, and First Deputy Minister of Defense and Chief of the General Staff of the Armed Forces of the Russian Federation Valery Gerasimov.

On February 28, 2022, Secretary Blinken announced additional measures against the Russian financial system in a press statement available at https://www.state.gov/additional-measures-against-the-russian-financial-system/. OFAC imposed blocking sanctions on "the Russian Direct Investment Fund, a known slush fund for President Putin and his inner circle, two of its subsidiaries, and CEO Kirill Dmitriev." 87 Fed. Reg. 12,216 (Mar. 3, 2022).

On March 1, 2022, OFAC issued the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587, to implement E.O. 14024, issued in 2021. See *Digest 2021* at 619. 87 Fed. Reg. 11,297 (Mar. 1, 2022).

On March 3, 2022, the State Department and the Treasury Department imposed sanctions on Alisher Usmanov, Boris Arkady, and Igor Rotenberg, and their family members and entities connected to them, and Nikolai Tokarev, President of Transneft; Sergei Chemezov, CEO of Rostec; and Igor Shuvalov, Chairman of VEB.RF. 87 Fed. Reg. 31,925 (May 25, 2022). See press statement available at https://www.state.gov/targeting-russian-elites-disinformation-outlets-and-defense-enterprises/. In addition, the State Department designated Dmitry Peskov, the chief propagandist of the Russian Federation and Vladimir Putin's spokesperson, under E.O. 14024. The Department also imposed sanctions on 22 defense-related firms. OFAC designated Yevgeniy Prigozhin, Prigozhin's wife Polina, daughter Lyubov, and son Pavel, who play various roles in his business enterprise. In addition, OFAC is designating 26 individuals and seven entities, under various authorities, including E.O. 13661, E.O. 13694, as amended, E.O. 13848, and 224(a)(l)(B) Countering America's Adversaries Through Sanctions Act ("CAATSA"). 87 Fed. Reg. 13,799 (Mar. 10, 2022).

On March 11, 2022, the State Department imposed sanctions on 12 individuals—Elena Aleksandrovna Georgieva; German Valentinovich Belous; Andrey Yurievich Sapelin; Dmitri Nikolaevich Vavulin; Yuri Valentinovich Kovalchuk; Kirill Mikhailovich Kovalchuk; Dmitri Alekseevich Lebedev; Vladimir Nikolaevich Knyaginin; Tatyana Aleksandrovna Kovalchuk; Boris Yurievich Kovalchuk; Stepan Kirillovich Kovalchuk; and Kira Valentinovna Kovalchuk—and entity AO ABR Management, under E.O. 14024. 87 Fed. Reg. 31,927 (May 25, 2022). On the same date, OFAC designated 26 individuals, one vessel, and one aircraft (not listed herein) pursuant to E.O. 14024. 87 Fed. Reg. 15,305 (Mar. 17, 2022).

On March 15, 2022, the State Department announced in a fact sheet designation on the following 11 individuals under E.O. 14024. The fact sheet is available at https://www.state.gov/u-s-announces-sanctions-on-key-members-of-russias-defense-enterprise/ and excerpted below.

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1. **ALEKSEY KRIVORUCHKO** is a Russian Ministry of Defense Deputy Minister of Defense.
2. **TIMUR IVANOV** is a Russian Ministry of Defense Deputy Minister of Defense.
3. **YUNUS-BEK EVKUROV** is a Russian Ministry of Defense Deputy Minister of Defense.
4. **DMITRY BULGAKOV** is a Russian Deputy Minister of Defense and a General of the Army. Bulgakov is the Russian Federation Ministry of Defense's senior-most officer responsible for logistics matters.
5. **YURIY SADOVENKO** is a Russian Ministry of Defense Deputy Minister of Defense.
6. **NIKOLAY PANKOV** is a Russian Ministry of Defense Deputy Minister of Defense.
7. **RUSLAN TSALIKOV** is a Russian Ministry of Defense Deputy Minister of Defense.
8. **GENNADY ZHIDKO** is a Russian Ministry of Defense Deputy Minister of Defense.
9. **VIKTOR ZOLOTOV** is a Russian General of the Army and Commander-in-Chief of Russia's National Guard Troops. He is a member of Russia's Security Council.
10. **DMITRY SHUGAEV** is a senior leader of the Russian Ministry of Defense who is the Director of the Russian Ministry of Defense's Federal Service for Military Technical Cooperation.
11. **ALEXANDER MIKHEEV** is the Director General of Rosoboronexport, which is Russia's state-controlled intermediary that carries out foreign trade with respect to military goods. Mikheev has been involved in synchronizing the supplies of weapons and special equipment using the Russian Ministry of Defense's capabilities; has served as a member of an organizing committee led by Russia's Minister of Defense of a Russian Ministry of Defense-organized military-focused forum; and has served on a delegation led by Russia's Minister of Defense.

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On March 15, 2022, the State Department announced a series of actions to promote accountability for human rights abuses perpetuated by the governments of Russia and Belarus under several authorities including E.O. 14024. See the press statement available at https://www.state.gov/promoting-accountability-for-human-rights-abuses-perpetrated-by-the-governments-of-russia-and-belarus/, and includes the following.

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- Designation of Alyaksandr Lukashenka pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021. Lukashenka was publicly designated for his involvement in gross violations of human rights and significant corruption. Under this authority, Lukashenka and Lukashenka's immediate family members are ineligible for entry into the United States, to include his wife, Galina Lukashenka, his adult sons, Viktar Lukashenka and Dzmitry Lukashenka, and his minor son.
- Designation of 11 senior Russian defense officials by the Department of State pursuant to E.O. 14024. This includes Viktor Zolotov, the Head of the National Guard of Russia. Under Zolotov's leadership, the National Guard has cracked down on Russian citizens who have taken to the streets to protest their government's brutal campaign in Ukraine. In addition, Zolotov's troops are responsible for suppressing dissent in occupied areas of Ukraine. More broadly, the designation of these 11 senior Russian defense leaders continues our imposition of severe costs on Russia's Ministry of Defense as it pursues its brutal military invasion of Ukraine, which has led to unnecessary casualties and suffering, including the deaths of children.

List here: **https://www.state.gov/u-s-announces-sanctions-on-key-members-of-russias-defense-enterprise/**

- A new visa restriction policy under Section 212(a)(3)(C) of the Immigration and Nationality Act that applies to current and former Russian government officials believed to be involved in suppressing dissent in Russia and abroad. Family members of those who fall under the policy will also be ineligible for visas. We have taken our first action pursuant to this new visa authority against 38 individuals, and will continue to implement this policy to demonstrate solidarity with the victims of Russia's repression.
- Designation of two of Russia's Federal Security Service (FSB) officers in Crimea, Artur Shambazov and Andrey Tishenin, pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021. Shambazov and Tishenin were publicly designated for their involvement in a gross violation of human rights, namely torture.
- Imposition of visa restrictions on six individuals who, acting on behalf of the Russian Federation, were involved in attacks on Chechen dissidents living in Europe. This action is being taken pursuant to the "Khashoggi Ban," a visa restriction policy the Administration announced last year to counter transnational repression.
- Imposition of visa restrictions on 25 individuals responsible for undermining democracy in Belarus pursuant to Presidential Proclamation 8015, including Belarusian nationals involved in the fatal shooting and beating of two peaceful protesters; security forces involved in the violent dispersal of peaceful protests; regime officials responsible for launching politically-motivated cases against members of the opposition and civil society; and individuals engaging in corrupt practices supporting the Lukashenka regime.

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At the same time, OFAC designated Kurchaloi District of the Chechen Republic Branch of the Ministry of Internal Affairs of the Russian Federation, two of its officers, a Kurchaloi District prosecutor, and a district court judge in Moscow, pursuant to the Sergei Magnitsky Rule of Law Accountability Act of 2012, and redesignated

Alyaksandr Lukashenka pursuant to E.O. 13405. See Treasury's press release at https://home.treasury.gov/news/press-releases/jy0654#_blank.

On March 24, 2022, the United States designated more than 328 individuals (not listed herein) associated with the Russian State Duma, Russian elites, PJSC Sovcombank, and defense entities, and entity STATE DUMA OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION under E.O. 14024. 87 Fed. Reg. 18,873 (Mar. 31, 2022). State Department's press statement is available at https://www.state.gov/sanctioning-additional-members-of-russias-duma-russian-elites-bank-board-members-and-defense-entities/.

On March 24, 2022, the State Department imposed sanctions on one entity and 12 individuals under E.O. 14024. 87 Fed. Reg. 31,927 (May 25, 2022). The State Department also released a fact sheet detailing the actions taken, which is available at https://www.state.gov/targeting-elites-of-the-russian-federation/, and excerpted below.

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The Department of State is targeting elites close to Putin, along with their property, holdings, and family members. Today, the Department has designated:

- Dmitry Vladimirovich Gusev, Mikhail Lvovich Kuchment, Anatoly Alexandrovich Bravverman, Ilya Borisovich Brodskiy, Aleksey Leonidovich Fisun, Dmitry Vladimirovich Khotimskiy, Sergey Vladimirovich Khotimskiy, Mikhail Vasilyevich Klyukin, Mikhal Olegovich Avtukhov, Albert Alexandrovich Boris, Dmitry Vladimirovich Beryshnikov, Elena Alexandrovna Cherstvova, Sergey Nikolaevich Bondarovich, Oleg Alexandrovich Mashtalyar, Alexey Valeryevich Panferov, Irina Nikoalyevna Kashina, and Joel Raymon Lautier
    - These individuals are each being designated for being or having been a leader, official, senior executive officer, or member of the board of directors of PJSC Sovcombank, pursuant to section 1(a)(iii)(C) of E.O. 14024.
- OOO Volga Group
    - OOO Volga Group is being designated for operating or having operated in the financial services sector of the Russian Federation economy, pursuant to Section 1(a)(i) of E.O. 14024.
- Gennady Nikolayevich Timchenko
    - Gennady Nikolayevich Timchenko is being designated for being or having been a leader, official, senior executive officer, or member of the board of directors of OOO Volga Group, pursuant to section 1(a)(iii)(C) of E.O. 14024.
- OOO Transoil
    - OOO Transoil is being designated for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Gennady Nikolayevich Timchenko, pursuant to section 1(a)(vii) of E.O. 14024.
- Ksenia Gennadevna Frank

- Ksenia Gennadevna Frank is being designated for being or having been a leader, official, senior executive officer, or member of the board of directors of OOO Transoil, pursuant to section 1(a)(iii)(C) of E.O. 14024.

- Gleb Sergeevich Frank
  - Gleb Sergeevich Frank is being designated for being the spouse of Ksenia Gennadevna Frank, pursuant to Section 1(a)(v) of E.O. 14024.
- Elena Petrovna Timchenko and Natalya Browning
  - Elena Petrovna Timchenko and Natalya Browning are each being designated for being a spouse or adult child of Gennady Nikolayevich Timchenko, pursuant to Section 1(a)(v) of E.O. 14024.
- The Yacht *Lena*
  - The Yacht *Lena* is property in which Gennady Nikolayevich Timchenko has an interest and is therefore blocked property.

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Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0677#_blank.

On March 24, 2022, OFAC designated individuals Herman Oskarovich GREF and Boris Viktorovich OBNOSOV and 48 entities (not listed herein), under E.O. 14024. 87 Fed. Reg. 18,857 (Mar. 31, 2022).

On March 31, 2022, Secretary Blinken announced the designation of 21 entities and 13 individuals (not listed herein) involved in sanctions evasion networks to procure of western technology. 87 Fed. Reg. 20,505 (Apr. 7, 2022). He also announced designations of three individuals for their involvement in malicious cyber activities, one of whom the Department of Justice indicted, and the expansion of sanctions authorities under E.O. 14024. See the press statement available at https://www.state.gov/additional-sanctions-on-russias-technology-companies-and-cyber-actors/, which includes the following:

> In addition to the sanctions imposed today, the Department of the Treasury is also expanding its Russia sanctions authorities. The Secretary of the Treasury, in consultation with me, identified the aerospace, marine, and electronics sectors of the Russian Federation economy pursuant to section 1(a)(i) of Executive Order 14024. This allows for sanctions to be imposed on any individual or entity determined to operate or have operated in any of those sectors and provides an expanded ability to swiftly impose additional economic costs on Russia for its war of choice in Ukraine.

Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0692#_blank and a March 24, 2022, Department of Justice press release on the indictment is available at https://www.justice.gov/opa/pr/four-russian-government-employees-charged-two-historical-hacking-campaigns-targeting-critical#_blank.

On April 6, 2022, OFAC designated 25 individuals, 50 entities, and 5 vessels (not listed herein), under E.O. 14024. 87 Fed. Reg. 23,023 (Apr. 18, 2022). On April 7, 2022, OFAC designated entities Joint Stock Company United Shipbuilding Corporation and PUBLIC JOINT COMPANY ALROSA under E.O. 14024. 87 Fed Reg. 23,046 (Apr. 18, 2022). Secretary Blinken's press statement is available at https://www.state.gov/further-targeting-russian-state-owned-enterprises/. The Department also released a fact sheet available at https://www.state.gov/additional-state-department-designations-targeting-russian-state-owned-defense-shipbuilding-enterprise/, excerpted below.

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Joint Stock Company United Shipbuilding Corporation

Joint Stock Company United Shipbuilding Corporation

Joint Stock Company United Shipbuilding Corporation is responsible for developing and building the Russian Navy's warships as a part of implementing Russia's state defense order. Joint Stock Company United Shipbuilding Corporation develops and produces a wide range of military vessels, including submarines, frigates, and mine sweepers, among others. The Department of State has designated Joint Stock Company United Shipbuilding Corporation pursuant to E.O. 14024 Section 1(a)(i) for operating or having operated in the defense and related materiel sector of the Russian Federation economy.

Members of the Joint Stock Company United Shipbuilding Corporation Board of Directors

The Department of State has designated the following eight persons pursuant to E.O. 14024 Section 1(a)(iii)(C) as individuals who are or have been a leader, official, senior executive officer, or member of the board of directors of Joint Stock Company United Shipbuilding Corporation, an entity whose property and interests in property are blocked pursuant to E.O. 14024:

1. Georgiy Sergeyevich Poltavchenko, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
2. Andrey Vasilyevich Lavrishchev, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
3. Vitaliy Anatolyevich Markelov, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
4. Vladimir Yakovlevich Pospelov, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
5. Aleksey Lvovich Rakhmanov, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
6. Oleg Nikolayevich Ryazantsev, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
7. Ilya Vasilyevich Shestakov, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.
8. Andrey Nikolaevich Shishkin, a member of the Board of Directors of Joint Stock Company United Shipbuilding Corporation.

Joint Stock Company United Shipbuilding Corporation Subsidiaries

The Department of State has designated the following 28 entities pursuant to E.O. 14024 Section 1(a)(vii) as entities that are owned or controlled by, or that have acted or purported to act

for or on behalf of, directly or indirectly, Joint Stock Company United Shipbuilding Corporation, an entity whose property and interests in property are blocked pursuant to E.O. 14024:

1. JSC 33 Shipyard, a Joint Stock Company United Shipbuilding Corporation subsidiary, specializes in the repair of warships.
2. Joint Stock Company Admiralty Shipyards, a Joint Stock Company United Shipbuilding Corporation subsidiary, constructs warships and submarines.
3. Baltic Shipyard JSC, a Joint Stock Company United Shipbuilding Corporation subsidiary, builds naval ships.
4. Public Joint Stock Company Vyborg Shipyard, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in the construction of icebreakers.
5. Public Joint Stock Company Shipbuilding Plant Severnaya Verf, a Joint Stock Company United Shipbuilding Corporation subsidiary, builds missile cruisers, anti-aircraft ships, anti-submarine ships, and torpedo boat destroyers.
6. Joint Stock Company Sredne-Nevsky Shipyard, a Joint Stock Company United Shipbuilding Corporation subsidiary, specializes in the construction of warships.
7. Severnoe Design Bureau Joint Stock Company, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in projects related to frigates and destroyers.
8. Joint Public Stock Company Nevskoe Design Bureau, a Joint Stock Company United Shipbuilding Corporation subsidiary, designs warships, including aircraft carriers.
9. Almaz Central Marine Design Bureau Joint Stock Company, a Joint Stock Company United Shipbuilding Corporation subsidiary, designs fast missile and patrol ships.
10. Public Joint Stock Company Krasnoe Sormovo Shipyard, a Joint Stock Company United Shipbuilding Corporation subsidiary, produces military vessels, including submarines.
11. Joint Stock Company Central Design Bureau for Marine Engineering Rubin, a Joint Stock Company United Shipbuilding Corporation subsidiary, designs submarines and conducts other Russian defense activities.
12. Joint Stock Company Research Design and Technological Bureau Onega, a Joint Stock Company United Shipbuilding Corporation subsidiary, provides engineering and design support for Russian Navy vessels.
13. Joint Stock Company the St. Petersburg's Sea Bureau of Mechanical Engineering Malachite, a Joint Stock Company United Shipbuilding Corporation subsidiary, designs submarines.
14. Joint Stock Company 10 Ordena Trudovogo Krasnogo Znameni Dockyard, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in ship repair activities.
15. Joint Stock Company Baltic Shipbuilding Plant Yantar, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in military shipbuilding.
16. Public Joint Stock Company Amursky Shipbuilding Plant, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in the construction of submarines and the manufacturing of weapons and defense products.
17. Joint Stock Company Shiprepairing Center Zvyozdochka, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in the repair of submarines and other military activities.

18. Public Joint Stock Company Proletarsky Zavod, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in fulfilling Russian Government strategic orders and producing products for submarines.
19. Joint Stock Company Khabarovsk Shipbuilding Yard, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in building ships for the Russian Navy and the Russian Federal Security Service (FSB).
20. United Shipbuilding Corporation JSC Aysberg Central Design Building, a Joint Stock Company United Shipbuilding Corporation subsidiary, is involved in the design of ships.
21. Limited Liability Company Kaspiyskaya Energiya Administration Office, a Joint Stock Company United Shipbuilding Corporation subsidiary, undertakes activities to fulfill strategic efforts of the Joint Stock Company United Shipbuilding Corporation related to the oil and gas industries.
22. Joint Stock Company Northern Production Association Arktika, a Joint Stock Company United Shipbuilding Corporation subsidiary, engages in production activities related to military vessels.
23. Joint Stock Company Production Association Northern Machine-Building Enterprise, a Joint Stock Company United Shipbuilding Corporation subsidiary, builds submarines for the Russian Navy.
24. Joint Stock Company Svetlovsky Enterprise ERA, a Joint Stock Company United Shipbuilding Corporation subsidiary, conducts activities related to the automation of vessels.
25. Joint Stock Company Shipbuilding Plant Lotos, a Joint Stock Company United Shipbuilding Corporation subsidiary, is a shipbuilding plant of Russia's military-industrial complex.
26. Federal State Unitary Enterprise Kronshtadtskyy Morskoy Factory Minoborony Rossii, a Joint Stock Company United Shipbuilding Corporation subsidiary, conducts activities for Russia's Ministry of Defense.
27. Joint Stock Company Sudoexport, a Joint Stock Company United Shipbuilding Corporation subsidiary, represents Joint Stock Company United Shipbuilding Corporation with regard to the world shipbuilding market.
28. Joint Stock Company Design Office for Shipbuilding Vympel, a Joint Stock Company United Shipbuilding Corporation subsidiary, designs special-purpose ships for the Russian Navy as well as other items for Russia's Ministry of Defense.

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Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0707#_blank.

On April 20, 2022, OFAC designated 14 individuals—Yevgeniy Yuryevich GADETSKIY; Mikhail Aleksandrovich LESHCHENKO; Ilya Anatolyevich MARKOV; Roman Viktorovich NECHIPORUK; Natalya Aleksandrovna TYURINA; Konstantin MALOFEYEV; Alexey Aleksandrovich KUPRIYANOV; Nikita MELIKOV; Aleksandr OKULOV; Artem SAMOYLOV; Alexey Anatolyevich SUBBOTIN; Kirill Konstantinovich MALOFEYEV; Pavel Vladimirovich KUZMIN; and Mikhail Ilich YAKUSHEV—and 40 entities (not listed herein), under E.O. 14024. 87 Fed. Reg. 24,624 (Apr. 26, 2022).

Effective April 20, 2022, the State Department imposed sanctions on 16 individuals under E.O. 14024: Kseniya Valentinovna Yudayeva, Mikhail Yurevich Alekseev, Anatoly Mikhailovich Karachinskiy, Vladimir Vladimirovich Kolychev, Alexey Yurevich Simanovskiy, Andrey Fedorovich Golikov, Elena Borisovna Titova, Mikhail Mikhaylovich Zadornov, Dmitriy Olegovich Levin, Svetlana Petrovna Emelyanova, Tatyana Gennadevna Nesterenko, Irina Vladimirovna Kremleva, Viktor Andreevich Nikolaev, Sergey Georgievich Rusanov, Nadia Narimanovna Cherkasova and Paul Andrew Goldfinch. 87 Fed. Reg. 31,923 (May 25, 2022).

On April 20, 2022, Secretary Blinken announced additional sanctions to promote accountability for human rights abuses and violations in Russia and Belarus in a press statement. The State Department designated 16 Bank Otkritie Board Members under E.O. 14024: Kseniya Valentinovna Yudayeva, Mikhail Yurevich Alekseev, Anatoly Mikhailovich Karachinskiy, Vladimir Vladimirovich Kolychev, Alexey Yurevich Simanovskiy, Andrey Fedorovich Golikov, Elena Borisovna Titova, Mikhail Mikhaylovich Zadornov, Dmitriy Olegovich Levin, Svetlana Petrovna Emelyanova, Tatyana Gennadevna Nesterenko, Irina Vladimirovna Kremleva, Viktor Andreevich Nikolaev, Sergey Georgievich Rusanov, Nadia Narimanovna Cherkasova, and Paul Andrew Goldfinch under E.O. 14024. 87 Fed. Reg. 31,923 (May 25, 2022). At the same time, the Department announced additional actions under multiple authorities in a press statement available at https://www.state.gov/promoting-accountability-for-human-rights-abuses-in-russia-and-belarus-and-taking-action-against-sanctions-evaders/ and excerpted below.

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- Action to impose visa restrictions on 587 Russian individuals pursuant to a new policy under Section 212(a)(3)(C) of the Immigration and Nationality Act, which was announced March 15. The policy applies to Russian government officials involved in suppressing dissent in Russia and abroad. Today's action includes Duma members who have been involved in repressing independent media. Family members of those who fall under the policy will also be ineligible for visas.
- Designation of three Russian officials, Khusein Merlovich Khutaev, Nurid Denilbekovich Salamov, and Dzhabrail Alkhazurovich Akhmatov, pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022. Khutaev, Salamov, and Akhmatov were publicly designated for their involvement in a gross violation of human rights perpetrated against human rights defender Oyub Titiev.
- Action to impose visa restrictions on 48 individuals pursuant to a policy under Section 212(a)(3)(C) of the Immigration and Nationality Act that applies to those who are believed to have taken, supported, or been actively complicit in actions that threaten or violate the sovereignty, territorial integrity, or political independence of Ukraine. Today's action includes ten purported "authorities" of the so-called Donetsk People's Republic and Luhansk People's Republic who are further reported to have been involved in human rights abuses at

prison facilities and places of unofficial detention in Russia-controlled areas of the Donbas since 2014.

- Action to impose visa restrictions on 17 individuals responsible for undermining democracy in Belarus pursuant to Presidential Proclamation 8015, including Belarusian nationals involved in the intimidation, harassment, and repression of strikers supporting the pro-democracy movement and the expulsion of students for participating in peaceful pro-democracy protests. Specific individuals include officials from state-owned factories and universities.

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In addition, OFAC designated more than 40 individuals and entities (not listed herein) pursuant to E.O. 14024. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0731.

On May 8, 2022, OFAC designated 35 individuals and 15 entities (not listed herein) pursuant to E.O. 14024. 87 Fed. Reg. 29,442 (May 13, 2022).

On June 2, 2022, the State Department designated Russian oligarchs and elites and their family members and associates pursuant to E.O. 14024. 87 Fed. Reg. 74,464 (Dec. 5, 2022). The Department released a fact sheet, available at https://www.state.gov/promoting-accountability-and-imposing-costs-on-the-russian-federation-and-its-enablers-for-putins-aggression-against-ukraine/ and excerpted below.

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INDIVIDUALS AND ENTITIES DESIGNATED BY THE STATE DEPARTMENT

- God Nisanov, an oligarch with close ties to numerous Russian officials, is being designated pursuant to E.O. 14024 section 1(a)(vii). Nisanov is a real estate investor and one of the richest people in Europe.
- Evgeny Novitskiy, a Russian elite with close ties to the Government of Russia, is being designated pursuant to E.O. 14024 section 1(a)(vii).
- Maria Zakharova is being designated pursuant to E.O. 14024 section 1(a)(iii)(A) for her role as an official of the Government of the Russian Federation as the spokesperson for the Foreign Ministry. The EU, UK, Japan, Australia, and New Zealand have previously designated Maria Zakharova.
- Sergey Gorkov, the head of RosGeo and a former executive of sanctioned banks, is being designated pursuant to E.O. 14024 section 1(a)(iii)(A) for his involvement in the Government of the Russian Federation via RosGeo.
- Severgroup is a multi-billion-dollar Russia's investment company with holdings and subsidiaries in metallurgy, engineering, mining, tourism, banking, technology, media, and finance, among other sectors. Severgroup is being designated pursuant to E.O. 14024 Section 1(a)(i) because it operates or has operated in the financial services sector of the Russian Federation economy.

- Alexey Mordashov, the leader of Severgroup Limited Liability Company and one of Russia's wealthiest billionaires, is being designated, pursuant to section 1(a)(iii)(C) of E.O. 14024, for being a leader, official, senior executive officer, or member of the board of directors of Severgroup, an entity whose property or interests in property are blocked pursuant to E.O. 14024 section 1(a)(i). The EU, Australia, New Zealand, and the UK previously designated Alexey Mordashov.
- Family members of Alexey Mordashov who are being designated pursuant to section 1(a)(v) of E.O. 14024 for being the spouse or adult child of a person whose property and interests in property are blocked pursuant to section 1(a)(ii) or 1(a)(iii) of E.O. 14024 are:
    - Marina Mordashova
    - Nikita Mordashov
    - Kirill Mordashov
- Entities designated for relation to Alexey Mordashov include:
    - Severstal is among Russia's leading domestic steel producers. Severstal is being designated pursuant to E.O. 14024 Section 1(a)(vii) because it is owned or controlled by Alexey Mordashov, a person whose property and interests in property are blocked pursuant to section 1(a)(iii)(C) of E.O. 14024.
    - Algoritm is a holding company that controls dozens of Russian technology, media, and advertising companies. Algoritm is being designated pursuant to E.O. 14024 section 1(a)(vii) because it is owned or controlled by Alexey Mordashov, a person whose property and interests in property are blocked pursuant to section 1(a)(iii)(C) of E.O. 14024.
    - Nord Gold is a gold mining company with assets and operations around the world, including in the Russian Federation, Burkina Faso, French Guiana, Guinea, Kazakhstan, and Canada. Nord Gold is being designated pursuant to E.O. 14024 section 1(a)(vii) because it is owned or controlled by Alexey Mordashov, a person whose property and interests in property are blocked pursuant to section 1(a)(iii)(C) of E.O. 14024.
- In addition, the Department of the Treasury issued two new general licenses ("GL") and amended one GL in connection with the Department's designations of Severstal, Nord Gold, and Alogritm. Specifically:
    - Under GL 36, all transactions prohibited by E.O. 14024 that are ordinarily incident and necessary to the wind down of transactions involving Public Joint Stock Company Severstal or any entity in which Public Joint Stock Company Severstal owns, directly or indirectly, a 50 percent or greater interest, are authorized through 12:01 a.m. eastern daylight time, August 31, 2022, provided that any payment to Public Joint Stock Company Severstal or any other blocked person must be made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR)
    - Under GL 37, all transactions prohibited by E.O. 14024 that are ordinarily incident and necessary to the wind down of transactions involving Nord Gold PLC, or any entity in which Nord Gold PLC owns, directly or indirectly, a 50 percent or greater interest, are authorized through 12:01 a.m. eastern daylight time, July 1, 2022, provided that any payment to Nord Gold PLC or any other

blocked person must be made into a blocked account in accordance with the RuHSR.

- GL 25 was amended to exclude Algorithm, an entity that will be designated pursuant to E.O. 14024, from the scope of the authorization. GL 25 authorizes all transactions ordinarily incident and necessary to the receipt or transmission of telecommunications involving the Russian Federation that are prohibited by the RuHSR. Additionally, GL 25 authorizes the exportation or re-exportation, sale, or supply, directly or indirectly, from the United States or by U.S. persons, wherever located, to the Russian Federation of services, software, hardware, or technology incident to the exchange of communications over the internet, such as instant messaging, videoconferencing, chat and email, social networking, sharing of photos, movies, and documents, web browsing, blogging, web hosting, and domain name registration services, that is prohibited by the RuHSR.

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See 87 Fed. Reg. 40,441 (Jul. 7, 2022). The State Department press statement is available at https://www.state.gov/targeting-russias-oligarchs-and-vessels/. OFAC made additional designations at the same time. 87 Fed. Reg. 35,597 (Jun. 10, 2022). See Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0802#_blank.

On June 28, 2022, Secretary Blinken announced a number of designations (not listed herein) under E.O. 14024 and other authorities. The press statement is available at https://www.state.gov/targeting-russias-war-machine-sanctions-evaders-military-units-implicated-in-human-rights-abuses-and-officials-involved-in-suppression-of-dissent/ and excerpted below.

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Today, the Departments of State and the Treasury are imposing sanctions on additional entities and individuals, including Russia's largest defense conglomerate (State Corporation Rostec) and dozens of Russia's defense industrial base entities. We are also designating an individual in Ukraine illegitimately installed as a mayor by Russia, as well as 19 Rostec board members and nine of their adult family members.

As part of this action, the Department of State is imposing sanctions on 45 entities and 29 individuals under Executive Order 14024. This includes the designation of an entity outside of Russia for providing material support to a blocked Russian entity, which, in this case, is a Russian entity that specializes in procuring items for Russia's defense industry. This action underscores the risks of doing business with sanctioned Russian entities or individuals. The Department of State is also designating Russian military units that have been credibly implicated in human rights abuses or violations of international humanitarian law as part of our commitment to promote accountability for atrocities in Ukraine.

Additionally, the Department of State is taking action to impose visa restrictions on 511 Russian military officers for threatening or violating Ukraine's sovereignty, territorial integrity, or political independence, in connection with Russia's unprovoked and unjustified war against Ukraine including officers operating in the Zaporizhzhia and Mariupol areas, where reports of war crimes continue to mount. We have also taken steps to impose visa restrictions on 18 Russian nationals in relation to suppression of dissent, including politically motivated detentions.

The Department of the Treasury's Office of Foreign Assets Control (OFAC) is designating 70 entities, many of which are critical to Russia's defense base, including State Corporation Rostec, the cornerstone of Russia's defense, aerospace, industrial, technology, and manufacturing sectors, as well as 29 individuals, pursuant to Executive Orders 14024 and 14065.

The Department of Commerce is taking complementary actions, adding several entities to the Entity List for continuing to contract to supply for Russia even after its further invasion of Ukraine. These Entity List additions demonstrate the United States will impose stringent export controls on companies, including those in third countries, in order to deny them access to items they can use to support Russia's military and/or defense industrial base.

OFAC is prohibiting the importation of gold of Russian Federation origin into the United States, and Treasury's Financial Crimes Enforcement Network is issuing a joint alert with the Department of Commerce's Bureau of Industry and Security advising financial institutions to remain vigilant against attempts to evade export controls implemented in connection with Russia's invasion of Ukraine. As outlined in these alerts, financial institutions play a critical role in disrupting Russia's efforts to acquire critical goods and technology to support Russia's war-making industries.

Finally, the President issued a proclamation to raise tariffs on over 570 groups of Russian products worth approximately $2.3 billion to Russia. These measures are carefully calibrated to impose costs on Russia, while minimizing costs to U.S. consumers.

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The State Department released a Fact Sheet detailing the sanctions available at https://www.state.gov/targeting-russias-war-machine-sanctions-evaders-military-units-credibly-implicated-in-human-rights-abuses-and-russian-federation-officials-involved-in-suppression-of-dissent/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0838#_blank.

On July 14, 2022, OFAC removed the following entity, previously designated under E.O. 14024, from the SDN List: SUBSIDIARY BANK ALFA–BANK JSC. 87 Fed. Reg. 45,402 (Jul. 28, 2022).

On July 29, 2022, the United States designated two individuals—Aleksandr Viktorovich Ionov and Natalya Valeryevna Burlinova—and four entities—Anti-Globalization Movement of Russia; Ionov Transkontinental, OOO; STOP-Imperialism; and Center for Support and Development of Public Initiative Creative Diplomacy, under E.O. 14024. Secretary Blinken's press statement is available at https://www.state.gov/targeting-russias-global-malign-influence-operations-and-election-interference-activities/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0899#_blank.

On August 2, 2022, OFAC designated six individuals-- Andrey Grigoryevich GURYEV; Andrey Andreevich GURYEV; Alina Maratovna KABAEVA; Viktor Filippovich RASHNIKOV; Anton Sergeevich URUSOV; and Natalya Valeryevna POPOVA—and five entities--DZHI AI INVEST 000; INVESTITSIONNAYA KOMPANIYA MMK-FINANS; PUBLICHNOE AKTSIONERNOE OBSCHESTVO MAGNITOGORSKIY METALLURGICHESKIY KOMBINAT; JOINT STOCK COMPANY PROMISING INDUSTRIAL AND INFRASTRUCTURE TECHNOLOGIES; and MMK METALURJI SANAYI TICARET VE LIMAN ISLETMECILIGI ANONIM SIRKETI, under E.O. 14024. OFAC also designated vessel ALFA NERO. 87 Fed. Reg. 48,227 (Aug. 8, 2022).

On September 15, 2022, the State Department imposed sanctions on the following 23 individuals pursuant to E.O. 14024: Volodymyr Valeriyovych Rogov, Oleksandr Fedorovych Saulenko, Volodymyr Volodymyrovich Bandura, Valery Mykhailovych Pakhnyts, Mikhail Leonidovich Rodikov, Vladimir Aleksandrovich Bespalov, Pavlo Ihorovych Filipchuk, Tetyana Yuriivna Tumilina, Hennadiy Oleksandrovych Shelestenko, Oleksandr Yuriyovych Kobets, Ihor Ihorovych Semenchev, Tetyana Oleksandrivna Kuz'mych, Serhiy Mykolayovych Cherevko, Yevhen Vitaliiovych Balytskyi, Andrey Dmitrievich Kozenko, Oleksiy Sergeevich Selivanov, Andriy Leonidovich Siguta, Anton Robertovich Titskiy, Andriy Yuriovych Trofimov, Anton Viktorovich Koltsov, Mykyta Ivanovich Samoilenko, Viktor Andriyovych Emelianenko, and Maxim Stanislavovich Oreshkin. 87 Fed. Reg. 74,467 (Dec. 5, 2022).

On September 15, 2022, OFAC designated 22 individuals and 2 entities under E.O. 14024. 87 Fed. Reg. 58,909 (Sep. 28, 2022).

On September 30, 2022, OFAC designated 109 individuals under E.O. 14024. 87 Fed. Reg. 60,756 (Oct. 6, 2022). In addition, OFAC designated 25 individuals and 9 entities under E.O. 14024. At the same time. 87 Fed. Reg. 60,748 (Oct. 6, 2022). On the same date, OFAC designated 169 individuals (not listed herein) and entity THE FEDERATION COUNCIL OF THE FEDERAL ASSEMBLY OF THE RUSSIAN FEDERATION under E.O. 14024. 87 Fed. Reg. 60,776 (Oct. 6, 2022).

On October 19, 2022, the State Department, Justice Department, Federal Bureau of Investigation, and Treasury Department designated Yury Yuryevich Orekhov and his companies Nord-Deutsche Industrieanlagenbau GmbH (NDA GmbH) and Opus Energy Trading LLC (Opus Energy Trading) pursuant to Executive Order 14024. 87 Fed. Reg. 64,547 (Oct. 25, 2022). The State Department press statement is available at https://www.state.gov/imposing-sanctions-on-russias-technology-procurement/.

In an October 26, 2022, press statement from Secretary of State Antony J. Blinken announcing the designation under E.O. 14024 of Ilan Shor, leader of the Shor Party and seven additional individuals and 12 entities: individuals—Leonid Mikhailovich GONIN, Olga Yurievna GRAK, Yuriy Igorevich GUDILIN, Ilan Mironovich SHOR, Sara Lvovna SHOR, Igor Yuryevich CHAYKA, Aleksei Valeryevich TROSHIN, and Ivan Aleksandrovich ZAVOROTNYT—and twelve entities—SHOR PARTY; AKTSIONERNOE OBSHCHESTVO NATSIONALNAYA INZHINIRINGOVAYA KORPORATSIYA; 000 AGRO-REGION; 000 AQUA SOLID; 000 BM PROEKT-EKOLOGIYA; 000 EKOGRUPP; 000 INNOVATSII SVETA; 000 INZHINIRING.RF; 000 KHARTIYA; 000 KOMPANIYA ZOLOTOI VEK; 000 MEZHMUNITSIPALNOE ATP; and 000 REGION-COMFOR. 87 Fed. Reg. 66,779 (Nov. 4,

2002). The statement is available at https://www.state.gov/response-to-corruption-and-election-interference-in-moldova/, and includes the following:

> OFAC is also designating Ilan Shor, leader of the Shor Party, pursuant to the primary U.S. Russia sanctions authority (E.O. 14024), for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in interference in a foreign government election, for or on behalf of, or for the direct or indirect benefit of the Government of the Russian Federation. A beneficiary of a large-scale 2014 money laundering scheme related to the theft of $1 billion from Moldovan banks, Shor has worked with other corrupt oligarchs and Moscow-based entities to create political unrest in Moldova and sought to undermine Moldova's bid for EU candidate status.
>
> Pursuant to E.O. 14024, OFAC is designating 7 additional individuals and 12 entities that have be1en involved in the Kremlin's attempts to interfere in Moldova's elections. Russia has sought to advance its own interests by providing illicit financing – including funds earmarked for bribes and electoral fraud – to support pro-Kremlin political activity in Moldova.

On November 14, 2022, the State Department designated AO PKK Milandr under E.O. 14024. At the same time, OFAC designated 14 individuals, 27 entities, and eight aircrafts, including entities tied to Milandr: Armenia-based Milur Electronics LLC; Sharp Edge Engineering Inc.; and Milur SA. Treasury additionally designated two Milur SA officials and the General Director of both Milandr itself and Milur Electronics. 87 Fed. Reg. 69,390 (Nov. 18, 2022). The State Department press statement is available at https://www.state.gov/targeting-russias-global-military-procurement-network-and-kremlin-linked-networks/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy1102.

On November 15, 2022, the State Department and Treasury Department imposed sanctions on individuals and entities in response to Iran's transfer for military unmanned aerial vehicles (UAVs) to Russia. Three Iranian entities, the Islamic Revolutionary Guards Corps Aerospace and Force; Qods Aviation Industries are designated under E.O. 14024 and Shahed Aviation Industries Research Center is designated under E.O. 13382. In addition, the State Department designated Russian individuals and entities, including Private Military Company Wagner. OFAC made additional designations under E.O. 14024, including Abbas Djuma and Tigran Khristoforovich Srabionov for being involved in Wagner's acquisition of Iranian UAVs to support combat operations in Ukraine. 87 Fed. Reg. 70,896 (Nov. 21, 2022). State Department's press statement is available at https://www.state.gov/imposing-sanctions-on-entities-and-individuals-in-response-to-irans-transfer-of-military-uavs-to-russia/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy1104.

On December 9, 2022, Secretary Blinken announced additional designations of Russian entities involved in the transfer of UAVs from Iran. The State Department designated the Russian Aerospace Forces, 924th State Center for Unmanned Aviation,

and the Command of the Military Transport Aviation pursuant to E.O. 14024. The press statement is available at https://www.state.gov/the-united-states-imposes-sanctions-on-russian-entities-involved-in-uav-deal-with-iran/.

Also on December 9, 2022, OFAC designated 18 individuals (not listed herein) and entity CENTRAL ELECTION COMMISSION OF THE RUSSIAN FEDERATION under E.O. 14024. 87 Fed. Reg. 76,668 (Dec. 15, 2022).

On December 15, 2022, OFAC designated 18 entities (not listed herein) under E.O. 14024. 87 Fed. Reg. 77,954 (Dec. 20, 2022).

On December 22, 2022, Secretary Blinken announced, in a press statement available at https://www.state.gov/the-united-states-imposes-sanctions-on-russian-naval-entities-2/, the designation of 10 Russian naval entities pursuant to E.O. 14024. The Department released a fact sheet with information about the designations, available at https://www.state.gov/the-united-states-imposes-sanctions-on-russian-naval-entities/, and excerpted below.

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- **JOINT STOCK COMPANY BATTERY COMPANY RIGEL (RIGEL)** is a manufacturer of nickel-metal hydride and silver-zinc batteries and has been a supplier to the Russian navy for more than 15 years. It provides the full cycle of development, production, and supply of lithium batteries for the Russian Ministry of Defense.
- **JOINT STOCK COMPANY CONCERN CENTRAL INSTITUTE FOR SCIENTIFIC RESEARCH ELEKTROPRIBOR (ELEKTROPRIBOR)** develops and manufactures high-precision navigation, gyroscopy, gravimetry, optical electronic systems of submarines, and marine communication systems. The Department of State assess that it produces a navigation system for Russian combat ships – including navigation, periscope, sonar systems, and radio communication for naval navigation, ship control, radio communication, and surveillance. It works to ensure high operational availability of Moscow's naval submarine forces.
- **JOINT STOCK COMPANY CONCERN AVRORA SCIENTIFIC AND PRODUCTION ASSOCIATION (AVRORA)** has been described as leading Russian enterprise in the fields of development, production, and supply of automated control systems for surface ships and submarines for Russian military vessels. Specifically, it develops, manufactures supplies, and ensures warranty maintenance and servicing of on-board hardware automated control systems for submarines and naval surface ships.
- **CONCERN MORINFORMSYSTEM AGAT JOINT STOCK COMPANY** has been described as the leading company in the Russian shipbuilding industry specializing in the development, production and maintenance of combat information and control systems as well as integrated systems, integrated control automation systems for marine formations, sea-based cruise and ballistic missile fire control systems, ship-based and coastal missile and radar systems, sonar systems. It has been described as an umbrella organization in the Russian shipbuilding industry specializing in the domains of informational systems and technologies, system engineering in the sphere of marine data computing equipment,

electromagnetic compatibility of radio-electronic facilities, degaussing systems, fire control systems of sea-based cruise and ballistic missiles, combat information and control systems and integrated management systems for surface ships and submarines.

- **CENTRAL RESEARCH INSTITUTE OF STRUCTURAL MATERIALS PROMETEY** has been described as the largest materials research center in Russia and as being among the country's leading companies involved in military naval shipbuilding and development of military technology.
- **JOINT STOCK COMPANY CENTRAL RESEARCH INSTITUTE OF MARINE ENGINEERING** has been described as one of the major Russian enterprises engaged in development and supply of ship machinery installed on Russian merchant and naval vessels.

Additionally, the Department of State has designated the following four entities pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy:

- **P.P. SHIRSHOV INSTITUTE OF OCEANOLOGY OF THE RUSSIAN ACADEMY OF SCIENCES** is the oldest and largest Russian research center in the field of oceanology, which conducts fundamental and applied research through the use of research vessels, aircraft, underwater and space vehicles and other technical means. Additionally, it develops remotely operated and autonomous robotic tools that perform search and reconnaissance missions, as well as form parts of network-centric systems for the observation, registration, and guidance of surface and submarine forces of the Russian navy and other Russian government agencies.
- **TECHNOPOLE COMPANY** is involved in system integration, engineering, consultancy, development, manufacturing and delivery of equipment for the following applications: ocean exploration, oceanology, oceanography, hydrography, seabed data imagery, navigation and positioning at sea and under water, dredging, inspection of underwater objects, hydrology and water quality. In particular, it produces a navigation system called "PHINS" or "PHINS Inertial Navigation System (iXBlue)" that is designed to be installed on Russian military vessels including frigates, corvettes, patrol vessels, and high-speed missile boats, as well as on submarines and remotely operated and autonomous unmanned underwater vehicles.
- **JOINT STOCK COMPANY OBUKHOVSKOYE** has been described as one of the leading Russian developers and manufacturers of marine equipment, with a wide range of customers in military and civil shipbuilding.
- **MARINE BRIDGE AND NAVIGATION SYSTEMS LTD** is a developer and manufacturer of marine equipment and automation systems for the maritime industry – including navigation equipment, including integrated bridge systems and navigation simulators, oceanographic equipment, integrated monitoring and control systems, fire alarm and firefighting systems, and deck and auxiliary machinery. It has installed components of a security system on warships of the Russian navy.

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d. New E.O. 14071

On April 6, 2022, President Biden issued a new executive order, E.O. 14071, "Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression." 87 Fed. Reg. 20,999 (Apr. 8, 2022). The portion of Section 1 of E.O. 14071 follows, describing persons that may be designated.

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I, JOSEPH R. BIDEN JR., President of the United States of America, in order to take additional steps with respect to the national emergency declared in Executive Order 14024 of April 15, 2021, expanded by Executive Order 14066 of March 8, 2022, and relied on for additional steps taken in Executive Order 14039 of August 20, 2021, and Executive Order 14068 of March 11, 2022, hereby order:

Section 1. (a) The following are prohibited:

(i) new investment in the Russian Federation by a United States person, wherever located;

(ii) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any category of services as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, to any person located in the Russian Federation; and

(iii) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this section if performed by a United States person or within the United States.

(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 license or permit granted prior to the date of this order.

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Also on April 6, 2022, Secretary Blinken announced new economic sanctions detailed in press statement available at https://www.state.gov/targeting-additional-russian-financial-institutions-officials-and-other-individuals/ and excerpted below.

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The United States is united with our allies and partners to ensure the Government of Russia pays a severe price for causing such death and destruction in Ukraine, and particularly for the horrors in Bucha and elsewhere. In furtherance of this goal, today we are implementing full blocking sanctions on two key Russian financial institutions: Sberbank, Russia's largest financial institution, and its subsidiaries and Alfa Bank, one of the largest private banks in Russia, and its subsidiaries. These entities continue to sustain President Putin's aggression against Ukraine. Accordingly, all U.S. persons are generally prohibited from engaging in transactions with Sberbank or Alfa Bank.

In addition, we are imposing sanctions on the adult children of President Vladimir Putin, Katerina Tikhonova and Maria Vorontsova, as well as Maria Lavrova, the wife of Russia's Foreign Minister Sergei Lavrov, and Ekaterina Lavrova, his adult child.

The United States is also designating 21 members of Russia's National Security Council, including former President Dmitry Medvedev and Prime Minister Mikhail Mishustin, for their role and authority in crafting the Kremlin's brutal policies and resulting abuses.

And finally, President Biden's Executive Order today bans new investment in Russia – forcing Russia further down the road of financial and economic isolation.

This announcement of new economic sanctions follows our approval last night of $100 million in new security assistance to help Ukraine meet a continued need for additional anti-armor systems. This is only the most recent of six drawdowns of arms, equipment, and supplies from Department of Defense inventories for Ukraine since August 2021, and brings U.S. military assistance to almost $2.5 billion since September, and $4.5 billion since 2014. The United States commends the continued support of our allies and partners across the world in the face of Russia's aggression against Ukraine. We stand with Ukraine and recognize the bravery and heroism of its people and they defend their country and their freedom against Russia's brutal war against Ukraine.

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On May 8, 2022, in a press statement available at https://www.state.gov/targeting-russias-financial-defense-and-marine-sectors-and-promoting-accountability-for-russian-and-belarusian-military-officials/, Secretary Blinken announced sanctions under E.O. 14071 and other authorities explained in the excerpt below.

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Today, the United States, in coordination with our allies and partners, is taking further actions to increase the pressure on the Russian Federation by designating the executives and board members of two of Russia's most important banks, Sberbank and Gazprombank; a Russian state-owned bank, Moscow Industrial Bank, and 10 of its subsidiaries; and a state-supported weapons manufacturer, Promtekhnologiya.

Further, following our recent port ban, we continue to target Russia's maritime defense logistics capabilities by designating the Ministry of Defense's shipping company and six other maritime shipping companies that transport weapons and other military equipment for the Government of Russia, while identifying 69 of their vessels as blocked property. Additionally, we are designating Fertoing, a specialized marine engineering company that produces remotely operated subsea equipment, among other activities. Fertoing will now be blocked from accessing critical U.S. technologies.

In addition, the Treasury Department is designating Russia-1, Channel One, and NTV, all of which are directly or indirectly state-owned and controlled media within Russia, spreading disinformation to bolster Putin's war. These television stations have been among the largest recipients of foreign revenue, which feeds back to the Russian state. The United States remains a steadfast champion for media freedom.

We are also taking steps today to impose visa restrictions on over 2,600 Russian and Belarusian military officials who are believed to have been involved in actions that threaten or violate the sovereignty, territorial integrity, or political independence of Ukraine. Included among this group are personnel who reportedly took part in Russian military activities in Bucha, the horrors of which have shocked the world. We are further announcing a new visa restriction policy targeting Russian Federation military officials and Russian-backed or Russian-installed purported authorities who are believed to have been involved in human rights abuses, violations of international humanitarian law, or public corruption in Ukraine.

In addition to holding the Lukashenka regime accountable for its complicity in enabling the Kremlin's war, we continue to promote accountability for those involved in the decades-long violent repression of the political opposition in Belarus. In that context, the State Department has designated three Belarusian officials, Dzmitry Paulichenka, Yury Sivakov, and Viktar Sheiman, pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act for their involvement in gross violation of human rights, namely the enforced disappearance of at least one of Lukashenka's political opponents in 1999. Under this authority, immediate family members are also ineligible for entry to the United States, to include Viktar Sheiman's wife, Elena Sheiman, and his adult son, Sergei Sheiman.

Finally, the United States is cutting off Russia's access to certain key services from U.S. companies that the Russian Federation and Russian elites use to hide their wealth and evade sanctions. We are prohibiting U.S. persons, wherever located, from providing accounting, trust and corporate formation, and management consulting services to any person located in the Russian Federation, under Executive Order (E. O.) 14071. We are also identifying the accounting, trust and corporate formation services, and management consulting sectors of the Russian economy pursuant to E.O. 14024, which will allow the United States to target any person who operates or has operated in these sectors of the Russian Federation economy.

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Further, the State Department released a Fact Sheet detailing these actions, available at https://www.state.gov/state-department-actions-to-promote-accountability-and-impose-costs-on-the-russian-government-for-putins-aggression-against-ukraine/. The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0771.

5. Belarus

See also discussion in section A.15.b, *infra*, for visa restrictions on multiple Belarusian nationals under the "Khashoggi Ban."

On February 24, 2022, OFAC designations pursuant to E.O. 14038,"Blocking Property of Additional Persons Contributing to the Situation in Belarus," include: Aliaksandr Mikalaevich ZAITSAU; Aliaksandr Yauhenavich SHATROU; Aliaksei Ivanavich RYMASHEUSKI; Aliaksandr Piatrovich VETSIANEVICH; Viktor Gennadievich KHRENIN; Pantus Aleksandrovich DMITRY; Viachaslau Yevgenyevich RASSALAI; and Aleksandr Grigorievich VOLFOVICH. 87 Fed. Reg. 11,810 (Mar. 2, 2022). The following entities were designated at the same time under E.O. 14038: 000 SOKHRA; LLC 24X7 PANOPTES; LLC

SYNESIS; MINSK WHEEL TRACTOR PLANT; BANK DABRABYT JOINT STOCK COMPANY; BELARUSSIAN BANK OF DEVELOPMENT AND RECONSTRUCTION BELINVESTBANK JOINT STOCK COMPANY; CJSC BELBIZNESLIZING; LIMITED LIABILITY COMPANY BELINVEST-ENGINEERING; JSC 558 AIRCRAFT REPAIR PLANT; OJSC KB RADAR-MANAGING COMP ANY HOLDING RADAR SYSTEM; INDUSTRIAL-COMMERCIAL PRIVATE UNIT ARY ENTERPRISE MINOTOR-SERVICE; STATE OWNED FOREIGN TRADE UNITARY ENTERPRISE BELSPETSVNESHTECHNIKA; STATE AUTHORITY FOR MILITARY INDUSTRY OF THE REPUBLIC OF BELARUS; PUBLIC JOINT STOCK COMPANY INTEGRAL; 0KB TSP SCIENTIFIC PRODUCTION LIMITED LIABILITY COMPANY; and 000 OBORONNYE INITSIATIVY. OFAC updated the entry on the SDN List for JSC TRANSAVIAEXPORT AIRLINES to OTKRYTOYE AKTSIONERNOYE OBSCHESTVO TAE A VIA.

On March 15, 2022, Secretary Blinken announced in a press statement actions to promote accountability for the Belarusian and Russian governments' human rights abuses within and outside their border. See section A.4.a, *supra*, for a discussion of Russia. The press statement making the announcement is available at https://www.state.gov/promoting-accountability-for-human-rights-abuses-perpetrated-by-the-governments-of-russia-and-belarus/, and excerpted below.

_____

* * * *

…the Department of State is announcing a series of actions to promote accountability for the Russian Federation's and Government of Belarus's human rights abuses and violations. These include:

- Designation of Alyaksandr Lukashenka pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021. Lukashenka was publicly designated for his involvement in gross violations of human rights and significant corruption. Under this authority, Lukashenka and Lukashenka's immediate family members are ineligible for entry into the United States, to include his wife, Galina Lukashenka, his adult sons, Viktar Lukashenka and Dzmitry Lukashenka, and his minor son.
- Imposition of visa restrictions on 25 individuals responsible for undermining democracy in Belarus pursuant to Presidential Proclamation 8015, including Belarusian nationals involved in the fatal shooting and beating of two peaceful protesters; security forces involved in the violent dispersal of peaceful protests; regime officials responsible for launching politically-motivated cases against members of the opposition and civil society; and individuals engaging in corrupt practices supporting the Lukashenka regime.

* * * *

On May 8, 2022, the State Department imposed visa restrictions on over 2,600 Russian and Belarusian military officials believed to be involved in actions threatening the sovereignty of Ukraine. The press statement is available at https://www.state.gov/targeting-russias-financial-defense-and-marine-sectors-and-promoting-accountability-for-russian-and-belarusian-military-officials/. The Department

also designated three Belarusian officials, Dzmitry Paulichenka, Yury Sivakov, and Viktar Sheiman, pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act for their involvement in gross violation of human rights. See Section A.4, *supra*, for a discussion of additional actions against Russian and Belarusian military officials under E.O. 14071, E.O. 14024, and other authorities.

On July 6, 2022, OFAC published a designation made in 2020 under E.O. 13405 of 2006 ("Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus"): BELARUSIAN OIL TRADE HOUSE. 87 Fed. Reg. 41,385 (Jul. 12, 2022).

On August 9, 2022, the State Department issued a press statement, available at https://www.state.gov/promoting-accountability-on-the-second-anniversary-of-the-fraudulent-election-in-belarus/, marking the second anniversary of Belarus's fraudulent presidential election by announcing new visa restriction and designations pursuant to Section 7031(c). The press statement is excerpted below.

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* * * *

Today we are announcing steps to impose visa restrictions on 100 regime officials and their affiliates for their involvement in undermining or injuring democratic institutions or impeding the transition to democracy in Belarus, pursuant to Presidential Proclamation 8015. These individuals include those holding high-ranking positions in the Administration of the President, Ministry of Interior, State Security Committee (KGB), the Central Election Commission, the Prosecutor General's Office, Central Office of the Investigative Committee, Ministry of Transport and Communication, Main Directorate for Combatting Organized Crime and Corruption (GUBOPiK), the National State TV and Radio Company "Belteleradio," the Second National Television Station, and the Air Force and Air Defense Forces. They also include members of Parliament, district judges, security officials, members of executive committees, and state university administrators. Individuals subject to the proclamation have been implicated in torture; violent arrests of peaceful protesters; raids of homes and offices of journalists, members of the opposition, and activists; coerced confessions; electoral fraud; politically motivated sentences of political prisoners; expulsion of students for participation in peaceful protests; passage of legislation impacting the enjoyment of fundamental freedoms; and acts of transnational repression.

Since the fraudulent 2020 election, the State Department has taken steps to impose visa restrictions on more than 297 individuals under PP8015 for undermining democracy in Belarus.

In addition, the State Department is announcing the designations pursuant to Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022, of Mikalai Karpiankou, Deputy Minister of Internal Affairs and Commander of the Internal Troops, and Dzmitriy Balaba, Commander of the Special Task Police Force (OMON) of the Minsk City Executive Committee of Internal Affairs, for involvement in gross violations of human rights, namely the arbitrary detention of peaceful protesters.

Balaba and Karpiankou played a significant role in the repression surrounding the fraudulent August 9, 2020 presidential election, in which thousands were violently detained and subjected to abuses for exercising human rights and fundamental freedoms, including through peacefully protesting. Today's action expands existing restrictions on Karpiankou and Balaba to include visa restrictions against their immediate family members, including Karpiankou's wife Irina and adult son Igor, and Balaba's wife Tatyana and adult sons Artem and Maksim, making them ineligible for entry into the United States.

The United States stands with the people of Belarus as they pursue a democratic, sovereign, and prosperous future. We will continue to promote accountability for the Lukashenka regime's human rights abuses and support international efforts to document abuses and hold perpetrators to account.

* * * *

On September 30, 2022, OFAC designated entity OPEN JOINT STOCK COMPANY SVETLOGORSKKHIMVOLOKNO under E.O. 14038. 87 Fed. Reg. 60,755 (Oct. 6, 2022).

Also on September 30, 2022, the State Department took steps to impose visa restrictions on 910 individuals, including Belarusian military officials and members of the Russian Federation military for violating Ukraine's sovereignty, territorial integrity, and political independence. Secretary Blinken's press statement is available at https://www.state.gov/imposing-swift-and-severe-costs-in-response-to-russias-violations-of-ukraines-sovereignty/.

6. 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 of 2011 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 May 12, 2022, the State Department announced in a press statement that OFAC issued Syria General License (GL) 22 authorizing specific economic activities in certain non-regime-held areas of northeast and northwest Syria. The press statement is available at https://www.state.gov/authorizing-specified-economic-activities-in-non-regime-held-areas-of-northeast-and-northwest-syria-in-support-of-d-isis-efforts/ and includes the following:

> This new authorization supports the Biden Administration's strategy to defeat ISIS by promoting economic stabilization in areas liberated from the terrorist group's control. It comes on the heels of the D-ISIS Ministerial in Marrakesh, Morocco, where the United States announced nearly $110 million in stabilization funds for areas liberated from ISIS in Iraq and Syria and stressed the importance of continued Coalition efforts to erode support for violent extremism through initiatives designed to improve stability. The authorization does not permit any activity with the Government of Syria or other sanctioned persons.

The Department of Treasury press release is available at https://ofac.treasury.gov/recent-actions/20220512.

7. Burma

On January 26, 2022, the State Department announced in a press statement, available at https://www.state.gov/business-advisory-for-burma/, that, along with the U.S. Departments of Commerce, Homeland Security, Labor, the Treasury, and the Office of the U.S. Trade Representative, it was issuing a business advisory on the heightened risks associated with doing business in Burma, and particularly business activity that could benefit the Burmese military regime. The press statement describes the advisory as follows:

> The military regime has undermined the rule of law, facilitated widespread corruption, and committed serious human rights abuses, which exacerbate risks to foreign businesses operating in Burma or providing financial services to Burmese businesses.
>
> These industries have been identified as primary industries providing economic resources for Burma's military regime:
>
> - State-owned enterprises
> - Gems and precious metals
> - Real-estate and construction projects
> - Arms, military equipment, and related activity
>
> Businesses and individuals with potential exposure to, or involvement in, operations or supply chains tied to the military regime that do not conduct appropriate due diligence run the risk of engaging in conduct that may expose them to significant reputational, financial, and legal risks, including violations of U.S. anti-money laundering laws and sanctions, as well as abetting human rights abuses.

The full business advisory is available at https://www.state.gov/risks-and-considerations-for-businesses-and-individuals-with-exposure-to-entities-responsible-for-undermining-democratic-processes-facilitating-corruption-and-committing-human-rights-abuses-in-burma/.

On January 31, 2022, Secretary Blinken announced increased pressure on the Burmese military regime and its supporters in a press statement, available at https://www.state.gov/increasing-pressure-on-the-burmese-military-regime-and-its-supporters/. The press statement is excerpted below.

> Since the military coup of February 1, 2021, the people of Burma have stood firm in rejecting military rule and calling for their country's return to the path to inclusive democracy. Tragically, in its continued violent quest to consolidate control, the regime has killed nearly 1,500 people, including women and children, and detained some 10,000 more, including civilian officials, civil society and labor activists, journalists, and foreign citizens.
>
> On the one-year anniversary of the coup, the United States is imposing sanctions on the Directorate of Procurement of the Commander-in-Chief of Defense Services; on Tay Za, a prominent business supporter of the regime, and his adult sons, Htoo Htet Tay Za and Pye Phyo Tay Za; and on prominent business supporter of the regime Jonathan Myo Kyaw Thaung and his KT Services and Logistics (KTSL) Company Limited. Today's action also includes the designation of Supreme Court Chief Justice Tun Tun Oo, Union Attorney General Thida Oo, and Anti-Corruption Commission Chair Tin Oo for their role in enabling the regime to undermine the rule of law and Burma's democratic institutions. These actions were taken pursuant to Executive Order 14014.

On January 31, 2022, OFAC designated the following under E.O. 14014: individuals—Thida OO, Tin OO, Tun Tun OO, Htoo Htet TAY ZA, Pye Phyo TAY ZA, Jonathan Myo Kyaw THAUNG, and Tay ZA—and entities—DIRECTORATE OF PROCUREMENT OF THE COMMANDER–IN–CHIEF OF DEFENSE SERVICES ARMY and KT SERVICES & LOGISTICS KTSL COMPANY LIMITED. 87 Fed. Reg. 6240 (Feb. 3, 2022).

On March 25, 2022, OFAC designated the following pursuant to E.O. 14014: five individuals—Zaw HEIN, Ko Ko OO, Naing Htut AUNG, Sit Taking AUNG, and Aung Hlaing OO—and five entities— 66TH LIGHT INFANTRY DIVISION, INTERNATIONAL GATEWAYS GROUP OF COMPANY LIMITED, MYANMAR CHEMICAL AND MACHINERY COMPANY LIMITED, HTOO GROUP OF COMPANIES, and ASIA GREEN DEVELOPMENT BANK LTD. 87 Fed. Reg. 18,471-72 (Mar. 30, 2022).

On March 25, 2022, the Secretary Blinken announced additional designations under E.O. 14014 in a press statement available at https://www.state.gov/united-states-and-allies-impose-additional-sanctions-on-the-burmese-military-regime/. The press statement describes those designated, as well as measures taken by other countries in response to the Burmese military regime's violence:

> The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has designated Burmese business leaders Aung Hlaing Oo, Naing Htut Aung, and Sit Taing Aung, as well as Burmese military officials Zaw Hein and Ko Ko Oo. OFAC has also designated the 66th Light Infantry Division, which has been tied to the "Christmas Eve massacre" in December, for its responsibility for the arbitrary

> detention or torture of people in Burma. Additionally, OFAC has designated Myanmar Chemical & Machinery Company Limited (MC&M), International Gateways Groups of Company Limited (IGG), Htoo Group of Companies (Htoo Group), and the Asian Green Development Bank (AGDB), companies owned by Burmese business leaders. All of these designations were made under Executive Order 14014 "Blocking Property with Respect to the Situation in Burma." With these designations, the United States government has sanctioned 27 entities and 70 individuals for their actions in support of the regime.
>
> I recently announced the United States' determination that members of the Burmese military committed genocide and crimes against humanity against Rohingya, most of whom are Muslim. We also recognize that for decades the Burmese military has killed, raped, and committed other atrocities against members of other ethnic and religious minority groups. Many of these military members are in power today. Since the coup, the military regime has shown it will target any person, regardless of ethnicity, religion, gender, or age, in order to maintain its grip on power.
>
> We have taken these actions today in response to the regime's escalating violence, to show our strong support for the people of Burma, and to promote accountability in connection with the coup and the violence perpetrated by the regime. We will continue to impose costs on the military regime and those who support it until it ceases the violence and restores Burma's path to democracy.
>
> The United States appreciates the coordinated actions taken today by the United Kingdom and Canada under their respective sanctions programs to target Burmese actors responsible for violence and repression.

See also the Treasury Department's press release, available at https://home.treasury.gov/news/press-releases/jy0679#_blank.

On October 6, 2022, OFAC designated the following under E.O. 14014: two individuals—Aung Moe MYINT, Hlaing Moe MYINT, and Myo THITSAR—and one entity—DYNASTY INTERNATIONAL COMPANY LIMITED. 87 Fed. Reg. 62,183 (Oct. 13, 2022). The State Department press statement announcing these designations is available at https://www.state.gov/designations-of-burmese-targets-to-promote-justice-and-accountability/ and explains:

> Today, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is designating three individuals, Aung Moe Myint, Hlaing Moe Myint, and Myo Thitsar, for their roles related to the procurement Russian-produced military arms from Belarus for the Burmese regime, as well as Dynasty International Company Limited, under Executive Order 14014.
>
> These designations follow the regime's executions of pro-democracy activists and elected leaders Ko Jimmy, Phyo Zeya Thaw, Hla Myo Aung, and Aung Thura Zaw and aim to target those abetting the military's ability to carry out human rights abuses, including the September 16 assault helicopter attack on a school that killed at least 11 children. These designations also implicate the

> Burmese military's long-time ties to the Russian and Belarusian militaries. We will continue to use our sanctions authorities to target those in Burma and elsewhere supporting Russia's unlawful invasion of Ukraine, as well as Russia and Belarus' facilitation of the Burmese regime's violence against its own people.

On November 8, 2022, OFAC designated the following pursuant to E.O. 14014: one individual—Kyaw Min OO—and one entity—SKY AVIATOR COMPANY LIMITED. 87 Fed. Reg. 68,580 (Nov. 15, 2022). The State Department announced these sanctions in a November 8, 2022 press statement, available at https://www.state.gov/designation-of-the-burmese-regimes-military-aircraft-suppliers/.

> Today, the United States is taking additional actions against those who enable the regime's violence, particularly its repeated air assaults and killing of civilians. The Department of the Treasury is designating Sky Aviator Company Limited and its owner and director, Kyaw Min Oo, pursuant to Executive Order 14014, for operating in the defense sector of the Burmese economy. Under Kyaw's control, Sky Aviator is a key supplier of military aircraft parts to Burma's military. Since the February 2021 coup, Sky Aviator has received multiple arms shipments from sanctioned entities. Kyaw has also facilitated foreign military officers' visits to Burma as well as the import of arms and other military equipment and provided assault helicopter upgrades.

8. Cuba

On December 30, 2021, OFAC removed Manuel Antonio NORIEGA and Felicidad SIEIRO DE NORIEGA, who had previously been designated under the Cuban Assets Control Regulations, from the SDN List. A Federal Register Notice was published in 2022. 87 Fed. Reg. 543 (Jan. 5, 2022).

On January 6, 2022, Secretary Blinken announced steps to impose visa restrictions on eight Cuban officials in response to the Cuban regime's crackdown on peaceful demonstrators on July 11, 2021. The press statement, available at https://www.state.gov/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 eight individuals include Cuban officials connected to the detention, sentencing, and imprisonment of peaceful July 11 protesters. The United States took steps to enforce visa restrictions in response to Cuban government attempts to deny Cubans their freedom and rights through continued intimidation tactics, unjust imprisonment, and severe sentences.
>
> Approximately 600 protesters across the island remain jailed after the July 11 protests, some with worsening health conditions and no access to proper food, medicine, or calls to their loved ones.

On June 9, 2022, OFAC amended the Cuban Assets Control Regulations, in consultation with the Department of State, to implement certain policy changes announced by the Administration on May 16, 2022 to increase support for the Cuban people. 87 Fed. Reg. 35,088 (Jun. 9, 2022). The May 16, 2022 State Department fact sheet detailing the Biden Administration's measures to support the Cuban people is available at https://www.state.gov/biden-administration-measures-to-support-the-cuban-people/.

On June 16, 2022, Secretary Blinken announced steps to impose visa restrictions on five additional Cuban officials in response to the Cuban regime's crackdown on peaceful demonstrators on July 11. The press statement, available at https://www.state.gov/state-department-takes-steps-to-impose-visa-restrictions-against-cuban-officials/, explains:

> The Department of State has taken steps to impose visa restrictions on five Cuban officials pursuant to Presidential Proclamation 5377, which suspends nonimmigrant entry into the United States of officers and employees of the Cuban government.
>
> These five officials are connected to unfair trials and unjust sentencing and imprisonment of peaceful July 11, 2021, protesters. This announcement of visa restrictions comes in response to the actions of Cuban government officials that deny Cubans their basic human rights and fundamental freedoms.

On July 9, 2022, Secretary Blinken announced additional steps to impose visa restrictions on 28 Cuban officials in response to repression of the peaceful July 11 protests. The press statement, available at https://www.state.gov/announcement-of-visa-restrictions-against-cuban-officials-2/, explains:

> The Department of State has taken steps to impose visa restrictions on 28 Cuban officials pursuant to Presidential Proclamation 5377, which suspends nonimmigrant entry into the United States of officers and employees of the Cuban government and Cuban Communist Party.
>
> These 28 officials include officials who are implicated in the repression of the peaceful July 11, 2021 protests. Those covered include high-ranking members of the Cuban Communist Party responsible for setting national- and provincial-level policies. Instead of ensuring the safety of the Cuban people and respect for their freedoms of expression and peaceful assembly, these officials permitted or facilitated violent and unjust detentions, sham trials, and prison sentences spanning decades for hundreds of protesters.
>
> Also covered are multiple officials who work in the state communications and media sectors who formulate and implement policies that restrict Cubans' ability to freely access and share information and who engage in the spread of disinformation. The Cuban government employed Internet throttling on July 11, 2021, to both prevent the Cuban people from communicating with each other

> and keep the world from witnessing the historic events that day. Further, state media officials continue to engage in a campaign against jailed July 11, 2021, protesters and their family members who speak publicly about their loved ones' cases.

9. 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 March 14, 2022, 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): Zhengzhou Nanbei Instrument Equipment Co. Ltd (People's Republic of China); Second Academy of Natural Science Foreign Affairs Bureau (SANS FAB) (DPRK); Ri Sung Chol (aka Ri Su'ng-ch'o'l) (DPRK individual); Ardis Group of Companies LLC (Russia); PFK Profpodshipnik, LLC (Russia); and Igor Aleksandrovich Michurin (Russian individual). 87 Fed. Reg. 16,820 (Mar. 24, 2022). The State Department media note on the designation, available at https://www.state.gov/new-sanctions-under-the-iran-north-korea-and-syria-nonproliferation-act-inksna/, includes the following:

> The United States today announced sanctions on five entities and individuals located in Russia and the DPRK and one entity in the People's Republic of China (PRC) for proliferation activities under the Iran, North Korea, and Syria Nonproliferation Act (INKSNA). As part of this action, we imposed sanctions against the Russian entities Ardis Group of Companies LLC (Ardis Group); PFK Profpodshipnik; LLC, and Russian individual Igor Aleksandrovich Michurin; as well as DPRK entity Second Academy of Natural Science Foreign Affairs Bureau (SANS FAB); and DPRK individual Ri Sung Chol (aka Ri Su'ng-ch'o'l) for transferring sensitive items to North Korea's missile program. These measures are part of

> our ongoing efforts to impede the DPRK's ability to advance its missile program and they highlight the negative role Russia plays on the world stage as a proliferator to programs of concern.
>
> We also are imposing sanctions against the PRC entity Zhengzhou Nanbei Instrument Equipment Co. Ltd for supplying Syria with equipment controlled by the Australia Group chemical and biological weapons nonproliferation regime. The ongoing imposition of INKSNA sanctions against PRC entities calls attention to the role of PRC entities in proliferation and shortcomings in the PRC's implementation of export controls and its nonproliferation track record.

On October 3, 2022, 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): Beijing J&A Industry & Trade Co. Ltd. (People's Republic of China); Linda Zhai (PRC individual); Synnat Pharma Pvt Ltd (India); and OTOBOT Project Group (Turkey). 87 Fed. Reg. 62,485 (Oct. 14, 2022).

10. Terrorism

a. U.S. targeted financial sanctions

(1) Department of State designations

In 2022, 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 March 7, 2022, the State Department designated Katibat al Tawhid wal Jihad (KTJ) as a Specially Designated Global Terrorist (SDGT). The State Department press statement on the designation is available at https://www.state.gov/terrorist-designation-of-katibat-al-tawhid-wal-jihad/.

On June 15, 2022, the State Department designated Anton Thulin as a Specially Designated Global Terrorist (SDGT) pursuant to Executive order (E.O.) 13224, as amended. 87 Fed. Reg. 37,903 (Jun. 24, 2022). The State Department press statement on this designation is available at https://www.state.gov/designation-of-anton-thulin-as-a-specially-designated-global-terrorist/, and includes the following:

> The U.S. government remains deeply concerned about the evolving racially or ethnically motivated violent extremist (REMVE) threat worldwide. An element of it entails violent white supremacists traveling internationally to train and fight with likeminded individuals. […]
>
> In 2016, Anton Thulin, a Swedish citizen, traveled to St. Petersburg and received paramilitary training from RIM, including in bomb-making. In 2017, a Swedish court convicted Thulin and sentenced him to 22 months in prison in connection with the detection of a powerful homemade bomb near a refugee residential center in Gothenburg, Sweden. After serving his sentence, Thulin

> sought to receive additional paramilitary training in Poland, before he was expelled by Polish authorities who cited the "serious, real, and current threat to security and public order" he posed.
>
> The United States is designating Anton Thulin because his continued pursuit of terrorist training, even after serving his prison sentence for his role in the 2017 attack in Sweden, demonstrates that he continues to pose a significant risk of committing acts of terrorism.

The press statement also notes the Department of the Treasury is designating Stanislav Shevchuk for acting or purporting to act for or on behalf of, directly or indirectly, the Russian Imperial Movement (RIM); and Alexander Zhuchovsky for materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services to or in support of, RIM, pursuant to E.O. 13224, as amended.

On October 17, 2022, Secretary Blinken announced the designation of five al-Shabaab leaders as Specially Designated Global Terrorists (SDGTs) under Executive Order (E.O.) 13224, as amended:

> Mohamed Mire is a senior al-Shabaab leader responsible for the group's strategic decision-making and leads the group's interior wing, overseeing many of the group's activities in Somalia.
>
> Yasir Jiis is an al-Shabaab leader and the commander of the armed wing, the Jabha, which conducts attack operations.
>
> Yusuf Ahmed Hajji Nurow, also known as Gees Ade, is the chief of al-Shabaab's intelligence wing, the Amniyat, which plays a key role in the execution of suicide attacks and assassinations in the region.
>
> Mustaf 'Ato is a senior Amniyat official responsible for coordinating and conducting al-Shabaab attacks in Somalia and Kenya and has helped plan attacks on Kenyan targets and U.S. military compounds in Kenya.
>
> Mohamoud Abdi Aden is an al-Shabaab leader and was part of the cell that planned the Dusit2 Hotel attack in 2019.

87 Fed. Reg. 65,637 (Oct. 31, 2022). The State Department press statement on these designations is available at https://www.state.gov/terrorist-designation-of-al-shabaab-leaders/. The press statement also notes that OFAC concurrently designated a network of nine al-Shabaab financial facilitators.

(2) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224, as amended, during 2022. 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 2022, OFAC designated several individuals and entities

pursuant to E.O. 13224.

On January 11, 2022, OFAC designated Jihad Salim 'ALAMAH; Ali Mohamad DAOUN; Adel DIAB; and DAR AL SALAM FOR TRAVEL & TOURISM. 87 Fed. Reg. 4105-06 (Jan. 26, 2022).

On January 18, 2022, OFAC announced the designations of three Hizballah-linked financial facilitators and their Lebanese-based travel company—individuals Adel Diab, Ali Mohamad Daoun, and Jihad Salem Alame, and business Dar Al Salam for Travel & Tourismunder E.O. 13224. See press statement, available at https://home.treasury.gov/news/press-releases/jy0558.

On January 21, 2022, OFAC designated Hizballah-affiliated financial facilitator Adnan Ayad, Jihad Adnan Ayad, Ali Adel Diab, and 10 companies pursuant to E.O. 13224. 87 Fed. Reg. 4329-32 (Jan. 27, 2022). The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0564.

On February 3, 2022, OFAC designated World Human Care, an Indonesia-based organization that has provided financial support to Majelis Mujahidin Indonesia (MMI), an Indonesia-based terrorist group, that provided financial support for MMI activities in Syria pursuant to E.O. 13224. 87 Fed. Reg. 7523 (Feb. 9, 2022). The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0585.

On February 23, 2022, OFAC designated members of an international network funding the Houthis' military forces, which have routinely attacked civilians and civilian infrastructure in Yemen and in neighboring states, while intensifying Yemen's humanitarian crisis under E.O. 13224. The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0603.

On February 23, 2022, OFAC designated three individuals—Abdo Abdullah Dael AHMED; Chiranjeev Kumar SINGH; and Konstantinos STAVRIDIS—and nine entities (not listed herein). 87 Fed. Reg. 11,510-13 (Mar. 1, 2022). At the same time, OFAC designated the vessel LIGHT MOON. 87 Fed. Reg. 11,514 (Mar. 1, 2022).

On March 1, 2022, OFAC designated four ISIS and ISIS-Mozambique (ISIS-M) financial facilitators in South Africa—Farhad Hoomer, Siraaj Miller, Abdella Hussein Abadigga, and Peter Charles Mbaga pursuant to E.O. 13224, as amended. The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0616.

On March 4, 2022, OFAC designated two Hizballah financiers operating in Guinea: Ali Saade and Ibrahim Taher. 87 Fed. Reg. 13,369 (Mar. 9, 2022).The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0631.

On March 25, 2022, OFAC designated Nigerian nationals Abdurrahman Ado Musa, Salihu Yusuf Adamu, Bashir Ali Yusuf, Muhammed Ibrahim Isa, Ibrahim Ali Alhassan, and Surajo Abubakar Muhammad "for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Boko Haram." The State Department press statement of the designations is available at https://www.state.gov/designation-of-six-individuals-for-their-support-to-boko-haram/.

In the second quarter of 2022, OFAC designated several individuals and entities pursuant to E.O. 13224.

On April 7, 2022 OFAC designated Akhmed CHATAYEV. 87 Fed. Reg. 22,284 (Apr. 14, 2022).

The following five individuals participating in an ISIS network of financial facilitators operating across Indonesia, Syria, and Turkey were designated on May 9: Muhammad Dandi ADHIGUNA; Dini RAMADHANI; Rudi HERYADI; Ari KARDIAN; and Dwi Dahlia SUSANTI . 87 Fed. Reg. 29,441-42 (May 13, 2022). The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0772.

On May 19, 2022, OFAC designated a key Hizballah businessman and financial facilitator, as well as several of his companies and associates in Lebanon and Iraq: Ahmad Jalal Reda Abdallah under Executive Order (E.O.) 13224, as amended. The OFAC press release is available at https://home.treasury.gov/news/press-releases/jy0796.

On May 24, 2022, OFAC designated an expansive network of three Hamas financial facilitators and six companies across the Middle East and North Africa that generated revenue for the terrorist group through the management of an international investment portfolio and a senior Hamas finance official. The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0798.

On May 25, 2022, OFAC designated an international oil smuggling and money laundering network, led by Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) official Behnam Shahriyari and former IRGC-QF official Rostam Ghasemi, both of whom are designated persons. OFAC designated ten individuals and nine entities pursuant to E.O. 13224: Abdulhamid CELIK; Esam ETTEHADI; Seyyid Cemal GUNDUZ; Mihrab Suhrab HAMIDI; Mohammad Sadegh KARIMIAN; Alireza KASHANIMER; Abdulaziz KASKARIY; Azim MONZAVI; Kamaluddin NABIZADA; Hakki Selcuk SANLI; CHINA HAOKUN ENERGY LIMITED; CONCEPTO SCREEN SAL OFF-SHORE; FUJIE PETROCHEMICAL ZHOUSHAN CO., LTD.; HAOKUN ENERGY GROUP COMPANY LIMITED; PETRO CHINA PARS CO,; RPP LIMITED LIABILITY COMPANY; SHANDONG SEA RIGHT PETROCHEMICAL CO., LTD.; TURKOCA IMPORT EXPORT TRANSIT CO., LTD.; and ZAMANOIL DMCC. 87 Fed. Reg. 33,306-11 (Jun. 1, 2022).The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy0799.

On June 15, 2022, OFAC designated individuals Stanisalv SHEVCHUK and Alexander ZHUCHKOVSKY under E.O. 13224. 87 Fed. Reg. 37,374 (Jun. 22, 2022).

OFAC designated additional individuals and entities pursuant to E.O. 13224 in the fourth quarter of 2022.

On October 17, 2022, OFAC designated entity GRUPO AROSFRAN EMPREENDIMENTOS E PARTICIPACOES SARL. 87 Fed. Reg. 63,854 (Oct. 20, 2022). At the same time, OFAC designated nine individuals: Mohamed BADAAS; Ahmed Hasan Ali Sulaiman MATAAN; Mohamed Hussein SALAD; Khalif ADALE; Hassan AFGOOYE; Abdikarim Hussein GAGAALE; Abdullahi JEERI; Abdirahman NUREY; and Abdi SAMAD. 87 Fed. Reg. 63,855-56 (Oct. 20, 2022). On November 1, 2022, OFAC designated Mahad Isse ADEN; Abdirahman Fahiye ISSE MOHAMUD; Liibaan Yousuf MOHAMED; Abdirahman Mohamed OMAR; Ahmed Haji Ali Haji OMAR; Mohamed Ahmed QAHIYE; Isse Mohamoud YUSUF; and Osama Abdelmongy Abdalla BAKR and entity LIIBAAN GENERAL

TRADING CO. 87 Fed. Reg. 66,778-79 (Nov. 4, 2022). On November 3, 2022, OFAC designated six individuals, seventeen entities, and eleven vessels (not listed herein). 87 Fed. Reg. 67,751-55 (Nov. 9, 2022). OFAC's press release is available at https://home.treasury.gov/news/press-releases/jy1076. Secretary Blinken's press statement on the designations is available at https://www.state.gov/designation-of-sanctions-evasion-network/ and includes the following:

> The United States is designating a sanctions evasion network providing support to Hizballah and the Islamic Revolutionary Guard Corps-Qods Force. This network has facilitated the sale of hundreds of millions of dollars' worth of oil for these organizations. The network consists of shell and front companies established to facilitate the illegal blending and exportation of Iranian oil around the world. The Treasury Department is designating six individuals and 17 entities and is blocking 11 vessels for providing support to terrorists or acts of terrorism.
>
> Today's action includes designations of Viktor Artemov, Edman Nafrieh, Rouzbeh Zahedi, and Mohamed El Zein, key facilitators of the network. They leveraged dozens of companies under their control to facilitate the network's activities. The designated entities and vessels are owned, operated, or controlled by these individuals. The action also includes Tatiana Ryabikova, who has supported Artemov in his operations by helping to coordinate financial activities for his companies; and Gregorio Fazzone, the CEO of an entity that is being designated today.

On October 28, 2022, in response to the attack on author Salman Rushdie, the OFAC designated the Iranian entity 15 Khordad Foundation under E.O. 13224. OFAC's press release is available at https://home.treasury.gov/news/press-releases/jy1059.Secretary Blinken's press statement is available at https://www.state.gov/sanctioning-the-iranian-entity-responsible-for-a-bounty-on-salman-rushdie/.

On November 1, 2022, OFAC designated an Islamic State in Iraq and Syria (ISIS)-Somalia network of weapons traffickers, their associates, and an affiliated business for facilitating weapons transfers to the terrorist group, as well as Osama Abdelmongy Abdalla Bakr, an ISIS supporter in Brazil under E.O. 13324. OFAC's press release is available at https://home.treasury.gov/news/press-releases/jy1066. See also the State Department press statement available at https://www.state.gov/designation-of-isis-somalia-weapons-trafficking-network/.

On November 7, 2022, OFAC designated four members of an ISIS cell in South Africa who have provided technical, financial, or material support to the terrorist group, as well as eight companies owned, controlled, or directed by the individuals in this ISIS cell. OFAC designated individuals Nufael AKBAR; Mohamad AKBAR; Yunus Mohamad AKBAR; and Umar AKBAR; and entities ASHIQ JEWELLERS CC; INEOS TRADING PTY LTD; SHAAHISTA SHOES CC; SULTAN'S CONSTRUCTION CC; HJ BANNISTER CONSTRUCTION CC; MA GOLD TRADERS PTY LTD; BAILEY HOLDINGS PTY LTD; and FLEXOSEAL WATERPROOFING SOLUTIONS PTY LTD. 87 Fed. Reg. 68,007-08 (Nov. 10, 2022). The

OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy1084.

On November 9, 2022, OFAC designated Mohamad Irshad Mohamad Haris Nizar, a Sri Lanka-based business partner of Talib, and Turkey-based Musab Turkmen, Talib's brother-in-law and business partner. 87 Fed. Reg. 68,581 (Nov. 15, 2022). The OFAC press statement on the designations is available at https://home.treasury.gov/news/press-releases/jy1088.

On December 1, 2022, OFAC designated three individuals—Hassan KHALIL; Adel Mohamad MANSOUR; and Naser Hassan NESER—and two entities—AL-KHOBARA FOR ACCOUNTING, AUDITING, AND STUDIES and THE AUDITORS FOR ACCOUNTING AND AUDITING. 87 Fed. Reg. 75,137 (Dec. 7, 2022).

On December 8, 2022, OFAC designated five individuals: Bahaddin AYAN; Sitki AYAN; Mustafa KAPTAN; Kasim OZTAS; and Murat TEKE; twenty-six entities (not listed herein); and vessel QUEEN LUCA LPG. 87 Fed. Reg. 76,691-93 (Dec. 15, 2022). On December 21, 2022, OFAC designated Ismail BAYALTUN and Ahmet BAYALTUN. 87 Fed. Reg. 79,446 (Dec. 27, 2022).

On December 8, 2022, OFAC designated an international oil smuggling and money laundering network led by businessman Sitki Ayan for providing support to Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) and Lebanese Hizballah, under counterterrorism sanctions authorities. In addition, OFAC designated four individuals and 26 entities and is identifying one vessel as blocked property. OFAC's press release is available at https://home.treasury.gov/news/press-releases/jy1151.The State Department media note detailing these designations is available at https://www.state.gov/designating-a-network-of-iranian-oil-sanctions-evaders/.

(3) OFAC removals

On January 31, 2022, OFAC determined that the following vessel is no longer subject to the blocking provisions of E.O. 13224, as amended by E.O. 13886: OMAN PRIDE Crude Oil Tanker. 87 Fed. Reg. 6241 (Feb. 3, 2022).

On May 25, 2022, OFAC determined that the following are no longer subject to the blocking provisions of E.O. 13224: entity UKRAINIAN-MEDITERRANEAN AIRLINES and individual Rodrigue Elias MERHEJ. 87 Fed. Reg. 33,311 (Jun. 1, 2022).

b. Annual certification regarding cooperation in U.S. antiterrorism efforts

See Chapter 3 for discussion of the Secretary of State's 2022 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

11. Cyber Activity and Election Interference

a. Malicious Cyber-Enabled Activities

For background on E.O. 13694 of April 1, 2015, ''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities," see *Digest 2015* at 677–78. 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 April 5, 2022, OFAC designated entity GARANTEX EUROPE OU under E.O. 13694. 87 Fed. Reg. 21,263 (Apr. 11, 2022).

On May 6, 2022, OFAC designated entity BLENDER.IO, "which is used by the Democratic People's Republic of Korea (DPRK) to support its cyber-enabled illicit activities and money-laundering of stolen virtual currency funds" under E.O. 13694. 87 Fed. Reg. 28,866 (May 11, 2022). The State Department press statement is available at https://www.state.gov/the-democratic-peoples-republic-of-koreas-illicit-activities-and-sanctions-evasion/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0768.

On August 8, 2022, Secretary Blinken announced sanctions on virtual currency mixer Tornado Cash under E.O. 13694 "for its involvement in laundering a portion of the more than $600 million stolen by Democratic People's Republic of Korea (DPRK) hackers in one of the largest known virtual currency heists to date." 87 Fed. Reg. 49,652 (Aug. 11, 2022). The State Department press statement is available at https://www.state.gov/imposing-sanctions-on-virtual-currency-mixer-tornado-cash/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0916.

Effective September 6, 2022, OFAC amended the Cyber-Related Sanctions Regulations and reissued them in their entirety to include additional interpretive guidance and definitions, general licenses, and other regulatory provisions that provide further guidance to the public. 87 Fed. Reg. 54,373 (Sep. 6, 2022).

On September 9, 2022, OFAC designated one individual and one entity under E.O. 13694, as amended: individual—Esmail KHATIB—and entity—IRANIAN MINISTRY OF INTELLIGENCE AND SECURITY. 87 Fed. Reg. 58,435 (Sep. 26, 2022).

On September 14, 2022, OFAC designated ten individuals and two entities under E.O. 13694, as amended: individuals—Mohammad, AGHA AHMADI, Ali AGHA-AHMADI, Mansour AHMADI, Mojtaba HAJI HOSSEINI, Mostafa HAJI HOSSEINI, Ahmad KHATIBI AGHADA, Mo'in MAHDAVI, Amir Hossein NIKAEEN RAVARI, Aliakbar RASHIDI-BARJINI, Mohammad SHAKERI ASHTIJEH—and entities—AFKAR SYSTEM YAZD COMPANY and NAJEE TECHNOLOGY HOOSHMAND FATER LLC. 87 Fed. Reg. 57,256-58 (Sept. 19, 2022).

On November 8, 2022, OFAC redesignated entity TORNADO CASH under E.O. 13694, as amended. 87 Fed. Reg. 68,581 (Nov. 15, 2022). The Treasury Department press statement on this designation is available at https://home.treasury.gov/news/press-releases/jy1087 and includes the following:

> The United States is sanctioning virtual currency mixer Tornado Cash for its involvement in laundering a portion of the more than $600 million stolen by Democratic People's Republic of Korea (DPRK) hackers in one of the largest known virtual currency heists to date. These hackers are associated with the

> Lazarus Group and APT38, which were sanctioned by the United States in 2019. The United States will continue to pursue actions against mixers laundering virtual currency for criminals and those who assist them. Tornado Cash has reportedly been used to launder billions worth of virtual currency since its creation in 2019. This is the second virtual currency mixer designated by the U.S. Department of the Treasury, following the sanctions imposed on Blender.io in May 2022.

The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0916.

b. 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 March 3, 2022, OFAC designated 26 individuals (not listed herein) and seven entities—JOURNAL KAMERTON; NEW EASTERN OUTLOOK; ODNA RODYNA; ORIENTAL REVIEW; RHYTHM OF EURASIA; and UNITED WORLD INTERNATIONAL—under E.O. 13848. Some are simultaneously designated pursuant to other authorities: E.O. 14024; E.O. 13661; and E.O. 13694. At the same time, OFAC designated entity GEOPOLITICA pursuant to E.O. 13660. 87 Fed. Reg. 13,793-99 (Mar. 10, 2022).

12. The Global Magnitsky Sanctions Program and Other Measures Aimed at Corruption, Human Rights Violations and Abuses, and Related Conduct

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. 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. See section A.12.d, *infra*, for additional designations under E.O. 13818 imposed on International Anti-Corruption Day and on the eve of Human Rights Day.

On March 10, 2022, OFAC designated one entity, Sudan's CENTRAL RESERVE POLICE, pursuant to E.O. 13818. 87 Fed. Reg. 41,386 (Jul. 12, 2022).

On August 15, 2022, OFAC announced sanctions under E.O. 13818 on Liberian government officials Nathaniel McGill, Minister of State for Presidential Affairs and Chief of Staff to President George Weah; Sayma Syrenius Cephus, the Solicitor General and Chief Prosecutor of Liberia; and Bill Twehway, the Managing Director of the National Port Authority (NPA), for their involvement in ongoing public corruption in Liberia. 87 Fed. Reg. 52,616 (Aug. 26, 2022). See State Department press statement, available at https://www.state.gov/imposing-sanctions-on-senior-liberian-government-officials/, includes the following:

> McGill has used his position to undermine the integrity and independence of Liberia's democratic institutions and subvert government priorities for personal gain. Cephus has developed close relationships with suspects of criminal investigations and has received bribes from individuals in exchange for arranging for their cases to be dropped. Twehway has used his position at the NPA to corruptly advance his own personal wealth and political agenda. All three are being designated pursuant to Executive Order 13818, which builds upon and implements the Global Magnitsky Human Rights Accountability Act and targets perpetrators of serious human rights abuse and corruption around the world.

On October 26, 2022, OFAC designated Vladimir PLAHOTNIUC pursuant to E.O. 13818. 87 Fed. Reg. 66,780 (Nov. 4, 2022). The State Department press statement on Plahotniuc, a former government official, is available at https://www.state.gov/response-to-corruption-and-election-interference-in-moldova/, and includes the following:

> [OFAC] is designating Vladimir Plahotniuc for being a former government official responsible for or complicit in, or who has directly or indirectly engaged in, corruption. Plahotniuc's bribery of law enforcement officials reflects his longstanding efforts to capture and corrupt Moldova's judicial and law enforcement institutions, while using his wealth and political influence to undermine political rivals and rule of law in the country. The State Department imposed visa restrictions on Plahotniuc in January 2020 for his involvement in significant corruption. Plahotniuc and his immediate family members are ineligible for visas to the United States.

On November 18, 2022, OFAC designated two individuals—Dmitry KUDRYAKOV and Iryna LITVINIUK—and three entities—COMPANIA GUATEMALTECA DE NIQUEL, SOCIEDAD ANONIMA, COMPANIA PROCESADORA DE NIQUEL DE IZABAL, S.A., and MAYANIQUEL, SOCIEDAD ANONIMA. 87 Fed. Reg. 73,072 (Nov. 28, 2022). See press statement available at https://www.state.gov/targeting-russian-corruption-in-the-guatemalan-mining-sector/. The press statement explains:

> Today, the U.S. Department of the Treasury imposed sanctions on one Russian individual, Dmitry Kudryakov, and one Belarusian individual, Irina Gennadievna

Litviniuk, for their role in corruptly exploiting the Guatemalan mining sector, as well as three associated entities connected with their corruption schemes. Kudryakov, along with Litviniuk, allegedly led multiple bribery schemes over several years involving politicians, judges, and government officials to advance Russian mining interests. These individuals and entities are designated pursuant to Executive Order 13818, which builds upon and implements the Global Magnitsky Human Rights Accountability Act and targets perpetrators of serious human rights abuse and corruption around the world.

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 generally ineligible for entry into the United States. The following summarizes public designations by the Secretary of State in 2022 pursuant to Section 7031(c). See section A.12.d, *infra*, for additional designations under Section 7031(c) made on International Anti-Corruption Day and on the eve of Human Rights Day.

On January 5, 2022, the State Department announced the designation of former Bosnia and Herzegovina (BiH) High Judicial and Prosecutorial Council (HJPC) President Milan Tegeltija and the President of the Movement for Democratic Action (PDA) and Parliamentary Assembly Representative Mirsad Kukic, under Section 7031(c), due to their involvement in significant corruption. See press statement, available at https://www.state.gov/u-s-government-takes-action-against-current-and-former-bosnia-and-herzegovina-officials-due-to-involvement-in-significant-corruption-and-destabilizing-activities/. In addition to Tegeltija and Kukic, the Department designated Tegeltija's spouse, Tijana Tegeltija.

On March 8, 2022, the State Department announced the designation of former-Nairobi Governor Mike Sonko Gidion Mbuvi Kioko due to his involvement in significant corruption. The press statement is available at . Also designated under 7031(c) are the following members of Sonko's immediate family: his wife Primrose Mwelu Nyamu Mbuvi; their daughters Saumu Agnes Mbuvi and Salma Wanjiru Mbuvi; and Sonko's minor child. See press statement, available at https://www.state.gov/designation-of-former-nairobi-governor-sonko-for-involvement-in-significant-corruption/. Also designated under 7031(c) are the following members of Sonko's immediate family: his wife Primrose Mwelu Nyamu Mbuvi; their daughters Saumu Agnes Mbuvi and Salma Wanjiru Mbuvi; and Sonko's minor child.

On March 9, 2022, the State Department announced the designation of oligarch and former Ecuadorian President Abdalá Jaime Bucaram Ortiz, Sr. under Section 7031(c), due to his involvement in significant corruption. See press statement, available at https://www.state.gov/designation-of-former-ecuadorian-president-bucaram-for-

involvement-in-significant-corruption/. The media note includes the simultaneous imposition of economic sanctions pursuant to Executive Order (E.O.) 14033 on Milorad Dodik (Dodik), a member of the BiH Presidency, and the designation of a media outlet under his control, Alternativna Televizija (ATV). Also designated under Section 7031(c) are the following members of Bucaram's immediate family: his spouse, María Rosa Pulley Vergara, and sons Jacobo Abdalá Bucaram Pulley, Abdalá Jaime Bucaram Pulley, and Michel Abdalá Bucaram Pulley.

On April 11, 2022, the State Department announced the designation of former Prime Minister of the Republic of North Macedonia Nikola Gruevski and former Director of the Department for Security and Counterintelligence (UBK) Sasho Mijalkov as well as Gordana Tadić of Bosnia and Herzegovina from the chief prosecutor's office, under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2022. The Department also designated their immediate family members under Section 7031(c). The State Department press statement is available at https://www.state.gov/public-designation-of-former-officials-of-the-republic-of-north-macedonia-and-bosnia-and-herzegovina-due-to-involvement-in-significant-corruption/.

On May 16, 2022, the Secretary of State announced the designation of Attorney General of Guatemala Maria Consuelo Porras Argueta de Porres ("Porras"), and her immediate family members, pursuant to Section 7031(c) for her involvement in significant corruption. The press statement making the announcement, available at https://www.state.gov/designation-of-attorney-general-maria-consuelo-porras-argueta-de-porres-for-involvement-in-significant-corruption-and-consideration-of-additional-designations/. The Department also designated Porras's husband Gilberto de Jesus Porres de Paz under Section 7031(c). The designation follows Porras's September 2021 inclusion on the list of corrupt and undemocratic actors submitted to the U.S. Congress under Section 353 of the United States – Northern Triangle Enhanced Engagement Act. See *Digest 2021* at 670.

On June 30, 2022, the United States announced the designation of former Colombian Senator Luis Alberto Gil Castillo for his involvement in significant corruption under Section 7031(c). The press statement is available at https://www.state.gov/designation-of-former-colombian-senator-luis-alberto-gil-castillo-for-involvement-in-significant-corruption/ and includes the following:

> Gil Castillo solicited and accepted monetary bribes from a subgroup of the then-U.S.-designated foreign terrorist organization (FTO) known as the Autodefensas Unidas de Colombia (AUC). The bribe was accepted in exchange for exercising undue political influence in his official capacity as a member of the Colombian Senate. In addition, Gil Castillo later attempted to bribe a witness in a criminal case against him. These actions undermined the stability of Colombia's democratic institutions and the security of the United States against transnational crime and terrorism.

At the same time, the Department designated Castillo's spouse Doris Clemencia Vega Quiróz under Section 7031(c).

On July 22, 2022, the Secretary of State announced the designation under Section 7031(c) of former Paraguayan President Horacio Manuel Cartes Jara, due to his involvement in significant corruption. See press statement, available at https://www.state.gov/designation-of-former-paraguayan-president-horacio-manuel-cartes-jara-for-involvement-in-significant-corruption/ (also designating Cartes's adult children Juan Pablo Cartes Montaña, Sofía Cartes Montaña, and María Sol Cartes Montaña).

On August 12, 2022, Secretary Blinken announced designation of Paraguayan Vice President Hugo Velazquez and Yacyretá Bi-National Entity Legal Counsel Juan Carlos "Charly" Duarte under Section 7031(c) for involvement in significant corruption. The Department also designated their immediate family members. The press statement is available at https://www.state.gov/designation-of-paraguayan-vice-president-hugo-velazquez-and-yacyreta-bi-national-entity-legal-counsel-juan-carlos-duarte-for-involvement-in-significant-corruption/.

On October 6, 2022, the Department announced the designation of former Burma police chief and deputy Home Affairs minister Than Hlaing under Section 7031(c) for his involvement in gross violations of human rights, namely the extrajudicial killing of peaceful protestors following the military coup in February 2021. See press statement, available at https://www.state.gov/designations-of-burmese-targets-to-promote-justice-and-accountability/.

On October 24, 2022, the Department announced the designation of Brigadier General Adnan Aboud Hilweh, Major General Ghassan Ahmed Ghannam, and Major General Jawdat Saleebi Mawas and their immediate family members, pursuant to Section 7031(c). See press statement, available at https://www.state.gov/designation-of-three-syrian-military-officials-due-to-involvement-in-gross-violations-of-human-rights/ (designated for their involvement "in gross violations of human rights, namely the flagrant denial of the right to life of at least 1,400 people in Ghouta.")

On November 4, 2022, Secretary Blinken announced designation of President of the Haitian Senate, Joseph Lambert, for his involvement in significant corruption and a gross violation of human rights under Section 7031(c). See press statement available at https://www.state.gov/designation-of-haitian-senate-president-joseph-lambert-for-involvement-in-significant-corruption-and-a-gross-violation-of-human-rights/.

On November 15, 2022, the Department announced the designation of former Belizean Minister John Birchman Saldivar pursuant to Section 7031(c). See press statement available at https://www.state.gov/designation-of-former-belizean-minister-john-birchman-saldivar-for-involvement-in-significant-corruption/. As part of this action, the Department also designated Saldivar's immediate family members, Darlene Karen Saldivar, Johnelle Saldivar, Jevoughn Saldivar, and his minor child.

c. Visa restrictions relating to corruption and undermining democracy in Guatemala, Honduras, El Salvador, and Nicaragua

On February 7, 2022, the State Department declassified and publicized the inclusion of former Honduran President Juan Orlando Hernández on the United States' Corrupt and

Undemocratic Actors list, under Section 353 of the United States–Northern Triangle Enhanced Engagement Act, as amended, which generally makes the listed individuals ineligible for visas and admission to the United States. This inclusion was effective July 1, 2021. Secretary Blinken's press statement is available at https://www.state.gov/u-s-actions-against-former-honduran-president-juan-orlando-hernandez-for-corruption/.

On March 9, 2022, the State Department added nine individuals to the United States' Corrupt and Undemocratic Actors list, under Section 353 of the United States–Northern Triangle Enhanced Engagement Act, as amended. The press statement, available at https://www.state.gov/u-s-action-against-corruption-and-attacks-on-democracy-in-nicaragua/, and is excerpted below.

* * * *

The State Department adds the following nine Nicaraguan government officials to the list for undermining the democratic processes or institutions of Nicaragua:

- **Cairo Melvin Amador**, current Vice President of the Supreme Electoral Council (CSE), **Lumberto Ignacio Campbell Hooker**, current CSE member and Acting CSE President from 2018 until May 2021, and **Brenda Isabel Rocha Chacon**, current CSE President, for conspiring with the Ortega-Murillo regime to undermine Nicaragua's political institutions and subvert the November 2021 national election by disqualifying legitimate opposition parties and candidates on spurious grounds.
- **Edwin Ramon Castro Rivera**, member of the Nicaraguan National Assembly since 1997 and head of the FSLN caucus since 2007, for ensuring Ortega-Murillo loyalists won all magistrate positions in the CSE and ensuring the passage of extremely broad legislation that the Ortega-Murillo regime used to exclude opposition candidates and parties and harass and jail political opponents.
- **Karen Vanessa Chavarria Morales**, current judge in the ninth district in Managua, for abusing her authority and subverting legal processes to act against political opponents of the Ortega-Murillo regime and disqualify opposition candidates from the November 2021 election.
- **Walmaro Antonio Gutierrez Mercado**, current member of the Nicaraguan National Assembly, **Carlos Wilfredo Navarro Moreira**, current member of the Nicaraguan National Assembly, and **Gustavo Eduardo Porras Cortes**, current President of the Nicaraguan National Assembly for giving the Ortega-Murillo regime the tools to conduct its brazen assault on democracy by stacking the CSE with FSLN members loyal to Ortega.
- **Maria Haydee Osuna Ruiz,** current member of the Nicaraguan National Assembly, for conspiring with the Ortega-Murillo regime to subvert the November 2021 Nicaraguan national elections by signing a spurious complaint that served as pretext for the government to disqualify the last remaining legitimate opposition party and hound its leader into exile.

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On March 18, 2022, OFAC determined that the Yani Benjamin ROSENTHAL HIDALGO be removed from the SDN List. 87 Fed. Reg. 19,580 (Apr. 4, 2022).

On June 13, 2022, Secretary Blinken announced in a press statement, available at https://www.state.gov/visa-restrictions-on-ortega-murillo-regime-officials-for-undermining-democracy/, that the imposition of visa restrictions on an additional 93 Ortega-Murillo regime officials for undermining democracy in Nicaragua. The press statement explains the following:

> The United States remains deeply concerned about the Ortega-Murillo regime's unjust detentions of political prisoners and ongoing abuses against members of civil society. We remain committed to applying a range of diplomatic and economic tools to support the restoration of democracy and respect for human rights in Nicaragua. To that end, the Department of State is taking further steps to impose visa restrictions on an additional 93 individuals believed to have undermined democracy following Daniel Ortega's illegitimate November 2021 reelection, including judges, prosecutors, National Assembly Members, and Interior Ministry officials.
>
> Regime-aligned judges and prosecutors share complicity in the Ortega-Murillo regime's efforts to undermine democracy through their participation in prosecutions and convictions of opposition leaders, human rights defenders, private sector leaders, and student advocates. National Assembly members and Ministry of Interior officials enabled the Ortega-Murillo regime to tighten its authoritarian grip over Nicaraguan citizens and institutions by using repressive laws to strip more than 400 NGOs and a dozen universities of their legal status.
>
> The regime holds over 180 political prisoners, with many suffering from a lack of adequate food, proper medical care, and even sunlight. One political prisoner has died, and others remain in solitary confinement. Political prisoners detained under house arrest similarly suffer abuses and are unable to choose their own health care providers or receive visitors. The regime's corrupt security and judicial systems arrested and prosecuted these civic leaders and human rights defenders for speaking the truth, practicing courageous journalism, defending their communities through NGO work, and publicly advocating for alternatives to the regime's repressive rule – activities that should be permitted under Nicaragua's own constitution or any democratic political system.

On June 17, 2022, OFAC imposed sanctions on Nicaraguan state-owned mining company EMPRESA NICARAGUENSE DE MINAS (ENIMINAS) and the president of its board of directors, Ruy Delgado Lopez, pursuant to Executive Order (E.O.) 13851. 87 Fed. Reg. 37,556 (Jun. 23, 2022). The State Department press statement is available at https://www.state.gov/holding-the-nicaraguan-regime-accountable/.

On July 20, 2022, the U.S. government released the Section 353 Corrupt and Undemocratic Actors 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, El Salvador, and Nicaragua, 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/release-of-the-section-353-list-of-corrupt-and-undemocratic-actors-for-guatemala-honduras-el-salvador-and-nicaragua/. Section 353 generally requires that listed individuals are ineligible for visas and admission to the United States. The full 2022 report is available at https://www.state.gov/reports/section-353-corrupt-and-undemocratic-actors-report-2022/. The report identified the individuals listed below pursuant to the Act.

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Under Section 353, foreign persons identified in the report submitted to Congress are generally ineligible for visas and admission to the United States and any current visa shall be revoked immediately and any other valid visa or entry documentation cancelled. Consistent with Section 353(g), this report will be published in the *Federal Register*.

This report includes individuals who the Secretary has determined have engaged in the relevant activity based upon credible information or allegations of the conduct at issue, from media reporting and other sources. The Department will continue to review the individuals listed in the report and consider all available tools to deter and disrupt corrupt and undemocratic activity in El Salvador, Guatemala, Honduras, and Nicaragua. The Department also continues to actively review additional credible information and allegations concerning corruption or undemocratic activity and to utilize all applicable authorities, as appropriate, to ensure corrupt or undemocratic officials are denied safe haven in the United States.

El Salvador

Cecilia Coronada Alvarenga de Figueroa, spouse of former Public Security Minister Rene Mario Figueroa Figueroa, facilitated the transfer of proceeds of corruption when she assisted her husband in laundering over $3 million in public funds, while her husband was Minister of Public Security during the Saca administration.

Rene Mario Figueroa Figueroa, former Public Security Minister under the Saca Administration, during his time as Minister engaged in significant corruption when he converted $3 million in public funds for his and his wife's personal use and, with his wife, laundered those funds.

Jose Wilfredo Salgado Garcia, Mayor of San Miguel, undermined democratic processes or institutions when he used his official position to participate in drug trafficking and money laundering while mayor of San Miguel, El Salvador's second largest city. Salgado used his connections with city law enforcement to intimidate his electoral opponent's family.

Francisco Javier Argueta Gomez, current Presidential Legal Advisor, undermined democratic processes or institutions by masterminding the removal of five Supreme Court Magistrates and the Attorney General in an unusual process in apparent contravention of the processes set out in Article 186 of the Constitution, which requires the selection of such Magistrates from a list of candidates drafted by the National Council of the Judiciary.

Christian Reynaldo Guevara Guadron, Legislative Assembly Deputy and Nuevas Ideas Party's Chief of Faction, undermined democratic processes or institutions when he introduced a Gang Prohibition Law that will punish with up to 15 years in prison the dissemination of gang messages in the media, considered by many observers to be a clear attempt to censor the media.

Jose Ernesto Sanabria, current Presidential Press Secretary, undermined democratic processes or institutions by using his position and wielding the Presidency's influence to inappropriately pressure officials in opposition political parties to resign on threat of being charged with criminal offenses.

Guatemala

Dennis Billy Herrera Arita, a Guatemalan lawyer, undermined the democratic process or institutions by participating in the "Parallel Commissions 2020" scheme to stack the Supreme and Appellate Courts with corrupt judges.

Carlos Estuardo Galvez Barrios, former Rector of the University of San Carlos (USAC), undermined the democratic process or institutions by using his standing in the legal community to influence members of the judicial nomination commission in the facilitation of the "Parallel Commissions 2020" scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Jose Rafael Curruchiche Cacul (Rafael Curruchiche), the current chief of the Public Ministry's Office of the Special Prosecutor Against Impunity (FECI), obstructed investigations into acts of corruption by disrupting high-profile corruption cases against government officials and raising apparently spurious claims against FECI prosecutors, private attorneys, and former International Commission Against Impunity in Guatemala (CICIG) prosecutors.

Axel Arturo Samayoa Camacho, the owner of several trucking and shipping companies operating in the government-run EMPORNAC (Atlantic) and EPQ (Pacific) ports, engaged in significant corruption by improperly colluding with public officials and paying bribes to ensure his companies won lucrative port contracts.

Ramiro Mauricio Lopez Camey, the current co-owner of construction company Asfaltos y Petróleos S.A. (Aspetro), engaged in significant corruption by paying bribes to receive government construction contracts.

Ramon "Moncho" Campollo Codina, a current owner of Corporacion Energias de Guatemala, engaged in significant corruption by bribing public officials and in a manner that harmed U.S. commercial and policy goals to improve energy efficiency.

Geisler Smaille Perez Dominguez, a current judge for the Third Criminal Court, undermined democratic processes by obstructing prosecutions of proponents of the "Parallel Commissions 2020" scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Sofia Janeth Hernandez Herrera, the current congressional representative for the Union del Cambio Nacional (UCN) party, undermined the democratic process or institutions by misusing her official powers to intimidate her political opponents. She also solicited bribes and threatened to weaponize the legitimate purposes of Guatemala's congress to retaliate against her enemies for personal benefit.

Steffan Christian Emanuel Lehnhoff Hernandez, a current owner of Corporacion Energias de Guatemala, engaged in significant corruption by bribing public officials and in a manner that harmed U.S. commercial and policy goals to improve energy efficiency.

Mayra Alejandra Carrillo de Leon (Alejandra Carrillo), current Director of the Victim's Institute, undermined the democratic process or institutions by using her official position to facilitate the "Parallel Commissions 2020" scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Erick Gustavo Santiago de Leon, a former judge and President of the Regional Appeal Civil Court, engaged in significant corruption and obstructed investigations into acts of corruption by soliciting bribes in return for favorable court rulings in cases before him.

Nery Oswaldo Medina Mendez, a current Supreme Court of Justice magistrate, undermined the democratic process or institutions by participating in the "Parallel Commissions 2020" scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Vitalina Orellana y Orellana, a current Supreme Court of Justice magistrate, undermined the democratic process or institutions by participating in the "Parallel Commissions 2020" scheme to stack the Supreme Court and Appellate Courts with corrupt judges.

Mauricio Lopez Oliva, the current co-owner of construction company Asfaltos y Petróleos S.A. (Aspetro), engaged in significant corruption by paying bribes to receive government construction contracts.

Victor Manuel Cruz Rivera, a current Criminal Court Judge, obstructed investigations into acts of corruption by improperly delaying court proceedings.

José Luis Benito Ruiz, the former Minister of Communications and Infrastructure from 2018-2020, engaged in significant corruption when he solicited, accepted, and offered bribes in order to maintain his official position and receive kickbacks from contractors, and facilitated the transfer of proceeds of corruption.

Honduras

Harvis Edulfo Herrera Carballo, General Manager at the Presidential Palace from 2010 to 2014, transferred proceeds of corruption when he aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Elmer Jeovanny Ordonez Espinal, Internal Controls Supervisor of the National Bank for Agricultural Development from 2010 to 2014, transferred proceeds of corruption when he aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Rasel Antonio Tome Flores, Vice President of Congress, engaged in significant corruption when he used his position as President of the National Telecommunications Commission to misappropriate approximately $327,000 in public funds.

Claudia Yamilia Noriega González, Project Coordinator for the "Catracha Card" Program from 2010 to 2014, transferred proceeds of corruption when she aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Carol Vanessa Alvarado Izaguirre, Finance Manager at the Presidential Palace in 2014, transferred proceeds of corruption when she aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Enrique Alberto Flores Lanza, Minister of Presidency from 2008 to 2009, engaged in significant corruption by receiving $2 million in public money from the Honduran Central Bank and improperly redistributing it to political allies.

Juan Ramon Maradiaga, General Manager of the National Bank for Agricultural Development (BANADESA) from 2010 to 2014, transferred proceeds of corruption when he

aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Edgardo Antonio Casaña Mejia, a current member of Congress, engaged in significant corruption by improperly restructuring the National Institute for Teachers' Pensions to direct more than $5 million in benefits to political allies and constituents, in order to secure votes and maintain political power.

Roberto David Castillo Mejia, member of the Executive Committee of the Honduran Electrical Company (ENEE) from 2006 to 2009, engaged in corruption related to government contracts when he used his position on the ENEE Executive Committee to interfere in the public procurement process and steer contracts to a company in which he had a financial interest.

Carlos Josué Romero Puerto, Project Coordinator for Bono10 Mil, transferred proceeds of corruption when he aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Carlos Josue Montes Rodriguez, Vice Secretary of Labor in 2011, engaged in significant corruption by accepting bribes to improperly award contracts to political allies and to expedite payments.

Gonzalo Molina Solorzano, Chief of Supply for the National Bank for Agricultural Development from 2010 to 2014, transferred proceeds of corruption when he aided the misappropriation of more than $500,000 from Bono 10 Mil, a presidential project aimed at reducing rural poverty.

Juan Carlos "El Tigre" Bonilla Valladares, Director of the National Police from 2012 to 2013, engaged in significant corruption when he used his position as Director of the National Police to facilitate movement of cocaine through Honduras in exchange for bribes.

Javier Rodolfo Pastor Vasquez, Vice Minister of Health in 2011, engaged in significant corruption by accepting $235,000 in bribes to interfere in public procurement procedures to improperly award contracts to political allies and to expedite payments.

Nicaragua

Yubelca del Carmen Perez Alvarado, a prosecutor in the Public Prosecutor's Office headquarters in Managua, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Erick Ramon Laguna Averruz, a judge, undermined democratic processes or institutions when he convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of opposition activist Alexis Peralta and farmer without political affiliation Santos Camilo Bellorin.

Perla de los Angeles Baca, a Chief Prosecutor in Chinandega Department, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Rosa Velia Baca Cardoza, a judge, undermined democratic processes or institutions when she convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Donald Alvarenga.

Carlos Rafael Espinoza Castilla, a prosecutor, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Irma Oralya Laguna Cruz, a judge, undermined democratic processes or institutions when she convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Evelyn Pinto.

Luis Alberto Mena Gamez, a prosecutor in Nueva Segovia, undermined democratic processes or institutions by bringing the regime's case against political prisoner Douglas Cerros and by pursuing spurious charges, convictions, and harsh sentences against private citizens who are critical of the government.

Luden Martin Quiroz Garcia, a judge, undermined democratic processes or institutions when he convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of opposition leader Ana Margarita Vijil, journalist Miguel Mendoza, former Foreign Minister Mauricio Diaz, former presidential candidate Cristiana Chamorro, opposition member Pedro Joaquin Chamorro, employees of the Violeta Barrios de Chamorro Foundation (FVBCH) Pedro Vasquez, Walter Gomez, and Marcos Fletes; and former National Assembly member Maria Fernanda Flores.

Melvin Leopoldo Vargas Garcia, a judge, undermined democratic processes or institutions when he convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Samantha Jiron.

Angel Jancarlos Fernandez Gonzalez, a judge, undermined democratic processes or institutions when he convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of private sector leaders Luis Rivas, Michael Healy, and Alvaro Vargas; former Sandinista leader Dora Maria Tellez; opposition leaders Jose Antonio Peraza and Victor Hugo Tinoco.

Nancy Del Carmen Aguirre Gudiel, a judge, undermined democratic processes or institutions when she convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Irving Larios.

Jorge Luis Arias Jarquin, a prosecutor in the Public Prosecutor's Office headquarters in Managua, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

William Irving Howard Lopez, a judge, undermined democratic processes or institutions when he convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Nidia Barbosa.

Martha Ileana Morales Mendoza, a prosecutor and the Director of Planning at the Public Prosecutor's Office headquarters in Managua, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Maria Francis Perez Mojica, a prosecutor in Nueva Segovia, undermined democratic processes or institutions when she led the regime's case against pro-democracy activist and political prisoner Donald Alvarenga and pursued spurious charges, convictions, and harsh sentences against the regime's prodemocracy opponents.

Veronica Fiallos Moncada, a judge, undermined democratic processes or institutions when she convicted and sentenced a prodemocracy leader on vague, false charges of "undermining national integrity" in the sham trial of political prisoner Douglas Cerros.

Felix Ernesto Salmeron Moreno, a judge, undermined democratic processes or institutions when he convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of former presidential candidates Juan Sebastian Chamorro, Felix Maradiaga, Arturo Cruz, and Medardo Mairena; civic leaders Pedro Mena, Jose Pallais, Violeta Granera, Tamara Davila, Jose Quintanilla Hernandez, Roger Reyes; and business leader Jose Adan Aguerri.

Rolando Salvador Sanarrusia Munguia, a judge, undermined democratic processes or institutions when he convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trial of opposition activist Yoel Sandino.

Marling de Jesus Castro Rodriguez, a prosecutor in the Public Prosecutor's Office headquarters in Managua, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Nadia Camila Tardencilla Rodriguez, a judge, undermined democratic processes or institutions when she convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of student leaders Lesther Aleman and Max Jerez, former presidential candidate Miguel Mora, political analyst Edgar Parrales, Director of La Prensa newspaper Juan Lorenzo Holmann, and electoral expert Harry Chavez.

Andrea del Carmen Salas, a prosecutor in the Public Prosecutor's Office headquarters in Managua, undermined democratic processes or institutions by bringing spurious charges in order to jail regime opponents in the leadup to national elections.

Ulisa Yahoska Tapia Silva, a judge, undermined democratic processes or institutions when she convicted and sentenced prodemocracy leaders on vague, false charges of "undermining national integrity" in the sham trials of opposition activists Yaser Vado and Yader Parajon, former Foreign Minister Francisco Aguirre Sacasa, opposition leader Suyen Barahona, civic leader Freddy Navas, human rights lawyer Maria Oviedo, former presidential candidate Noel Vidaurre, and political commentator Jaime Arellano.

Auxiliadora del Carmen Sequeira Suazo, a prosecutor in Esteli, undermined democratic processes or institutions by bringing the regime's case against pro-democracy activist and political prisoner Alexis Peralta and by pursuing spurious charges, convictions, and harsh sentences against regime opponents.

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d. Combatting Global Corruption and Human Rights Abuses

On December 9, 2022, the United States took multiple actions under a range of authorities on International Anti-Corruption Day and on the eve of Human Rights Day to promote accountability for corruption and human rights abuse. These actions, which were taken under the Global Magnitsky sanctions programs, other relevant U.S. domestic sanctions programs, and visa restriction authorities, were publicly announced through fact sheets, press releases, and publication in the Federal Register. 87 Fed. Reg. 76,684 (Dec. 15, 2022). The press statement is available at https://www.state.gov/combatting-global-corruption-and-human-rights-abuses/, and excerpted below.

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On International Anti-Corruption Day and on the eve of Human Rights Day, the United States is taking dozens of actions to promote accountability for corruption and human rights abuse around the world. In doing so, we are using a range of accountability tools, including Global Magnitsky

sanctions and the Department of State's Section 7031(c) visa restriction authority, to designate more than 65 individuals and entities connected to corruption and human rights abuses in 17 countries.

Russia's invasion of Ukraine is a stark reminder that corrupt regimes are among the worst perpetrators of human rights violations and abuses. The actions we are taking today reflect U.S. efforts to address these pervasive challenges globally. By exposing the practices of these malign actors, these designations disrupt illicit activity and networks, promote accountability, and impose costs for egregious behavior.

State capture and systemic corruption enable autocrats to retain power, deprive societies of critical resources, and undermine democracy and the rule of law. In support of the U.S. Strategy on Countering Corruption, today's corruption-related designations take aim at acts that contribute to state capture and democratic backsliding; corruption as a root cause of migration in Central America; misappropriation of state funds and embezzlement in Africa; and the solicitation of bribes in exchange for undue judicial influence by a corrupt judge in Ukraine. In support of the Haitian people, we are shining a light on those who have abused public positions for personal gain, contributing to the current crisis.

Today's human rights-related designations span the globe. Our designations target Russian officials and proxies who have perpetuated Russia's illegal and deadly war in Ukraine though abhorrent filtration operations and forcible deportations of Ukraine's citizens, including a growing number of children.

We reiterate our condemnation of Iran's brutal acts of violence against peaceful protestors, ongoing denial of human rights and fundamental freedoms, and pervasive oppression and state-sponsored violence against women. Today, we are responding to this repressive behavior in coordination with international partners.

Our actions further aim to disrupt and deter the People's Republic of China's (PRC) arbitrary detention and physical abuse of members of religious minority groups in the Tibetan Autonomous Region, and the Government of the Democratic People's Republic of Korea's role in restricting freedom of movement, mistreating asylum seekers, and exploiting laborers to generate revenue for the state. Among other critical designations, we are also taking action to curb the sexual abuse and exploitation of children and women in the Philippines and address impunity for decades-old human rights violations in Peru and Indonesia.

Finally, our designations also address the nexus between PRC-based illicit fishing and human rights abuse, including forced labor as a form of human trafficking. The actions of the individuals and entities sanctioned today undermine fundamental labor and environmental standards, harm the economic prospects of local populations in the Indo-Pacific, and exacerbate the environmental and socioeconomic effects of climate change.

These actions build upon several prior Global Magnitsky designations this year, including designations of senior officials in Liberia for their involvement in ongoing public corruption; a fugitive oligarch widely recognized for capturing and corrupting Moldova's political and economic institutions; and a Russia-linked network for exploiting the Guatemalan mining sector. In total, we have designated hundreds of individuals and entities for activity related to corruption and human rights abuses in 2022.

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The State Department fact sheet, providing an overview of the measures applied under multiple authorities, is available at https://www.state.gov/combating-global-corruption-and-human-rights-abuses/, and excerpted below.

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Actions Taken for Significant Corruption
El Salvador
Conan Tonathiu Castro Ramirez (Castro Ramirez), Presidential Legal Secretary

- Pursuant to E.O. 13818, the Department of the Treasury is designating Castro Ramirez for facilitating the cover-up of fraud by obstructing investigations into the misappropriation of public funds during the pandemic and for directly engaging in corrupt activities by using his office for personal financial gain.
- Pursuant to Section 7031(c), the Department of State is publicly designating Castro Ramirez for his involvement in significant corruption. As part of this action, four immediate family members are also designated.

Oscar Rolando Castro (Castro), Minister of Labor

- Pursuant to E.O. 13818, the Department of the Treasury is designating Castro for engaging in corruption and misappropriating public funds for his personal benefit. Rolando used aligned unions to benefit himself and political allies in exchange for express processing of union credentials, among other benefits.
- Pursuant to Section 7031(c), the Department of State is designating Castro for his involvement in significant corruption. As part of this action, an immediate family member is also designated.

Guatemala
Allan Estuardo Rodriguez Reyes (Rodriguez), Former President of Congress

- Pursuant to E.O. 13818, the Department of the Treasury is designating Rodriguez for using his political influence to award construction grants in exchange for financial kickbacks as well as offering bribes for votes on a bill in congress.
- Pursuant to Section 7031(c), the Department of State is designating Rodriguez for his involvement in significant corruption. As part of this action, one immediate family member is also designated.

Jorge Estuardo Vargas Morales (Vargas), Congressman

- Pursuant to E.O. 13818, the Department of the Treasury is designating Vargas for corruption related to contracts and operations at government-run ports. Vargas maintains influence at the port through bribery, creating blockades and strikes for personal profit.
- Pursuant to Section 7031(c), the Department of State is designating Vargas for his involvement in significant corruption. As part of this action, four immediate family members are also designated.

Luis Alfonso Chang Navarro (Chang), Former Minister of Energy and Mines

- Pursuant to E.O. 13818, the Department of the Treasury is designating Chang for using his position to secure kickbacks. Chang solicited bribes and other favors in exchange for not revoking licenses.

- Pursuant to Section 7031(c), the Department of State is designating Chang for his involvement in significant corruption. As part of this action, two immediate family members are also designated.

Haiti

Romel Bell, Former Director General of the General Administration of Customs

- Pursuant to Section 7031(c), the Department of State is designating Romel Bell for abusing his public position by participating in corrupt activity that undermined the integrity of Haiti's government. As part of this action, one immediate family member was also designated.

Rony Celestin, Senator

- Pursuant to Section 7031(c), the Department of State is designating Rony Celestin for abusing his public position by participating in corrupt activity that undermined the integrity of Haiti's government. As part of this action, four immediate family members are also designated.

Mali

Karim Keita (Keita), Former President of the National Assembly's Defense Committee

- Pursuant to E.O. 13818, the Department of the Treasury is designating Keita, and one entity controlled by Keita, Konijane Strategic Marketing, for involvement in corruption. Keita used his position as chairman of the National Assembly's Security and Defense Commission to embezzle defense spending, secure bribes, and redirect contracts to his associates. Additionally, Keita used defense funds to bribe other officials in support of the 2018 re-election of his father, Ibrahim Boubacar Keita, who is the former President of Mali.
- Pursuant to Section 7031(c), the Department of State is designating Keita for misappropriation of public funds. As part of this action, two immediate family members are also designated.

Ukraine

Pavlo Vovk (Vovk), Chairman of the Kyiv District Administrative Court

- Pursuant to Section 7031(c), the Department of State is designating Vovk for soliciting bribes in return for interfering in judicial and other public processes. As part of this action, two immediate family members are also designated.

Action Taken Related to Human Rights Abuses and Violations

Azerbaijan

Kerim Heydar Alimardanov (Alimardanov), an official in the Main Department for Combating Organized Crime within the Azerbaijani Ministry of Internal Affairs, known as the "Bandotdel"

- Pursuant to Section 7031(c), the Department of State is designating Alimardanov for his involvement in a gross violation of human rights, namely torture of detainees in 2015 and 2016.

Burundi

Alain Guillaume Bunyoni (Bunyoni), a former Burundian official

- Pursuant to Section 7031(c), the Department of State is designating Bunyoni for his involvement in a gross violation of human rights.

Democratic People's Republic of Korea (DPRK)

Border Guard General Bureau (BGGB)

- Pursuant to E.O. 13687, which authorizes imposition of sanctions with respect to the DPRK, the Department of the Treasury is designating the BGGB for being an agency,

instrumentality, or controlled entity of the Government of DPRK or the Workers' Party of Korea. DPRK state security agencies, including the BGGB, thwart escapes through tight border controls, including land mines and shoot-on-sight orders that have resulted in the deaths of numerous North Koreans.

Two DPRK-related individuals and Seven Entities

- Pursuant to E.O. 13722, which authorizes the imposition of sanctions with respect to the DPRK and Workers' Party of Korea, the Department of the Treasury is designating two individuals as well as seven related entities for providing material support to, acting on behalf of, or being owned by the DPRK's government-run animation studio, SEK Studio. The targets are: Kim Myong Chol, based in France; Everlasting Empire Limited, based in Hong Kong; Tian Fang (Hong Kong) Holding Limited, based in Hong Kong; Fujian Nan'an Import and Export Company, based in China; Limited Liability Company Kinoatis, based in the Russian Federation; and Funsaga Pte Ltd, based in Singapore; Deepak Subhash Jadhav based in India; Yancheng Three Line One Point Animation Co., Ltd, based in China; Quanzhou Yiyangjin Import and Export Trade Co., Ltd., based in China.

Guinea

Alpha Conde (Conde), former president of Guinea

- Pursuant to E.O. 13818, the Department of the Treasury is designating Conde for his connection to serious human rights abuse. During Conde's tenure, Guinean security forces engaged in serious human rights abuse, including extrajudicial killings, in the context of political protests surrounding the March 22, 2020, legislative elections and constitutional referendum.

Indonesia

Godlief Mangkak Timbul Silaen (Silaen), former police chief of the then-East Timor region and commander of Indonesia's Security Control Command

- Pursuant to Section 7031(c), the Department of State is designating Silaen for his involvement in a gross violation of human rights, namely the extrajudicial killing of civilians in East Timor (now Timor-Leste) in 1999.

Iran

Ali Akbar Javidian (Javidian), Kermanshah Province Commander of the Law Enforcement Forces of the Islamic Republic of Iran (LEF)

- Pursuant to E.O. 13818, the Department of the Treasury is designating Javidian for his connection to serious human rights abuse. During Javidian's tenure members of the LEF used excessive force against protestors, resulting in extrajudicial killings.

Allah Karim Azizi (Azizi), warden of Rezaee Shah Prison

- Pursuant to E.O. 13818, the Department of the Treasury is designating Azizi for his connection to serious human rights abuse. During Azizi's tenure, prison guards have engaged in maltreatment of prisoners, including serious physical abuse.

Ebrahim Kouchakzaei (Kouchakzaei), LEF commander in Chabahar, in Iran's Sistan and Baluchistan Province

- Pursuant to E.O. 13553, which authorizes the imposition of sanctions with respect to serious human rights abuses by the Government of Iran, the Department of the Treasury is designating Kouchakzaei for having acted or purported to act for or on behalf of, directly or indirectly, Iran's LEF. He is the alleged perpetrator of a rape of a 15-year-old girl in mid-September 2022.

Mohammed Reza Ostad (Ostad), warden of Bushehr Prison

- Pursuant to Section 7031(c), the Department of State is designating Ostad for his involvement in gross violations of human rights, namely the cruel, inhuman, or degrading treatment or punishment of prisoners.

13 Iranian government officials

- Pursuant to INA Section 212(a)(3)(C), the Department of State is also taking action to impose visa restrictions on 13 current and former Iranian government officials who are believed to be responsible for, or complicit in, the abuse, detention or killing of peaceful protestors or inhibiting their rights to freedom of expression or peaceful assembly, including through censorship via a country-wide internet shutdown in Iran.

People's Republic of China (PRC)

Wu Yingjie (Wu), Party Secretary of Tibetan Autonomous Region (TAR)

- Pursuant to E.O. 13818, the Department of the Treasury is designating Wu for his connection to serious human rights abuse in Tibet. As the TAR's Party Secretary from 2016 to October 2021, Wu directed government officials in the region to engage in "social stability" policies, which led to serious human rights abuse, including physical abuse and arbitrary arrests and detentions.

Zhang Hongbo (Zhang), director of the Tibetan Public Security Bureau (TPSB)

- Pursuant to E.O. 13818, the Department of the Treasury is designating Zhang for his connection to serious human rights abuse in Tibet. Zhang has been the director of the TPSB since 2018 through at least November 2022. He has worked to advance the PRC's goals and policies in Tibet as "Tibet's police chief." During Zhang's tenure, the TPSB engaged in serious human rights abuse, including arbitrary detention and physical abuse.
- Pursuant to Section 7031(c), the Department of State is designating Zhang for gross violations of human rights, namely arbitrary detention of Tibetans, which also amount to particularly severe violations of religious freedom.

Tang Yong (Tang), former deputy director of the Chongqing Area Prisons in the PRC

- Pursuant to Section 7031(c), the Department of State is designating Tang for his involvement in gross violations of human rights, namely arbitrary detention of Falun Gong practitioners, which also amount to particularly severe violations of religious freedom.

Li Zhenyu (Li)

Zhuo Xinrong (Zhuo)

- Pursuant to E.O. 13818, the Department of the Treasury is designating Li and Zhuo as well as a network of entities including Dalian Ocean Fishing Co., Ltd. (Dalian) and Pingtan Marine Enterprise, Ltd**.** (Pingtan), and over 150 vessels for their connection to serious human rights abuse. Dalian- and Pingtan-owned and -operated vessels engaged in forced labor, involving withheld pay, physical violence, abusive working and living conditions, and meager food and water, which contributed to the deaths of crew members.

Peru

José Carlos Bertarelli Rodríguez (Rodríguez)**,** a former commander of the Ayacucho Intelligence Detachment in Peru

- Pursuant to Section 7031(c), the Department of State is designating Rodríguez for his involvement in gross violations of human rights, namely torture between 1983 – 1985.

Philippines

Apollo Quiboloy (Quiboloy)

- Pursuant to E.O. 13818, the Department of the Treasury is designating Quiboloy for his connection to serious human rights abuse. As the founder of the Philippines-based church, Kingdom of Jesus Christ, the Name Above Every Name (KOJC), Quiboloy took advantage of his leadership role within the KOJC to engage in a pattern of systemic and pervasive rape and other physical abuse involving minors as young as 11 years old from 2006 to at least 2020.

The Russian Federation

Central Election Commission of the Russian Federation (Russia's CEC)

- Pursuant to E.O. 14024, the Department of the Treasury is designating Russia's CEC alongside its 15 members. In September 2022, Russia's CEC helped oversee and monitor sham referendums held in areas of Russia-controlled Ukraine that were rife with incidents of clear voter coercion and intimidation. Additionally, Russia's CEC conducts and oversees federal and local elections in Russia, including referendums. For years, Russia's CEC has touted as clean and transparent elections in Russia that have been riddled with irregularities and credible accusations that the Kremlin has carefully managed the results.

Lyudmila Nikolaevna Zaitseva (Zaitseva)

- Pursuant to E.O. 14024, , the Department of State is designating Zaitseva, under Section 1(a)(ii)(F), for being responsible for or complicit in, or having directly or indirectly engaged or attempted to engage in, activities that undermine the peace, security, political stability, or territorial integrity of the United States, its allies, or its partners for or on behalf of, or for the benefit of, directly or indirectly, the Government of the Russian Federation. Zaitseva was reportedly implicated in human rights abuses against civilians in Ukraine, specifically the kidnapping and forced relocation of children from Ukraine.

Ochur-Suge Terimovich Mongush (Mongush)

- Pursuant to E.O. 14024, the Department of State is designating Mongush, under Section 1(a)(vi)(B), for materially assisting, sponsoring, or providing 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 E.O. 14024. Mongush was reportedly implicated in human rights abuses against civilians in Ukraine, specifically torture.

Oleg Yuryevich Nesterov (Nesterov), Russian Federation Presidential Administration official

- Pursuant to E.O. 14024, the Department of the Treasury is designating Nesterov for being directly involved in the planning for and implementation of filtration points in Russia-controlled Ukraine.

Yevgeniy Radionovich Kim (Kim), Russian Federation Presidential Administration official

- Pursuant to E.O. 14024, the Department of the Treasury is designating Kim for being directly involved in the planning for and implementation of filtration points in Russia-controlled Ukraine.

Marina Konstantinovna Sereda (Sereda)

- Pursuant to E.O. 14024, the Department of the Treasury is designating Sereda for working with the so-called Donetsk People's Republic (DNR) Ministry of Internal Affairs to manage filtration points in Russia-controlled Donetsk Oblast, Ukraine.

Aleksey Valentinovich Muratov (Muratov), Official of the so-called DNR

- Pursuant to E.O. 14024, the Department of the Treasury is designating Sereda for coordinating filtration point operations with so-called DNR leader Denis Pushilin. In particular, Muratov has spearheaded the procurement of necessary equipment and technology to support filtration points in Russia-controlled Donetsk Oblast, Ukraine.

Sri Lanka

Prabath Bulathwatte (Bulathwatte), former head of a clandestine Sri Lankan Army platoon, known as the "Tripoli Platoon,"

- Pursuant to Section 7031(c), the Department of State is designating Bulathwatte for his involvement in a gross violation of human rights, namely torture and/or cruel, inhuman, or degrading treatment or punishment of Sri Lankan journalist, Keith Noyahr, in May 2008.

Vietnam

- Vo Thanh Dung (Vo), former warrant officer at the Lagi Police Station Pursuant to Section 7031(c), the Department of State is designating Vo for his involvement in a gross violation of human rights, namely torture, in January 1987.

* * * *

13. Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home

President Biden issued a new executive order on wrongful detention on July 19, 2022, Executive Order (E.O.) 14078, entitled, "Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home." 87 Fed. Reg. 43,389 (Jul. 21, 2022). Section 6 and 7 follow, describing the sanctions and visa restriction authorities included in E.O. 14078. See Chapter 2 for additional discussion of E.O. 14078.

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* * * *

Sec. 6. (a) All property and interests in property of the following persons that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General:

(A) to be responsible for or complicit in, to have directly or indirectly engaged in, or to be responsible for ordering, controlling, or otherwise directing, the hostage-taking of a United States national or the wrongful detention of a United States national abroad;

(B) to have attempted to engage in any activity described in subsection (a)(i)(A) of this section; or

(C) to be or have been a leader or official of an entity that has engaged in, or whose members have engaged in, any of the activities described in subsections (a)(i)(A) or (a)(i)(B) of this section relating to the leader's or official's tenure;

(ii) any foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:

(A) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:

(1) any activity described in subsection (a)(i)(A) of this section; or

(2) any person whose property and interests in property are blocked pursuant to this order;

(B) to be owned, controlled, or directed by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order; or

(C) to have attempted to engage in any activity described in subsection (a)(ii)(A) of this section.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 7. (a) The unrestricted immigrant and nonimmigrant entry into the United States of noncitizens determined to meet one or more of the criteria set forth in section 6(a) of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except when the Secretary of State or the Secretary of Homeland Security, as appropriate, determines that the person's entry would not be contrary to the interests of the United States, including when the Secretary of State or the Secretary of Homeland Security, as appropriate, so determines, based on a recommendation of the Attorney General, that the person's entry would further important United States law enforcement objectives.

(b) The Secretary of State shall implement this authority as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish.

(c) The Secretary of Homeland Security shall implement this order as it applies to the entry of noncitizens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(d) Such persons shall be treated by this section in the same manner as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

* * * *

Secretary Blinken's July 19, 2022 press statement regarding Executive Order 14078 is available at https://www.state.gov/issuance-of-executive-order-on-bolstering-ongoing-efforts-to-bring-hostages-and-wrongfully-detained-u-s-nationals-home/ and includes the following.

The sanctions authority included in this E.O. enables the United States to impose financial and travel sanctions on those who are responsible for unjustly holding U.S. nationals, whether their captor is a terrorist network or a state actor.

14. Transnational Organized Crime and Global Drug Trade

a. Transnational Organized Crime

On April 11, 2022, OFAC designated the following individuals under E.O. 13581, as amended by E.O. 13863, relating to transnational criminal organizations: Bernard Patrick CLANCY, Ian Thomas DIXON, Daniel Joseph KINAHAN, Christopher Vincent KINAHAN, Christopher Vincent KINAHAN JUNIOR, Sean Gerard MCGOVERN, John Francis MORRISSEY. OFAC also designated the following entities: DUCASHEW GENERAL TRADING LLC, HOOPOE SPORTS LLC, KINAHAN ORGANIZED CRIME GROUP, and NERO DRINKS COMPANY LIMITED. 87 Fed. Reg. 22,284-85 (Apr. 14, 2022).

On November 12, 2021, OFAC determined that 10 individuals—Sergio Enrique VILLARREAL BARRAGAN, Lucia Ines CIFUENTES VILLA, Jorge Andres CIFUENTES OSORIO, Teresa de Jesus CIFUENTES VILLA, Jorge Milton CIFUENTES VILLA, Fabian Rodrigo GALLEGO MARIN, Winston NICHOLLS EASTMAN, Shimon Yalin YELINEK, Paula Andrea VARGAS CIFUENTES, and Edmon Felipe VARGAS CIFUENTES—and 33 entities (not listed herein) are unblocked and removed them from the SDN List. These removals were published in the Federal Register in 2022. See 87 Fed. Reg. 30,557-59 (May 19, 2022).

On July 22, 2022, President Biden determined that significant transnational criminal organizations continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and continued the national emergency declared in E.O. 13581, as amended by E.O. 13863, for one year. 87 Fed. Reg. 43,983 (Jul. 22, 2022).

On August 19, 2022, OFAC designated individual Lazar Gurgenovich SHAYBAZIAN and two entities GUGA ARM SRO and GURGEN HOUSE FZCO. 87 Fed. Reg. 52,114 (Aug. 24, 2022).

On October 7, 2022, OFAC designated individual Teo Boon CHING and entities SUNRISE GREENLAND SDN. BHD and TEO BOON CHING WILDLIFE TRAFFICKING TRANSNATIONAL CRIMINAL ORGANIZATION. 87 Fed. Reg. 73,073 (Nov. 28, 2022).

On December 16, 2022, OFAC designated six individuals—Maneul Dario BALDENEGRO BASTIDAS; Gildardo de Jesus BEDOYA LOPEZ; Wilton Cesar HERNANDEZ DURANGO; Manuel HUERTA RAMOS; Victor Gabriel MEJIA ALZATE; and Pedro Claver MEJIA SALAZAR—and ten entities-- ALMEQUIP S.A.S.; ARENERA EL CERREJON; CANTERAS COPACABANA S.A; EUROMECANICA; GARCES Y BEDOYA CIA. LTDA; INVERSIONES MEYBAR S.A.S.; MEJIA ALZATE ASOCIADOS Y CIA. LTDA.; PROMOTORA TURISTICA SOL PLAZA S.A.; REPRESENTACIONES MIDAS; and TRITCON S.A.S. 87 Fed. Reg. 78,766 (Dec. 22, 2022).

b. Global Drug Trade

On February 17, 2022, OFAC designated Sergio Armando OROZCO RODRIGUEZ, under E.O. 14059, "Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade." 87 Fed. Reg. 10,280 (Feb. 23, 2022).

On February 10, 2022, OFAC designated two individuals—Miguel Angel VALDEZ RUIZ and Wilder Emilio SANCHEZ FARFAN—under E.O. 14059. 87 Fed. Reg. 8,636 (Feb. 15, 2022). 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. 87 Fed. Reg. 8,635 (Feb. 15, 2022).

On March 18, 2022, OFAC designated seven individuals—Werner Dario MOLINA MONTEJO, Eugenio Dario MOLINA LOPEZ, Alex Bladimir MONTEJO SAENZ, Ervin Rene MORENO LOPEZ, Freddy Arnoldo SALAZAR FLORES, Roger Antulio SAMAYOA MONTEJO, and Aler Baldomero SAMAYOA RECINOS and two entities—COMPRADORES Y EXPORTADORES DE CAFÉ CAPTZIN, SOCIEDAD ANONIMA and LOS HUISTAS DRUG TRAFFICKING ORGANIZATION—under E.O. 14059. 87 Fed. Reg. 16,552 (Mar. 23, 2022).

On June 2, 2022, OFAC designated six individuals—Severo FLORES MENDOZA, Esther GODOY ARELLANO, Moises GONZALEZ ANGUIANO, Julio Cesar MONTERO PINZON, Angelberto RINCON GODOY, and Julio Efrain RINCON GODOY—under E.O. 14059. 87 Fed. Reg. 34,930 (Jun. 8, 2022).

On July 11, 2022, OFAC designated Obed Christian SEPULVEDA PORTILLO under E.O. 14059. 87 Fed. Reg. 42,266 (Jul. 14, 2022).

On October 19, 2022, OFAC designated three individuals—Juan Francisco VALENZUELA VALENZUELA, Raul RIVAS CHAIRES, and Hector Alfonso ARAUJO PERALTA and four entities— VALENZUELA DRUG TRAFFICKING ORGANIZATION, ARFEL TRANSPORTADORA COOL LOGISTIC, S.A. DE C.V., SERVICIOS DE TRANSPORTE MARUHA, SOCIEDAD ANONIMA DE CAPITAL VARIABLE, and TRANSPORTES REFRIGERADOS PANDAS TRUCKING, SOCIEDAD ANONIMA DE CAPITAL VARIABLE—under E.O. 14059. 87 Fed. Reg. 64,309-10 (Oct. 24, 2022).

On November 4, 2022, OFAC designated Joseph LAMBERT and Youri LATORTUE under E.O. 14059. 87 Fed. Reg. 67,751 (Nov. 9, 2022).

On November 9, 2022, OFAC designated two individuals—Martinus Pterus Henrikus DE KONING and Alex Adrianus Martinus PEIJNENBURG—nine entities-- A.A.M. PEIJNENBURG HOLDING B.V.; BELLIZO; BEST SPORT COMPANY; BEST SPORT COMPANY B.V; GREEN DISTRICT B.V.; KING TRADE B.V.; ORGANIC DISTRICT B.V.; ERJM LIMITED; and NATURAL GIFTS B.V. 87 Fed. Reg. 73,071-72 (Nov. 28, 2022).

On November 17, 2022, OFAC designated two individuals—Johnny HURTADO OLASCOAGA and Jose HURTADO OLASCOAGA and one entity— LA NUEVA FAMILIA MICHOACANA—under E.O. 14059. 87 Fed. Reg. 71,740-41 (Nov. 23, 2022).

On December 2, 2022, OFAC designated Rony CELESTIN and Herve FOURCAND under E.O. 14059. 87 Fed. Reg. 75,137 (Dec. 7, 2022).

On December 6, 2022, OFAC designated Jose CALDERON RIJO under E.O. 14059. 87 Fed. Reg. 77,675 (Dec. 19, 2022).

15. Other Visa Restrictions, Sanctions, and Measures

a. Venezuela

On November 26, 2022, OFAC issued Venezuela General License 41, "authorizing Chevron Corporation to resume limited natural resource extraction operations in Venezuela." See Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy1127.*

b. "Khashoggi Ban" related to Transnational Repression

In 2021, the Biden-Harris Administration announced the "Khashoggi Ban" to counter transnational repression. See *Digest 2021* at 675. On February 3, 2022, the State Department took steps to impose visa restrictions on multiple Belarusian nationals under the "Khashoggi Ban" for their involvement in extraterritorial counter-dissident activity and attempting to forcibly repatriate a Belarusian Olympian. The press statement, available at https://www.state.gov/promoting-accountability-for-transnational-repression-of-belarusian-athletes-abroad/, explains:

> Today's actions target multiple Belarusian nationals for their involvement in serious, extraterritorial counter-dissident activity. The United States condemns all such activity, including the attempt to forcibly repatriate Belarusian Olympian Krystsina Tsimanouskaya during the Tokyo Summer Olympic Games last year.
>
> The United States applauds the Belarusian Sport Solidarity Foundation's efforts to support and protect the human rights of athletes amid the Lukashenka regime's violent crackdown and ongoing repression of Belarusians inside and outside the country. We stand in solidarity with Ms. Tsimanouskaya and all others who have experienced the regime's attempts to silence criticism.
>
> This action is part of a comprehensive effort to prevent and respond to acts of transnational repression by any government targeting journalists, activists, and dissidents for abuse, bringing together diplomatic, law enforcement, and intelligence tools to deter repressive governments and protect targeted individuals and groups, including within the United States. The Khashoggi Ban, a global visa restriction policy pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act, is one important tool in this effort.

On March 15, 2022, Secretary Blinken announced in a press statement actions to promote accountability for the Russian and Belarusian governments' human rights abuses and violations within and outside their border. See discussion of additional actions announced in section A.4.a and A.5, *supra*. The press statement making the announcement is available at https://www.state.gov/promoting-accountability-for-

* Editor's note: The Treasury Department published General License 41 on January 13, 2023. See 88 Fed. Reg. 2238 (Jan. 13, 2023).

human-rights-abuses-perpetrated-by-the-governments-of-russia-and-belarus/ and further states:

> …the Department of State is announcing a series of actions to promote accountability for the Russian Federation's and Government of Belarus's human rights abuses and violations. These include:
>
> Imposition of visa restrictions on six individuals who, acting on behalf of the Russian Federation, were involved in attacks on Chechen dissidents living in Europe. This action is being taken pursuant to the "Khashoggi Ban," a visa restriction policy the Administration announced last year to counter transnational repression.

c. Ethiopia

On February 9, 2022, OFAC published the Ethiopia Sanctions Regulations, 31 CFR part 500, to implement E.O. 14046, "Imposing Sanctions on Certain Persons With Respect to the Humanitarian and Human Rights Crisis in Ethiopia" issued in 2021. 87 Fed. Reg. 7374 (Feb. 9, 2022). See *Digest 2021* at 676.

d. Nicaragua

On November 27, 2018, the President issued E.O. 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua." See *Digest 2018* at 614.

In a January 10, 2022 press statement, available at https://www.state.gov/holding-accountable-nicaraguan-agents-of-repression/, Secretary Blinken announced visa restrictions on 116 individuals complicit in undermining democracy in Nicaragua. The State Department press statement also referred to sanctions by Treasury on six members of the Ortega-Murillo regime for currently serving as officials of the Government of Nicaragua or for having served at any time on or after January 10, 2007. 87 Fed. Reg. 2486 (Jan. 14, 2022). The press statement explains:

> We are undertaking these economic sanctions and visa restrictions to promote accountability for the Ortega-Murillo regime's escalating authoritarianism and abuses.
>
> The regime continues to hold 170 political prisoners, with many of those detained suffering from a lack of adequate food and proper medical care. Others remain in solitary confinement. Ortega's corrupt security and judicial system arrested these individuals for practicing independent journalism, working for civil society organizations, seeking to compete in elections, and publicly expressing an opinion contrary to government orthodoxy, among other activities considered normal in a free society.

> We join the European Union in taking a strong stand against the human rights abuses and disrespect for the Nicaraguan people, demonstrated by the Ortega-Murillo regime. President Ortega will inaugurate himself for a new presidential term today, but the pre-determined election he staged on November 7 does not provide him with a new democratic mandate; only free and fair elections can do that. The Nicaraguan people deserve nothing less.

The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0552#_blank.

On June 13, 2022, Secretary Blinken announced visa restrictions on 93 individuals under Presidential Proclamation 10309, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Policies or Actions That Threaten Democracy in Nicaragua," issued on November 16, 2021. See *Digest 2021* at 683. The press statement is available at https://www.state.gov/visa-restrictions-on-ortega-murillo-regime-officials-for-undermining-democracy/ and includes the following.

> The United States remains deeply concerned about the Ortega-Murillo regime's unjust detentions of political prisoners and ongoing abuses against members of civil society. We remain committed to applying a range of diplomatic and economic tools to support the restoration of democracy and respect for human rights in Nicaragua. To that end, the Department of State is taking further steps to impose visa restrictions on an additional 93 individuals believed to have undermined democracy following Daniel Ortega's illegitimate November 2021 reelection, including judges, prosecutors, National Assembly Members, and Interior Ministry officials.

On October 24, 2022, in response to the continued anti-democratic actions of the Ortega-Murillo regime, President Biden amended E.O. 13851 with expanded sanctions authorities, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/24/executive-order-on-taking-additional-steps-to-address-the-national-emergency-with-respect-to-the-situation-in-nicaragua/. Excerpts follow.

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* * * *

I, JOSEPH R. BIDEN JR., President of the United States of America, in order to take additional steps with respect to the national emergency declared in Executive Order 13851 of November 27, 2018 (Blocking Property of Certain Persons Contributing to the Situation in Nicaragua), hereby order:

Section 1. The first clause of the preamble to Executive Order 13851 is amended to read as follows:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (NEA), the Nicaragua Investment Conditionality Act of 2018 (50 U.S.C. 1701 note), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,".

Sec. 2. Section 1 of Executive Order 13851 is amended by adding a new subsection 1(a)(i)(E) after subsection 1(a)(i)(D), to read as follows:

"(E) the arrest or prosecution of a person, including an individual or media outlet disseminating information to the public, primarily because of the exercise by such person of the freedom of expression, including for members of the press, or assembly;".

Sec. 3. Subsections 1(a)(iv)(B) through 1(a)(v) of Executive Order 13851 are replaced with new subsections 1(a)(iv)(B) through 1(a)(vi), to read as follows:

"(B) any person whose property and interests in property are blocked pursuant to this order;

(v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order; or

(vi) to operate or have operated in the gold sector of the Nicaraguan economy or in any other sector of the Nicaraguan economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State.".

Sec. 4. Subsection 1(b) of Executive Order 13851 is replaced with a new subsection 1(b), to read as follows:

"(b) The following are prohibited:

(i) the importation into the United States of any products of Nicaraguan origin as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce;

(ii) the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any items as may be determined by the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Treasury, to any person located in Nicaragua;

(iii) new investment in any sector of the Nicaraguan economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, by a United States person, wherever located; and

(iv) any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited by this subsection if performed by a United States person or within the United States.".

* * * *

Following President Biden's October 24, 2022 amendment of E.O. 13851, Secretary Blinken announced steps to impose visa restrictions on over 500 Nicaraguan individuals and their family members pursuant to Presidential Proclamation 10309 and OFAC's designation of Nicaraguan mining authority General Directorate of Mines and Reinaldo Gregorio Lenin Cerna Juarez, pursuant to E.O. 13851. Secretary Blinken's

October 24, 2022 press statement is excerpted below and available at https://www.state.gov/expanding-u-s-sanctions-authorities-and-announcement-of-visa-restrictions-for-nicaraguan-officials/.

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* * * *

Today, we are announcing steps to impose visa restrictions on over 500 Nicaraguan individuals and their family members. We are doing so pursuant to Presidential Proclamation 10309, which suspends entry into the United States as immigrants and nonimmigrants of members of the Government of Nicaragua and other persons who formulate, implement or benefit from policies or actions that undermine democratic institutions or impede the return to democracy in Nicaragua. These individuals include members of Nicaraguan security services, such as the Nicaraguan National Police, penitentiary officials, judges, prosecutors, higher education officials and non-government actors who enable regime repression and corruption as well as their family members. No member of the Nicaraguan government nor anyone who facilitates the Ortega-Murillo regime's abuses should believe they can travel freely to the United States.

The White House also announced an amendment to Executive Order (E.O.) 13851 on Nicaragua that expands sanctions authorities, including specific trade-related measures for Nicaragua. These new authorities will support our efforts to hold the Ortega-Murillo regime accountable. The regime's accelerating actions this year closing space for civil society, increasing its security cooperation with Russia, and silencing independent voices despite broad international calls for dialogue and moderation compel the United States to act. Governments that deny their people's basic rights or threaten the security interests of their neighbors should not expect that their political, economic, and trade relationships will remain unaffected.

In conjunction with the E.O. announcement, the U.S. Department of the Treasury's Office of Foreign Assets Control imposed sanctions on Nicaraguan mining authority General Directorate of Mines, an office in the Ministry of Energy and Mines, and Reinaldo Gregorio Lenin Cerna Juarez, a close confidante of Nicaraguan President Ortega, pursuant to E.O. 13851.

* * * *

On December 21, 2022, OFAC determined that the following be removed from the SDN List: individual Orlando CASTILLO CASTILLO and aircraft N488RC. 87 Fed. Reg. 79,445 (Dec. 27, 2022).

e. Balkans

On January 5, 2022, OFAC designated individual Milorad DODIK and entity ALTERNATIVNA TELEVIZIJA D.O.O. BANJA LUKA under E.O. 14033, "Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans." 87 Fed. Reg. 2240 (Jan. 13, 2022).

On April 11, 2022, OFAC designated seven individuals under E.O. 14033: Gordana TADIC; Ylli Bahri NDROQI; Nikola GRUEVSKI; Sasho MIJALKOV; Asim SARAJLIC; Aqif RAKIPI; and Svetozar MAROVIC. OFAC also designated one entity, I.C.I.C. KFT. At the same time, OFAC determined that twenty-one individuals (not listed herein) who had been identified pursuant to E.O. 13219, as amended by 13304, should be removed from the SDN list. 87 Fed. Reg. 22,625-27 (Apr. 15, 2022). Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0712.

On June 6, 2022, OFAC designated Marinko CAVARA and Alen SERANIC under E.O. 14033. 87 Fed. Reg. 35,596-97 (Jun. 10, 2022). The State Department press statement on this designation is available at https://www.state.gov/designation-of-officials-in-bosnia-and-herzegovina-for-anti-dayton-behavior/ and is excerpted below.

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* * * *

The United States is designating Marinko Cavara and Alen Seranic, both of whom have obstructed or threatened the implementation of the Dayton Peace Agreement and have undermined Bosnia and Herzegovina's (BiH) democratic processes or institutions. They continue to pursue ethno-nationalist interests at the expense of the peace, stability, and prosperity of their country. These destabilizing activities undermine BiH's chosen future within the Euro-Atlantic community and prevent the country and its citizens from realizing their full potential.

BiH is facing its most serious crisis since 1995, constrained by ethno-nationalist political parties sustained by patronage networks. The ruling coalition in the Republika Srpska (RS) entity is moving to establish parallel structures that undermine the authority of state-level institutions, and leaders of the Croatian Democratic Union of Bosnia and Herzegovina are crippling the country's democratic processes.

Marinko Cavara and Alen Seranic are being designated pursuant to Executive Order 14033 and for being responsible for, or complicit in, or having directly or indirectly engaged in actions or policies that undermine democratic processes or institutions in the Western Balkans. Cavara's refusal to nominate judges to fill vacancies on the Federation of BiH (FBiH) Constitutional Court has blocked the function of the Court's Vital National Interest panel, a body of FBiH Constitutional Court judges created by 2002 amendments to the FBiH Constitution by the High Representative for BiH that is intended to address key issues raised by delegates in the FBiH House of Peoples. This has prevented key reforms and hindered democratic processes or institutions. Such failures in governance impact the well-being, prosperity, and rights of citizens across the FBiH. Seranic furthered efforts to create an RS entity-level agency for medicines and medical devices that will undermine the state-level Agency for Medicinal Products and Medical Devices and is an attack on BiH's constitutional order. The United States strongly urges RS leadership to respect the Dayton Peace Agreement and return to work within existing state institutions and to reverse efforts to create illegal parallel institutions in the RS.

The United States will continue to use all of its authorities to promote accountability for those who undermine the Dayton Peace Agreement and democracy in the Western Balkans.

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The Treasury Department press statement is available at https://home.treasury.gov/news/press-releases/jy0808.

On September 26, 2022, OFAC designated Diana KAJMAKOVIC pursuant to E.O. 14033. 87 Fed. Reg. 59,496 (Sep. 30, 2022). The State Department press statement on this designation is available at https://www.state.gov/designation-of-a-person-in-bosnia-and-herzegovina-for-corruption-and-undermining-democratic-institutions-and-processes/.

On October 3, 2022, OFAC designated individuals Fadil NOVALIC and Slobodan STANKOVIC and entity INTEGRAL INZENJERING A.D. LAKTASI under E.O. 14033. 87 Fed. Reg. 60,747-48 (Oct. 6, 2022). The State Department press statement on the designation is available at https://www.state.gov/designation-of-two-individuals-and-one-entity-in-bosnia-and-herzegovina/.

f. Colombia

On December 30, 2021, OFAC removed 101 individuals and 47 entities (not listed herein) from the SDN List, published in the Federal Register in 2022. 87 Fed. Reg. 539-43 (Jan. 5, 2022).

In 2022, OFAC removed several individuals and entities from the SDN List under the relevant sanctions authorities. On April 22, 2022, OFAC removed the following six individuals and one entity from the SDN List: Gustavo BOLIVAR ZAPATA; Kevin FLORES CHAVEZ; Daniel Alberto MORA RICARDO; Roberto Javier PEREZ SANTORO; Vicente ZAMBADA NIEBLA; Maria del Rosario ZEVALLOS GONZALES DE ARREDONDO; and ABS HEALTH CLUB S.A. 87 Fed. Reg. 25,352 (Apr. 28, 2022).

On May 27, 2022, OFAC removed six individuals and eleven entities (not listed herein) from the SDN List. 87 Fed. Reg. 34,346-47 (Jun. 6, 2022).

On August 19, 2022, OFAC removed seven individuals and five entities (not listed herein) from the SDN List. 87 Fed. Reg. 52,113-14 (Aug. 24, 2022).

g. 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 17, 2022, OFAC designated the one individual and nine entities pursuant to E.O. 13413, as amended by E.O. 13671: Alain Francois Viviane GOETZ; AFRICAN GOLD REFINERY LIMITED; AGOR DMCC; AGR INTERNATIONAL LIMITED; ALAXY; CG—VASTGOED INVEST; GOETZ GOLD LLC; OROFINO NV; PREMIER GOLD REFINERY LLC; and WWG DIAMONDS. 87 Fed. Reg. 16,553 (Mar. 23, 2022).

h. Libya

On April 11, 2022, OFAC designated Faysal AL–WADI; Musbah Mohamad WADI; and Nourddin Milood M MUSBAH IBRAHIM pursuant to E.O. 13726, "Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya." 87 Fed. Reg. 23,320 (Apr. 19, 2022).

On September 15, 2022, OFAC designated the following vessel pursuant to E.O. 13726: BONU 5 Malta flag. 87 Fed. Reg. 58,909 (Sep. 28, 2022).

On October 17, 2022, OFAC designated Terence MICALLEF under E.O. 13726. 87 Fed. Reg. 64,133 (Oct. 21, 2022).

i. South Sudan

On May 23, 2022, the State Department announced the issuance of a Business Advisory for Sudan in a press statement available at https://www.state.gov/u-s-government-issues-a-business-advisory-for-sudan/. The Advisory comes from the State Department, Treasury Department, Commerce Department, and the Department of Labor and is available at https://www.state.gov/risks-and-considerations-for-u-s-businesses-operating-in-sudan/. The press statement further explains:

> The Departments of State, Treasury, Commerce, and Labor today issued a business advisory on Sudan, highlighting the growing reputational risks to U.S. businesses and individuals associated with conducting business with Sudanese State-Owned Enterprises (SOE) and military-controlled companies.
>
> These risks arise from, among other things, recent actions undertaken by Sudan's Sovereign Council and security forces under the military's command, including and especially serious human rights abuse against protesters. While certain risks predate the country's October 2021 military takeover, the takeover and the military's actions since then have exacerbated them and could adversely impact U.S. businesses and individuals and their operations in Sudan.
>
> Businesses and individuals operating in Sudan should undertake increased due diligence related to human rights issues and be aware of the potential reputational risks of conducting business activities and/or transactions with SOEs and military-controlled companies. U.S. businesses and individuals should also take care to avoid interaction with any persons listed on the Department of the Treasury's Office of Foreign Assets Controls'(OFAC) list of Specially Designated Nationals and Blocked Persons (SDN List).

j. North Korea

On January 12, 2022, the United States Designated seven DPRK-linked individuals and one entity under E.O. 13382, 'Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters" for their connection to DPRK's weapons programs. The State Department designated individuals O Yong Ho and Roman Anatolyevich ALAR and entity Parsek LLC. 87 Fed. Reg. 32,066 (May 26, 2022). Secretary Blinken's press statement is available at https://www.state.gov/united-states-designates-entities-and-individuals-linked-to-the-democratic-peoples-republic-of-koreas-dprk-weapons-programs/. Treasury's press release is available at https://home.treasury.gov/news/press-releases/jy0555.

On March 11, 2022, OFAC made the following designations pursuant to E.O. 13687, which target the Government of the Democratic People's Republic of Korea ("DPRK"): individuals: Aleksandr Andreyevich GAYEVOY and Aleksandr Aleksandrovich CHASOVNIKOV; and entities: APOLLON OOO; RK BRIZ, OOO; and ZEEL–M CO., LTD. 87 Fed. Reg. 15,491-92 (Mar. 18, 2022).

On May 16, 2022, the State Department, Treasury Department, and the Federal Bureau of Investigation issued a joint advisory to alert the international community, the private sector, and the public to attempts by the Democratic People's Republic of Korea (DPRK) and remote DPRK information technology (IT) workers to obtain employment while posing as non-DPRK nationals. The State Department press statement is available https://www.state.gov/guidance-on-the-democratic-peoples-republic-of-korea-information-technology-workers/ and includes the following:

> The advisory is intended to provide freelance recruitment and digital payment platforms, along with private sector companies that may intentionally or inadvertently recruit, hire, or facilitate the hiring of DPRK IT workers, with information and tools to counter the risks associated with these activities.
>
> Hiring or supporting the activities of DPRK IT workers poses many risks, ranging from theft of intellectual property, data, and funds to reputational harm and legal consequences, including sanctions under both United States and United Nations authorities.
>
> The advisory provides detailed information on how DPRK IT workers operate and identifies red flags to help companies avoid hiring them and identify those who may already be abusing their services. Additionally, it provides information about relevant United States and United Nations sanctions, including a non-exhaustive list of activities for which persons could be sanctioned by the U.S. government.

The Advisory is available at https://ofac.treasury.gov/sanctions-programs-and-country-information/north-korea-sanctions.

On November 8, 2022, OFAC designated two individuals under E.O. 13722 for engaging in transportation and procurement activities on behalf of the DPRK: Ri Sok and Yan Zhiyong. 87 Fed. Reg. 68,580 (Nov. 15, 2022). See State Department press statement is available at https://www.state.gov/disrupting-dprk-logistical-and-financial-networks-supporting-unlawful-weapons-programs/. At the same time, OFAC re-

designated Tornado Cash, a virtual currency mixer, under E.O. 13722 "for providing material support to the Lazarus Group, whose malicious cyber activities have supported the DPRK's weapons of mass destruction program" and under E.O. 13694. 87 Fed. Reg. 68,578 (Nov. 15, 2022). See section 11, *supra*.

(1) UN Security Council resolutions

On December 22, 2022, Ambassador Linda Thomas-Greenfield issued a statement on Russia's use of weapons illegally acquired from the DPRK. The remarks are excerpted below and available at https://usun.usmission.gov/statement-by-ambassador-linda-thomas-greenfield-on-russias-use-of-weapons-illegally-acquired-from-the-dprk-and-iran-in-its-brutal-war-against-ukraine/.

* * * *

It is despicable that Russia, a permanent member of the UN Security Council, is now using weapons procured from the DPRK and Iran – in violation of UN Security Council resolutions – to pursue its war of aggression against Ukraine.

The United States can confirm that the DPRK has completed an initial arms delivery to the Russian private military company known as Wagner, which paid for the equipment and currently has thousands of troops deployed to Ukraine. Last month the DPRK delivered infantry rockets and missiles into Russia for use by Wagner. In part because of our sanctions and export controls, Wagner is searching around the world for arms suppliers to support its military operations in Ukraine. We assess that the amount of materiel delivered to Wagner will not change battlefield dynamics in Ukraine, but we are concerned that the DPRK is planning to deliver more military equipment to Wagner.

For years, the Kremlin has used the Wagner Group to support its dangerous and destabilizing foreign policy while attempting to maintain deniability in the Middle East, Africa, and Ukraine. Wagner's purchase of weapons from the DPRK to wreak destruction in Ukraine also contributes to instability on the Korean peninsula by giving the DPRK funds it can use to further develop its prohibited weapons of mass destruction and ballistic missile programs. These transfers occur as Pyongyang has launched an unprecedented number of ballistic missiles this year – a serious violation of multiple Security Council resolutions for which the Security Council must hold the DPRK accountable. Russia is not only defending the DPRK as it engages in unlawful and threatening behavior, Russia is now a partner to such behavior.

The United States intends to raise the DPRK's and Russia's violations of UN Security Council resolutions in future meetings of the Security Council and will share information of this violation with the Council's 1718 Sanctions Committee. We also continue to call on the UN Secretariat to send a team to Ukraine to investigate Russia's and Iran's violations of UN Security Council Resolution 2231, Annex B, especially given Russia's renewed use this month of Iranian drones against Ukraine's infrastructure.

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(*2*) *Nonproliferation Sanctions*

On January 12, 2022, OFAC designated the following five individuals under E.O. 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters:" Myong Hyon CHOE; Chol Hak KANG; Song Hun KIM; Kwang Chol PYON; and Kwang Sok SIM. 87 Fed. Reg. 6242-43 (Feb. 3, 2022). The State Department press statement announcing the designations is available at https://www.state.gov/united-states-designates-entities-and-individuals-linked-to-the-democratic-peoples-republic-of-koreas-dprk-weapons-programs/ and includes the following:

> These designations convey our serious and ongoing concern about the DPRK's continued proliferation activities and those who support it. The United States will use every appropriate tool to address the DPRK's WMD and ballistic missile programs, which constitute a serious threat to international peace and security and undermine the global nonproliferation regime.
>
> Specifically, the U.S. Department of State has designated one DPRK individual, one Russian individual, and one Russian entity that have engaged in activities or transactions that have materially contributed to the proliferation of WMD or their means of delivery by DPRK.
>
> Between at least 2018 and 2021, Russia-based DPRK national O Yong Ho has procured and engaged in efforts to procure missile-applicable items from third countries on behalf of the DPRK's missile program, including aramid fiber, stainless steel tubes, and ball bearings on behalf of the Rocket Industry Department (aka Ministry of Rocket Industry), which is subordinate to the DPRK's UN- and U.S.-designated Munitions Industry Department.

The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0555.

On April 1, 2022, OFAC designated five entities under E.O. 13382: MINISTRY OF ROCKET INDUSTRY; HAPJANGGANG TRADING CORPORATION; KOREA ROUNSAN TRADING CORPORATION; SUNGNISAN TRADING CORPORATION; and UNCHON TRADING CORPORATION. 87 Fed. Reg. 20,515-16 (Apr. 7, 2022).

On May 27, 2022, the State Department announced in a press release, available at https://www.state.gov/united-states-targets-the-dprks-ballistic-missile-and-weapons-of-mass-destruction-programs/, sanctions targeting DPRK's escalatory ballistic missile launches, under E.O. 13382 and E.O. 13722. 87 Fed. Reg. 33,877-79 (Jun. 3, 2022). The press statement includes the following:

> The Democratic People's Republic of Korea's (DPRK's) series of escalatory ballistic missile launches – including six intercontinental ballistic missile tests this

year alone – are in blatant violation of UN Security Council resolutions and pose a grave threat to regional stability and international peace and security.

Today, the United States is designating for sanctions Air Koryo Trading Corporation, a DPRK entity that has provided or attempted to provide support to the U.S.-designated DPRK Ministry of Rocket Industry; Jong Yong Nam, a DPRK representative for an organization subordinate to the UN- and U.S.-designated Second Academy of Natural Sciences; and Bank Sputnik, a Russian bank that has assisted the UN- and U.S.-designated Foreign Trade Bank, pursuant to Executive Order 13382, which targets proliferators of weapons of mass destruction and their means of delivery. The United States is also sanctioning Far Eastern Bank, a Russian bank, pursuant to E.O. 13722, which targets the DPRK government and certain activities in the DPRK.

We are taking these actions in response to the DPRK's ongoing development of its weapons of mass destruction (WMD) and ballistic missile programs in violation of multiple United Nations Security Council resolutions. As a result of today's sanctions, any property or interests in property of the designated persons in the possession or control of U.S. persons or entities or within the United States must be blocked, and U.S. persons are prohibited from dealing with any of the designated parties.

The Treasury Department press release is available at https://home.treasury.gov/news/press-releases/jy0801.

On October 7, 2022, OFAC imposed sanctions on two individuals, Kwek Kee Seng and Chen Shih Huan, and three entities, New Eastern Shipping Co Ltd.; Anfsar Trading (S) Pte. Ltd.; and Swanseas Port Services Pte. Ltd. "connected to the delivery of refined petroleum to the DPRK, an action which directly supports the development of DPRK weapons programs and its military." 87 Fed. Reg. 62,182-83 (Oct. 13, 2022). See the State Department press release available at https://www.state.gov/designating-dprk-related-sanctions-evaders/.

k. Zimbabwe

On September 15, 2022, OFAC designated Stephen MUTAMBA under E.O. 13469, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." 87 Fed. Reg. 57,752-53 (Sep. 21, 2022). At the same time, OFAC determined that the following persons should be removed from the SDN List: Kenneth MANYONDA; Edwin MUGUTI; Selina POTE; Morris SAKABUYA; Absolom SIKOSANA; Biggie Joel MATIZA; Simon Khaya MOYO; Tendai SAVANHU; Perence SHIRI; Paradzai ZIMONDI; and Olivia Nyembezi MUCHENA.

On December 12, 2022, OFAC removed 17 individuals from the SDN List and designated four Zimbabwean individuals and two entities. Sandra Mpunga, Nqobile Magwizi, Obey Chimuka, and two entities, Fossil Agro, and Fossil Contracting, pursuant to Executive Order (E.O.) 13469, for their ties to previously designated Kudakwashe

Tagwirei and his company, Sakunda Holdings. Additionally, OFAC is designating Emmerson Mnangagwa, Jr., the Zimbabwean president's son, pursuant to E.O. 13391. The State Department press statement on these designations and removals is available at https://www.state.gov/updates-to-the-zimbabwean-sanctions-program/.

I. Somalia

On February 8, 2022, Secretary Blinken announced the implementation of a policy under Section 212(a)(3)(C) of the Immigration and Nationality Act that restricts visa issuance for individuals undermining the democratic process in Somalia. Secretary Blinken's press statement on the announcement is available at https://www.state.gov/promoting-sustainable-peace-and-responsive-governance-in-somalia/ and excerpted below.

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Today, on the one-year anniversary of the expiration of the Somali president's term in office, I am announcing the implementation of a policy under Section 212(a)(3)(C) of the Immigration and Nationality Act that restricts the issuance of visas to current or former Somali officials or other individuals who are believed to be responsible for, or complicit in, undermining the democratic process in Somalia, including through violence against protestors, unjust arrests or intimidation of journalists and opposition members, and manipulation of the electoral process. Immediate family members of such persons may also be subject to these restrictions.

This policy will apply to individuals who have played a role in procedural irregularities that have undermined the electoral process, who have failed to follow through with their obligations to implement timely and transparent elections, and who have targeted journalists and opposition party members with harassment, intimidation, arrest, and violence.

Somalia's national and federal member state leaders must follow through on their commitments to complete the parliamentary process in a credible and transparent manner by February 25, which will further lay the groundwork for responsive governance in Somalia. The United States strongly supports the Somali people, and we are committed to working together to advance democracy and mutual prosperity for both of our countries.

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On March 16, 2022, Secretary Blinken announced additional visa restrictions on Somali individuals under the policy announced on February 8, under Section 212(a)(3)(C) for undermining the democratic process in Somalia. A press statement is available at https://www.state.gov/additional-visa-restrictions-for-undermining-the-democratic-process-in-somalia/ and excerpted below.

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Following the government of Somalia's failure to meet another self-established deadline of March 15 for the completion of its parliamentary electoral process, the United States is expanding the number of Somali individuals subject to visa restrictions.

I am taking this action pursuant to a policy I announced on February 8, under Section 212(a)(3)(C) of the Immigration and Nationality Act, to restrict the issuance of visas for those believed to be responsible for, or complicit in, undermining the democratic process in Somalia.

While encouraging progress has been made over the past few weeks, there are still more than three dozen unfilled parliamentary seats. There are continued credible reports of procedural irregularities. Journalists and opposition party members working to support democratic institutions and transparent processes have been targeted with harassment, intimidation, arrest, and violence.

We will continue to evaluate additional designations under this policy and other tools at our disposal to promote accountability and support the rapid conclusion of Somalia's electoral process in a credible and transparent manner.

* * * *

On November 17, 2022, the United States submitted for the record its explanation of vote on the adoption of a UN Security Council resolution on the 751 Somalia Sanctions Regime. The U.S. statement is available at https://usun.usmission.gov/explanation-of-vote-at-the-un-security-council-adoption-of-the-751-somalia-sanctions-regime/ and excerpted below.

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The United States is pleased to vote in favor of the extension of the Somalia Panel of Experts mandate and the renewal of the arms embargo, travel ban, and asset freeze measures for a further 12 months. We welcome the Federal Government of Somalia's commendable progress on weapons and stockpile management. The modifications in this resolution reflect that significant progress. We hope that such progress continues, which would allow for the further easing of the arms embargo.

The sanctions regime adopted today is tailored to the Somali context to support and enable robust action by the Federal Government of Somalia through its three-part strategy to combat al-Shabaab in conjunction with its partnership and collaboration with the international community to deprive al-Shabaab of resources, thwart the group's exploitation of the financial system, curb its terror activities, and address the underlying drivers of the longstanding conflict in Somalia.

We urge all UN Member States to implement existing Security Council Resolution 751 concerning Al-Shabaab including measures to help curb al-Shabaab's ability to access funds, weapons, and other support it needs to carry out attacks, while supporting Somalia's security and police institutions with the resources they need to combat terrorism and secure their citizens.

We further urge all UN Member States to support designations of individuals, groups, and their supporters in the Security Council Committee pursuant to Resolution 751 concerning

Al-Shabaab. These designations demonstrate that the international community will support accountability and end impunity for those who undermine peace and security in Somalia. We are committed to the Somali people and will continue to work closely with the Federal Government of Somalia, fellow Council members, and all stakeholders to facilitate peace for the country and the region.

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m. Haiti

On October 12, 2022, Secretary Blinken announced a new visa restriction policy under 212(a)(3)(C) of the Immigration and Nationality Act against Haitian officials and other individuals, and their immediate family members, involved in "the operation of street gangs and other Haitian criminal organizations that have threatened the livelihoods of the Haitian people and are blocking life-saving humanitarian support." Secretary Blinken also announced a draft UN Security Council resolution proposing additional sanctions measures. Secretary Blinken's press statement announcing the new policy is available at https://www.state.gov/steps-to-address-the-humanitarian-and-security-situation-in-haiti/ and includes the following.

> We are also announcing a new visa restriction policy under section 212(a)(3)(C) of the Immigration and Nationality Act against Haitian officials and other individuals involved in the operation of street gangs and other Haitian criminal organizations that have threatened the livelihoods of the Haitian people and are blocking life-saving humanitarian support. Such actions may also apply to these individuals' immediate family members.
>
> At this time, the Department is identifying an initial group of individuals and their immediate family members who may be subject to visa restrictions under this policy. Our intent in imposing these visa restrictions is to demonstrate that there are consequences for those instigating violence and unrest in the country, while we continue to support the citizens, organizations, and public servants in Haiti who are committed to generating hope and opportunity for a better future in their nation.
>
> Building on UN Security Council resolution 2645, we have drafted with our close partner and co-penholder Mexico a resolution proposing specific sanctions measures to enable the international community to address the many challenges facing the people of Haiti. We introduced this resolution last week and are negotiating with other UN Security Council members ahead of a vote.

On October 21, 2022, the UN Security Council unanimously adopted Resolution 2653, establishing a sanctions regime on Haiti. See U.N. Doc. S/RES/2652, available at https://undocs.org/S/RES/2653. The resolution was co-drafted by the United States and Mexico and imposes a targeted arms embargo as well as a travel ban, asset freeze. Ambassador Linda Thomas-Greenfield delivered the U.S. statement following the

adoption of Resolution 2653.The October 21, 2022 remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-the-un-security-council-debate-on-haiti/.

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As co-penholders of this resolution, the United States and Mexico would like to jointly thank Council members for their thorough and expedient review and consultations. By adopting this resolution, we have taken an important step to help the Haitian people. After robust and inclusive negotiations, I feel this resolution is truly reflective of Council consensus. Even operating under the accelerated timeframe, we were able to incorporate the views of all members of this Council.

This resolution is an initial answer to the calls for help from the Haitian people. They want us to take action against criminal actors, including gangs and their financiers, who have been undermining stability and expanding poverty in their vibrant society. In response, this Council sanctioned one of the country's most notorious gang leaders. A gang leader whose actions have directly contributed to the humanitarian crisis that has caused so much pain and suffering to the people of Haiti.

We are sending a clear message to the bad actors that are holding Haiti hostage: The international community will not stand idly by while you wreak havoc on the Haitian people. Sanctions are at their most effective when they are targeted specifically towards bad actors and allow humanitarian aid to reach civilian populations. The resolution we adopted today accomplishes both these objectives. We have also worked to incorporate clear, measurable, and well-defined methods to periodically review the efficacy of these sanctions. And I thank my colleagues for their strong voices on this matter.

We have laid a great foundation for future action to stymie criminal actors and those who finance and support them. But colleagues, I want to stress today's adoption of this resolution is only the first step. We have much more work to do. Now that this Council has taken deliberate and decisive action to send a strong signal to the gangs and those who fund them through new targeted sanctions, we must build on these efforts to address another immediate challenge: to help restore security and alleviate the humanitarian crisis in Haiti.

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B. EXPORT CONTROLS

1. Debarments

On August 10, 2022, the U.S. Department of State provided notice of ten 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 ten persons by a court of the United States. 87 Fed. Reg. 48,748 (Aug. 10, 2022). The persons are:

> (1) Awer, Akeem Shonari; February 14, 2020; Southern District of Florida; 1:19–cr–20564; December 1990.
> (2) Cabalceta, Oben; September 18, 2019; District of New Jersey; 1:19–cr–00296; May 1965.
> (3) Camaj, Rrok Martin; February 28, 2020; Eastern District of Michigan; 2:19–cr–20403; July 1985.
> (4) Guerra, Claudia; March 4, 2019; Southern District of Texas; 1:18–cr– 00622; January 1992.
> (5) Sin, Aydan; a.k.a. Hon Chak Gordon Sin; a.k.a. Andy Sin; a.k.a. Bullion Sin; October 05, 2021; Western District of New York; 1:17–cr–00090; January 1972.
> (6) Sobrado, Roger; September 5, 2019; District of New Jersey; 1:18–cr– 00615; May 1970.
> (7) Wang, Shaohua; a.k.a. Eric Wang; February 3, 2020; Southern District of the California; 3:19–cr–01895; September 1982.
> (8) Wang, Ye Sang; a.k.a. Ivy Wang; December 21, 2021; Southern District of California; 3:19–cr–01895; September 1984.
> (9) Xie, Tuqiang; a.k.a. Tony Xie; March 30, 2022; Northern District of Illinois; 1:19–cr–00664; March 1962.
> (10) Zhang, Jian; December 30, 2020; District of Arizona; 2:18–cr–01236; January 1976..

See also State Department media note, available at https://www.state.gov/u-s-department-of-state-debars-ten-persons-for-violating-or-conspiring-to-violate-the-arms-export-control-act/.

2. Administrative Settlements

In a January 31, 2022 media note, available at https://www.state.gov/u-s-department-of-state-concludes-840000-settlement-of-alleged-export-violations-by-torrey-pines-logic-inc-and-dr-leonid-b-volfson/, the State Department announced the conclusion of a $840,000settlement of alleged export violations by Torrey Pines Logic, Inc. (TPL) of San Diego, California and Dr. Leonid B. Volfson. Unauthorized exports at issue include ITAR-controlled defense articles to various countries, including the People's Republic of China and Lebanon.
The media note states:

> Under the terms of the 36-month Consent Agreement, TPL and Dr. Volfson will pay a civil penalty of $840,000. The Department has agreed to suspend

> $420,000 of this amount on the condition that the funds will be used for Department-approved Consent Agreement remedial compliance measures to strengthen TPL's compliance program. In addition, for the duration of the Consent Agreement, an external Special Compliance Officer will be engaged by TPL to oversee the Consent Agreement, which will also require the company to conduct one external audit of its compliance program and implement additional compliance measures.

In an August 26, 2022 media note, available at https://www.state.gov/u-s-department-of-state-concludes-settlements-of-alleged-export-violations-by-ryan-adams-marc-baier-and-daniel-gericke/, the State Department announced administrative settlements with Ryan Adams, Marc Baier, and Daniel Gericke, respectively, 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 this case included unauthorized furnishing of defense services involving electronic systems, equipment, and software that were specially designed for intelligence purposes that collect, survey, monitor, exploit, analyze, or produce information from the electromagnetic spectrum to foreign persons in the United Arab Emirates. The media note summarizes the agreement as follows:

> Under the terms of the Consent Agreements, Mr. Adams, Mr. Baier, and Mr. Gericke will be administratively debarred and thereby prohibited from participating directly or indirectly in any activities subject to the ITAR for three years.

3. Litigation: *Washington v. Department of State* and *Defense Distributed*

To properly contextualize the 2022 developments in the *Defense Distributed* cases, some background from prior years must be introduced. For a more detailed background on the *Defense Distributed* case, see *Digest 2015* at 680–84, *Digest 2016* at 668–75, *Digest 2019* at 578–79, *Digest 2020* at 629, and *Digest 2021* at 695-701. The *Defense Distributed* 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 announced it planned to transfer export control jurisdiction of certain firearms to the Department of Commerce with its final rule of January 23, 2020 (85 Fed. Reg. 3819), and that consequently associated ITAR restrictions on publishing technical data online to prevent foreign persons from viewing it would change, a district court in Washington State issued a preliminary injunction in March 2020 in response to a suit by several states led by the State of Washington. The injunction stopped the transfer of the export control jurisdiction the Department had already planned and also happened to agree to in a settlement agreement in prior *Defense Distributed* litigation. The injunction was appealed to the Ninth Circuit and following an April 2021 opinion and mandate vacating the injunction, the State

Department published a notice in the Federal Register announcing that the transfer had taken full effect.

In addition, in late 2020 the Department was brought in as an additional Defendant in the Western District of Texas in a suit brought by the same Plaintiffs claiming the State Department breached its settlement agreement and asking the court for declaratory and injunctive relief to stop the State Department from regulating the export of 3D-gun files. *Def. Distributed v. Grewal*, No. 18-cv-637 (W.D.Tex.).

Meanwhile, the same district court in Texas, in April 2021, granted the motion of the preexisting Defendant, the New Jersey Attorney General (NJ AG), to sever and transfer the claims against them 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.

While the appeal of the transfer of the claims against the NJ AG was appealed Defense Distributed plaintiffs filed a temporary restraining order against the remaining Defendant, the State Department, in late April 2021, which was denied, and then filed a motion for a preliminary injunction in May 2021. The same day that the Ninth Circuit mandate issued in the case referenced above, the State Department filed a suggestion of mootness in the *Defense Distributed* case, and the Plaintiffs later withdrew their preliminary injunction. The State Department was then left with the amended complaint adding claims against it as a new defendant from late 2020 and filed a motion to dismiss in late July 2021.On April 1, 2022, the Fifth Circuit concluded that the district court's order severing and transferring of the claims against the New Jersey Attorney General to the District of New Jersey was a clear abuse of discretion giving rise to an appropriate exercise of the court's mandamus power. *Def. Distributed v. Bruck,* 30 F.4th 414 (5th Cir. 2022). The Court granted the petition for writ of mandamus and directed the district court to vacate the order severing and transferring Defense Distributed's claims against the New Jersey Attorney General to the United States District Court for the District of New Jersey. The Fifth Circuit also instructed the district court to request that the District of New Jersey return the transferred case to the Western District of Texas, Austin Division; and, after transfer, to reconsolidate Defense Distributed's case against the New Jersey Attorney General back into the case still pending against the State Department. In July 2022, the New Jersey district court refused to transfer the claims back to the Western District of Texas, finding that public interest factors did not support the transfer request, and not changing its mind on a motion for reconsideration. *Def. Distributed v. Platkin*, 617 F. Supp. 3d 213, 240 (D.N.J. 2022), r*econsideration denied*, No. CV 19-04753 (FLW), 2022 WL 14558237 (D.N.J. Oct. 25, 2022). Defense Distributed Plaintiffs moved for a preliminary injunction anyway against the NJ AG, and the district court denied that relief, and the Fifth Circuit affirmed that judgment. *Def. Distributed v. Platkin*, 55 F. 4th 846 (2022).

Throughout all of that related activity as to the claims against the NJ AG, the State Department's motion to dismiss the 2020-filed claims against it was left undecided by the Western District of Texas court in 2022.

Cross References

U.S. Passports Invalid for Travel to North Korea, **Ch. 1.A.6**
E.O. 14078, "Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home," **Ch. 2.A.3.b**
*Extradition of Former President Juan Orlando Hern*ández, **Ch. 3.A.5**
Determinations of countries not fully cooperating with U.S. antiterrorism efforts, **Ch. 3.B.2.b**
Designations of Foreign Terrorist Organizations ("FTOs"), **Ch. 3.B.2.d**
Narcotics, **Ch. 3.B.3.b**
Corruption, **Ch. 3.B.5**
Organized Crime, **Ch. 3.B.6**
Crystallex v. Venezuela*,* **Ch. 5.A.1**
UN 3C statements on sanctions (including comments on a humanitarian sanctions carveout), **Ch. 6.A.5**
HRC on sanctions, **Ch. 6.A.6**
HRC on Xinjiang, **Ch. 6.A.6.c&d**
Forced labor in China, **Ch. 6.F**
Repression of rights in Iran, **Ch. 6.J.2**
Repression of rights in Nicaragua, **Ch. 6.J.3**
Media freedom in Hong Kong, **Ch. 6.K.1**
Media freedom in Russia, **Ch. 6.K.1**
UN resolutions related to Russia's aggression against Ukraine, **Ch. 7.A.5**
Comments on UN sanctions at UN 6C, **Ch. 7.A.6.a**
OAS on repression in Nicaragua, **Ch. 7.D.2**
Resolution of Sudan claims, **Ch. 8.B**
Somalia, **Ch. 9.A.1**
South Sudan, **Ch. 9.A.3**
Haiti, **Ch. 9.A.4**
Libya, **Ch. 9.A.5**
Burma, **Ch. 9.A.7**
Cengiz v. Bin Salman *(case related to the murder of Jamal Khashoggi)*, **Ch. 10.B.1**
Forced Diversion of Ryanair Flight to Minsk, **Ch. 11.A.2**
Syria, **Ch. 17.B.3**
Ethiopia, **Ch. 17.B.7**
Atrocities in Burma, **Ch. 17.C.3**
Atrocities in Northern Ethiopia, **Ch. 17.C.4**
Atrocities in Ukraine, **Ch. 17.C.5**
Actions in Response to Iran and Iran-Backed Militia Groups, **Ch. 18.A.4**
Ukraine, **Ch. 18.A.6.a(ii)**
Cyber attacks against Ukraine, **Ch. 18.A.6.c**
Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

1. Israeli-Palestinian Affairs

On August 8, 2022, Secretary Antony J. Blinken issued a press statement welcoming the ceasefire agreement in Gaza and Israel. The press statement follows and is available at https://www.state.gov/welcoming-the-ceasefire-agreement-in-gaza-and-israel/.

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…The agreement will bring a welcome respite to Israeli and Palestinian civilians and permit deliveries of critical fuel and other supplies into Gaza. We express our condolences to the families of civilians who lost their lives or were injured.

The United States is deeply grateful for the unstinting efforts by Egypt in helping to mediate this agreement. We also commend the important roles played by Qatar, UN Special Envoy Wennesland, Jordan, and the Palestinian Authority over recent days. Our team worked around the clock with the parties to support this outcome.

The United States remains dedicated to our ironclad commitment to Israel's security and will remain fully engaged in the days ahead to promote calm. We will continue in the months ahead to work with partners to improve the quality of life for Palestinians in the Gaza Strip. Palestinians and Israelis deserve to live safely and securely and to enjoy equal measures of freedom, prosperity, and democracy.

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Ambassador Linda Thomas-Greenfield, U.S. Representative to the United Nations, delivered remarks on September 28, 2022 at a UN Security Council Briefing on the situation 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-a-un-security-council-briefing-on-the-situation-in-the-middle-east-8/.

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From day one, the Biden Administration has been unequivocal in our support for a two-state solution. That has not changed. As President Biden made clear to the UN General Assembly last week, "A negotiated two-state solution remains…the best way to ensure Israel's security and prosperity for the future and give the Palestinians the state…to which they are entitled."

And we are not alone in pushing for such a peace. In fact, the hall of the General Assembly was filled with calls for a two-state solution during High-Level Week. Prime Minister Lapid made a courageous and impassioned speech that articulated his vision of "two states for two peoples." The significance of his appeal for peace between Israelis and Palestinians should not be underestimated.

And I also want to acknowledge President Abbas's stated commitment to non-violence and reaffirmation of his support for a two-state solution.

Now, it is time to turn these words into action. To make real, sustained progress. It is incumbent on both parties to work in good faith toward two states for two peoples. There are no short-cuts to statehood. In this vein, we strongly oppose unilateral actions that exacerbate tensions and move us further away from a two-state solution – that move us further away from peace.

This includes terrorist attacks and incitement to violence against Israelis. This includes plans to develop Har Gilo west, which would further fragment the West Bank – and possible demolitions in Masafer Yatta. And this includes violence inflicted by Israeli settlers on Palestinians in their neighborhoods, and in some cases escorted by Israeli Security Forces. I'll also note that the United States is concerned about increasing tensions and violence in the West Bank among Palestinians, including the recent clashes in Jenin and Nablus. We are troubled by the overall trend of growing violence.

Instability in the West Bank is neither in the interests of Israel nor the Palestinian people. We call on both sides to work toward peace without delay.

The United States is doing its part to help. This July, while in the region, President Biden announced a number of measures to improve conditions for the Palestinian people in the West Bank and Gaza, including additional funding for UNRWA. We're now working to expand 4G digital connectivity to Gaza and the West Bank and improve accessibility to the Allenby Bridge. And we encourage the Government of Israel to move these projects forward quickly.

But we cannot do this alone. We strongly urge countries who espouse support for the Palestinian people to translate that conviction into concrete improvements on the ground. And we call on the Palestinian Authority to ensure respect for human rights – and refrain from making payments to those who harm Israelis. A strong and legitimate Palestinian Authority is in the interest of the entire region.

Before I close, I want to make note of the historic visit by the UAE Foreign Minister to Israel earlier this month. The United States will continue working with Israel and its neighbors to expand relationships across the region. And we will strive to ensure these new relationships also benefit the Palestinians.

Colleagues, even if present circumstances don't lend themselves to negotiation, we must not retreat into cynicism. The international community can and must take steps to achieve conditions conducive to negotiating a two-state solution. This will be a real challenge, but it's a

challenge we must take on together. The United States will not hesitate to work with our partners to build a brighter and more peaceful future.

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2. Israel-Lebanon Maritime Boundary Dispute

As discussed in *Digest 2020* at 481-82 and *Digest 2021* at 509, the Governments of Israel and Lebanon engaged in discussions on their maritime boundary with the United States serving as a facilitator. On October 11, 2022, President Biden announced that Israel and Lebanon agreed to formally end the dispute. The remarks are available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/11/statement-by-president-joe-biden-on-breakthrough-diplomacy-in-the-middle-east/ and excerpted below.

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Today, I am pleased to announce a historic breakthrough in the Middle East. After months of mediation by the United States, the Governments of Israel and Lebanon have agreed to formally end their maritime boundary dispute and establish a permanent maritime boundary between them. I have just spoken with the Prime Minister of Israel, Yair Lapid, and the President of Lebanon, Michel Aoun, who confirmed the readiness of both governments to move forward with this agreement. I want to also thank President Emmanuel Macron of France and his government for their support in these negotiations.

Energy—particularly in the Eastern Mediterranean—should serve as the tool for cooperation, stability, security, and prosperity, not for conflict. The agreement announced by both governments today will provide for the development of energy fields for the benefit of both countries, setting the stage for a more stable and prosperous region, and harnessing vital new energy resources for the world. It is now critical that all parties uphold their commitments and work towards implementation.

This agreement also protects Israel's security and economic interests critical to promoting its regional integration. It provides Lebanon the space to begin its own exploitation of energy resources. And it promotes the interests of the United States and the American people in a more stable, prosperous, and integrated Middle East region, with reduced risks of new conflicts.

I want to thank our diplomats and everyone across the U.S. government, past and present, who have worked tirelessly on this bipartisan issue throughout the years. Persistent U.S. diplomacy, paired with the openness of Israeli and Lebanese leaders to negotiate, consult, and ultimately choose what was in the best interests of their people, led to this breakthrough.

I congratulate everyone involved.

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On October 27, 2022, President Biden congratulated the governments of Israel and Lebanon for finalizing the agreement establishing a permanent maritime boundary. The remarks are available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/27/statement-by-president-joseph-r-biden-jr-on-the-conclusion-of-the-israel-lebanon-maritime-boundary-dispute/. The October 27, 2022 State Department press statement marking the conclusion of the agreement is available at https://www.state.gov/historic-agreement-establishing-a-permanent-israel-lebanon-maritime-boundary/.

3. The Negev Forum

On March 28, 2022, Secretary Blinken participated in the Negev Summit in Sde Boker, Israel with six foreign ministers from Israel, Bahrain, Egypt, Morocco, and United Arab Emirates. It was decided during the Summit to make the Negev Summit into a permanent forum. The joint press statements of the foreign ministers at the conclusion of the Negev Summit is available at https://www.state.gov/secretary-antony-j-blinken-joint-press-statements-at-the-conclusion-of-the-negev-summit/. Secretary Blinken's March 28, 2022 remarks include the following:

> The United States has and will continue to strongly support a process that is transforming this region and beyond. We'll help to strengthen the bonds between Israel and its circle of friends, both those with which it has normalization agreements and those with which it has longstanding peace treaties, like Egypt and Jordan.

On June 27, 2022, the Governments of the United States of America, Bahrain, Egypt, Israel, Morocco, and the United Arab Emirates released a joint statement on the outcomes of the inaugural meeting of the Negev Forum Steering Committee. The State Department issued the joint statement as a media note, which is excerpted below and available at https://www.state.gov/negev-forum-steering-committee-joint-statement/.

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Further to the Negev Summit, held in Sde Boker, Israel in March of this year, at which it was decided to form a framework for regional cooperation (the Negev Forum), the Governments of Bahrain, Egypt, Israel, Morocco, the United Arab Emirates, and the United States, represented by senior officials from their respective foreign ministries, held the inaugural meeting of the Negev Forum Steering Committee in Manama, Bahrain on June 27, 2022. The Committee's main objective is to further coordinate our collective efforts and advance a common vision for the region. In this context, we outlined a framework document for the Negev Forum, setting out the objectives of the Forum, and the working methods of its four-part structure: the Foreign Ministers' Ministerial, the Presidency, the Steering Committee, and the Working Groups.

This meeting demonstrates the strength of our relations, our shared commitment to cooperation, and the important opportunities unlocked by improved relations between Israel and its

neighbors, showing what can be achieved by working together to overcome shared challenges. The participants also affirmed that these relations can be harnessed to create momentum in Israeli-Palestinian relations, towards a negotiated resolution of the Israeli-Palestinian conflict, and as part of efforts to achieve a just, lasting and comprehensive peace.

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The Negev Forum Steering Committee released the Negev Forum Regional Cooperation Framework, adopted on November 10, 2022. The framework is available at https://www.mofaic.gov.ae/-/media/Negev%20Forum%20Framework%20-%20Adopted%20November%2010%202022. The framework codifies "the structure and goals of the Forum and recognizing the potential to build networks of cooperation to advance common interests, regional stability, and prosperity in the Middle East." See Secretary Blinken's January 10, 2023 press statement, available at https://www.state.gov/the-negev-forum-working-groups-and-regional-cooperation-framework/.

B. PEACEKEEPING AND CONFLICT RESOLUTION

1. General

On September 6, 2022, Ambassador Jeffrey DeLaurentis, senior advisor for special political affairs, delivered the U.S. statement at a UN Security Council briefing on peacekeeping operations. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-peacekeeping-operations/.

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The United States is deeply committed to UN peacekeeping. To ensure the success of peacekeeping operations, it is clear that all stakeholders must fulfill their responsibilities. To further the capacity of peacekeepers to effectively implement the mandates given to them by this Council, and to promote peacekeeper safety and security, the United States continues to work both within the UN system and bilaterally to promote peacekeeping leadership, performance, and accountability across missions.

Improving peacekeeping performance is an integral part of the Secretary-General's "Action for Peacekeeping" and "Action for Peacekeeping Plus" agenda and UN Security Council Resolution 2436 shows it is a priority for the Council, as well.

One of the most important responsibilities of today's integrated and multidimensional peacekeeping missions is the protection of civilians. We welcome that the Secretary-General's "Action for Peacekeeping" and "Action for Peacekeeping Plus" initiatives prioritize protection of civilians, as well as performance and accountability; conduct and discipline; and women, peace, and security initiatives.

These efforts further a mission's ability to be as efficient and effective as possible and to identify and secure appropriate resources, training, equipment, and personnel to carry out the mandates authorized by those of us around this table.

All of us around this table can play a part in enhancing peacekeeper safety and effective mandate implementation, by giving peacekeeping missions realistic and achievable mandates. We can also support efforts to ensure missions have the necessary resources and capabilities to fully carry out their mandated tasks in complex, fragile environments.

Of course, robust training and equipment are necessary, but not sufficient on their own to improve performance and effectiveness. It is essential that all UN personnel meet UN performance standards, while maintaining the highest standards of conduct. This especially means adherence to the Secretary-General's zero-tolerance policy on sexual exploitation and abuse. Those who do not meet such standards should be held accountable, including by the relevant troop- and police-contributing countries. Those who have been victimized deserve to know those responsible will face consequences for their actions.

Accountability, however, is a two-way street, and "Action for Peacekeeping" reminds us that we are also accountable to peacekeepers, and, to that end, we must do everything possible to improve the safety, security, and well-being of our peacekeepers. Improved performance across the board provides safety and security to peacekeepers everywhere and is in everyone's interest.

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2. Afghanistan

On April 8, 2022, the State Department issued as a media note the Communiqué of the Special Representatives and Envoys for Afghanistan, available at https://www.state.gov/communique-of-the-special-representatives-and-envoys-for-afghanistan/. Special envoys and special representatives of the United States of America, European Union, France, Germany, Italy, Norway, and the United Kingdom met in Brussels on April 5, 2022 to discuss the situation in Afghanistan. They issued the following communiqué.

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The Special Representatives and Envoys:

1. Reaffirmed their strong commitment to the Afghan people and the need to continue to address the humanitarian crisis in Afghanistan; the importance of adherence to International Humanitarian Law and the independence of humanitarian operations; stressed the importance of all humanitarian staff, including female staff, having unhindered access to any areas of the country necessary to perform their jobs effectively and the need for all Afghans in need to have unhindered access to humanitarian aid; and called for any remaining obstacle to the provision of humanitarian assistance to be removed immediately.
2. Condemned the Taliban's decision on 23 March 2022 to continue denying Afghan girls the ability to attend secondary education, which contradicts the Taliban's assurances to the Afghan people and to the international community; affirmed that every Afghan citizen, in all

provinces of the country and regardless of gender, has an equal right to education at all levels; called for an immediate reversal of the ban on education for girls above grade 6; and emphasised that the type and scope of international donor assistance will depend, among other things, on the right and ability of girls to attend equal education at all levels.

3. Noted that their governments and organisations had already substantially increased humanitarian and basic needs support, including for healthcare, to the Afghan people to mitigate Afghanistan's humanitarian and economic crisis and to ensure the continuation of basic services. Highlighted that 2.23 billion EUR were raised at the international humanitarian pledging conference on 31 March 2022, and nearly two thirds (1.42 billion EUR) of this total came from the combined pledges of the EU, EU Member States, Norway, the United Kingdom and the United States.
4. Reaffirmed that progress towards normalised relations between the Taliban and the international community will depend mostly on the Taliban's actions and their delivery on commitments and obligations to the Afghan people and to the international community.
5. Raised strong concerns about the continued structural and systemic abuse of Afghans' economic, social, legal, political and cultural rights, recognised in the international conventions to which Afghanistan is a State Party, including rights of ethnic and religious minorities and groups; and noted that such violations and abuses include killings, arbitrary detentions, enforced disappearances, physical abuse, torture, and the shrinking space for civil society, freedom of peaceful assembly and of movement.
6. Specifically condemned violations and abuses of the rights of Afghan women and girls in the country, including restrictions on freedom of movement, as well as exclusion from political, economic, educational and social spaces, and acknowledging also that women and girls are disproportionally affected by the humanitarian and economic crisis in Afghanistan.
7. Expressed concern over restrictions on freedom of opinion and freedom of expression, notably through media crackdowns, the increasing restrictions on broadcasters, journalists and media workers, particularly restrictions on women working in the media, as well as unjust detentions of journalists, and the prohibition on some international media outlets within Afghanistan.
8. Raised the importance of a genuine and credible inclusive political process in Afghanistan with the meaningful participation of women and religious groups and minorities, that leads to national reconciliation and broad-based and representative governance; emphasised that an inclusive and representative government is crucial for lasting peace and stability in the country; and noted the importance of the Taliban engaging regularly with other political and civil society leaders in a sincere dialogue that leads to an inclusive political system in which the rights of all Afghans are respected.
9. Discussed additional ways to help the Afghan people in sustaining their livelihood by stabilizing the economy and increasing liquidity in the country, and particularly highlighted the necessity of the Taliban creating favourable conditions, including an enabling environment for stimulating investment and other economic activity by adherence to rule of law; made clear that the Taliban expanding the capability and professionalism of the Afghan Central Bank, free from political interference, will be an important step toward stabilisation of the financial sector; agreed to further explore ways of addressing the macro-economic and financial sector crisis in the country and to closely coordinate on this issue.

10. Noted that the type and scope of future non-humanitarian development assistance to Afghanistan will be determined in large part by the Taliban's actions and their upholding of the rights of all Afghans, particularly women, girls and members of minority groups.
11. Underscored that the Taliban must fulfil their counterterrorism commitments as well as their commitments to counter drug production and trafficking and welcomed the Taliban's recent decision to ban opium cultivation.
12. Reaffirmed their expectations that the Taliban must allow safe, secure and orderly travel to and from Afghanistan, of both Afghans and foreign nationals, in full respect of freedom of movement and travel, policies to which the Taliban have committed in the past, as was highlighted in the UN Security Council Resolution 2593 (2021).
13. Highlighted the need for the neighbours of Afghanistan, the countries of the region, other Muslim-majority countries and all international partners to cooperate in Afghanistan with the interest of the Afghan people in mind, in view of alleviating their humanitarian and economic situation, meeting their basic needs, and promoting their human rights.
14. Welcomed the expanded role for the United Nations work in Afghanistan as spelled out in the Security Council Resolution 2626 (2022) renewing the mandate of UNAMA, and by the appointment by the Human Rights Council (HRC) of Richard Bennett as Special Rapporteur on the human rights situation in Afghanistan, and emphasised the importance of the United Nations, including the Special Rapporteur, having unhindered access throughout the territory of Afghanistan and to all Afghans.
15. Expressed their appreciation to the European Union for organizing these consultations and hosting the meeting.

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3. Syria

a. Joint statements

On March 3, 2022, 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 Washington, D.C. to discuss the crisis in Syria. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-of-the-syria-special-envoy-meeting/ and excerpted below.

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We remain committed to the pursuit of a political resolution to the Syrian crisis in accordance with UNSCR 2254 that will protect the rights and dignity of all Syrians. As we near the 11th commemoration of the peaceful Syrian uprising on March 15, we acknowledge the continued suffering of the Syrian people, which is unacceptable and must end. We continue to call for a nationwide ceasefire and respect for international humanitarian law, and to stress the importance of unhindered access to life-saving humanitarian assistance through all modalities, including

through the re-authorization of cross-border humanitarian aid delivery, to which there is no alternative, as well as cross-line aid and early recovery projects consistent with UNSCR 2585. We reaffirmed our support for the unity and territorial integrity of Syria and our commitment to the fight against terrorism in all its forms and manifestations.

We welcomed the briefing of UN Special Envoy Geir Pedersen, and took note of his efforts to build momentum, including through the step-for-step process, in accordance with our strong support to advance a comprehensive and inclusive political solution according to UNSCR 2254, as well as the implementation of all its aspects**.** We call for concrete outcomes from the seventh round of the upcoming March session of Constitutional Committee. We will continue to press for accountability, especially for the most serious crimes perpetrated in Syria, including the use of chemical weapons, as well as to press for the release of the arbitrarily detained and a full accounting of the missing. We welcomed ongoing efforts to prosecute crimes committed in Syria. We urged continued support to Syrian refugees and host countries until Syrians can voluntarily return home with safety and dignity in line with UNHCR standards.

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On March 15, 2022, the United States of America, France, Germany, Italy, and the United Kingdom issued a joint statement on the occasion of the 11-year anniversary of the Syrian uprising. The joint statement is available as a State Department media note at https://www.state.gov/joint-statement-on-the-occasion-of-the-11-year-anniversary-of-the-syrian-uprising/ and excerpted below.

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Today marks 11 years since the Syrian people courageously and peacefully took to the streets to demand freedom, political reform, and a government that respects and upholds human rights. The Assad regime met those demands with a brutal assault that continues today against the Syrian people. After 11 years of death and suffering, it is past time for the regime and its enablers, including Russia and Iran, to halt their ruthless attack on the Syrian people. The coincidence of this year's anniversary with the appalling Russian aggression against Ukraine, which constitutes a breach of exceptional gravity to international law and the UN Charter, highlights Russia's brutal and destructive behavior in both conflicts. After more than a decade of conflict, the Syrian economic and humanitarian situation is bleak and millions of Syrian refugees hosted generously by Syria's neighbors, as well as those internally displaced, cannot yet return home in line with UN standards, and without fear of violence, arbitrary arrest, and torture. Continued conflict has also led to space for terrorists, particularly Daesh (ISIS), to exploit. Preventing Daesh's resurgence remains a priority.

We continue to support the UN-facilitated, Syrian-led process outlined within UN Security Council Resolution 2254. We will continue to call for a nationwide ceasefire, respect for international humanitarian law, and unhindered aid access through all modalities, including through the continued authorization of the cross-border mechanism by the UN Security Council. We additionally urge the immediate release of those arbitrarily detained and clarification of the fate and whereabouts of those who remain missing. We do not support efforts to normalize

relations with the Assad regime and will not normalize relations ourselves, nor lift sanctions or fund reconstruction until there is irreversible progress towards a political solution. We encourage all parties, especially the Syrian regime, to participate in the March 21 meeting of the Constitutional Committee in good faith and call for the Committee to deliver on its mandate.

Impunity remains unacceptable. We will therefore continue to actively promote accountability, including through support to the Commission of Inquiry, the International, Impartial and Independent Mechanism, and the Organization for the Prohibition of Chemical Weapons (OPCW). This also includes supporting organizations, many of which are Syrian-led, in collecting evidence and documenting the atrocities and serious violations of international law committed in Syria, including the use of chemical weapons. The OPCW's Investigation and Identification Team's (IIT) efforts continue to attribute responsibility for the abhorrent use of chemical weapons in Syria. Despite Syria's lack of cooperation, the IIT has already confirmed the responsibility of the Assad regime in multiple chemical weapons attacks on the Syrian people. Those responsible for this disregard for the global norm against the use of chemical weapons must be held to account.

We welcome ongoing efforts by national courts to investigate and prosecute crimes within their jurisdiction committed in Syria and encourage increased support for these prosecutions. As their harrowing testimonies show, justice for victims and their families is long overdue. Pursuing accountability and justice is essential to building confidence in the political process called for in UNSCR 2254 and securing the stable, just, and enduring peace that Syrians need and deserve.

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On May 12, 2022, representatives of the United States, Arab League, Egypt, the European Union, France, Germany, Greece, Iraq, Italy, Japan, Jordan, Kuwait, Lebanon, Norway, Qatar, Saudi Arabia, Sweden, Turkey, the United Arab Emirates, and the United Kingdom issued a joint statement after a meeting in Brussels on May 10, 2022, 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-syria/ and excerpted below.

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We applauded the European Union for convening the Brussels VI Conference on Supporting the Future of Syria and the Region and welcomed the generous support pledged for vulnerable Syrians, Syrian refugees, and their host countries. We also urged continued support to Syrian refugees and host countries, until Syrians can voluntarily return home with safety and dignity, according to UN standards.

We remain committed to reducing the suffering of the Syrian people. We highlighted the importance of sustaining and increasing humanitarian aid to Syrians through all modalities, including UN-mandated cross-border aid, and continued implementation of UNSC Resolution 2585.

We reiterated our continued support for UN Special Envoy Geir Pedersen, for UNSC Resolution 2254, and for a political resolution to the crisis, with full respect for the unity and

territorial integrity of Syria. We also reaffirmed our commitment to the fight against terrorism in all its forms and manifestations, as well as to prevent violent extremism, and underlined the need to continue working closely with international partners to ensure a lasting defeat of Daesh and other terrorist organizations consistent with UNSC Resolution 2254. We also underscored the need to continue to press for accountability and justice for the atrocities perpetrated in Syria, as well as to press for the release of the arbitrarily detained and a full accounting of the missing.

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Representatives of the Arab League, Egypt, the European Union, France, Germany, Iraq, Jordan, Norway, Qatar, Saudi Arabia, Turkiye, the United Kingdom, and the United States issued a joint statement after a meeting on August 30-31, 2022 at the envoy level to discuss the crisis in Syria. The joint statement is available at https://geneva.usmission.gov/2022/09/01/joint-statement-on-syria-2/ and excerpted below.

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We reaffirmed our commitment to reaching a political solution to the Syrian crisis consistent with UN Security Council resolution 2254, including continued support for implementing and sustaining an immediate nation-wide ceasefire, the Constitutional Committee, free and fair elections, the end of arbitrary detention, and the release of all those unjustly held. We reiterated the need to create secure conditions for the safe, dignified, and voluntary return of refugees and internally displaced persons, consistent with UNHCR standards; and support the provision of sufficient and sustainable aid to the displaced and their host countries and communities until such conditions are in place. We noted with concern the continuing threat posed by Daesh and reiterated our commitment to the mission of the Global Coalition Against Daesh, and to the fight against terrorism in all its forms and manifestations.

We called on all parties, in particular the government-nominated bloc, to resume meetings of the Syrian-led and Syrian-owned Constitutional Committee under UN auspices in Geneva and to advance an inclusive political solution that will protect the territorial integrity, unity, and sovereignty of Syria and the rights and dignity of all Syrians. We reiterated that there is no military solution to the Syrian crisis and reaffirmed our continued support of UN Special Envoy Geir Pedersen and his tireless efforts to advance a UN-facilitated political process consistent with UNSC resolution 2254.

We remain deeply concerned about the dire humanitarian situation in Syria and the ongoing suffering of the Syrian people. We emphasized the importance of continuing to provide life-saving and early recovery humanitarian assistance across Syria through all modalities, including expansion and extension of the UNSC resolution 2642 cross-border aid mechanism, for which there is no alternative that can match its scope and scale. Furthermore, we underlined the necessity to continue to press for accountability for all atrocities and international crimes perpetrated in Syria, including the use of chemical weapons, as well as to press for a full accounting of the missing.

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b. U.S. statements at the UN

On September 14, 2022, Ambassador 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-at-a-un-security-council-briefing-on-syria-3/ and excerpted below.

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As our briefers have outlined, the Syrian people remain in peril. The Assad regime and others have made little progress in addressing the political situation as envisioned in Resolution 2254. And it is painful to hear about the further deteriorating humanitarian situation on the ground.

The new cholera outbreak just reported by Under-Secretary-General Martin, and recently also reported by UN Resident and Humanitarian Coordinator Riza poses a grave threat to Syria's people. This is yet another crisis facing the Syrian people who have had to endure over 11 years of conflict.

Conflict that has killed more than 350,000 people. Conflict that has displaced 13 million people. Conflict that has pushed over 2 million people into severe food insecurity.

The United States has been a committed supporter of the Syrian people and that is why we have pushed so hard over the past year for a one-year renewal and expansion of the Syrian cross-border mechanism to address this and other crises faced by the Syrian people and that's why we must extend the mechanism in January for another 12 months.

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On December 21, 2022, at a UN Security Council Briefing on the political and humanitarian situation in Syria, Ambassador Robert Wood delivered remarks on the failure of the Syrian Constitutional Committee to meet in accordance with the process outlined within UN Security Council Resolution 2254. U.N. Doc. S/RES/2254, available at https://digitallibrary.un.org/record/814715/files/S_RES_2254%282015%29-EN.pdf?ln=en. The remarks are available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-political-and-humanitarian-situation-in-syria-4/ and include the following:

> Turning to the political situation, we regret there has been no progress on the Constitutional Committee, as its work has been blocked by arbitrary demands from Russia on unrelated issues. We support a Syrian-led, Syrian owned process, and we call on the Assad regime to cooperate with Special Envoy Pedersen's efforts to reconvene the Constitutional Committee, agree to and implement a comprehensive, nationwide ceasefire, and humanely release the more than 130,000 missing and arbitrarily detained persons.

> We remain concerned about the continued violence and recent escalation in northern Syria, which is putting civilians at risk and threatens the progress made in defeating ISIS. We urge all parties to de-escalate immediately and to protect civilians and civilian objects and uphold international humanitarian law.

4. Armenia and Azerbaijan and Nagorno-Karabakh

On August 3, 2022, the State Department issued a press statement on the fighting around Nagorno-Karabakh. The press statement follows and is available at https://www.state.gov/de-escalation-in-and-around-nagorno-karabakh/.

> The United States is deeply concerned by and closely following reports of intensive fighting around Nagorno-Karabakh, including casualties and the loss of life. We urge immediate steps to reduce tensions and avoid further escalation.
>
> The recent increase in tensions underscores the need for a negotiated, comprehensive, and sustainable settlement of all remaining issues related to or resulting from the Nagorno-Karabakh conflict.

On September 15, 2022, U.S. Deputy Representative to the United Nations Richard Mills delivered remarks at a UN Security Council meeting on renewed violence along the Armenia-Azerbaijan border, available at https://usun.usmission.gov/remarks-at-a-un-security-council-meeting-on-renewed-violence-along-the-armenia-azerbaijan-border/ and excerpted below.

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The United States has engaged with Armenian and Azerbaijani officials and conveyed our deep concern over military actions along the border. We are particularly disturbed by reports of civilians being harmed inside Armenia. All sides must fully observe their obligations under international humanitarian law, including those related to protection of civilians.

Mr. President, like others the United States welcomes the cessation of all hostilities and encourages both parties to continue to exercise restraint. Military forces should disengage to allow both parties to resolve all outstanding issues through peaceful negotiations. There is an urgent need to return to talks aimed at a lasting, peaceful resolution to the conflict and the normalization of relations between Armenia and Azerbaijan.

I want to be clear today: the United States is firm – there can be no military solution to the conflict. We encourage both governments to re-establish direct lines of communication across diplomatic and military channels, and to recommit to the diplomatic process. A negotiated, comprehensive settlement of all remaining issues between Armenia and Azerbaijan is needed. And the international community must continue to engage diplomatically to help broker a lasting peace.

The United States is dedicated to a sustainable ceasefire and peaceful resolution. Secretary Blinken spoke with Armenian Prime Minister Pashinyan and Azerbaijani President Aliyev to convey our deep concern over military actions along the border. And Ambassador Phil Reeker, our Senior Advisor for Caucasus Negotiations, is in the region meeting with senior Azerbaijani and Armenian leaders.

The United States is committed to promoting a peaceful, democratic, and prosperous future for the South Caucasus region. We urge the parties to intensify their diplomatic engagement and to make use of existing mechanisms for direct communication to find comprehensive solutions to all outstanding issues related to and resulting from the conflict.

We stand ready to facilitate dialogue between Armenia and Azerbaijan bilaterally, through the OSCE, and in coordination with partners, in order to achieve a long-term political settlement to the conflict, in accordance with international law, including the UN Charter, as well as the Helsinki Final Act.

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5. Sudan

On September 13, 2022, U.S. Deputy Representative to the United Nations Richard Mills delivered remarks at a UN Security Council meeting on the situation in Sudan available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-situation-in-sudan-and-south-sudan-2/ and excerpted below.

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The United States continues to fully support the collaborative efforts of the UN Integrated Transition Assistance Mission in Sudan (UNITAMS), the African Union, and the Inter-Governmental Authority on Development to facilitate a Sudanese-led political process to restore a civilian-led transition to democracy. Following the public commitment of Generals Burhan and Hemedti to accept a civilian agreement on a new government, we welcome inclusive dialogue of civilian, pro-democracy parties to develop new constitutional arrangements and a civilian-led transitional government. Such arrangements should clearly define a timeline for free and fair elections; procedures for selecting a transitional prime minister and other key officials; the authorities and role of the military; and dispute resolution mechanisms to help avoid future political crises. Full respect for freedoms of association, expression, and peaceful assembly is vital. We have consistently condemned violence against and unjust detentions of peaceful protesters and called for those responsible to be held accountable.

We support Sudanese calls for accountability into incidents of violence, including through transitional justice mechanisms. We condemn recent violence in Darfur, Blue Nile, and elsewhere, which only deepens the dire humanitarian situation on the ground, erodes the gains of the Juba Peace Agreement (JPA), and hinders efforts to achieve sustainable peace. Ongoing violence demonstrates the urgent need for the Juba Peace Agreement to be implemented, including the full deployment of the Security Keeping Forces in Darfur, inclusive security sector

reform, robust international monitoring and reporting mechanisms, and comprehensive, inclusive, and transparent transitional justice processes, including accountability for violence against civilians and other human rights abuses and violations.

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On December 16, 2022, the State Department issued as a media note, available at https://www.state.gov/joint-statement-on-violence-in-upper-nile-and-jonglei-states-south-sudan/ the joint statement of the United States, United Kingdom, and Norway (the Troika), and the European Union on violence in Upper Nile and Jonglei States, South Sudan. The joint statement follows.

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Members of the Troika and EU are deeply concerned by an escalation in violence in Upper Nile and Jonglei, South Sudan, where there have been reports of scores of civilians killed and around 50,000 displaced. These reports of killings, homes and livelihoods burned and destroyed, and sexual and gender-based violence, including against minors, are horrifying and cannot go unaddressed. The impact of this violence on an already dire humanitarian situation is further devastating vulnerable communities and their access to health and education services. It is clear that South Sudan's transitional leaders bear a share of the responsibility for the escalation of this violence, and primary responsibility for ending it. The Troika and EU urgently call on South Sudan's transitional leaders to act now to end the violence and protect civilians.

We call on all South Sudanese authorities to allow and facilitate the safe access and delivery of humanitarian assistance to Upper Nile and Jonglei State, as well as in other conflict areas in the country and to the more than 9.4 million people in need of aid across South Sudan.

We call on all sides to abide by the conditions set out in the 2018 Revitalized Peace Agreement. Each missed implementation benchmark further calls into question the political commitment of South Sudan's leaders to end the transitional period in two years. Inaction now will lead to more innocent South Sudanese lives lost and a humanitarian situation that continues to worsen with each month. An enduring, nation-wide peace is the only way to address South Sudan's appalling human rights and humanitarian situation.

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6. Yemen

On March 8, 2022, Secretary Blinken issued a press statement welcoming the launch of UN consultations on Yemen by UN Special Envoy for Yemen Hans Grundberg. The press statement, available at https://www.state.gov/welcoming-the-launch-of-un-consultations-on-yemen/, states:

> The United States welcomes today's launch of inclusive consultations by UN Special Envoy for Yemen Hans Grundberg. Through consultations with a wide range of Yemeni political and civil society groups over the next few weeks, the UN Special Envoy seeks to finalize a new, comprehensive peace process framework. These consultations provide a valuable opportunity for Yemenis to discuss a renewed vision for a political resolution to the conflict.
>
> We call on all Yemeni groups to participate fully, meaningfully, and in good faith in the UN consultations. There is no military solution to the Yemen conflict; the only path forward is through dialogue and compromise. The destruction and suffering caused by over seven years of war is overwhelming. The parties must put the interest of the Yemeni people first and seize this opportunity to help bring this conflict to an end.

On June 2, 2022, Secretary Blinken issued a press statement welcoming the announcement by the UN on the 60-day truce extension in Yemen. The press statement, available at https://www.state.gov/the-united-states-welcomes-the-truce-extension-in-yemen/, and excerpted below.

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The United States welcomes today's announcement by the UN on the extension of the truce in Yemen. This 60-day extension is another important step toward peace and will bring further relief to millions of Yemenis. We are grateful for the efforts of UN Special Envoy Hans Grundberg as well as those of our own Special Envoy, Tim Lenderking, who has worked closely across our government and with the UN and our international partners to achieve this extension. We also appreciate the support of the Governments of Saudi Arabia, Jordan, Egypt, and Oman in helping secure the truce.

The United States urges the parties to cooperate fully with Special Envoy Grundberg as he builds on the truce toward a comprehensive and inclusive peace process. The parties must continue to uphold their responsibilities under the truce and work together to improve the lives of Yemenis, to include immediately opening roads to the city of Taiz, where hundreds of thousands of Yemenis have suffered for far too long. The first two months of the truce witnessed a dramatic reduction in civilian casualties, improved freedom of movement and humanitarian access, and increased access to fuel and basic goods. These benefits should continue and expand.

The United States remains committed to an inclusive, durable resolution to the conflict that alleviates the suffering of Yemenis, that empowers them to determine the future of their country without foreign interference, and that addresses Yemenis' calls for justice and accountability. The Yemeni parties have an opportunity to listen to the demands of the people and choose peace over continued suffering, destruction, and war. We urge them to seize this pivotal moment to begin a comprehensive peace process.

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On August 2, 2022, Secretary Blinken issued a press statement welcoming the extension of the UN-brokered truce in Yemen. The press statement, available at https://www.state.gov/the-united-states-welcomes-the-extension-of-the-un-brokered-truce-in-yemen/, and excerpted below.

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The United States welcomes today's announcement by the UN on the extension of the truce in Yemen. This truce has brought respite from conflict to millions of Yemenis and saved thousands of lives, providing Yemen the longest period of calm since the war began. We are appreciative of UN Special Envoy for Yemen Hans Grundberg's tireless efforts, working together with the United States and with our regional and international partners to achieve this extension, in particular the Governments of Saudi Arabia and Oman. We have prioritized our engagement on Yemen since the first days of the Administration, and I am appreciative of the efforts of colleagues throughout the Department, including our Special Envoy, Tim Lenderking. The United States also commends the Republic of Yemen Government's leadership during the truce in improving the lives of countless Yemenis, including through facilitating continued fuel imports through Hudaydah port and flights from Sana'a airport.

The United States urges the Yemeni parties not to let this opportunity pass and to engage with Special Envoy Grundberg to build upon this truce, which is Yemen's best opportunity for peace. The parties must work with Special Envoy Grundberg to urgently reach agreement on the expanded truce agreement he has presented, which includes steps to expand freedom of movement and salary payments, delivering greater and tangible benefits for the Yemeni people while paving the way for a durable resolution to the conflict. First and foremost, the Houthis must open major roads to Taiz, Yemen's third largest city, and alleviate the suffering of hundreds of thousands of Yemenis who have been under siege-like conditions since 2015.

The United States remains committed to advancing a durable, inclusive peace agreement in Yemen that alleviates the suffering of Yemenis, helps the people secure a more prosperous future for their country, and addresses their calls for justice and accountability. We are also committed to mitigating Yemen's dire humanitarian and economic crisis.

We urge the Yemeni parties to listen to the demands of their people and commit to cooperating under UN auspices to achieve peace.

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On September 23, 2022, the vice ministers and senior official representatives of the permanent five members of the United Nations Security Council and the European Union, Germany, Kuwait and Sweden, referred to as the P5+4 met to discuss concrete steps to support expansion of the UN-mediated truce in Yemen. The Netherlands, Oman, the Kingdom of Saudi Arabia and the United Arab Emirates participated as guests. The State Department media note detailing the meeting is excerpted below and is available at https://www.state.gov/joint-statement-concrete-steps-to-support-expansion-of-un-mediated-truce-in-yemen/.

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The P5+4 reiterated their support for Yemen's sovereignty, unity, independence, and territorial integrity.

The P5+4 reiterated their firm support for the UN Special Envoy and his ongoing efforts for a longer extension and expansion of the current truce. They underscored the urgency for quick progress and maximal flexibility by the parties. The P5+4 expressed their determination that an expanded truce agreement will provide an opportunity to reach an inclusive, comprehensive negotiated political settlement based on the agreed references and under the auspices of the UN. They recalled the importance of the full, equal, and meaningful participation of women in the peace process including a minimum 30 per cent participation by women.

The P5+4 underscored the tangible benefits of the truce to the Yemeni people including a 60% reduction in civilian casualties from frontline violence, four times the amount of fuel imported through Hudaydah port compared with last year, and commercial flights from Sana'a allowing over 21,000 passengers to receive medical treatment abroad and to unite with families. They called on the Yemeni parties to urgently intensify, and be flexible in, the negotiations under the auspices of the UN in order to agree on an expanded truce that could be translated into a durable ceasefire. They urged the Yemeni parties to intensify engagement with the UN Special Envoy on all aspects of negotiations, eschew conditionality, and ensure their economic experts work closely with the UN, to implement measures to tackle the economic and financial crises, in particular to identify a solution for paying salaries to civil servants.

The P5+4 welcomed the exceptional measures taken by the Government of Yemen to avert fuel shortages in the Houthi-controlled areas following a Houthi order that undermined the established process for clearing fuel ships. They called on the Houthis to refrain from such actions and to cooperate with UN-led efforts to identify a durable solution to ensure the flow of fuel.

The P5+4 condemned all attacks that threaten to derail the truce including, inter alia, the recent Houthi attacks on Taiz. They reiterated that there is no military solution to the Yemen conflict and condemned the recent Houthi military parade in Hudaydah. They called for an end to all forms of visible military manifestations in violation of the Hudaydah agreement. They expressed concern regarding recent instability in the southern part of Yemen and noted with concern the increase in civilian causalities caused by landmines. They recalled parties' obligations under international humanitarian law and the need to respect human rights, including the protection of civilians, especially children. They expressed their concern about the lack of progress on the opening of the Taiz roads, and reiterated their call on the Houthis to act with flexibility in negotiations and immediately open the main Taiz roads in line with recent UN proposals.

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On October 3, 2022, the State Department issued a press statement expressing concern that the UN-mediated truce in Yemen expired on October 2. The press statement, available at https://www.state.gov/un-truce-expiration-in-yemen/, excerpted below.

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The United States expresses its deep concern that the UN-mediated truce in Yemen expired on October 2 without the parties reaching agreement to extend it. Yemeni men, women, and children have experienced the tangible benefits provided by the truce: the longest period of calm since the war began, a dramatic reduction in civilian casualties, four times more fuel flowing into Yemen's northern ports, and commercial flights enabling over 25,000 Yemenis to seek medical care and reunite with loved ones abroad. Much more is certainly needed, and the expanded truce proposal presented by the UN would provide just that: providing salaries to tens of thousands of civil servants who have not been paid in years, opening roads across the country, expanding international flights, and easing the clearance process for fuel ships entering Hudaydah port. Most importantly, the UN proposal would enable the launch of negotiations on a comprehensive ceasefire and an inclusive, Yemeni-led political process that would durably end the war.

The United States welcomes the support from the Republic of Yemen Government for the UN's expanded truce proposal, as well as the strong support from countries across the region, the UN Security Council, and other international partners. The overwhelming consensus in support of the UN-mediated truce is a testament to its potential to put Yemen on the path to peace and recovery. The United States urges the Houthis to continue negotiations in good faith and work with the UN to come to an agreement to extend the truce and keep Yemen on the path to peace. We urge all the parties to exercise restraint during this sensitive time. The United States underscores the unacceptability of Houthi rhetoric threatening commercial shipping and oil companies operating in the region.

The truce represents the best opportunity Yemenis have had for peace in years. The choice before the parties is simple: peace and a brighter future for Yemen, or a return to pointless destruction and suffering that will further fracture and isolate a country already on the brink. The only way to truly ease the suffering of Yemenis is through negotiation, not war.

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7. Ethiopia

For statements regarding atrocities in northern Ethiopia, see section C.4, *infra*.

On March 24, 2022, Secretary Blinken issued a press statement welcoming the declaration of a humanitarian truce by the Ethiopian government. The press statement is available at https://www.state.gov/declaration-of-a-humanitarian-truce-by-the-government-of-ethiopia/, and includes the following:

> This commitment to a cessation of hostilities should be a critical step towards the resumption and sustainment of humanitarian assistance to the people in Tigray and all Ethiopian regions and communities in need. It should also serve as an essential foundation of an inclusive political process to achieve progress towards common security and prosperity for all the people of Ethiopia. In the context of this commitment, we reiterate our call for an immediate end to the violence committed against civilians by all parties to the conflict and underscore that any lasting solution to the conflict must involve accountability for those responsible for atrocities.
>
> The United States urges all parties to build on this announcement to advance a negotiated and sustainable ceasefire, including necessary security arrangements. The United States will continue to do everything possible to assist and to help the people of Ethiopia to advance a peaceful future.

On October 21, 2022, Secretary Blinken issued a statement welcoming the announcement of African Union-led peace talks to resolve conflict in Ethiopia. His statement, available at https://www.state.gov/welcoming-the-announcement-of-au-led-negotiations-to-resolve-conflict-in-ethiopia/, includes the following:

> The United States welcomes the planned launch of African Union-led peace talks next week between the Government of Ethiopia and the Tigrayan regional authorities. We commend South Africa for hosting the talks and stand ready to support AU High Representative Olusegun Obasanjo and AU panel members Phumzile Mlambo-Ngcuka and Uhuru Kenyatta in facilitating an agreement that, as President Biden told the UN General Assembly in September, ends the fighting in Ethiopia and restores security for all its people. As a partner to the African Union, the United States is committed to continuing to actively participate in efforts to advance peace in northern Ethiopia.
>
> We are deeply concerned by reports of significant loss of life, destruction, indiscriminate bombardment, and human rights abuses since the five-month humanitarian truce was broken on August 24. We are also alarmed by the risk of widespread atrocities. In advance of next week's talks, we reiterate our call on the parties to immediately cease all hostilities and for the Ethiopian National Defense Force and Eritrean Defense Forces to immediately halt their joint military offensive and ensure civilians are protected. We also call on Eritrea to withdraw its forces from northern Ethiopia and for unimpeded humanitarian assistance to be resumed immediately to all those in need.

On October 25, 2022, Secretary Blinken issued a statement welcoming the start of the African Union-led peace negotiations between the government of Ethiopia and Tigrayan regional authorities. His statement, available at https://www.state.gov/on-the-start-of-northern-ethiopia-peace-talks/, includes the following:

> We urge the delegations to engage seriously in these talks to reach a lasting resolution to this conflict. As a first priority, it is essential to achieve an immediate cessation of hostilities. We also call on the delegations to agree on unhindered delivery of humanitarian assistance to all those in need, measures to protect civilians, and Eritrea's withdrawal from northern Ethiopia.

On November 2, 2022, Secretary Blinken issued a statement on the signing of a cessation of hostilities between the Government of Ethiopia and the Tigray People's Liberation Front. His statement, available at https://www.state.gov/on-the-african-union-led-peace-talks/, includes the following:

> We welcome the momentous step taken in Pretoria today to advance the African Union's campaign to "silence the guns" with the signing of a cessation of hostilities between the Government of Ethiopia and the Tigray People's Liberation Front. We commend the parties for taking this initial step to agree to end the fighting and continue dialogue to resolve outstanding issues to consolidate peace and bring an end to almost two years of conflict. We welcome the unimpeded delivery of humanitarian assistance and the protection of civilians that should result from implementation of this agreement.

8. Lebanon

On August 31, 2022, Ambassador Richard Mills delivered the United States explanation of vote following the adoption of UN Security Council resolution 2650 (U.N. Doc. S/RES/2650, available at https://digitallibrary.un.org/record/3985829/files/S_RES_2650_%282022%29-EN.pdf?ln=en) renewing the mandate of the UN Interim Force in Lebanon (UNIFIL) until August 31, 2023. The remarks are available at https://usun.usmission.gov/explanation-of-vote-following-the-adoption-of-a-un-security-council-resolution-on-the-un-interim-force-in-lebanon-unifil/ and excerpted below.

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We are pleased to see this mandate reauthorize UNIFIL's provision of non-lethal material and logistical support to the LAF, which will help the LAF to extend and sustain state authority in southern Lebanon, including by increasing joint activities with UNIFIL and accelerating deployment of a Model Regiment. Through this new mandate, the Council reaffirms UNIFIL's authority to operate independently and to conduct both announced and unannounced patrols under the terms of its Status of Forces Agreement with the Government of Lebanon and consistent with the terms of the mission's mandate.

This is an important reminder as the Secretary-General has reported that UNIFIL peacekeepers are blocked with increasing frequency from conducting their mandated tasks and

accessing sites of concern. The proliferation of prefabricated containers placed by Green Without Borders obstructs UNIFIL's access to the Blue Line and is heightening tensions in the area, further demonstrating that this so-called environmental group is acting on Hizballah's behalf. The presence of firing ranges in UNIFIL's area of responsibility, a serious escalation of Hizballah's open defiance of Resolution 1701, is also increasing tensions in southern Lebanon.

We urge the Lebanese authorities, as the host state, to facilitate UNIFIL's full and timely access to UNIFIL's entire area of operations, including the entire Blue Line, the firing ranges, Green Without Borders sites and containers, the tunnel sites, and all other sites of concern to which UNIFIL requires access in order to fulfil its mandate. Ensuring UNIFIL's peacekeepers are able to move freely is also critical to helping mitigate the growing risks to UNIFIL peacekeepers' safety and security that the UN has documented this year.

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9. Georgia

On August 7, 2022, Secretary Blinken issued a press statement on the anniversary of the Russian invasion of Georgia. The statement is available at https://www.state.gov/anniversary-of-the-russian-invasion-of-georgia/ and excerpted below.

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Fourteen years ago today, Russia invaded the sovereign nation of Georgia. As we have done since 2008, we remember those killed and injured by Russian forces. For decades, the citizens of Georgia in Abkhazia and South Ossetia have lived under Russian occupation and tens of thousands have been displaced, persecuted, and impoverished. Lives and livelihoods have been taken from them.

This year, Russia's unprovoked further invasion of Ukraine underscores the need for the people of Georgia and Ukraine to stand together in solidarity. The people of Georgia know all too well how Russia's aggressive actions, including disinformation, so-called "borderization," and mass displacement cause untold hardships and destruction.

Russia must be accountable to the commitments it made under the 2008 ceasefire – withdrawing its forces to pre-conflict positions and allowing unfettered access for the delivery of humanitarian assistance. It also must reverse its recognition of Georgia's Abkhazia and South Ossetia regions. This is essential for hundreds of thousands of internally displaced persons to be able to return to their homes safely and with dignity.

We remain steadfast in our support for the people of Georgia as they seek to protect their sovereignty and territorial integrity and find a peaceful solution to the conflict.

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On October 5, 2022, the U.S. participated in the 56th Geneva International Discussions on the Conflict in Georgia. The U.S. delegation, led by Senior Advisor for Caucasus Negotiations Ambassador Philip Reeker, "urged participants to use the GID to find solutions to improve the lives of conflict-affected populations, including for the safe and voluntary return of internally displaced persons and refugees. The United States strongly supports Georgia's sovereignty and territorial integrity within its internationally recognized borders." See the U.S. Mission Geneva website at https://geneva.usmission.gov/2022/10/05/gid-october2022/.

10. Ukraine

See Chapter 9 for U.S. statements regarding Russia's appeal to recognize the so-called Donetsk and Luhansk People's Republics. Section C.5, *infra*, for discussion of atrocities in Ukraine. See also Chapter 16 for a discussion of U.S. and international sanctions imposed on Russia in response to its actions in Ukraine. See also Chapter 18 for additional discussion of Russia's 2022 invasion of Ukraine.

On January 20, 2022, Secretary Blinken delivered a speech on Russia's aggression against Ukraine. The speech is available at https://www.state.gov/the-stakes-of-russian-aggression-for-ukraine-and-beyond/ and excerpted below.

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So as Sigmar said, and as all of you know, I have come to Berlin at a moment of great urgency for Europe, for the United States, and, I would argue, for the world. Russia is continuing to escalate its threat toward Ukraine. We've seen that again in just the last few days with increasingly bellicose rhetoric, building up its forces on Ukraine's borders, including now in Belarus.

Russia has repeatedly turned away from agreements that have kept the peace across the continent for decades. And it continues to take aim at NATO, a defensive, voluntary alliance that protects nearly a billion people across Europe and North America, and at the governing principles of international peace and security that we all have a stake in defending.

Those principles, established in the wake of two world wars and a cold war, reject the right of one country to change the borders of another by force; to dictate to another the policies it pursues or the choices it makes, including with whom to associate; or to exert a sphere of influence that would subjugate sovereign neighbors to its will.

To allow Russia to violate those principles with impunity would drag us all back to a much more dangerous and unstable time, when this continent and this city were divided in two, separated by no man's lands, patrolled by soldiers, with the threat of all-out war hanging over everyone's heads. It would also send a message to others around the world that these principles are expendable, and that, too, would have catastrophic results.

That's why the United States and our allies and partners in Europe have been so focused on what's happening in Ukraine. It's bigger than a conflict between two countries. It's bigger

than Russia and NATO. It's a crisis with global consequences, and it requires global attention and action.

Here today, among this rapidly unfolding situation, I'd like to try to cut through to the facts of the matter.

To begin, Russia claims that this crisis is about its national defense, about military exercises, weapons systems, and security agreements. Now, if that's true, we can resolve things peacefully and diplomatically. There are steps we can take – the United States, Russia, the countries of Europe – to increase transparency, reduce risks, advance arms control, build trust. We've done this successfully in the past and we can do it again.

And, indeed, it's what we set out to do last week in the discussions that we put forward at the Strategic Stability Dialogue between the United States and Russia, at the NATO-Russia Council, and at the OSCE. At those meetings and many others, the United States and our European allies and partners have repeatedly reached out to Russia with offers of diplomacy in a spirit of reciprocity.

So far, our readiness to engage in good faith has been rebuffed, because in truth this crisis is not primarily about weapons or military bases. It's about the sovereignty and self-determination of Ukraine and all states. And at its core, it's about Russia's rejection of a post-Cold War Europe that is whole, free, and at peace.

For all our profound concerns with Russia's aggression, provocations, political interference – including against the United States – the Biden administration has made clear our willingness to pursue a more stable, predictable relationship; to negotiate arms control agreements, like the renewal of New START, and launch our Strategic Stability Dialogue; to pursue common action to address the climate crisis and work in common cause to revive the Iran nuclear deal. And we appreciate how Russia has engaged with us in these efforts.

And despite Moscow's reckless threats against Ukraine and dangerous military mobilization – despite its obfuscation and disinformation – the United States, together with our allies and partners, have offered a diplomatic path out of this contrived crisis. That's why I've returned to Europe – Ukraine yesterday, Germany here today, Switzerland tomorrow, where I'll meet with Russian Foreign Minister Lavrov and once again seek diplomatic solutions.

The United States would greatly prefer those to be the case, and certainly prefer diplomacy to the alternatives. We know our partners in Europe feel the same way. So do people and families across the continent, because they know that they will bear the greatest burden if Russia rejects diplomacy. And we look to countries beyond Europe, to the international community as a whole to make clear the costs to Russia if it seeks conflict, and to stand up for all the principles that protect all of us.

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On February 17, 2022, Secretary Blinken delivered remarks at the UN Security Council on Russia's threat to peace and security. The remarks are available at https://www.state.gov/secretary-antony-j-blinken-on-russias-threat-to-peace-and-security-at-the-un-security-council/ and excerpted below.

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Mr. President, this council was convened today to discuss the implementation of the Minsk Agreements, a goal that we all share, despite Russia's persistent violations. These agreements, which were negotiated in 2014 and 2015 and signed by Russia, remain the basis for the peace process to resolve the conflict in eastern Ukraine.

This council's primary responsibility – the very reason for its creation – is the preservation of peace and security. As we meet today, the most immediate threat to peace and security is Russia's looming aggression against Ukraine.

The stakes go far beyond Ukraine. This is a moment of peril for the lives and safety of millions of people, as well as for the foundation of the United Nations Charter and the rules-based international order that preserves stability worldwide. This crisis directly affects every member of this council and every country in the world.

Because the basic principles that sustain peace and security – principles that were enshrined in the wake of two world wars and a Cold War – are under threat. The principle that one country cannot change the borders of another by force. The principle that one country cannot dictate another's choices or policies, or with whom it will associate. The principle of national sovereignty.

This is the exact kind of crisis that the United Nations – and specifically this Security Council – was created to prevent.

We must address what Russia is doing right now to Ukraine.

Over the past months, without provocation or justification, Russia has amassed more than 150,000 troops around Ukraine's borders, in Russia, Belarus, occupied Crimea. Russia says it's drawing down those forces. We do not see that happening on the ground. Our information indicates clearly that these forces – including ground troops, aircraft, ships – are preparing to launch an attack against Ukraine in the coming days.

We don't know precisely how things will play out, but here's what the world can expect to see unfold. In fact, it's unfolding right now, today, as Russia takes steps down the path to war and reissued the threat of military action.

First, Russia plans to manufacture a pretext for its attack. This could be a violent event that Russia will blame on Ukraine, or an outrageous accusation that Russia will level against the Ukrainian Government. We don't know exactly the form it will take. It could be a fabricated so-called "terrorist" bombing inside Russia, the invented discovery of a mass grave, a staged drone strike against civilians, or a fake – even a real – attack using chemical weapons. Russia may describe this event as ethnic cleansing or a genocide, making a mockery of a concept that we in this chamber do not take lightly, nor do I do take lightly based on my family history.

In the past few days, Russian media has already begun to spread some of these false alarms and claims, to maximize public outrage, to lay the groundwork for an invented justification for war. Today, that drumbeat has only intensified in Russia's state-controlled media. We've heard some of these baseless allegations from Russian-backed speakers here today.

Second, in response to this manufactured provocation, the highest levels of the Russian Government may theatrically convene emergency meetings to address the so-called crisis. The government will issue proclamations declaring that Russia must respond to defend Russian citizens or ethnic Russians in Ukraine.

Next, the attack is planned to begin. Russian missiles and bombs will drop across Ukraine. Communications will be jammed. Cyberattacks will shut down key Ukrainian institutions.

After that, Russian tanks and soldiers will advance on key targets that have already been identified and mapped out in detailed plans. We believe these targets include Russia's capital – Ukraine's capital, Kyiv, a city of 2.8 million people.

And conventional attacks are not all that Russia plans to inflict upon the people of Ukraine. We have information that indicates Russia will target specific groups of Ukrainians.

We've been warning the Ukrainian Government of all that is coming. And here today, we are laying it out in great detail, with the hope that by sharing what we know with the world, we can influence Russia to abandon the path of war and choose a different path while there's still time.

Now, I am mindful that some have called into question our information, recalling previous instances where intelligence ultimately did not bear out. But let me be clear: I am here today, not to start a war, but to prevent one. The information I've presented here is validated by what we've seen unfolding in plain sight before our eyes for months. And remember that while Russia has repeatedly derided our warnings and alarms as melodrama and nonsense, they have been steadily amassing more than 150,000 troops on Ukraine's borders, as well as the capabilities to conduct a massive military assault.

It isn't just us seeing this: Allies and partners see the same thing. And Russia hasn't only been hearing from us. The international chorus has grown louder and louder.

If Russia doesn't invade Ukraine, then we will be relieved that Russia changed course and proved our predictions wrong. That would be a far better outcome than the course we're currently on. And we will gladly accept any criticism that anyone directs at us.

As President Biden said, this would be a war of choice. And if Russia makes that choice, we've been clear, along with Allies and partners, that our response will be sharp and decisive. President Biden reiterated that forcefully earlier this week.

There is another choice Russia can still make, if there is any truth to its claim that it is committed to diplomacy.

Diplomacy is the only responsible way to resolve this crisis. An essential part of this is through implementation of the Minsk agreements, the subject of our session today.

There are a series of commitments that Russia and Ukraine made under Minsk, with the OSCE and the Normandy Format partners involved as well.

If Russia is prepared to sit with the Ukrainian Government and work through the process of implementing these commitments, our friends in France and Germany stand ready to convene senior-level discussions in the Normandy Format to settle these issues. Ukraine is ready for this. And we stand fully ready to support the parties.

Progress toward resolving the Donbas crisis through the Minsk Agreements can reinforce the broader discussions on security issues that we're prepared to engage in with Russia, in coordination with our Allies and partners.

More than three weeks ago, we provided Russia with a paper that detailed concrete, reciprocal steps that we can take in the near term to address our respective concerns and advance the collective security interests of Russia, the United States, and our European partners and allies. This morning, we received a response, which we are evaluating.

Earlier today, I sent a letter to Russia's Foreign Minister Sergey Lavrov proposing that we meet next week in Europe, following on our talks in recent weeks, to discuss the steps that we

can take to resolve this crisis without conflict. We are also proposing meetings of the NATO-Russia Council and the OSCE Permanent Council.

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On February 19, 2022, 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 Russia and Ukraine. The media note is available at https://www.state.gov/g7-foreign-ministers-statement-on-russia-and-ukraine-2/. The February 19, 2022 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, remain gravely concerned about Russia's threatening military build-up around Ukraine, in illegally annexed Crimea and in Belarus. Russia's unprovoked and unjustified massing of military forces, the largest deployment on the European continent since the end of the Cold War is a challenge to global security and the international order.

We call on Russia to choose the path of diplomacy, to de-escalate tensions, to substantively withdraw military forces from the proximity of Ukraine's borders and to fully abide by international commitments including on risk reduction and transparency of military activities. As a first step, we expect Russia to implement the announced reduction of its military activities along Ukraine's borders. We have seen no evidence of this reduction. We will judge Russia by its deeds.

We took note of Russia's latest announcements that it is willing to engage diplomatically. We underline our commitment vis-à-vis Russia to pursue dialogue on issues of mutual concern, such as European security, risk reduction, transparency, confidence building and arms control. We also reiterate our commitment to find a peaceful and diplomatic solution to the current crisis, and we urge Russia to take up the offer of dialogue through the US-Russia Strategic Stability Dialogue, the NATO-Russia Council, and the OSCE. We commend the Renewed OSCE European Security Dialogue launched by the Polish OSCE Chairmanship-in-Office and express our strong hope that Russia will engage in a constructive way.

Any threat or use of force against the territorial integrity and sovereignty of states goes against the fundamental principles that underpin the rules-based international order as well as the European peace and security order enshrined in the Helsinki Final Act, the Paris Charter and other subsequent OSCE declarations. While we are ready to explore diplomatic solutions to address legitimate security concerns, Russia should be in no doubt that any further military aggression against Ukraine will have massive consequences, including financial and economic sanctions on a wide array of sectoral and individual targets that would impose severe and unprecedented costs on the Russian economy. We will take coordinated restrictive measures in case of such an event.

We reaffirm our solidarity with the people of Ukraine and our support to Ukraine's efforts to strengthen its democracy and institutions, encouraging further progress on reform. We

consider it of utmost importance to help preserve the economic and financial stability of Ukraine and the well-being of its people. Building on our assistance since 2014, we are committed to contribute, in close coordination with Ukraine's authorities to support the strengthening of Ukraine's resilience.

We reiterate our unwavering commitment to the sovereignty and territorial integrity of Ukraine within its internationally recognized borders and territorial waters. We reaffirm the right of any sovereign state to determine its own future and security arrangements. We commend Ukraine's posture of restraint in the face of continued provocations and efforts at destabilization.

We underline our strong appreciation and continued support for Germany's and France'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 in eastern Ukraine. We acknowledge public statements by President Zelensky underlining Ukraine's firm commitment to the Minsk Agreements and his readiness to contribute constructively to the process. Ukrainian overtures merit serious consideration by Russian negotiators and by the Government of the Russian Federation. We call on Russia to seize the opportunity which Ukraine's proposals represent for the diplomatic path.

Russia must de-escalate and fulfil its commitments in implementing the Minsk Agreements. The increase in ceasefire violations along the line of contact in recent days is highly concerning. We condemn the use of heavy weaponry and indiscriminate shelling of civilian areas, which constitute a clear violation of the Minsk Agreements. We also condemn that the Russian Federation continues to hand out Russian passports to the inhabitants of the non-government controlled areas of Ukraine. This clearly runs counter to the spirit of the Minsk agreements.

We are particularly worried by measures taken by the self-proclaimed "People's Republics" which must be seen as laying the ground for military escalation. We are concerned that staged incidents could be used as a pretext for possible military escalation. Russia must use its influence over the self-proclaimed republics to exercise restraint and de-escalate.

In this context, we firmly express our support for the OSCE's Special Monitoring Mission, whose observers play a key role in de-escalation efforts. This mission must be allowed to carry out its full mandate without restrictions to its activities and freedom of movement to the benefit and security of the people in eastern Ukraine.

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11. Chad

On August 8, 2022, the State Department released a press statement commending the Chadian signing of a Peace Agreement in Doha. The statement is included below and available at https://www.state.gov/the-chadian-signing-of-a-peace-agreement-in-doha/.

> We commend the signing of the Peace Agreement in Doha and welcome this step toward reconciliation in Chad. We acknowledge the role of the Government of Qatar, the Chadian transitional government, and political-

military voices in this process, and encourage all Chadian groups to join in ensuring peace, prosperity, and stability.

This peace agreement is a significant development in Chad's transitional period. The United States stands with Chad as it coordinates a National Dialogue, revises its constitution, and organizes free and fair elections of a civilian-led government that are held on time and reflect the will of the people and consistent with the principles outlined in the African Union's May 2021 Communique.

The U.S. government stands by the people of Chad as the next generation of leadership leverages the strengths of all voices to promote a durable peace. We share optimism for a bright future, one that respects the dignity of all Chadians, and enables prosperity for generations to come.

On October 20, 2022, the State Department released a press statement condemning violence in Chad and supporting a peaceful transition. The statement is included below and available at https://www.state.gov/on-supporting-a-peaceful-transition-in-chad/.

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The United States condemns the violence in Chad involving clashes between security forces and demonstrators protesting the extension of Chad's original 18-month transition period, which expires today. We are deeply concerned by reports of casualties and urge all parties to deescalate the situation and exercise restraint. We call for those responsible for the violence to be held accountable. We also condemn the attack that occurred outside the main gate of the U.S. Embassy in which assailants in civilian clothes and private vehicles cleared police checkpoints and killed four individuals. We further condemn the unauthorized use of embassy property by demonstrators involved in the protests.

As the Chadian people pursue their aspirations for a credible transition to democracy, we call on all parties to refrain from violence and to prioritize dialogue and respect for human rights of citizens, including the right to freedoms of expression and peaceful assembly.

The United States regrets the results of the Chadian National Dialogue and their consequences for an inclusive, peaceful, and timely transition to a democratic and civilian-led government. We note with concern the government's disregard for the clear directive of the African Union Peace and Security Council and public commitments of the Transitional Military Council that its leaders would not be candidates in upcoming elections.

The United States believes that a government selected by the people of Chad in a free and fair election, overseen by independent institutions, will offer the best hope for Chad to emerge from decades of conflict. We will continue to support the people of Chad in pursuing their aspirations for a credible and timely transition to democracy.

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12. Central African Republic

On November 14, 2022, the UN Security Council adopted resolution 2659 (U.N. Doc. S/RES/2659, available at https://digitallibrary.un.org/record/3994490/files/S_RES_2659_%282022%29-EN.pdf?ln=en), extending the mandate of the UN Multidimensional Integrated Stabilization Mission in the Central African Republic ("MINUSCA"). In voting for the resolution, Ambassador Richard Mills delivered an explanation of vote discussing, in part, human rights abuses and violations of international humanitarian law by the Kremlin-backed Wagner forces sent to the Central African Republic. The explanation of vote is available at https://usun.usmission.gov/explanation-of-vote-following-the-adoption-of-a-un-security-council-resolution-renewing-the-mandate-of-minusca/ and is excerpted below.

> We are pleased with this mandate's unequivocal support for peacekeeper safety and security, including its call for full implementation of the Status of Forces Agreement and authorization of night flights. We welcome the Central African Republic's attention to this issue and the positive discussions in recent weeks and look forward to the Central African Republic lifting the ban on MINUSCA flying at night as soon as possible. We find it difficult to understand frankly how some Council Members that purport to defend peacekeeper safety and peacekeeper security objected to including language on night flights in this mandate.
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> I would also like to highlight an important matter that was left out of this resolution. Although the mandate condemns the crimes of armed groups, it does not specifically name the Kremlin-backed Wagner Group. But there is extensive publicly available information that forces sent to the Central African Republic by the Russian Federation have consistently obstructed MINUSCA's ability to fulfill its mandate and these forces stand accused of egregious human rights abuses and violations of international humanitarian law, including those involving sexual violence, rape, summary executions, and torture.

C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

1. Elie Wiesel Congressional Report and New Atrocities Prevention Strategy

On July 15, 2022, Deputy Secretary of State Wendy R. Sherman announced that the 2022 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 2022 report is the fourth annual report to be submitted under the Elie Wiesel Act and addresses the U.S. government's efforts to prevent and respond to atrocities. See notice to the press, available at https://www.state.gov/deputy-secretary-sherman-to-deliver-remarks-on-elie-wiesel-act-report-and-new-strategy/. Deputy Secretary Sherman, joined by Assistant Secretary of State for Conflict and Stabilization

Operations Anne Witkowsky and U.S. Agency for International Development Deputy Administrator Isobel Coleman, delivered remarks to the press on the report's release, available at https://www.state.gov/on-the-2022-elie-wiesel-act-report-to-congress-and-new-u-s-strategy-to-anticipate-prevent-and-respond-to-atrocities/ and excerpted below. As discussed in *Digest 2019* at 588, the Elie Wiesel Act took effect in January 2019.

Deputy Secretary Sherman also announced the first U.S. Strategy to Anticipate, Prevent, and Respond to Atrocities on July 15, 2022. "[T]he strategy will guide our future work as we institutionalize a task force-based process and mobilize a true whole-of-government effort for atrocity prevention and response." See July 15, 2022 remarks. The report is available at https://www.state.gov/2022-united-states-strategy-to-anticipate-prevent-and-respond-to-atrocities/.

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"Human suffering anywhere concerns men and women everywhere." That's what Elie Wiesel said when accepting the Nobel Peace Prize in 1986. His words remind us that it is our duty as human beings to not look away from violence or atrocities, including genocide, war crimes, and crimes against humanity. And those words remind us as well that it is also our duty – both as human beings and as governments – to do something about it.

Virtually every day, at this moment, we hear of new atrocities committed against civilians in Ukraine as part of Vladimir Putin's war of aggression – of schools and hospitals bombed, of grain silos destroyed and wheat fields set ablaze, of women and girls raped, and men and boys executed. Smartphones and social media give the events in Ukraine a jarring sense of immediacy. But we all know that Ukraine is not the only place in the world where people are suffering – and suffering mightily – as a result of atrocities and abuses of human rights.

They are occurring in South Sudan and Ethiopia, where we have heard reports of sexual and gender-based violence being used as a tool of conflict; in the People's Republic of China, where genocide and crimes against humanity are being perpetrated against Uyghurs in Xinjiang; in Afghanistan, where the Taliban continues to abuse the human rights and fundamental freedoms of women and girls, members of ethnic and religious minority groups, and other marginalized people; in Syria, where the Assad regime has committed war crimes; in Myanmar, where Secretary Blinken earlier this year announced his determination that members of the Burmese military committed genocide and crimes against humanity against Rohingya.

All too often, in the decades since we began saying, "Never again," after the Holocaust, governments – including the United States – tended to be reactive, rather than proactive. We took action, after atrocities had already occurred: documenting human rights abuses and making the findings known to the public, denouncing and sanctioning perpetrators, investigating and prosecuting them in court, providing support to the survivors and to their communities.

These measures are important. Indeed, accountability is crucial to uncovering the truth, to punishing those who have done grave harm, to achieving some measure of justice for victims, survivors, and their families. But accountability alone is not enough. We must work to stop atrocities, crimes against humanity, war crimes, and genocide from occurring in the first place, to protect victims by preventing them from being victimized.

In 2018, Congress passed the Elie Wiesel Genocide and Atrocities Prevention Act in recognition that atrocity prevention is a priority and a responsibility of the United States. The 2022 Elie Wiesel Report, which we are releasing today, updates Congress and the public on the United States efforts to address genocide, war crimes, and crimes against humanity in every part of the world, including specifically aligning our work to support evidence collection, impose sanctions, and hold perpetrators accountable in these and other countries.

And we are going further today as well by launching the first ever Strategy to Anticipate, Prevent, and Respond to Atrocities. This plan will help coordinate resources and direct activities not only at the State Department but across the federal government in three key areas.

First, anticipation. We know from painful experience that the human and economic costs of atrocities are higher when we wait to respond, as opposed to when we can take early action to prevent escalation. That's why the strategy emphasizes the importance of data collection, observation, intelligence gathering, and analysis. Under the strategy, we will work through the White House-led Atrocity Prevention Task Force to identify the countries and regions most at risk for atrocities and develop targeted plans for prevention and response.

Second, prevention. We will use our foreign assistance dollars as well as our diplomacy to strengthen institutions and societies, provide emergency and humanitarian relief, and help address underlying tensions and advance justice in countries at risk of atrocities and escalation. We will deepen our work with allies and partners, both bilaterally and multilaterally, to coordinate our efforts and mobilize coalitions to take preventive action. And we will train U.S. diplomats and foreign aid workers to recognize the warning signs that atrocities may be on the horizon.

Third, response. As we know all too well, there will still be times when, despite our best efforts and those of our allies and partners, we cannot prevent atrocities from occurring. We will continue to deploy the full range of tools we have available to then hold people and governments to account for atrocities and human rights abuses.

We know none of these measures is sufficient on its own, and we must be humble about what even this new strategy can achieve. Despite the best efforts of the world, over the more than seven decades since the end of World War II, we have seen genocides in Rwanda, in Bosnia, in Myanmar. We have seen reports of sexual violence used as a weapon of war in the Democratic Republic of the Congo, in ISIS-controlled regions of Iraq and Syria, and now in Ukraine. We have seen reports of extrajudicial killings in Colombia, in the Philippines, in Afghanistan.

But this new strategy makes plain to the world once again that the United States stands with the victims of these abuses, and that we refuse to give in to cynicism. We refuse to accept that atrocities and human rights abuse are inevitable. We can do better. The world can do better.

To quote Elie Wiesel again, "Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented." This strategy and our other ongoing work to prevent atrocities once again demonstrates the United States commitment to standing on the side of victims and survivors, and holding the perpetrators of atrocities to account.

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2. Responsibility to Protect

a. U.S. statements on R2P

On June 2, 2022, Under Secretary for Civilian Security, Democracy, and Human Rights Uzra Zeya delivered remarks at a UN Security Council Open Debate on strengthening accountability and justice for serious violations of international law. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-under-secretary-uzra-zeya-at-a-unsc-open-debate-on-strengthening-accountability-and-justice-for-serious-violations-of-international-law/.

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The United States 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 which we continue to believe are best advanced together.

Genocide, war crimes, crimes against humanity, conflict-related sexual violence, and other gross violations of human rights law and serious violations of international humanitarian law undermine societies, destabilize nations and entire regions, and threaten international peace and security.

For the victims of genocide, crimes against humanity, and war crimes, urgency is an essential element in seeking justice. By holding perpetrators to account for their crimes, a measure of justice is provided to the victims and the loved ones they left behind. Holding perpetrators to account can also deter further atrocities.

Unfortunately, we cannot have a discussion on accountability without acknowledging that it is now nearly 100 days since Russia's unprovoked attack on Ukraine. In that time, we have witnessed Russian forces bombing maternity hospitals, train stations, apartment buildings and homes, and civilians killed even as they bicycled down a street.

We have received credible reports of Russian forces torturing and committing execution-style killings of people with their hands bound behind their back. We have received reports of women and girls being raped, some publicly, and children taken away to Russia and put up for adoption. And we know that Russian forces continue to deny safe passage to civilians fleeing violence and to humanitarian organizations trying to reach those in need.

Russia also continues to flagrantly disregard the International Court of Justice's order of March 16, which requires Russia to suspend immediately its military operations in Ukraine.

This type of unprovoked assault on sovereignty and the international rules-based order is exactly what this body was created to prevent.

Those who perpetrated these crimes must be held to account. Our message to Russia's military and political leadership is this: the world is watching you, and you will be held accountable.

The United States is working with our allies to support a broad range of international investigations into atrocities in Ukraine.

The European Democratic Resilience Initiative, which President Biden announced in March, will provide up to $320 million in new funding to support societal resilience and defend

human rights in Ukraine, with a particular focus on accountability for war crimes and other atrocities committed by Russia's forces in Ukraine.

As part of this initiative, we have created a new Conflict Observatory, to provide a platform to document, verify, and disseminate open-source evidence of Russia's human rights abuses and war crimes. This information will be collected and preserved consistent with international legal standards for use in ongoing and future accountability efforts, including potential civil and criminal legal processes.

This evidence database will be available to others engaged in documentation efforts as well as to domestic and international justice mechanisms for their use in making data-based decisions and determinations in pursuit of justice and accountability.

In addition, on May 25, the United States, in partnership with the UK and EU, announced the Atrocity Crimes Advisory Group to ensure efficient coordination of support for accountability efforts in Ukraine. It is a demonstration of international support and solidarity at this crucial historical moment for Ukraine.

As Secretary Blinken said, "The initiative will directly support efforts by the Ukrainian Office of the Prosecutor General to document, preserve, and analyze evidence of war crimes and other atrocities committed by members of Russia's forces in Ukraine, with a view toward criminal prosecutions."

We are also supporting a broad range of international investigations into atrocities in Ukraine. These investigations include those conducted by the International Criminal Court, the United Nations, and the Organization for Security and Cooperation in Europe. This includes supporting the establishment of the Human Rights Council's Commission of Inquiry, and we look forward to hearing more from High Commissioner Bachelet about its work.

We know too that while the war in Ukraine rages, other atrocities have been — and still are — being perpetrated around the world, including in Syria, the People's Republic of China, Burma, Ethiopia, and Afghanistan. We must not lose sight of them or their victims and survivors.

The United States is supporting investigative mechanisms such as the Independent Investigative Mechanism for Myanmar, to which we provided a new $1 million donation, as well as support to the Sri Lanka Accountability Project.

In addition to our support for many of the International Criminal Court's open investigations, we are funding capacity building for the hybrid Special Criminal Court in the Central African Republic.

We are also looking for ways to support cases being brought in domestic courts around the world, such as the groundbreaking prosecution of Anwar Raslan in Germany, which resulted in a judgment for crimes against humanity.

Finally, we recognize the contributions of the International Court of Justice to the realization of the purposes and principles of the United Nations.

Given the breadth of work we face, we look forward to today's discussion to explore ways to develop and strengthen accountability mechanisms at the State, regional, and international levels.

We must also bring necessary focus to victims and survivors. Establishing the truth about international crimes is essential to restoring their rights and dignity, ensuring the same for their relatives, and obtaining remedies for the harm victims and survivors have suffered.

Effective accountability measures for those who are ordering and committing atrocities will make clear that those who engage in brutality will not enjoy impunity. Together with our Allies and partners, we are united in our resolve to bring perpetrators to justice.

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On June 24, 2022, Deputy Legal Advisor Julian Simcock delivered remarks at a UN General Assembly Plenary on the responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-unga-plenary-on-the-responsibility-to-protect-and-the-prevention-of-genocide-war-crimes-ethnic-cleansing-and-crimes-against-humanity/.

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It has been seventeen years since the General Assembly adopted the World Summit Outcome Document. Seventeen years since Member States proclaimed, in this room, that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. And yet even today, we continue to see the perpetration of atrocities against civilians in situations around the world.

As the Secretary-General has urged, we, the Member States of the United Nations, must do more to protect the most vulnerable individuals in the world from the perpetration of the most horrific crimes. We welcome the Secretary-General's focus in this year's report on the risk and impact of atrocity crimes on children and youth, and on the importance of prevention.

As the first pillar of "responsibility to protect" provides, each Member State bears its own responsibility to protect its population of children from mass atrocities. Since 2005, more than 100,000 children have been killed or maimed in armed conflict. Over 93,000 children have been unlawfully recruited or used as child soldiers. Countless more remain vulnerable to rape and sexual violence.

How many more children have to be killed or harmed before we take effective action?

The suffering and harm to children takes on many additional forms. Unlawful attacks on schools rob children not only of their education but also their hope for a better future. Displaced families often flee with their children as IDPs or refugees, causing a disruption that creates lasting trauma. While displaced, children face similar threats and remain vulnerable to exploitation.

It is clear that we have not done enough. The United States remains committed to protecting children from the impacts of conflict, as demonstrated by our push in the Security Council to elevate and better integrate the Children and Armed Conflict agenda into the Council's work. We also recognize the need to update toolkits by addressing the specific needs of children in ongoing conflict or atrocities, as well as those in contexts of conflict or atrocity risk.

Member States should make every effort to implement the seven priorities listed in the Secretary-General's report this year. In particular, we need to leverage education for peace and the prevention of atrocities. Teachers can play a critical role in building societies that are inclusive, tolerant, respectful of diversity, and able to manage conflict. We must also recall the importance of accountability as a critical deterrent for future perpetrators of atrocities and as one of the most important tools for prevention.

In most countries affected by conflict, children comprise the majority of their populations. When we work collectively to protect children, we are not just saving lives, but also safeguarding our future.

Finally, I cannot conclude without decrying the horrific atrocities that have been committed by Russian Forces against civilians in Ukraine. We reiterate our call for the international community to take collective action to put a halt to these atrocities. And as we have stated in other settings, the United States is resolutely committed to pursuing accountability for such crimes. The international community must ensure that they do not go unpunished.

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On September 15, 2022, Under Secretary Uzra Zeya delivered remarks at the Organization of American States Focal Points meeting. The remarks are available at https://www.state.gov/the-responsibility-to-protect-focal-points/ and excerpted below.

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It has been 17 years since the UN General Assembly adopted its World Summit Outcome Document, which included the responsibility to protect.

This document proclaimed that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

Unfortunately, we continue to see the perpetration of atrocities around the world against populations protected by international law. Genocide, war crimes, and crimes against humanity – including conflict-related sexual violence– undermine societies, destabilize nations and regions, and threaten international peace and security.

The United States will continue to be a strong supporter of atrocity prevention, response, and recovery, including through meaningful accountability for perpetrators and justice for the victims and survivors of atrocities through appropriate mechanisms.

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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 2022. The 49th regular session of the HRC took place between February and April of 2022 ("HRC 49"). See discussion of HRC 49 in Chapter 6 of this Digest. The Group of Friends' March 22, 2022 joint statement, which the United States joined, is available at https://geneva.usmission.gov/2022/03/22/responsibility-to-protect/, and excerpted below.

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The Group of Friends of R2P wishes to take this opportunity to reiterate its strong commitment to the multilateral human rights system and the integrity and independence of Special Procedures. We also wish to thank the Special Rapporteur on minority issues for his report and his leadership in highlighting when persons belonging to national or ethnic, religious or linguistic minorities around the world face threats, discrimination, or legal obstacles abusing or violating their human rights and fundamental freedoms.

We strongly oppose the misuse of the language of R2P or of the protection of persons belonging to minority groups for political purposes, in particular as a tool to divert attention from, or justify, violations of international law, including human rights law.

Human rights violations and abuses are often early indicators of atrocities. In this regard, Special Procedures – including both thematic and country-specific mandate holders – are often the first to raise alarm and recommend robust action in light of emerging warning signs. They also directly engage with concerned states to alert them of these risks, help strengthen protection capacities and contribute to follow-up technical assistance and capacity building measures. As such, they play an indispensable role in helping UN member states uphold their individual and collective Responsibility to Protect.

Persons belonging to minorities are often particularly at risk of becoming targets of the commission of genocide, war crimes, crimes against humanity or ethnic cleansing. Early risk indicators range from attacks on religious or ethnic minorities to their exclusion from decision-making processes and public life. Often, unequal access to resources further exacerbates the vulnerable situation of persons belonging to minority groups. Xenophobia, incitement to hatred or violence, and discriminatory rhetoric often fuels further mistrust and tensions, putting minority groups at heightened risk. Together with aggravating circumstances, such as deteriorating economic conditions, increasing inequalities or rising political instability, this may create an environment conducive to the commission of atrocity crimes.

In this context, the mandate of the Special Rapporteur on minority issues plays an essential role in highlighting situations of risk and engaging with concerned countries, as well as the wider multilateral system, to enhance protection capacities and address context-specific concerns. As women and girls belonging to minorities often experience unique challenges, the application of a gender lens within the mandate of the Special Rapporteur has also been instrumental in ensuring a more robust analysis of gender-sensitive indicators of early warning signs of atrocity crimes.

As the systematic undermining of human rights of members of national, ethnic, religious, racial or linguistic minorities continues around the world, we call on all UN Member States to cooperate actively with the Special Rapporteur, and to utilise the recommendations and analysis of his reports to identify gaps and challenges in domestic legal protection frameworks for members of minorities. Putting in place strong, resilient and robust protection mechanisms for persons belonging to minority groups is a core element of enhancing national resilience to atrocity crimes and building structural prevention capacities at home, in line with Pillar I of R2P and Item 10 of this Council's agenda. Thus, the work of the Special Rapporteur should also be used for technical assistance and capacity building measures for countries in need of stronger

political and legislative protections and mitigation strategies to protect members of minority groups.

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On September 16, 2022, the Group of Friends delivered a joint statement during the interactive dialogue with the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence at the 51st regular session of the HRC ("HRC 51"). See discussion of HRC 51 in Chapter 6 of this *Digest*. The joint statement, which the United States joined, is available at https://geneva.usmission.gov/2022/09/16/joint-statement-on-responsibility-to-protect/, and excerpted below.

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The Special Rapporteur's mandate to contribute to accountability and prevent recurrence of atrocity crimes is intrinsically linked to the Responsibility to Protect.

We thank the Special Rapporteur for his report, which provides an important resource to better understand how private sector actors may facilitate systematic violations and abuses of human rights. A holistic assessment of such actors benefitting from repression is essential to address economic and political drivers of violence and inform better regulation of the private sector, if and where needed. Anyone complicit in the commission of atrocity crimes should be held accountable, as appropriate.

The Special Rapporteur's analysis on the role of non-state armed groups in reparation, memorialization and truth-seeking processes also provides an important framework to better understand the role of various actors in contributing to accountability and redress for victims.

In this regard, we would like to ask the Special Rapporteur:

"How can the UN human rights system, including its mechanisms and procedures, strengthen measures to ensure that relevant actors adhere to their obligations under international law, and contribute to transitional justice processes?

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3. Atrocities in Burma

On January 31, 2022, the High Representative on behalf of the European Union, and the Foreign Ministers of Albania, Australia, Canada, New Zealand, Norway, Republic of Korea, Switzerland, the United Kingdom and the United States issued a joint statement on the one-year anniversary of the military coup in Myanmar. The joint statement appears below, and as a State Department media note at https://www.state.gov/joint-statement-on-the-situation-in-myanmar/.

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On 1 February 2021, the military seized power in Myanmar, denying the democratic aspirations of Myanmar's people. One year later, the devastating impact on the people of Myanmar is clear. Over 14 million people are in humanitarian need, the economy is in crisis, democratic gains have been reversed, and conflict is spreading across the country. The military regime bears responsibility for this crisis, which has gravely undermined peace and stability in Myanmar and the region. We once again call for the immediate cessation of violence and for constructive dialogue among all parties to resolve the crisis peacefully. We reiterate our call on the military regime to immediately end the State of Emergency, allow unhindered humanitarian access, release all arbitrarily detained persons, including foreigners, and swiftly return the country to the democratic process.

On the anniversary of the coup, we remember those who have lost their lives over the past year, including women, children, humanitarian personnel, human rights defenders, and peaceful protesters. We strongly condemn the military regime's human rights violations and abuses across the country, including against Rohingya and other ethnic and religious minorities. We express grave concern at the credible reports of torture and sexual and gender-based violence. We express serious concern over the more than 400,000 additional people who have fled their homes since the coup. We also express grave concern at the deepening humanitarian crisis across the country and urge the military regime to provide rapid, full, and unhindered humanitarian access to vulnerable populations, including for the purposes of vaccination against COVID-19. We express grave concern over the large number of persons arbitrarily detained and the sentencing of State Counsellor Aung San Suu Kyi and other political detainees.

We call on all members of the international community to support efforts to promote justice for the people of Myanmar; to hold those responsible for human rights violations and abuses accountable; to cease the sale and transfer of arms, materiel, dual-use equipment, and technical assistance to the military and its representatives; and to continue supporting the people of Myanmar in meeting urgent humanitarian needs.

We emphasize our support for the ASEAN Five-Point Consensus and the efforts of the ASEAN Special Envoy to support a peaceful resolution in the interests of the people of Myanmar. We call on the military regime to engage meaningfully with ASEAN's efforts to pursue full and urgent implementation of the Five-Point Consensus, which includes ensuring that the ASEAN Special Envoy has access to all parties in Myanmar, including pro-democracy groups. We also welcome the work of the UN Special Envoy of the Secretary-General on Myanmar and urge the military regime to engage constructively with her.

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On March 21, 2022, Secretary Blinken announced his determination that members of the Burmese military committed genocide and crimes against humanity against Rohingya at the United States Holocaust Memorial Museum. His remarks are excerpted below and available at https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/.

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Beyond the Holocaust, the United States has concluded that genocide was committed seven times. Today marks the eighth, as I have determined that members of the Burmese military committed genocide and crimes against humanity against Rohingya.

It's a decision that I reached based on reviewing a factual assessment and legal analysis prepared by the State Department, which included detailed documentation by a range of independent, impartial sources, including human rights organizations like Amnesty International and Human Rights Watch, as well as our own rigorous fact-finding.

Among those sources was a joint report, published in November 2017, by the museum's Simon-Skjodt Center for the Prevention of Genocide and the human rights group, Fortify Rights; and the museum's determination, in December 2018, that there is compelling evidence that Burmese military committed crimes against humanity and genocide against Rohingya.

Given the gravity of this determination, it was also important that this administration conduct its own analysis of the facts and the law. (Inaudible) instances, the military used similar tactics targeting Rohingya: the razing of villages, killing, rape, torture, and other horrific abuses.

The military's attacks in 2016 forced nearly 100,000 Rohingya to flee to Bangladesh. In 2017, attacks killed more than 9,000 Rohingya, and forced more than 740,000 to seek refuge in Bangladesh.

Let me take a moment to share some findings of this report, because they are a key part of how I arrived at my own determination.

The report was based on a survey of more than 1,000 Rohingya refugees living in Bangladesh, all of whom were displaced by the violence in 2016 or 2017. Three-quarters of those interviewed said that they personally witnessed members of the military kill someone. More than half witnessed acts of sexual violence. One in five witnessed a mass-casualty event – that is, the killing or injuring of more than 100 people in a single incident.

These percentages matter. They demonstrate that these abuses were not isolated cases. The attack against Rohingya was widespread and systematic, which is crucial for reaching a determination of crimes against humanity.

The evidence also points to a clear intent behind these mass atrocities – the intent to destroy Rohingya, in whole or in part. That intent has been corroborated by the accounts of soldiers who took part in the operation and later defected, such as one who said he was told by his commanding officer to, and I quote, "shoot at every sight of a person," end quote – burn villages, rape and kill women, orders that he and his unit carried out.

Intent is evident in the racial slurs shouted by members of the Burmese military as they attacked Rohingya, the widespread attack on mosques, the desecration of Korans.

Intent is evident in the soldiers who bragged about their plans on social media, such as a lieutenant in the 33rd Light Infantry Division who, as he was deployed to Rakhine State in August 2017, wrote on his Facebook page, and I quote: "If they're Bengali, they'll be killed." His unit is among those reported to have committed atrocities.

Intent is evident in public comments by Min Aung Hlaing, the commander-in-chief of the Burmese military, who was overseeing the operation. On September 1, 2017, as soldiers were razing villages, killing, torturing, raping men, women, and children, he said this, and I quote: "The Bengali problem was a longstanding one that has become an unfinished job… The government in office is taking great care in solving it," end quote.

This is the same man who, in 2021, would lead the military coup to overthrow Burma's democratically-elected government, and who currently heads its repressive regime.

Intent is evident in the preparatory steps that soldiers took in the days leading up to the atrocities. In the village of Maung Nu, for example, soldiers started by confiscating Rohingyas' kitchen knives and machetes. Then they imposed a curfew. Then they tied pieces of red cloth outside the homes of Rohingya and at a local mosque. And then, only then, did the killing start.

Intent is evident in the military's efforts to prevent Rohingya from escaping, like soldiers blocking exits to villages before they began their attacks, sinking boats full of men, women, and children as they tried to flee to Bangladesh. This demonstrates the military's intent went beyond ethnic cleansing to the actual destruction of Rohingya.

Percentages, numbers, patterns, intent: these are critically important to reach the determination of genocide. But at the same time, we must remember that behind each of these numbers are countless individual acts of cruelty and inhumanity.

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On June 13, 2022, Nick Hill, Deputy U.S. Representative to the UN Economic and Social Council, delivered remarks at a UN General Assembly briefing on the human rights situation in Burma. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-briefing-on-the-human-rights-situation-in-burma/.

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In the 17 months since the military coup derailed Myanmar's democratic transition, we have seen the regime escalate a brutal crackdown on the people of Myanmar, killing over 1,900 – including women and children – displacing over half a million from their homes, detaining thousands, and reportedly torturing and committing sexual violence against those in custody. There are also reports of the jailing and denial of medical treatment to over a dozen mentally and physically disabled persons. The regime has shown no sign of willingness to negotiate and continues its attempts to consolidate power at the expense of the people of Myanmar.

Unfortunately, those who led the military's coup are many of the same individuals responsible for abuses against members of Myanmar's religious and ethnic minority groups, including genocide and crimes against humanity against Rohingya. Ongoing actions to violently suppress dissent and exert control are a continuation of the Burmese military's history of atrocities against the people of Myanmar.

In March, Secretary Blinken determined members of Myanmar's military committed genocide and crimes against humanity against Rohingya. We see it in the segregation of Rohingya into internally displaced persons camps in Rakhine State, the requirement that all Rohingya households register with the government and Myanmar's 1982 citizenship law, which effectively excluded Rohingya from citizenship and denied them full political rights.

The United States stands up for religious freedom for Rohingya and people around the world. We will keep working alongside other governments, multilateral organizations, and civil society to do so.

We remain the global leader in our response to the Rohingya crisis. We are supporting efforts to provide justice and accountability for Rohingya, including by supporting the work of the UN's Independent Investigative Mechanism for Myanmar.

We are deeply troubled by the ongoing reports of human rights abuses, including the increase in gender-based violence. The increased violence and ongoing challenges posed by the COVID-19 pandemic have enhanced the risks faced by women and girls across Myanmar. Women and girls in areas where fighting is ongoing are particularly vulnerable to sexual violence, arbitrary detention, and forced labor. The United States continues to call for an immediate end to the violence along with accountability and justice for the victims.

We continue to pursue multiple channels to provide humanitarian assistance and COVID-19 vaccines. We work closely with international organizations and regional partners to ensure our aid reaches all those in need, without discrimination. We have been horrified that the regime blocked the delivery of humanitarian aid, while targeting medical and aid workers. Therefore, we are supporting efforts by ASEAN, the UN, and other key partners to facilitate the effective delivery of aid.

The military coup and horrific violence in Myanmar have closed the door for large-scale voluntary, safe return of refugees to Myanmar. Conditions conducive to the voluntary, sustainable, and dignified return of Rohingyas to Rakhine State are those that we have called for since the coup – a cessation of violence, respect for the will and interests of the people of Myanmar, and a return to the democratic path.

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On August 24, 2022, Secretary Blinken issued a press statement marking five years since Burma's military launched a campaign against Rohingya, which involved genocide, crimes against humanity, and ethnic cleansing. Secretary Blinken also remarked that the United States would support referral of the situation in Burma to the International Criminal Court. The statement is excerpted below and available at https://www.state.gov/marking-five-years-since-the-genocide-in-burma/.

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Five years ago, Burma's military launched a brutal campaign against Rohingya – razing villages, raping, torturing, and perpetrating large-scale violence that killed thousands of Rohingya men, women, and children. More than 740,000 Rohingya were forced to flee their homes and seek refuge in Bangladesh. In March of this year, I spoke at the United States Holocaust Memorial Museum and attested that the atrocities committed by the Burmese military against Rohingya amounted to crimes against humanity and constitute genocide.

Since the February 2021 military coup d'état, many of the same military forces continue to repress, torture, and kill the people of Burma in a blatant attempt to extinguish Burma's democratic future. The regime's recent executions of pro-democracy and opposition leaders is only the latest example of the military's abject disregard for the lives of the Burmese people. Its escalation of violence has exacerbated the worsening humanitarian situation, particularly for

ethnic and religious minority communities, including Rohingya, who continue to remain among the most vulnerable and marginalized populations in the country.

The United States remains committed to advancing justice and accountability for Rohingya and all the people of Burma in solidarity with the victims and survivors. We continue to support the Independent Investigative Mechanism for Myanmar, the case under the Genocide Convention that The Gambia has brought against Burma before the International Court of Justice, and credible courts around the world that have jurisdiction in cases involving Burmese military's atrocity crimes. The United States also supports measures by the UN Security Council to promote justice and accountability for the military's actions in line with its mandate to promote international peace and security. In this vein, the United States would support a UN Security Council referral of the situation in Burma to the International Criminal Court.

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On September 22, 2022, Ambassador Michèle Taylor delivered a statement at an interactive dialogue with the special rapporteur on the situation of human rights in Myanmar at the 51st regular session of the HRC ("HRC 51"). See discussion of HRC 51 in Chapter 6 of this *Digest*. The remarks are excerpted below and available at https://geneva.usmission.gov/2022/09/22/interactive-dialogue-with-special-rapporteur-on-the-situation-of-human-rights-in-myanmar-2/.

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The United States remains deeply concerned by the reports of human rights abuses committed by Myanmar's military, including torture, sexual violence, and extrajudicial killings.

We condemn in the strongest terms the military's actions, including the executions of four pro-democracy and elected leaders in July. These acts exemplify the military's complete disregard for human rights and the rule of law.

The United States calls for coordinated action to impose costs on the military for its violence against the people of Myanmar through an international arms embargo and targeted economic action.

We also call on all member states to urge the military to immediately cease such violence and allow for full, safe, and unhindered humanitarian access.

We remain committed to pursuing accountability for those responsible for atrocities and other abuses. To that end, earlier this week, the United States announced an additional contribution of one million dollars to the Independent Investigative Mechanism for Myanmar.

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On September 28, 2022, Ambassador Lisa Carty, U.S. Representative to the UN Economic and Social Council, delivered remarks at an event on accountability for atrocities in Burma hosted by the Canadian Mission to the UN. The remarks are available at https://usun.usmission.gov/remarks-at-an-event-on-accountability-for-atrocities-in-

burma-hosted-by-the-canadian-mission-to-the-un-global-justice-center-and-ushmm/ and excerpted below.

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Last month we commemorated the fifth anniversary of the horrific 2017 campaign against Rohingya, during which members of the Burmese military committed genocide and crimes against humanity. Many of these same military forces have participated in the coup and continue to repress, physically abuse, and kill the people of Burma in a blatant attempt to extinguish Burma's democratic future.

As recently as September 16, Burmese armed forces attacked a school in Let Yet Kone in, killing at least 11 children and two adults. Since the February 2021 military coup approximately 380 children have lost their lives.

The regime's executions of pro-democracy and opposition leaders in July is another example of the military's abject disregard for the lives of the Burmese people. Its violence has exacerbated the worsening humanitarian situation, particularly for ethnic and religious minority communities, including Rohingya, who continue to remain among the most vulnerable and marginalized populations in the country.

We are deeply troubled by the ongoing reports of human rights abuses, including the increase in gender-based violence. Women and girls in areas where fighting is ongoing are particularly vulnerable to sexual violence, arbitrary detention, and forced labor.

The United States remains committed to advancing justice and accountability for all people in Burma and stands in solidarity with the victims and the survivors.

Since 2017, the United States has supported Rohingya, recognizing that they cannot safely return to their homeland of Burma under current conditions. We have provided more than $1.7 billion to assist those affected by the crisis in Burma, in Bangladesh, and elsewhere in the region, remaining the leading donor of humanitarian assistance.

Last week we were proud to announce $170 million in additional assistance to support the expansion of the Myanmar Curriculum, a major milestone towards offering all Rohingya children in Bangladesh an opportunity for a formal education. With the Government of Bangladesh's endorsement of the UN's Skills Development Framework, we look forward to supporting more livelihood and vocational training opportunities for Rohingya within the refugee camps.

Let me also highlight the concrete actions the United States has taken to ensure we address accountability and justice.

The United States has taken steps to support the case The Gambia has brought the International Court of Justice, asserting that Burma violated its obligations under the Genocide Convention.

We provide support to the UN's Independent Investigative Mechanism for Myanmar, which has mandated to collect, consolidate, preserve, and analyze evidence of the most serious international crimes and violations of international law committed in Burma since 2011.

The United States works with international partners and NGOs to support brave Rohingya seeking justice in the courts of Argentina for the atrocities committed against them.

And we are working with the Rohingya community more broadly to help document atrocities and abuses. We stand ready to support a transitional justice process that respects victims' demands for truth, reparation, justice, and non-recurrence – once that becomes viable.

Finally, Secretary Blinken has made clear that the United States, "supports measures by the UN Security Council to promote justice and accountability for the military's actions…and would support a UN Security Council referral of the situation in Burma to the International Criminal Court."

We want to be clear about the United States' position on the need for accountability for victims of the Burmese military's atrocities. We are open to all available options to help ensure there is justice.

Preventing the recurrence of atrocities, addressing the needs of victims, and ensuring that those responsible are held accountable are essential to address the military's continued impunity and to ensure a peaceful, prosperous, and democratic Burma that respects the human rights of all.

Justice may still feel like it is a long way off. Justice for these types of atrocities can take decades. But it can only happen through the efforts of victims, survivors, their advocates, and allies, laying the foundation year after year. The United States will keep working alongside you towards this end.

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On November 16, 2022, Ambassador Larry Dinger, U.S. Senior Area Adviser for East Asia and Pacific Affairs, delivered the U.S. explanation of position on a UN General Assembly Third Committee resolution on the situation of human rights of Rohingya and other minorities in Myanmar, co-sponsored by the United States. The remarks are excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-situation-of-human-rights-of-rohingya-muslims-and-other-minorities-in-myanmar/.

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The United States is proud to co-sponsor the resolution on the situation of human rights in Myanmar. We thank the core group for a productive negotiations process.

We note with great concern the atrocities and other human rights abuses, including torture, reportedly committed by Myanmar, and more specifically, the Myanmar military, which has escalated violence against the people of Myanmar, including members of civil society, journalists, and human rights defenders.

The Myanmar military's actions since the February 2021 military coup have created a humanitarian and human rights catastrophe that is rapidly undoing the hard-fought democratic progress achieved by the Myanmar people over the past decade. The worsening crisis has exacerbated conditions for Myanmar's most vulnerable populations, including Rohingya and members of other ethnic and religious minority communities.

We urge the international community to act collectively to pressure the military to cease violence, release all those unjustly detained, address human rights abuses, promote justice and

accountability, allow unhindered humanitarian access, and support the people of Myanmar in their aspirations for peace and multiparty democracy.

We condemn the military regime's continued repression and call for coordinated action, including an international arms embargo. The continued transfer and sale of arms by Member States to the military must stop. We call on all UN Member States to refrain from complicity in the regime's continued violence and brutality against people in Myanmar. We will continue to press for language condemning the sale of arms to the regime.

With regard to other issues relevant to this resolution, we refer you to the U.S. General Statement 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.

The United States will continue to work with our international partners to advance justice and accountability for the military's atrocities and unjust actions, including against Rohingya, and highlight behavior that undermines the regime's credibility. We stand with those promoting peace, respect for human rights and fundamental freedoms, and inclusive democratic governance.

In closing, we reiterate our ongoing support for the people of Myanmar and encourage all delegations to co-sponsor and vote in favor of this resolution.

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On December 21, 2022, Ambassador Robert Wood delivered the U.S. explanation of vote on UN Security Council Resolution 2669 (U.N. Doc. S/RES/2669, available at https://digitallibrary.un.org/record/3998406/files/S_RES_2669_%282022%29-EN.pdf?ln=en), on the situation in Burma. Ambassador Wood's remarks are excerpted below and available at https://usun.usmission.gov/explanation-of-vote-following-the-adoption-of-a-un-security-council-resolution-on-the-situation-in-burma/.

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The resolution is a strong next step in the Council's efforts to address the Myanmar military regime's egregious behavior. The resolution comes in response to the regime's brutal repression and violence, which pose a clear threat to international peace and security. The regime's actions continue to contribute to regional instability and refugee flows, impacting neighboring states while inflicting tremendous suffering on the people of Myanmar.

The resolution notes the need for the regime to respect human rights, immediately release detained prisoners, allow unhindered humanitarian access, and protect minority groups. It also expresses concern with attacks on civilians and civilian infrastructure, which have killed far too many innocent men, women, and children.

The resolution is premised on the important role of ASEAN and its special envoy in addressing the situation in Myanmar, as well as the importance of cooperation between the UN Special Envoy and her ASEAN counterpart. It helps answer the call from our ASEAN partners for greater support from the UN and the international community. We look forward to Special Envoy Heyzer's briefing to the Security Council on the situation in Myanmar this spring.

At the same time, this resolution does not go far enough. We should directly address the regime's severe violations of freedom of religion and belief. We should call directly for the regime to face justice for the crimes it has reportedly committed, such as strikes on a school and a concert that killed scores of civilians. We should not overlook the General Assembly's resolution in support of an arms embargo. And we should pursue a mechanism to prevent the flow of financial resources to the regime.

These measures are critical to ending the bloodshed. Given these realities, the United States views the adoption of this resolution as an important start to the conversation within the Security Council on Myanmar. The Council should use this opportunity to seek additional ways to support implementation of the Five-Point Consensus and to promote accountability for the regime's actions. We look forward to working with all of you toward these ends.

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Also on December 21, 2022, Secretary Blinken issued a statement welcoming the UN Security Council's adoption of Resolution 2669 on Burma. The press statement is available at https://www.state.gov/un-security-council-adopts-resolution-on-burma/ and included below.

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The United States welcomes the UN Security Council's adoption of Resolution 2669 on Burma. This is an important step by the Security Council to address the crisis and end the Burma military regime's escalating repression and violence against civilians. It sends a strong message from the international community that the regime must end its violence across the country, release arbitrarily detained prisoners, allow unhindered humanitarian access, protect members of minority groups, and respect the will and democratic aspirations of the people of Burma.

While we applaud the adoption of this resolution, the Council still has much more work to do to advance a just solution to the crisis in Burma. The Security Council should leverage this opportunity to seek additional ways to promote a return to the path of democracy, advance accountability for the regime's actions, and support ASEAN's efforts to achieve meaningful implementation of the Five Point Consensus. We remain committed to working with the UN and our international partners, including ASEAN, to end the violence in Burma and seek a peaceful reconciliation to the crisis.

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4. Atrocities in Northern Ethiopia

On February 22, 2022, the State Department issued the following statement, available at https://www.state.gov/reports-of-atrocities-in-the-amhara-region/, expressing grave concern about reported atrocities in the Amhara region of Ethiopia.

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The United States is gravely concerned by the reports of atrocities, including sexual violence, committed by fighters affiliated with the Tigray People's Liberation Front in the Amhara region of Ethiopia in late August and early September 2021, as described in a recent Amnesty International report. We call on all armed actors to renounce and end all human rights abuses and violence against civilians. It remains our firm position that there must be credible investigations into and accountability for atrocities as part of any lasting solution to the crisis.

Continued reports of atrocities underscore the urgency of ending the ongoing military conflict. We continue to engage parties to the conflict to urge a halt to the violence, an end to atrocities, the unhindered provision of life-saving humanitarian assistance, and a peaceful resolution to the conflict.

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The State Department issued another statement on April 8, 2022, expressing grave concern about "continuing reports of ethnically-motivated atrocities committed by Amhara authorities in western Tigray, Ethiopia, including those described in the recent joint report by Human Rights Watch and Amnesty International. In particular, we are deeply troubled by the report's finding that these acts amount to ethnic cleansing." Press statement, available at https://www.state.gov/reports-of-mass-atrocities-in-western-tigray/.

On June 30, 2022, Ambassador Michèle Taylor delivered a statement at an interactive dialogue with the International Commission of Human Rights Experts on Ethiopia at the 50th regular session of the HRC ("HRC 50"). See discussion of HRC 50 in Chapter 6 of this *Digest*. The remarks are excerpted below and available at https://geneva.usmission.gov/2022/06/30/interactive-dialogue-with-the-international-commission-of-human-rights-experts-on-ethiopia-hrc50/.

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…We are gravely concerned by the reports of atrocities against civilians in Ethiopia, including those involving extrajudicial killings, forced displacement, arbitrary detentions, and sexual violence.

We are alarmed that thousands are reportedly continuing to be detained arbitrarily in life-threatening conditions in Western Tigray and, in recent weeks, thousands of new arrests have reportedly occurred elsewhere in the country.

We are deeply concerned about the narrowing space for freedom of expression and independent media, including reports of harassment and arbitrary detention of journalists, media professionals, and activists, and the continued information blockade in Tigray.

We call for the immediate release of anyone in arbitrary detention and urge international monitors to be granted full access to all detention facilities. We also call for

sustained and unhindered access to humanitarian assistance and restoration of essential services.

We were happy to hear today that discussions are taking place and urge the Government of Ethiopia to fully cooperate with the Commission and allow human rights monitors access to conflict areas to document and investigate alleged atrocities by all parties. Comprehensive, transparent, and inclusive transitional justice, including accountability for atrocities, is essential for lasting peace.

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The governments of Australia, Denmark, Germany, the Netherlands, the United Kingdom, and the United States issued a joint statement on October 12, 2022, condemning acts in Ethiopia. The joint statement appears below and as a State Department media note at https://www.state.gov/joint-statement-on-resumption-of-hostilities-in-northern-ethiopia/.

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We … are profoundly concerned by the escalation of the ongoing conflict and humanitarian crisis in northern Ethiopia. We call on the Government of Ethiopia and the Tigray regional authorities to immediately halt their military offensives, agree to a cessation of hostilities, allow for unhindered and sustained humanitarian access, and pursue a negotiated settlement through peace talks under an African Union-led process. We also condemn the escalating involvement of Eritrean military forces in northern Ethiopia. We call on Eritrean forces to cease their military operations and withdraw from northern Ethiopia. All foreign actors should cease actions that fuel this conflict.

Multiple reports, including the joint investigation report of the Ethiopian Human Rights Commission/Office of the United Nations High Commissioner for Human Rights and the recent report of the International Commission of Human Rights Experts on Ethiopia (ICHREE), have documented human rights abuses committed by Ethiopian and Eritrean government forces, Tigrayan forces, and other armed actors, such as Fano militia, since the start of the conflict in November 2020. Human rights abuses documented in these reports include unlawful killings, physical abuse, and gender-based violence. We are deeply concerned by the ICHREE's finding that there are reasonable grounds to believe that starvation of a civilian population has been used as a method of warfare. The resumption of fighting in northern Ethiopia raises a high risk of further human rights violations and abuses.

We denounce any and all violence against civilians. We call on the parties to recognize there is no military solution to the conflict, and we call on the Government of Ethiopia and the Tigray regional authorities to participate in African Union-led talks aimed at helping Ethiopia achieve a lasting peace. Any durable solution must include accountability for human rights abuses and violations. We also call on all parties to allow unhindered humanitarian access, ensure the safety and security of humanitarian workers, and cooperate with, and facilitate access for, international human rights monitors.

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On October 27, 2022, Ambassador Deborah Malac, U.S. Senior Area Adviser for African Affairs, delivered remarks at a UN General Assembly Third Committee interactive dialogue with the International Commission of Human Rights Experts on Ethiopia. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-third-committee-interactive-dialogue-with-the-international-commission-of-human-rights-experts-on-ethiopia/.

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We recognize that there are ongoing discussions [between the Commission and the Government of Ethiopia] and call on the government to grant you full access so that you can implement the mandate from this Council.

The United States remains deeply concerned by the escalation of violence and the involvement of outside actors in northern Ethiopia. We strongly condemn violence harming civilians by all parties, including Eritrean forces. We welcome the Ethiopian government's expressed commitment to avoid combat operations in urban areas, but we are deeply disturbed by reports of unlawful killing, rape, and displacement.

We welcome the detainees released to date, but we remain concerned about reports of ongoing arbitrary detentions based on ethnicity.

We are also concerned by the ongoing denial of humanitarian assistance, the seizure of humanitarian materials for military use, and Internet shutdowns and other restrictions on freedom of expression on and offline, including for members of the press.

We welcome the government's expressed commitments to hold those responsible for human rights violations and abuses accountable, and we call for comprehensive, inclusive, and transparent transitional justice processes. We call for an immediate cessation of hostilities, unhindered access for humanitarian assistance, Eritrea's withdrawal, and accountability for human rights violations.

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5. Atrocities in Ukraine

On March 23, 2022, Secretary Blinken released a press statement announcing the U.S. government's assessment that members of Russia's forces had committed war crimes in Ukraine. The statement follows and is available at https://www.state.gov/war-crimes-by-russias-forces-in-ukraine/.

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Since launching his unprovoked and unjust war of choice, Russian President Vladimir Putin has unleashed unrelenting violence that has caused death and destruction across Ukraine. We've seen numerous credible reports of indiscriminate attacks and attacks deliberately targeting civilians, as well as other atrocities. Russia's forces have destroyed apartment buildings, schools, hospitals, critical infrastructure, civilian vehicles, shopping centers, and ambulances, leaving thousands of innocent civilians killed or wounded. Many of the sites Russia's forces have hit have been clearly identifiable as in-use by civilians. This includes the Mariupol maternity hospital, as the UN Office of the High Commissioner for Human Rights expressly noted in a March 11 report. It also includes a strike that hit a Mariupol theater, clearly marked with the word "дети" — Russian for "children" — in huge letters visible from the sky. Putin's forces used these same tactics in Grozny, Chechnya, and Aleppo, Syria, where they intensified their bombardment of cities to break the will of the people. Their attempt to do so in Ukraine has again shocked the world and, as President Zelenskyy has soberly attested, "bathed the people of Ukraine in blood and tears."

Every day that Russia's forces continue their brutal attacks, the number of innocent civilians killed and wounded, including women and children, climbs. As of March 22, officials in besieged Mariupol said that more than 2,400 civilians had been killed in that city alone. Not including the Mariupol devastation, the United Nations has officially confirmed more than 2,500 civilian casualties, including dead and wounded, and emphasizes the actual toll is likely higher.

Last week, I echoed President Biden's statement, based on the countless accounts and images of destruction and suffering we have all seen, that war crimes had been committed by Putin's forces in Ukraine. I noted then that the deliberate targeting of civilians is a war crime. I emphasized that Department of State and other U.S. government experts were documenting and assessing potential war crimes in Ukraine.

Today, I can announce that, based on information currently available, the U.S. government assesses that members of Russia's forces have committed war crimes in Ukraine.

Our assessment is based on a careful review of available information from public and intelligence sources. As with any alleged crime, a court of law with jurisdiction over the crime is ultimately responsible for determining criminal guilt in specific cases. The U.S. government will continue to track reports of war crimes and will share information we gather with allies, partners, and international institutions and organizations, as appropriate. We are committed to pursuing accountability using every tool available, including criminal prosecutions.

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On April 7, 2022, 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 statement condemning the atrocities committed by Russia's forces in the course of Russia's war of aggression against Ukraine. The statement is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-russias-war-of-aggression-against-ukraine/ and 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, condemn in the strongest terms the atrocities committed by the Russian armed forces in Bucha and a number of other Ukrainian towns. Haunting images of civilian deaths, victims of torture, and apparent executions, as well as reports of sexual violence and destruction of civilian infrastructure show the true face of Russia's brutal war of aggression against Ukraine and its people. The massacres in the town of Bucha and other Ukrainian towns will be inscribed in the list of atrocities and severe violations of international law, including international humanitarian law and human rights, committed by the aggressor on Ukrainian soil.

In the presence of the Foreign Minister of Ukraine, Dmytro Kuleba, we expressed today our heart-felt solidarity with the Ukrainian people and our deepest condolences to the victims of this war and their families. We underline our unwavering support for Ukraine within its internationally recognized borders and express our readiness to assist further, including with military equipment and financial means, to allow Ukraine to defend itself against Russia's aggression and to rebuild Ukraine.

We underscore that those responsible for these heinous acts and atrocities, including any attacks targeting civilians and destruction of civilian infrastructure, will be held accountable and prosecuted. We welcome and support the ongoing work to investigate and gather evidence of these and other potential war crimes and crimes against humanity, including by the ICC Office of the Prosecutor, the Commission of Inquiry mandated by the UN Human Rights Council, the Human Rights Monitoring Mission Ukraine of the OHCHR, and the OSCE's mission of experts mandated by OSCE Participating States. We will provide investigative support, technical experts and funding. We will continue to promote accountability for all those complicit in Moscow's war of choice, including the Lukashenka regime in Belarus. We are convinced that now is the time to suspend Russian membership of the Human Rights Council.

Russia must immediately comply with the legally binding order of the International Court of Justice (ICJ) to suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. Further, we urge Russia to withdraw completely its military forces and equipment from the entire territory of Ukraine within its internationally recognized borders.

We warn against any threat or use of chemical, biological or nuclear weapons. We recall Russia's obligations under international treaties of which it is a party, and which protect us all. Any use by Russia of such a weapon would be unacceptable and result in severe consequences. We condemn Russia's unsubstantiated claims and false allegations against Ukraine, a respected member of the Biological and Toxin Weapons Convention and the Chemical Weapons Convention that is in compliance with its legal obligations under those instruments. We express concern about other countries and actors that have amplified Russia's disinformation campaign.

We express our gravest concern with Russia forcefully seizing control of nuclear facilities, and other violent actions in connection with a number of nuclear facilities, nuclear and other radioactive material, which have caused and continue to pose serious and direct threats to the safety and security of these facilities and their civilian personnel, significantly raising the risk of a nuclear accident or incident, which endangers the population of Ukraine, neighboring States and the international community.

We reiterate our demand that Russia upholds its obligations under international humanitarian law and desists from further blatant abuses. The Russian leadership must immediately provide for safe, rapid and unimpeded humanitarian access and make safe passages work, enabling humanitarian aid to be delivered to besieged cities and civilians to reach safety.

We commit to supporting the Government of Ukraine's humanitarian coordination structure and to disburse humanitarian support quickly. We ask others to join in this effort. A humanitarian push including more funding is urgently needed for Ukraine and beyond as Russia's ruthless war and actions are having massive consequences on global commodity and food prices. The resulting rise in food insecurity is being felt disproportionately by the most vulnerable. We stand in solidarity with our partners across the world who have to bear the rising price of President Putin's unilateral choice to wage war in Europe. We will make coherent use of all instruments and funding mechanisms to address food insecurity, keep markets open, and build resilience in the agriculture sector on all continents. We will actively counter Russia's narrative that Western sanctions have caused the rise in global food prices and call it out for what it is: a blatant lie.

In light of Russia's ongoing aggression against Ukraine, carried out with Belarus' complicity, we have already adopted unprecedented and coordinated economic and financial sanctions against Russia that impose a significant cost on its economy. We stress the necessity of further increasing the economic pressure inflicted on Russia and the Lukashenka regime in Belarus. Together with international partners, the G7 will sustain and increase pressure on Russia by imposing coordinated additional restrictive measures to effectively thwart Russian abilities to continue the aggression against Ukraine. We will work together to stop any attempts to circumvent sanctions or to aid Russia by other means. We are taking further steps to expedite plans to reduce our reliance on Russian energy, and will work together to this end.

We commend those neighboring states to Ukraine that demonstrated great solidarity and humanity by welcoming Ukrainian refugees and third country nationals affected by the conflict. We confirm the need for increased international assistance and will continue to support these countries, including by receiving more refugees. President Putin's war of aggression against Ukraine has already forced millions of civilians, especially women, children, and elderly, to flee their homes. Over 4.2 million crossed the border to other countries, almost all of them to the EU and the Republic of Moldova. We reiterate our concern about the risk to this vulnerable population, including the risk of human trafficking and our commitment to protect these refugees.

Ministers paid special attention to the Republic of Moldova, which hosts the largest group of refugees from Ukraine per capita. The Ministers agreed to further coordinate their assistance for Moldova's humanitarian response and long-term resilience following the Moldova Support Conference co-hosted by Germany, France and Romania on 5 April in Berlin and the establishment of the Moldova Support Platform.

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On July 13, 2022, Secretary Blinken issued a press statement on Russia's "filtration" operations, forced disappearances, and mass deportations of Ukrainian citizens. The press statement is available at https://www.state.gov/russias-filtration-operations-forced-disappearances-and-mass-deportations-of-ukrainian-citizens/ and excerpted below.

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On the eve of the Ukraine Accountability Conference, the United States calls on Russia to immediately halt its systematic "filtration" operations and forced deportations in Russian-controlled and held areas of Ukraine. The unlawful transfer and deportation of protected persons is a grave breach of the Fourth Geneva Convention on the protection of civilians and is a war crime. Russian authorities must release those detained and allow Ukrainian citizens forcibly removed or coerced into leaving their country the ability to promptly and safely return home. We call on Russia to provide outside independent observers access to so-called "filtration" facilities and to forced deportation relocation areas in Russia.

Estimates from a variety of sources, including the Russian government, indicate that Russian authorities have interrogated, detained, and forcibly deported between 900,000 and 1.6 million Ukrainian citizens, including 260,000 children, from their homes to Russia – often to isolated regions in the Far East. Moscow's actions appear pre-meditated and draw immediate historical comparisons to Russian "filtration" operations in Chechnya and other areas. President Putin's "filtration" operations are separating families, confiscating Ukrainian passports, and issuing Russian passports in an apparent effort to change the demographic makeup of parts of Ukraine.

Reports also indicate Russian authorities are deliberately separating Ukrainian children from their parents and abducting others from orphanages before putting them up for adoption inside Russia. Eyewitnesses and survivors of "filtration" operations, detentions, and forced deportations report frequent threats, harassment, and incidents of torture by Russian security forces. During this process, Russian authorities also reportedly capture and store biometric and personal data, subject civilians to invasive searches and interrogations and coerce Ukrainian citizens into signing agreements to stay in Russia, hindering their ability to freely return home.

Evidence is mounting that Russian authorities are also reportedly detaining or disappearing thousands of Ukrainian civilians who do not pass "filtration." Those detained or "filtered out" include Ukrainians deemed threatening because of their potential affiliation with the Ukrainian army, territorial defense forces, media, government, and civil society groups. Eyewitnesses, survivors, and Ukraine's General Prosecutor have reported that Russian authorities have transported tens of thousands of people to detention facilities inside Russian-controlled Donetsk, where many are reportedly tortured. There are reports that some individuals targeted for "filtration" have been summarily executed, consistent with evidence of Russian atrocities committed in Bucha, Mariupol, and other locations in Ukraine.

President Putin and his government will not be able to engage in these systematic abuses with impunity. Accountability is imperative. This is why we are supporting Ukrainian and international authorities' efforts to collect, document, and preserve evidence of atrocities. Together, we are dedicated to holding perpetrators of war crimes and other atrocities accountable.

The United States and our partners will not be silent. Ukraine and its citizens deserve justice.

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On July 14, 2022, Under Secretary for Civilian Security, Democracy, and Human Rights Uzra Zeya delivered remarks at the Ukraine Accountability Conference at The Hague. The remarks are available at https://www.state.gov/remarks-at-the-ukraine-accountability-conference/ and excerpted below.

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Genocide, war crimes, crimes against humanity, and other atrocities, including conflict-related sexual violence, destabilize nations and regions and threaten international peace and security. By joining our efforts to hold perpetrators to account, we provide a measure of justice to victims and survivors.

Sadly, war crimes and other atrocities, including notably "filtration" operations, are being committed before our eyes in Ukraine as a result of Russia's premeditated and unprovoked war. As Secretary Blinken stated yesterday, the unlawful transfer and deportation of protected persons is a grave breach of the Fourth Geneva Convention on the protection of civilians and is a war crime. We call on Russia to provide outside independent observers access to so-called "filtration" facilities and to forced deportation relocation areas in Russia.

The Kremlin has taken aim not only at Ukraine, but at the very principles underpinning peace, security, justice, and international law established in the wake of two World Wars.

Today, it falls to all of us here to ensure that these principles, which we have championed since Nuremburg, are maintained and strengthened. We cannot allow atrocities to occur with impunity.

This conference, therefore, is a sign of our collective commitment to holding those responsible for atrocities accountable. We appreciate the focus of this conference on the need for coherence of action.

For Ukraine, it is critical that we all continue to improve coordination of efforts to support Ukrainian Prosecutor General Venediktova, who has a central and crucial role in pursuing accountability through both her own efforts and in coordination with international institutions such as the International Criminal Court.

We further support unified and coordinated action for all existing efforts to examine mounting evidence of atrocities in Ukraine, including the International Criminal Court, the UN Commission of Inquiry, the UN Human Rights Monitoring Mission in Ukraine, the expert missions established under the OSCE's Moscow Mechanism, and the Joint Investigative Team coordinated through Eurojust.

It is also important to continue to support civil society organizations documenting atrocities, and we stand ready to support national courts that establish jurisdiction over individuals accused of international crimes in Ukraine.

In this regard, under the European Democratic Resilience Initiative, we have created a Conflict Observatory, a digital platform to document, verify, and disseminate open-source evidence of human rights abuses and war crimes in Ukraine. This documentation is available to others engaged in accountability efforts, including domestic and international justice mechanisms.

Of course, our accountability efforts do not begin or end with Ukraine; as Secretary Blinken has noted, we also cannot lose sight of the imperative to pursue justice for survivors of

atrocities in other situations around the world. We applaud recent court decisions, including in Sweden, Germany, and here in the Netherlands, holding perpetrators accountable for atrocities in Syria and Iraq and welcome further collaboration to help deliver justice to these victims.

I assure you that the United States is fully committed to strengthening international action to prevent and respond to conflict-related sexual violence, and all forms of gender-based violence, using a survivor-centered approach. Starting this year, we're focused on documenting conflict-related sexual violence in Burma and Sri Lanka, ensuring that these efforts are led by survivors in their pursuit of justice, and propel local, regional, and international justice agendas.

In the face of Russia's atrocities in Ukraine, the principles of international justice are ever more important to defend. The ideas and energy generated today should catalyze mutually supportive action for accountability in Ukraine and galvanize our collective efforts as we pursue justice worldwide.

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Secretary Blinken's statement, as delivered at the Ukraine Accountability Conference on July 14, 2022 by Under Secretary of State for Civilian Security, Democracy, and Human Rights Uzra Zeya is available at https://www.state.gov/statement-to-ukraine-accountability-conference-the-hague/ and include the following:

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It is our responsibility to hold the perpetrators accountable – and deliver justice and support for the growing number of victims.

We can support Ukraine's Office of the Prosecutor General in its efforts to hold accountable perpetrators in the country's justice system, and to coordinate with international inquiries – as the United States, the European Union, and the United Kingdom are doing through the Atrocity Crimes Advisory Group.

We can support national courts when they establish jurisdiction over individuals accused of committing international crimes in Ukraine – and against Ukrainians deported to Russia.

We can support existing international and multilateral efforts to collect and examine the mounting evidence of atrocities in Ukraine, including those by the International Criminal Court.

We can undertake our own efforts to gather evidence of war crimes, and make it available to national and international investigations, as we are doing through the Conflict Observatory.

We can support the work of civil society groups documenting abuses and providing support to survivors. And we can better integrate their findings into investigations.

We can provide survivors with access to medical care, psychosocial services, and other vital assistance. And when we gather evidence from these individuals, we can ensure we engage in a way that is survivor-centered and trauma-informed, so that we don't exacerbate their suffering.

Countries in every part of the world are already supporting many of these efforts, which is testament to our global unity in standing with victims in Ukraine. But this attention makes our coordination crucial.

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Department of Justice Counselor for War Crimes Accountability Eli Rosenbaum also delivered remarks at the Ukraine Accountability Conference on July 14, 2022. The remarks are available at https://www.justice.gov/opa/speech/intervention-counselor-war-crimes-accountability-eli-rosenbaum-ministerial-conference and excerpted below.

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It is certainly our responsibility as countries that respect the rule of law to ensure that those who have committed ghastly crimes in the wake of Russia's unprovoked invasion of Ukraine do not escape justice.

Great courage and determination are being demonstrated in Ukraine on a daily basis and in many ways, including by domestic, foreign, and international authorities, and by representatives of non-governmental organizations, in seeking to identify, investigate and prosecute those responsible for these crimes. The challenges that they face in their evidence-gathering and preservation activities in the midst of the brutal war of aggression launched by Russia are formidable. In this regard, I wish to make two points:

First, every effort must be made to prevent these challenges from prompting any divergence from applicable legal standards of evidence collection, preservation and documentation, including chain-of-custody assurance. For we know that, in the future, the authenticity, admissibility and sufficiency of the evidence on which criminal charges are based will be challenged in court – vigorously – by defense counsel, which is as it should be, since the right to defense is fundamental to the rule of law. If, in the great courtroom battles that most assuredly lie ahead, proofs do not meet the standards established by law in the various jurisdictions, then cases will fail – in which event the surviving victims, the families of those who have perished, and the nation of Ukraine will not see justice done. Such a result, which would compound tragedy upon tragedy, can be averted only through clear standards, proper training and proper implementation.

Second, there is already a core group of authorities focused on the investigation and prosecution of these crimes; and they are discussing the challenges in many respects, in this international city of peace. It is clear that Ukraine will shoulder much of the burden of these prosecutions, but particular individuals will be tried in other courts as well, each judicial system with its own legal standards of evidence. These authorities should work together to facilitate, to the greatest extent possible, the successful use of the evidence no matter where eventual trials take place, so that prosecutions of perpetrators of atrocity crimes are successful. Since the evidence will likely be used in different jurisdictions, it is essential that high standards of rigor are observed and accurately conveyed to those who are and will be gathering and storing the evidence, and that oversight be put in place to facilitate quality results. The evidence is being collected as we speak. We cannot afford to lose time, but we must also ensure quality.

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On September 7, 2022, Ambassador Linda Thomas-Greenfield delivered remarks at a UN Security Council meeting on Russia's filtration operations. The remarks are excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-un-security-council-meeting-on-russias-filtration-operations/.

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The United States has information that officials from Russia's Presidential Administration are overseeing and coordinating these filtration operations. And we are further aware that Russian Presidential Administration officials are providing lists of Ukrainians to be targeted for filtration, and receiving reports on the scope and the progress of operations.

Filtered. The word does not begin to convey the horror and the depravity of these pre-meditated policies. Just look at how Russia is treating Ukrainian children.

Estimates indicate that thousands of children have been subject to filtration, some separated from their families and taken from orphanages before being put up for adoption in Russia. The United States has information that over the course of July alone, more than 1,800 children were transferred from Russian-controlled areas of Ukraine to Russia.

Of course, I need not remind this Council that the forcible transfer or deportation of protected persons from occupied territories, to the territory of the occupier, is a grave breach of the Fourth Geneva Convention on the protection of civilians, and constitutes a war crime.

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Cross References

Special Immigrant Visa program, **Ch. 1.B.5.e**
Crimes against humanity, **Ch. 3.C.1**
International tribunals and other accountability mechanisms, **Ch. 3.C**
ICC and Sudan, **Ch. 3.C.1.b**
ICC and Central African Republic, **Ch. 3.C.1.c**
Accountability for atrocity crimes in Ukraine, **Ch. 3.C.4.a**
Special Criminal Court in the Central African Republic, **Ch. 3.C.4.b**
Promoting Security and Justice for Victims of Terrorism Act, **Ch. 5.A.2**
HRC on international humanitarian law, **Ch. 6.A.6**
HRC on Syria, **Ch. 6.A.6**
HRC on Ethiopia, **Ch. 6.A.6.d**
HRC on Afghanistan, **Ch. 6.A.6.c&d**
HRC on Burma, **Ch. 6.A.6**
HRC on Sudan, **Ch. 6.A.6.c**
Ethiopia, **Ch. 6.A.7.a**
Ukraine human rights, **Ch.6.A.7.c**
Israel, **Ch. 6.A.7.d**
Burma, **Ch. 6.A.7.e**
Statements on the situation of women and girls in Afghanistan, **Ch. 6.B.2.d**
ILC Draft Articles on Crimes Against Humanity, **Ch. 7.C.2**
Sudan, **Ch. 9.A.2**
Afghanistan, **Ch. 9.A.9**
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Armenia and Azerbaijan, **Ch. 9.B.3**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.1**
Russia sanctions, **Ch. 16.A.4**
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Syria sanctions, **Ch. 16.A.6**
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Ethiopia sanctions, **Ch. 16.A.15.c**
Syria, **Ch. 18.A.2**
Afghanistan, **Ch. 18.A.3**
Ethiopia protection of civilians, **Ch. 18.A.6.a(i)**
Ukraine protection of civilians, **Ch. 18.A.6.a(ii)**
Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 18

Use of Force

A. GENERAL

1. The Path Forward on the 2001 Authorization for the Use of Military Force ("AUMF")

On March 2, 2022, Deputy Secretary of State Wendy Sherman, Acting Legal Adviser Richard C. Visek, and U.S. Department of Defense (DoD) General Counsel Caroline Krass, and Assistant Secretary of Defense Christopher P. Maier testified at a House Foreign Affairs Committee hearing on the possible repeal and replacement of the 2001 AUMF. All witness statements for the records are available at https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114468. Mr. Visek's statement for the record follows and is available at https://docs.house.gov/meetings/FA/FA00/20220302/114468/HHRG-117-FA00-Wstate-VisekR-20220302.pdf.

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Thank you very much, Mr. Chairman and Members of the Committee, for providing an opportunity to address the question of repealing and replacing the 2001 Authorization for the Use of Military Force (AUMF). I am pleased to be here to discuss how Congress and the Administration can work together on this important and complex task and to answer your questions on the 2001 AUMF. The President has committed 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.

Congress passed the 2001 AUMF shortly after the September 11, 2001 terrorist attacks, and it remains the cornerstone of our domestic legal authority for the use of force against al-Qa'ida and associated forces. Specifically, it authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 attacks or "harbored such organizations or persons." As stated in the 2001 AUMF, Congress's purpose in authorizing force against those groups was to "prevent any future acts of international terrorism against the United States" by such nations, organizations, or persons.

Presidential Administrations across both parties have acknowledged the authority conferred upon the President by the 2001 AUMF to use necessary and appropriate force against

the Taliban, al-Qa'ida, and associated forces. Congress has also acknowledged this authority, including in section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81). But, this Administration, like prior Administrations, understands that the 2001 AUMF does not authorize the President to use force against every terrorist group.

A determination that a group is covered by the 2001 AUMF is made at the most senior levels of the U.S Government only after careful evaluation of the intelligence concerning each group's organization, links with al-Qa'ida, and its participation with al-Qa'ida's ongoing hostilities against the United States and its coalition partners. To be considered an associated force of al-Qa'ida, an entity must satisfy two conditions. First, an entity must be an organized, armed group that has entered the fight alongside al-Qa'ida. Second, the entity must be a co-belligerent with al-Qa'ida against the United States and its coalition partners. The Executive Branch has provided Congress with a complete list of all groups that have been determined to be covered by the 2001 AUMF, including al Qa'ida, the Taliban, certain other terrorist or insurgent groups affiliated with al Qa'ida and the Taliban in Afghanistan, al Qa'ida in the Arabian Peninsula, al Shabaab, al Qa'ida in the Lands of the Islamic Maghreb, al Qa'ida in Syria, and ISIS. The Executive Branch is required to keep Congress informed on all groups determined to be within the scope of the 2001 AUMF through reporting under section 1264 of the National Defense Authorization Act for Fiscal Year 2018 (P.L. 115-91), as amended, and also regularly reports to Congress on the ways in which the 2001 AUMF is used.

Repealing and replacing the 2001 AUMF is an extremely complex task. The Biden-Harris Administration welcomes enhanced dialogue between Congress and the Executive Branch over the use of military force, and I am here today as part of that effort. The Administration does not have all the answers yet on what a new or revised authority should look like, but we are committed to working with Congress to get it right.

The United States faces terrorist threats that continue to evolve, and the Administration will work with Congress to explore the contours of a new or updated AUMF that would establish mechanisms for appropriate input from and engagement between the President and Congress to ensure the United States can continue to respond effectively as these threats change. Any new or updated AUMF should provide uninterrupted authority to continue operations currently authorized by statute that the President and Congress deem necessary to address an ongoing threat, including detention activities.

Additionally, Congress should consider establishing mechanisms and standards in an updated or replacement AUMF to address the following issues. First, any AUMF should be narrow and specific in defining against whom the President is authorized to use military force. In particular, it should include explicit authority to use force against ISIS and al-Qa'ida. The authorization should also establish a mechanism and standards to address how it will apply to terrorist groups beyond those identified by name in the AUMF. Second, any AUMF should include periodic review of the groups that are subject to the use of force, and the locations where force is used, under the AUMF. The Administration is also open to further engaging with Congress on the issue of locations in which force can be used and how a periodic review process should be structured.

We hope that today's hearing will provide some momentum for these conversations. We look forward to answering your questions today and to working with you to ensure that outdated authorizations are replaced with a narrow and specific framework that will ensure that we can continue to protect Americans from terrorist threats.

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2. Syria

On February 3, 2022, Secretary Blinken issued a press statement on the U.S. military operation resulting in the death of Abu Ibrahim al-Hashimi al-Qurayshi, the leader of ISIS. The press statement follows and is available at https://www.state.gov/an-important-milestone-in-the-campaign-against-isis/.

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The military operation authorized by President Biden and carried out by U.S. forces last night in northwest Syria has resulted in the death of Abu Ibrahim al-Hashimi al-Qurayshi, the leader of ISIS – a significant victory in the global fight to disrupt and dismantle ISIS.

This successful operation is a credit to our brave service members and national security professionals, who undertook this mission at President Biden's direction after months of careful planning. Throughout that process, the United States took extraordinary care to protect innocent lives and prevent noncombatant casualties. ISIS, however, once again revealed its disregard for human life, including that of women and children, when al-Qurayshi choose to detonate a suicide bomb, killing his own family.

Al-Qurayshi, also known as Hajji Abdallah, took over ISIS in October 2019 after years of serving as a senior leader in the terrorist organization. He was known for his brutal enforcement of ISIS's vicious ideology and was a driving force behind ISIS's violent campaigns to subjugate communities and oppress perceived enemies, including the Yazidis, a religious minority in Iraq. He coordinated the group's global terror operations during a period in which ISIS expanded its geographic presence and attacks in Africa.

This operation was part of a larger mission by the members of the Global Coalition to Defeat ISIS to deny ISIS's territorial control in Iraq and Syria, counter ISIS's messaging and financing, and stabilize areas that have been liberated from ISIS to prevent the group from resurging. Al-Qurayshi's death strikes a significant blow against ISIS. Now the United States and our partners in the Global Coalition to Defeat ISIS will continue the effort. Our goal is the enduring defeat of ISIS and that fight continues.

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3. Afghanistan

On August 1, 2022, Secretary Blinken issued a press statement on the U.S. operation resulting in the death of Ayman al-Zawihiri, the leader of al Qa'ida. The press statement follows and is available at https://www.state.gov/the-death-of-ayman-al-zawahiri/.

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President Biden last year committed to the American people that, following the withdrawal of U.S. forces, the United States would continue to protect our country and act against terrorist threats emanating from Afghanistan. The President made clear that we would not hesitate to protect the Homeland. With the operation that delivered justice to Ayman al-Zawihiri, the leader of al Qa'ida, we have made good on that commitment and we will continue to do so in the face of any future threats. We were able to do so in this instance — and will be positioned to do so going forward — as a result of the skill and professionalism of our intelligence and counterterrorism community colleagues, for whom the President and I are deeply grateful.

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4. Actions in Response to Iran and Iran-Backed Militia Groups

The United States submitted a letter dated August 26, 2022 to the UN Security Council in accordance with Article 51 of the UN Charter regarding actions taken in self-defense. The Article 51 Letter from Ambassador Thomas-Greenfield, U.N. Doc. S/2022/647, is excerpted below. The letter reports on precision strikes against a facility in eastern Syria used by militia groups affiliated with Iran's Islamic Revolutionary Guard Corps, and supplements prior letters dated 27 February 2021 and 29 June 2021. See *Digest 2021* at 751-54.

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I wish to report, on behalf of my Government, that the United States has undertaken precision strikes against a facility in eastern Syria used by militia groups affiliated with Iran's Islamic Revolutionary Guard Corps. This action was in response to armed attacks against the United States and was taken in the exercise of the United States' inherent right of self-defence, as reflected in Article 51 of the Charter of the United Nations. The present letter supplements prior letters provided to the Council, including on 27 February 2021 and 29 June 2021, which further explain the basis for such actions in self-defence.

On 15 August 2022, Iran-backed militia groups attacked United States forces at two locations in Syria. These attacks followed a series of attacks by Iran-backed militia groups on United States forces and facilities in Iraq and Syria throughout 2022 and before, which have threatened the lives of United States and Coalition personnel. The military action of the United States was taken to protect and defend the safety of its personnel, to degrade and disrupt the ongoing series of attacks against the United States and its partners and to deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks on United States personnel or facilities. In support of these aims, these necessary and proportionate actions were directed at a facility near Dayr az Zawr, Syria, used by groups involved in these ongoing attacks for logistics and ammunition storage.

This military response was taken after non-military options proved inadequate to address the threat, with the aim of de-escalating the situation and preventing further attacks. As the United States has noted in prior letters to the Security Council, 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. This action was conducted together with diplomatic measures.

The United States remains prepared to use necessary and proportionate force in self-defence in response to future threats or attacks.

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On December 8, 2022, President Biden submitted a supplemental consolidated report to Congress pursuant to the War Powers Resolution. The report concerns U.S. military operations in multiple locations. The report is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/08/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-regarding-the-war-powers-report-4/. The excerpt below concerns the same targeted military strikes against a facility in eastern Syria used by Iran-backed militia groups as reported in the August 26, 2022 letter to the UN Security Council excerpted above.

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As part of a comprehensive strategy to defeat ISIS, United States Armed Forces are working by, with, and through local partners to conduct operations against ISIS forces in Iraq and Syria and against al-Qa'ida in Syria to limit the potential for resurgence of these groups and to mitigate threats to the U.S. homeland. A small presence of United States Armed Forces remains in strategically significant locations in Syria to conduct operations, in partnership with indigenous ground forces, to address continuing terrorist threats emanating from Syria. United States Armed Forces in Iraq continue to advise, assist, and enable select elements of the Iraqi security forces, including Iraqi Kurdish security forces. United States Armed Forces also provide limited support to the North Atlantic Treaty Organization mission in Iraq. United States Armed Forces, as part of the Global Coalition to Defeat ISIS, remain present in Iraq at the invitation of the Government of Iraq.

As reported on August 25, 2022, I directed precision strikes against a facility in eastern Syria on August 23, 2022. The facility was used by militia groups affiliated with Iran's Islamic Revolutionary Guard Corps that have been involved in a series of unmanned aerial vehicle, rocket, and mortar attacks against United States personnel and facilities in Syria. Two attacks on August 15, 2022, by Iran-backed militia groups targeted al-Tanf Garrison and Mission Support Site Green Village, both United States bases in Syria. These August 15 attacks followed a series of attacks by Iran-backed militia groups on United States forces and facilities in Iraq and Syria in the 6 months prior. These attacks threatened the lives of United States and Coalition

personnel. 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.

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5. Bilateral and Multilateral Agreements and Arrangements

a. Japan

On January 7, 2022, the United States and Japan signed 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. A joint statement welcoming the signing of the agreement is available at: https://www.state.gov/joint-statement-of-the-u-s-japan-security-consultative-committee-22/. The agreement entered into force on April 1, 2022. The agreement is available at https://www.state.gov/japan-22-401.1.

b. Samoa

On January 14, 2022, a U.S.-Samoa agreement entered into force, which provides certain use, security and retransfer provisions related to assistance received under the Foreign Assistance Act and other relevant authorities. The agreement, available at https://www.state.gov/samoa-22-114, was concluded via an exchange of notes at Apia December 10, 2021 and January 14, 2022.

c. Ukraine

On March 1, 2022, a Memorandum of Agreement Between the Government of the United States of America and the Government of Ukraine Regarding End-Use, Retransfer and Security Assurances Related to Retransfers of United States Sold or Granted Defense Articles, Related Training or Other Defense Services to the Government of Ukraine was signed at Washington and entered into force. The agreement is available at https://www.state.gov/wp-content/uploads/2022/05/22-301-Ukraine-Defense-Assistance.pdf.

d. Papua New Guinea

On March 30, 2022, an Agreement Between the Government of the United States of America and the Government of the Independent State of Papua New Guinea Regarding the Furnishing on a Grant Basis of Defense Articles, Related Training, and Other Defense Services entered into force. The agreement, available at

https://www.state.gov/papua_new_guinea-22-330, was signed at Port Moresby on July 9, 2021.

e. Slovakia

On April 1, 2022, an Agreement on Defense Cooperation Between the Government of the United States of America and the Government of the Slovak Republic entered into force. The agreement, available at https://www.state.gov/slovakia-22-401, was signed at Washington on February 3, 2022.

f. Bahamas

On April 19, 2022, a Status of Forces Agreement between the Government of the United States of America and the Government of the Commonwealth of the Bahamas entered into force via exchange of notes at Nassau on April 13, 2022 and April 19, 2022. The agreement is available at https://www.state.gov/bahamas-22-419.

g. Greece

On May 24, 2022, the Second Protocol of Amendment to the Mutual Defense Cooperation Agreement between the Government of the United States of America and the Government of the Hellenic Republic entered into force. The protocol, which was signed at Washington on October 14, 2021, is available at https://www.state.gov/greece-22-524.

h. Norway

On June 17, 2022, the Supplementary Defense Cooperation Agreement between the Government of the United States of America and the Government of the Kingdom of Norway entered into force. The agreement was signed at Washington and Oslo on March 31 and April 16, 2021. The agreement is available at https://www.state.gov/norway-22-617.

i. Trinidad and Tobago

On June 30, 2022, an agreement to further extend the U.S.-Trinidad and Tobago Status of Forces Agreement entered into force. The agreement was concluded by exchange of notes at Port of Spain on June 22 and 30, 2022 and is available at https://www.state.gov/trinidad_and_tobago-22-630.

6. International Humanitarian Law

a. Protection of civilians

On October 17, 2022, Attorney-Adviser David Bigge delivered remarks at a meeting of the UN General Assembly Sixth Committee on Agenda Item 81: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of Armed Conflicts. The remarks are available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-81-status-of-the-protocols-additional-to-the-geneva-conventions-of-1949/ and excerpted below.

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The United States has long been a strong proponent of the development and implementation of international humanitarian law, which we often also refer to as the law of war or the law of armed conflict. We recognize the vital importance of compliance with its requirements during armed conflict. Accordingly, the United States continues to ensure that all of our military operations comply with IHL, as well as all other applicable international and domestic law. We similarly call on all states and parties to armed conflicts to ensure that they comply fully with applicable IHL.

The United States is a party to the Third Additional Protocol to the 1949 Geneva Conventions relating to the adoption of an additional distinctive emblem, but it is not a party to the 1977 Additional Protocols to the 1949 Geneva Conventions. Extensive U.S. Government reviews, including one completed in 2011, have found U.S. military practice to be consistent with Additional Protocol II's provisions. Those reviews also found that any issues with ratification, which is pending before the U.S. Senate for its advice and consent, could be addressed with reservations, understandings, and declarations. These conclusions remain valid today.

Although the United States continues to have significant concerns with many aspects of Additional Protocol I, Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well. Furthermore, some provisions of Additional Protocol I have been incorporated into later treaties to which the United States is a party. For example, Additional Protocol I's definition of military objective in Article 51(2) is substantially similar to the definition in Article 2(6) of the Convention of Certain Conventional Weapons (CCW) Amended Mines Protocol and Article 1(3) of CCW Protocol III on Incendiary Weapons. Similarly, requirements under the Child Soldiers Protocol and U.S. law are comparable to Additional Protocol I's requirements with respect to child soldiers.

Proper implementation of IHL obligations is critical to reducing the risk to civilians and civilian objects during armed conflict. As we have seen in recent conflicts, it is crucial that all parties comply with their obligations under IHL including the principles of distinction and proportionality, as well as the obligations of both attacking and defending parties to take

precautionary measures for the protection of the civilian population and other protected persons and objects. In taking precautions for the protection of civilians, the United States routinely imposes, as a matter of policy, certain heightened standards that are more protective of civilians than would otherwise be required under IHL. Moreover, the United States always seeks to adhere to applicable IHL requirements during armed conflicts and encourages all states and parties to armed conflicts to do the same.

Russia's recent unlawful full-scale invasion of Ukraine, in which Russia's forces have committed war crimes, is a reminder to all States of the importance of compliance with IHL and accountability for IHL violations. Those responsible for atrocities must be held accountable, and the United States continues to support a range of mechanisms to document and pursue accountability for war crimes and other atrocities in Ukraine.

We encourage all states to implement their IHL obligations and look forward to continuing to work with other states, as well as the ICRC, on further strengthening the implementation of and respect for IHL.

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(i) Ethiopia

On October 14, 2022, 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/intensifying-military-operations-in-northern-ethiopia/.

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The United States is deeply concerned over reports of increasing violence, loss of life, indiscriminate targeting of civilians, and destruction in the conflict in northern Ethiopia, particularly around Shire in the Tigray region. We call on the Ethiopian National Defense Forces and Eritrean Defense Forces to immediately halt their joint military offensive and for Eritrea to withdraw its forces from northern Ethiopia. We further call on the Tigrayan Defense Forces to cease provocative actions. The fighting since the August 24 operation by the Tigrayan Defense Forces near Kobo in the Amhara Region contributed to the return to hostilities, which greatly increases the risk of atrocities and further human rights abuses.

It is incumbent on all armed actors to respect and protect civilians, and we call on them to allow unhindered humanitarian access to all Ethiopians in need.

We reiterate that the government of Ethiopia and Tigray regional authorities should immediately cease all hostilities and participate seriously in the forthcoming African Union-led peace talks. The United States is fully engaged with the African Union, the governments of Kenya and South Africa, and other international and regional partners to organize and mediate peace talks as soon as possible.

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(ii) Ukraine

See Chapter 17 for discussion of war crimes by Russia's forces in Ukraine.

On March 4, 2022, 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-3/ 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 reiterate our profound condemnation of Russia's unprovoked and unjustifiable war of choice against Ukraine, enabled by the Belarussian government.

Russia must immediately stop its ongoing assault against Ukraine, which has dramatically impacted the civilian population and destroyed civilian infrastructure, and immediately withdraw Russia's military forces. With its further aggression, President Putin has isolated Russia in the world, as evidenced by the overwhelming vote at the United Nations General Assembly condemning Russia's aggression and calling upon it to withdraw its forces immediately.

We express our heart-felt solidarity with the Ukrainian people and our sympathy with the victims of this war and their families. We underline our unwavering support for Ukraine, its freely-elected government and its brave people at this most difficult time, and express our readiness to assist them further.

We condemn the Russian attacks on Ukrainian civilians and civilian infrastructure, including schools and hospitals. We call on Russia to uphold its obligation to fully respect international humanitarian law and human rights law. Ukrainian and UN humanitarian agencies, medical personnel, and non-governmental assistance providers must be given safe, rapid and unimpeded access to people in need immediately throughout the entire territory of Ukraine within its internationally recognized borders. We acknowledge the announcement of an arrangement on humanitarian access as an important first step. This will need to be implemented reliably and swiftly. We commit to increasing humanitarian support, as the needs of the Ukrainian people grow due to Russia's aggression. We urge Russia to stop its attacks especially in the direct vicinity of Ukraine's nuclear power plants. Any armed attack on and threat against nuclear facilities devoted to peaceful purposes constitutes a violation of the principles of international law. We support the initiative of IAEA Director General Grossi announced today for an agreement between Ukraine and Russia to ensure the safety and security of nuclear facilities in Ukraine.

We are deeply concerned with the catastrophic humanitarian toll taken by Russia's continuing strikes against the civilian population of Ukraine's cities. We reemphasize that indiscriminate attacks are prohibited by international humanitarian law. We will hold accountable those responsible for war crimes, including indiscriminate use of weapons against

civilians, and we welcome the ongoing work to investigate and gather evidence, including by the Prosecutor of the International Criminal Court (ICC).

Russia's blatant violation of the fundamental principles of international peace and security and the breach of international law have not gone unanswered. We have imposed several rounds of far-reaching economic and financial sanctions. We will continue to impose further severe sanctions in response to Russian aggression, enabled by the Lukashenka regime in Belarus.

We wish to make clear to the Russian and Belarusian people that the severe sanctions imposed on Russia and Belarus are a consequence of and clear reaction to President Putin's unprovoked and unjustifiable war against Ukraine. President Putin, and his government and supporters, and the Lukashenka regime, bear full responsibility for the economic and social consequences of these sanctions.

We condemn the widespread use of disinformation by the Russian Government and its affiliated media and proxies to support its military aggression against Ukraine. Their steady stream of fabricated claims is putting additional lives at risk. We commit to countering Russia's disinformation campaign.

We reaffirm our support and commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters. We underline that any purported change of status achieved by Russia's renewed aggression will not be recognized.

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On May 14, 2022, 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 statement on Russia's war against Ukraine, including a statement about Russia's violations of international law, including international humanitarian law. The statement is available as a State Department media note at https://www.state.gov/g7-foreign-ministers-statement-on-russias-war-against-ukraine/ and follows.

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1. We, the G7 Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States of America, and the High Representative of the European Union, are steadfast in our solidarity with and our support for Ukraine as it defends itself against Russia's unjustifiable, unprovoked and illegal war of aggression, a war in which Belarus is complicit. We are committed to helping Ukraine, a democracy and a UN member, uphold its sovereignty and territorial integrity, to defend itself and resist future attacks or coercion, choose its own future and prosper.
2. In the presence of the Foreign Ministers of Ukraine and Moldova, we underscore Ukraine's sovereignty, territorial integrity, independence and right for self-defence under the UN Charter. This war of aggression has reaffirmed our determination to reject outright attempts to redraw borders by force in violation of sovereignty and territorial integrity.

3. We are providing significant humanitarian assistance to Ukraine and its neighbours to meet urgent protection and other lifesaving needs. We continue to make substantial financial and economic support available to Ukraine to strengthen the resilience of its economy. We reaffirm our commitment to support Ukraine, including in the reconstruction of the country, and call on all partners to join our efforts to ensure support for Ukraine in meeting its immediate humanitarian and financial needs and for Ukraine to rebuild its future. We will pursue our ongoing military and defense assistance to Ukraine as long as necessary.
4. We reiterate our demand that Russia put an end to the war it started unprovoked and to end the tragic suffering and loss of life it continues to cause. We also continue to call on Belarus to stop enabling Russia's aggression and to abide by its international obligations. We urge full compliance with international humanitarian law, allowing and facilitating rapid, safe and unimpeded humanitarian access as well as the humanitarian evacuation of civilians safeguarding evacuees' freedom to choose their destination. We call on Russia to immediately comply with the legally binding order of the International Court of Justice of 16 March 2022 and to abide by the relevant resolutions of the UN General Assembly and stop its military aggression – to cease fire, and immediately and unconditionally withdraw its troops from the entire territory of Ukraine within its internationally recognised borders.
5. Russia has violated the UN Charter, undermined the fundamental principles of the European security architecture as enshrined in the Helsinki Final Act and the Charter of Paris and will have to face consequences for its actions. We reject any notion of spheres of influence and any use of force that is not in compliance with international law. We will never recognize borders Russia has attempted to change by military aggression, and will uphold our engagement in the support of the sovereignty and territorial integrity of Ukraine, including Crimea, and all states. We condemn as irresponsible threats of use of chemical, biological or nuclear weapons or related materials by Russia and reiterate that any use of such weapons would be met with severe consequences.
6. Russia's war of aggression against Ukraine as well as its unilateral actions restraining Ukrainian agricultural exports, are leading to steep price rises in commodity markets and the threats we are now seeing to global food security. As global markets suffer from Russia's war of choice by rising food and commodity prices, thus affecting the lives of people around the world and exacerbating existing humanitarian and protection needs, we are determined to contribute additional resources to and support all relevant efforts that aim to ensure availability and accessibility of food, energy and financial resources as well as basic commodities for all. We call on Russia to cease immediately its attacks on key transport infrastructure in Ukraine, including ports, so that they can be used for exporting Ukrainian agricultural products. We will address the causes and consequences of the global food crisis through a Global Alliance for Food Security, that is to be launched officially at the G7 Development Ministers meeting, and other efforts in close cooperation with international partners and organisations beyond the G7. We will closely cooperate with international parters and organisations beyond the G7, and, with the aim of transforming political commitments into concrete actions as planned by various international initiatives such as the Food and Agricultural Resilience Mission (FARM) and key regional outreach initiatives, including towards African and Mediterranean countries.
7. We underscore that our sanctions and export controls against Russia do not and will not target essential exports of food and agricultural inputs to developing countries and to this end include measures to avoid any negative consequences for the production and distribution of

food. We reaffirm our commitment to protect the most vulnerable countries and people suffering from Russia's war against Ukraine and its global repercussions.

8. We condemn and will systematically expose Russia's policy of information manipulation and interference, including disinformation which it employs to justify and support its war of aggression against Ukraine and which deliberately aims at manipulating public opinions domestically and worldwide with a view to covering its responsibilities in the ongoing war. We will continue to work together to address this manipulative behavior, in particular within the G7 Rapid Response Mechanism, and promote the exercise of freedom of opinion and expression and access to reliable information from free, pluralistic and independent media, notably on the war and its consequences for the world.
9. We stand united against Russia's violation of the UN Charter and other fundamental principles of international law. We condemn in the strongest terms the ongoing attacks killing and wounding civilians and non-combatants, the systematic targeting of critical infrastructure and the extensive harm to healthcare personnel and facilities, as well as conflict-related sexual and gender-based violence in Ukraine. We will continue to support the ongoing investigations into violations of international law, including violations of international humanitarian law, and human rights violations and potential war crimes and crimes against humanity committed in Ukraine. We support investigations by the Prosecutor of the International Criminal Court, the Prosecutor-General of Ukraine, and other national prosecutors who are able to establish jurisdiction under national law. Further, we fully support the Commission of Inquiry mandated by the UN Human Rights Council, the UN Human Rights Monitoring Mission in Ukraine and efforts of civil society organizations to investigate violations and document potential war crimes. We commit to providing investigative support, technical expertise, funding and other assistance to work towards ensuring the accountability of those who are responsible for the atrocities and crimes committed.
10. A number of countries have shown solidarity and provided safe haven for those who have fled from Russia's war of aggression. We particularly commend Moldova's remarkable efforts in hosting so many refugees, both in relative and absolute terms. Through the Moldova Support Platform launched in Berlin on 5 April and other formats, we will support Moldova to meet short-term needs and its longer-term development and reform programme. We express our concern regarding the recent attempts to destabilise the Transnistrian region and emphasize our support to Moldova's stability, sovereignty and territorial integrity.
11. We reaffirm our determination to further increase economic and political pressure on Russia, continuing to act in unity. We will do so, as underlined by G7 Leaders on 8 May, by imposing coordinated further restrictive measures on Russia‘s economy and financial system; by further targeting Russian elites including economic actors, the central government institutions and the military, that enable President Putin to lead his war of choice; and by isolating Russia from our economies, the international financial system, and within global institutions. We will broaden our sanctions measures to include sectors on which Russia has a particular dependence.
12. We commend partners that have aligned with us, and encourage others to adopt measures to increase the cost of the war for Russia by isolating it, and Belarus for its support, from the global economy, and to prevent sanctions evasion, circumvention and backfilling. We will listen to and work with partners around the world through increased outreach to mitigate any

impacts to their own economies caused by Putin's war, and pledge our support in mitigating the costs.

13. We will expedite our efforts to reduce and end reliance on Russian energy supplies as quickly as possible, building on G7 commitments to phase out or ban imports of Russian coal and oil. We will accelerate the energy transition and enhance energy efficiency in the context of the accelerated phasing out of our dependency on Russian energy, in accordance with our climate objectives and energy security imperatives, thereby steadily reducing foreign currency flows into Russia and restricting the financial means available to fund Russia's war machinery. We will ensure that we do so in a timely and orderly fashion, and in ways that provide time for the world to secure alternative supplies.
14. We deplore the domestic repressions in Russia and Belarus against independent media, civil society, the opposition and citizens who peacefully express their disapproval of Russia's war against Ukraine. The Russians and Belarusians deserve better: They should be able to make full use of fundamental human rights, most basically the right to decide their own fate and the fate of their countries. We, the G7, are not at war with Russia or the Russian people. The Russian decision to attack Ukraine was taken by leaders who reject democratic responsibility. We lend our support to those who have fallen victim to repression. We reaffirm the right of Russians and Belarusians to seek, receive and impart fact-based information from free, pluralistic and independent media and condemn the Russian government's and Belarusian regime's recourse to censorship and other methods of hampering Russians' and Belarusians' access to independent media, including through restrictions on access to the internet and social media platforms.
15. We condemn actions perpetrated by Russia, which compromise the safety and security of nuclear material and facilities in Ukraine and consequently pose serious risks to human life and the environment. We underline our full support for the efforts of the IAEA and its Director-General to ensure the nuclear safety and security of, and the application of safeguards to, nuclear material and facilities in Ukraine. We call on Russia to immediately withdraw its forces from Ukraine's nuclear facilities and to return full control to legitimate Ukrainian authorities. We reiterate that the IAEA must be able to access all nuclear facilities in Ukraine safely and without any impediments.

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On December 12, 2022, the U.S. Mission in Geneva published a statement of the G7 leaders, which includes remarks on Russia and Ukraine. The statement is excerpted below and available at https://geneva.usmission.gov/2022/12/13/g7-leaders-statement/.

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We, the Leaders of the Group of Seven (G7), met on 12 December, to reflect on progress of our cooperation under Germany's Presidency to jointly address global challenges at a time of severe geopolitical crisis and critical moment for the world economy. We were joined by Ukraine's President Volodymyr Zelenskyy. This year in the face of Russia's illegal, unjustifiable and

unprovoked war of aggression against Ukraine, we stood more united than ever, together with Ukraine and in unwavering commitment to our shared values, the rules-based multilateral order and international cooperation.

Today, we reaffirm our unwavering support for and solidarity with Ukraine in the face of ongoing Russian war of aggression for as long as it takes. We condemn Russia's continuous inhumane and brutal attacks targeting critical infrastructure, in particular energy and water facilities, and cities across Ukraine, and recall that indiscriminate attacks and attacks on the civilian population or civilian objects, constitute a war crime. We also condemn those who are facilitating Putin's illegal war. We are determined to help Ukraine repair, restore and defend its critical energy and water infrastructure. We will help Ukraine in meeting its winter preparedness needs, will continue to support Ukraine's civilian resilience, and will further enhance our efforts on this during the international conference to be held in Paris on 13 December. We are determined that Russia will ultimately need to pay for the restoration of critical infrastructure damaged or destroyed through its brutal war. There can be no impunity for war crimes and other atrocities. We will hold President Putin and those responsible to account in accordance with international law. We reiterate that Russia's irresponsible nuclear rhetoric is unacceptable and that any use of chemical, biological, or nuclear weapons would be met with severe consequences.

Building on our commitments so far, we will continue to galvanise international support to help address Ukraine's urgent short-term financing needs. We ask our Finance Ministers to convene shortly to discuss a joint approach for coordinated budget support in 2023. We affirm that the International Monetary Fund (IMF) should be central to this effort.

We firmly support efforts to secure Ukraine's immediate financial stability and its recovery and reconstruction towards a sustainable, prosperous and democratic future, in line with its European path. We will build on the outcomes of the International Expert Conference on the Recovery, Reconstruction and Modernisation of Ukraine held on 25 October in Berlin, as well as at the Ukraine Recovery Conference on 21-22 June 2023 in London. In particular, with a view to supporting Ukraine's repair, recovery and reconstruction, together with Ukraine and our international partners and in close coordination with relevant International Organisations and International Financial Institutions, we will establish a multi-agency Donor Coordination Platform. Through this platform, we will coordinate existing mechanisms to provide ongoing short- and long-term support – with particular responsibility of the Finance Track for short-term financial support –, coordinate further international funding and expertise, and encourage Ukraine's reform agenda as well as private sector led growth. We will also set up a Secretariat for the Platform. We will each designate a senior government representative to oversee the set-up of the platform and ongoing coordination efforts, and ask them to convene as soon as possible in January 2023.

With a view to a viable post-war peace settlement, we remain ready to reach arrangements together with Ukraine and interested countries and institutions on sustained security and other commitments to help Ukraine defend itself, secure its free and democratic future, and deter future Russian aggression in line with its rights enshrined in the Charter of the United Nations (UN Charter).

We will continue to coordinate efforts to meet Ukraine's urgent requirements for military and defense equipment with an immediate focus on providing Ukraine with air defense systems and capabilities.

We also reiterate our strong condemnation of Russia's continued seizure and militarisation of Ukraine's Zaporizhzhya Nuclear Power Plant, the abduction and reported abuse of Ukrainian personnel, and the willful destabilisation of its operations. We support the International Atomic Energy Agency's (IAEA) efforts to establish a Safety and Security Zone.

Russia's war of aggression must end. To date, we have not seen evidence that Russia is committed to sustainable peace efforts. Russia can end this war immediately by ceasing its attacks against Ukraine and completely and unconditionally withdrawing its forces from the territory of Ukraine. We welcome and support President Zelenskyy's initiative for a just peace.

We remain committed to our unprecedented coordinated sanctions measures in response to Russia's war of aggression. We will maintain and intensify economic pressure on Russia and those who evade and undermine our restrictive measures. We will continue to shield vulnerable countries that are severely impacted by the repercussions of Russia's war of aggression and its weaponisation of energy and food.

We reaffirm our intention to phase out Russian-origin crude oil and petroleum products from our domestic markets. During the week of 5 December 2022, the price cap on seaborne Russian crude oil entered into force in our respective jurisdictions, delivering on our commitment to limit Russia from profiting from its war of aggression against Ukraine, to support stability in global energy markets and to minimise negative economic spillovers of Russia's war of aggression, especially on low- and middle-income countries. We encourage third countries that seek to import seaborne Russian-origin crude oil and petroleum products to leverage the price cap. We reiterate our decision that the price cap on Russian origin petroleum products will enter into force on 5 February 2023.

Russia's war in Ukraine is exacerbating existing fragilities in the global economy, with direct impacts on the cost of living of people in our own countries, and on the world's most vulnerable. We will continue to use all available policy tools to maintain global financial, macroeconomic and price stability and long-term fiscal sustainability, while providing targeted support to those most in need and working collaboratively to strengthen our collective economic security to external shocks and wider risks. We will make public investments and structural reforms to promote long term growth. We will further coordinate to respond to the urgent needs of most vulnerable countries and will encourage private investment in developing and emerging markets as a key enabler of sustainable economic pathways.

We will keep up our ambition to address global food insecurity, including through the Global Alliance for Food Security (GAFS). We will keep supporting the delivery of grain and fertilisers to vulnerable countries in need and welcome the recent operations led by the World Food Programme (WFP) on this front. We welcome the extension of the Black Sea Grain Initiative (BSGI) alongside further efforts to bring Ukrainian food to the world, namely the European Union's Solidarity Lanes and the Grain from Ukraine Initiative.

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b. Political declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of explosive weapons in populated areas

On June 17, 2022, Charles Trumbull, Deputy Legal Adviser, U.S. Mission Geneva, delivered remarks at the final consultation on the draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas. In the statement, Deputy Legal Adviser Trumbull announced the U.S. government plan to endorse the declaration. See *Digest 2021* at 757-59 for a discussion of the draft. The remarks are excerpted below and https://geneva.usmission.gov/2022/06/21/protecting-civilians-in-urban-warfare/.

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The United States is pleased to announce that we are prepared to endorse the draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas that was circulated in advance of our meeting today. We hope and expect that this Declaration will help States improve the protection of civilians and reduce human suffering in armed conflict.

We also appreciate this opportunity to provide points of clarification with respect to our understanding of certain key aspects of the Declaration. We will post this statement on the website of the U.S. Mission to International Organizations in Geneva. Subject to these understandings, the United States is prepared to participate in the signing ceremony in Dublin.

Paragraph 3.3 of the Declaration reflects an important commitment by States for their armed forces to adopt and implement a range of policies and practices to help avoid harm to civilians and civilian objects during military operations. This commitment is not limited to policies and practices focused solely on the use of explosive weapons, but would include broader measures, for example, policies and practices related to the appropriate mix of strategies and tactics to accomplish mission objectives, including those to protect civilians affirmatively, and to avoid incidentally harming civilians and civilian objects.

Within this broader context, the relevant policies and practices would include, as appropriate, measures restricting or refraining from the use of explosive weapons in populated areas. Paragraph 3.3 represents an important policy commitment, but it does not reflect a legal principle, an emerging customary international law norm, or a policy presumption against the use of EWIPA. Rather, paragraph 3.3 reflects a commitment for armed forces to adopt and implement a range of policies or practices that effectively implement IHL protections for civilians and that, as the competent authorities within each national system deem appropriate, may in some cases be more protective of civilians than what IHL requires. For example, it can be appropriate to take steps, not required by IHL, to mitigate the risk of harm to civilians and civilian objects in planning and conducting an attack, even if the expected death or injury to civilians or damage to civilian objects incidental to that particular attack would not be excessive in relation to the concrete and direct military advantage anticipated. The United States military already takes such steps, where appropriate, along with its implementation of IHL.

At the same time, the commitment recognizes that restricting or refraining from the use of explosive weapons in populated areas may not be appropriate in some circumstances. In our view, whether restricting or refraining from the use of explosive weapons is appropriate in particular circumstances would be a decision made by the military operational command.

Military commanders would take into account a variety of considerations, including humanitarian and military considerations, such as potential effects on mission accomplishment, the risk to one's own forces, as well as the risks to civilians. Whether it would be appropriate to restrict or refrain from the use of explosive weapons would be considered by the commander in light of potential alternative means and methods of warfare, including the practical availability of such alternatives and the risks that the use of such alternatives would pose to civilians. In some circumstances, the use of an explosive weapon might be the best option to mitigate the risks to civilians during military operations. At a minimum, States must comply with IHL, by, for example, taking 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 an attack.

Another point we would like to emphasize is that good practices can help strengthen compliance with and improve the implementation of applicable IHL outside the context of the use of EWIPA. While we appreciate the ways this Declaration focuses on EWIPA, we should be mindful that harm to civilians in armed conflict arises in many different contexts and for many different reasons. Policies and practices developed by States with regard to the protection of civilians in armed conflict should be implemented with regard to non-explosive weapons and when weapons are used outside of populated areas. Therefore, the intention of the United States is to apply its good practices for the protection of civilians on the broadest possible basis, and we encourage all other States to adopt a similar approach in implementing their IHL obligations and this Declaration.

We would also like to take this opportunity to provide some technical comments regarding the discussion of IHL in the Declaration. We would first state our general understanding that this document, which is non-legally binding in nature, is an effort to develop a set of political commitments and not an effort to negotiate new IHL, amend existing IHL, or ascertain customary international law. Although it is important and useful for the Declaration to refer to relevant IHL obligations, we interpret the Declaration to be consistent with IHL, rather than evidence of an interpretation of existing treaty or customary law. In addition, specifically in regard to paragraphs 2.3 and 4.4, we would like to note that not all States that may sign this Declaration are parties to the same treaties. Accordingly, the international law obligations referenced in these paragraphs, including relating to humanitarian access, may not apply to all States in the same manner.

Finally, we would like to underscore the importance of implementation to the success of this Declaration. Adoption is just an initial step. States, especially States that conduct military operations, also need to implement the Declaration for it to have a real-world humanitarian impact.

We believe the commitments set forth in this Declaration are already reflected in existing U.S. military policy and practice. But, nonetheless, the U.S. military continually strives to improve its policies and practices relating to the protection of civilians in armed conflict. As a case in point, the U.S. Department of Defense is currently conducting a Department-wide review and effort to develop and implement recommendations to improve protection of civilians. We will continue to work with a number of allies and partners on improving civilian protections in armed conflict. We hope to share information about those efforts with other States, and learn from their good practices, in the context of this Declaration.

In this regard, the impact of this Declaration will be significantly enhanced if the follow-on mechanism described in paragraph 4.7 provides an avenue for militaries from around the

world to learn from each other and continue to improve their policies and practices. The United States regularly collaborates with our allies and partners on supporting and improving efforts to mitigate and respond to civilian harm. We are eager to enhance our collaboration through the continued development and exchange of good practices and lessons learned in a non-politicized and non-contextualized manner. To this end, we would like to highlight the draft technical compilation of Practical Measures to Strengthen the Protection of Civilians During Military Operations in Armed Conflict that was jointly submitted in 2019 by Belgium, France, Germany, the United Kingdom, and the United States. We hope this compilation can form a basis for future exchanges, workshops, and seminars among our militaries.

In conclusion, the United States would like to reiterate our thanks to Ireland for facilitating our work and to all the delegations that contributed to the productive negotiations on this Declaration over the past several years. We look forward to working with interested States to strengthen the protection of civilians and to reduce human suffering in armed conflict.

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In November 2022, the United States joined more than 80 countries in endorsing the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas. The State Department issued a statement published as a media note at https://www.state.gov/united-states-endorses-political-declaration-relating-to-protection-of-civilians-in-armed-conflict/, and below.

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Today in Dublin, Ireland, the United States joined more than 50 other States in endorsing the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas. The United States thanks the Government of Ireland for its dedication in leading this important effort. We also express our appreciation to all States, civil society organizations, and international organizations that contributed to the negotiation of this Declaration.

Protecting civilians from harm in connection with military operations is a moral imperative. It is also critical to preserving civil society and restarting economic growth after the conflict is over. The United States is instituting major changes to our domestic policies and practices in this area, most notably through the Department of Defense Civilian Harm Mitigation and Response Action Plan released on August 25. We are eager to strengthen our collaboration with allies and partners as part of the follow-on mechanism established in the Declaration, through which States will meet on a regular basis to review the implementation of the Declaration and participate in military-to-military exchanges.

The atrocities committed by Russia's forces as part of its aggression against Ukraine have made a global unified approach on this issue urgent. Russia's attacks on civilian infrastructure and cities across Ukraine have destroyed parks, schools, apartment buildings, train stations, hospitals, and other public spaces. All States endorsing this Declaration are unified in their

commitment to strengthen the protection of civilians during armed conflict and improve the implementation of international humanitarian law.

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On November 18, 2022, Ambassador Claire D. Cronin delivered a statement at the adoption ceremony for the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas in Dublin. The statement follows.

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- The United States is proud to endorse the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas. We believe this Declaration will help States improve the protection of civilians and reduce human suffering in armed conflict. Protecting civilians from harm in connection with military operations is not only a moral imperative; it is also critical to achieving long-term success on the battlefield.
- The urgency of this issue cannot be overstated. Russia's devastating strikes have hit cities across Ukraine, with shells damaging or destroying residential areas, medical facilities, and critical energy infrastructure as winter fast approaches. In Syria, the United Nations estimates that over 300,000 civilians have been killed since 2011 due to the conflict, with the actual death toll likely far higher. The United States is proud to join the States endorsing this Declaration in committing to seek to reduce harm to civilians through improving our implementation of international humanitarian law to achieve a better future for humankind.
- The United States would like to express our profound appreciation for Foreign Minister Coveney, Ambassador Gaffey, and the rest of the team from Ireland for their dedication towards making this Political Declaration a reality. Ireland's sustained and skillful diplomacy resulted in a Declaration that brings together a wide range of views on this critical issue. Although this Declaration will be implemented by States, the contributions of civil society organizations and international organizations greatly enhanced the negotiations and resulting text, and we look forward to continuing our collaboration.
- Our collective work on this Declaration does not end today. Endorsement is just an initial step. We must now turn our efforts to implementation. To have a lasting impact, this Declaration will need robust implementation by each State and active follow-on exchanges among States. We want to see militaries from around the world learning from each other and sharing practical measures to strengthen their implementation of international humanitarian law and improve the protection of civilians. The United States regularly collaborates with allies and partners on efforts to mitigate and respond to civilian harm, and we look forward to strengthening those relationships as part of our implementation of this Declaration.
- Although the commitments set forth in this Declaration are already reflected in existing U.S. military policy and practice, the U.S. military continually strives to improve its

policies and practices in this area. On August 25, Secretary of Defense Austin issued the U.S. Department of Defense's Civilian Harm Mitigation and Response Action Plan, which sets forth 11 objectives and specific actions to advance those objectives over the next four years. These efforts include the establishment of a new Civilian Protection Center of Excellence, dedicated civilian harm mitigation and response personnel throughout the Department, and a data management platform for data related to civilian harm. We look forward to sharing more information on this Plan with you this afternoon.

- In closing, thank you again to Ireland for facilitating our work and to all the delegations that are here to support this Declaration. We look forward to a productive session today, and to working with you all going forward to strengthen our collective efforts to reduce human suffering in armed conflict.

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c. Cyber Attacks Against Ukraine

On May 10, 2022, Secretary Blinken issued a statement sharing publicly the United States' assessment that Russia was responsible for a number of cyber attacks against Ukraine in the period leading up to and following Russia's full-scale invasion of Ukraine on February 24, 2022. The press statement is available at https://www.state.gov/attribution-of-russias-malicious-cyber-activity-against-ukraine/ and excerpted below.

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The United States is joining with allies and partners to condemn Russia's destructive cyber activities against Ukraine. In the months leading up to and after Russia's illegal further invasion began, Ukraine experienced a series of disruptive cyber operations, including website defacements, distributed denial-of-service (DDoS) attacks, and cyber attacks to delete data from computers belonging to government and private entities – all part of the Russian playbook. For example, the United States has assessed that Russian military cyber operators have deployed multiple families of destructive wiper malware, including WhisperGate, on Ukrainian Government and private sector networks. These disruptive cyber operations began in January 2022, prior to Russia's illegal further invasion of Ukraine and have continued throughout the war.

Today, in support of the European Union and other partners, the United States is sharing publicly its assessment that Russia launched cyber attacks in late February against commercial satellite communications networks to disrupt Ukrainian command and control during the invasion, and those actions had spillover impacts into other European countries. The activity disabled very small aperture terminals in Ukraine and across Europe. This includes tens of

thousands of terminals outside of Ukraine that, among other things, support wind turbines and provide Internet services to private citizens.

As nations committed to upholding the rules-based international order in cyberspace, the United States and its allies and partners are taking steps to defend against Russia's irresponsible actions. The U.S. Government has developed new mechanisms to help Ukraine identify cyber threats and recover from cyber incidents. We have also enhanced our support for Ukraine's digital connectivity, including by providing satellite phones and data terminals to Ukrainian government officials, essential service providers, and critical infrastructure operators. We praise Ukraine's efforts—both in and outside of government—to defend against and recover from such activity, even as its country is under physical attack.

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7. Anti-Personnel Landmine Policy

On June 21, 2022, the Biden-Harris administration announced policy changes to U.S. Anti-Personnel Landmine policy. The White House fact sheet explaining the changes is available at https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/21/fact-sheet-changes-to-u-s-anti-personnel-landmine-policy/. The State Department held a special briefing with Ambassador Bonnie Denise Jenkins, Under Secretary for Arms Control and International Security, and Stanley L. Brown, Principal Deputy Assistant Secretary Bureau of Political-Military Affairs, on the United States' updated anti-personnel landmine policy. The briefing transcript is available at https://www.state.gov/briefing-on-the-united-states-updated-anti-personnel-landmine-policy/, and excerpted below.

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UNDER SECRETARY JENKINS:
…Curtailing the use of landmines worldwide was a commitment that President Biden made as a candidate, and I'm extremely pleased to highlight the White House's announcement today regarding the new anti-personnel landmine policy that achieves just what President Biden had promised.
The United States new policy on anti-personnel landmines is centered on people, the communities and the individuals around the world who seek peace and security. It is a tenet of our humanitarian demining activities. Our annual report, ***To Walk the Earth in Safety***, which I rolled out in April, is a great reminder of the United States' global leadership, and I strongly encourage you to read it if you have not yet done so.
I know that you have a lot of questions about today's White House announcement, so I will ask my colleague Stan Brown, Principal Deputy Assistant Secretary at the Bureau of Political-Military Affairs, to speak more about it.
Over to you, Stan.
MR BROWN: Thank you, Under Secretary Jenkins. I just want to take a moment to echo Under Secretary Jenkins's comments and reiterate the importance of today's announcement,

which follows through on President Biden's commitment to curtail the use of landmines worldwide.
After conducting a comprehensive policy review, the administration has announced a new U.S. policy to limit the use of anti-personnel landmines and align the United States' policy and practice with key provisions of the Ottawa Convention for all activities outside the context of the Korean Peninsula.
As a result of the decision, the United States will not develop, produce, or acquire anti-personnel landmines, not export or transfer anti-personnel landmines except when necessary for activities related to mine destruction or removal and for the purpose of destruction. They will not use anti-personnel landmines outside the Korean Peninsula, they will not assist, encourage, or induce anyone outside the context of the Korean Peninsula to engage in activity that would be prohibited by the Ottawa Convention, and undertake to destroy anti-personnel landmines and their stockpiles not required for the defense of the Korean Peninsula.
We will continue to pursue materiel and operational solutions that would be compliant with and ultimately allow the United States to accede to the Ottawa Convention, while we at the same ensure our ability to meet our alliance commitments.
The administration's actions today are in a sharp contrast to Russia's actions in Ukraine, where there's compelling evidence that Russian forces are using explosive munitions, including landmines, in an irresponsible manner which is causing extensive harm to civilians and damage to vital civilian infrastructure there.
Lastly, just in a – here at – the United States is proud to lead the world in conventional weapons destruction. We've invested more than 4.2 billion in more than 100 countries since 1993 to promote international peace and security through our conventional weapons destruction programs. We'll continue this important work and remain committed to continuing partnerships to address the humanitarian impacts of anti-personnel landmines.
With that just kind of as an opening statement, I'd be happy to take any questions from the group.

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B. CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

1. Group of Governmental Experts on Emerging technologies in the area of Lethal Autonomous Weapons Systems ("LAWS")

Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States submitted a joint proposal, entitled, "Principles and Good Practices on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems" at the first session of 2022 of the Group of Governmental Experts on Lethal Autonomous Weapons Systems ("GGE on LAWS"), which took place in Geneva from March 7-11, 2022. See U.N. Doc. CCW/GGE.1/2022/WP.2. The joint proposal follows and available at https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2022)/CCW-GGE.1-2022-WP.2.pdf.

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Proposed by Australia, Canada, Japan, the Republic of Korea, the United Kingdom and the United States

I. Preamble and Introduction

1. 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 ("the Convention" or "CCW"):

2. *Recalling* the objectives and purposes of the Convention;

3. *Reaffirming* that international law, in particular the United Nations Charter and International Humanitarian Law (IHL) as well as relevant ethical perspectives, should guide continued consideration and elaboration, by consensus, of possible measures and options related to the normative and operational framework on emerging technologies in the area of lethal autonomous weapons systems (LAWS);

4. *Noting* the potential challenges posed by emerging technologies in the area of lethal autonomous weapons systems to IHL;

5. *Reaffirming* without prejudice to the result of future discussions, the following guiding principles, which were affirmed by the High Contracting Parties:

(a) International humanitarian law continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems;

(b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) Risk assessments and mitigation measures should be part of the design, development, testing and deployment cycle of emerging technologies in any weapons systems;

(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;

(i) In crafting potential policy measures, emerging technologies in the area of lethal autonomous weapons systems should not be anthropomorphized;
(j) Discussions and any potential policy measures taken within the context of the CCW should not hamper progress in or access to peaceful uses of intelligent autonomous technologies;
(k) The CCW offers an appropriate framework for dealing with the issue of emerging technologies in the area of lethal autonomous weapons systems within the context of the objectives and purposes of the Convention, which seeks to strike a balance between military necessity and humanitarian considerations.
6. *Acknowledging* the consensus achievements to date of the Group of Governmental Experts while also recognizing the importance of continued work, including in light of the evolving and dynamic nature of emerging technologies in the area of LAWS;
7. *Affirm* the following principles and good practices, without prejudice to the result of future discussions.

II. Purpose and Scope
8. The following principles and good practices are intended to:
(a) strengthen the implementation of international humanitarian law and to promote responsible behavior with regard to emerging technologies in the area of LAWS;
(b) be considered by States throughout the life-cycle of weapons systems based on emerging technologies in the area of LAWS, such as when designing, developing, deploying, and using such systems; and
(c) provide a basis for further international discussion and work, including the further elaboration of these principles and good practices.
III. Characteristics and Concepts
9. The role and impacts of autonomous functions in the identification, selection, or engagement of a target are among the essential characteristics of weapons systems based on emerging technologies in the area of LAWS (based on 2019 GGE Report 19a).
10. Emerging technologies in the area of LAWS can include novel advancements in the field of Artificial Intelligence.
11. These principles and good practices may be of particular relevance when considering uses of weapons systems based on emerging technologies in the area of LAWS in which the system operator relies on autonomous functions to select and engage targets with lethal force and, before activation, the system operator does not identify a specific target or targets for intended engagement.
12. The following considerations may continue to aid the identification of characteristics and concepts relevant to emerging technologies in the area of LAWS and to the application of these principles and good practices:
(a) Characterization, or working definitions, should neither predetermine nor prejudge policy choices; they should be universally understood by stakeholders (2018 GGE Report 22a).
(b) Purely technical characteristics such as physical performance, endurance, or sophistication in target acquisition and engagement may alone not be sufficient to characterize LAWS, especially in view of rapid evolution in technology (2018 GGE Report 22b).
(c) Attempting to define a general threshold level of autonomy based on technical criteria alone could pose difficulty because autonomy exists on a spectrum, understandings of autonomy change with shifts in the technology frontier, and different functions of a weapons system could have different degrees of autonomy (based on 2018 GGE Report 22c).

(d) A focus on characteristics related to the human element in the use of force and its interface with machines is necessary in addressing accountability and responsibility (based on 2018 GGE Report 22f).

IV. Application of International Humanitarian Law

13. International humanitarian law continues to apply fully with respect to weapons systems based on emerging technologies in the area of LAWS.

14. The right of parties to an armed conflict to choose methods or means of warfare, including weapons systems based on emerging technologies in the area of LAWS, is not unlimited (CCW preamble with insertion in bold).

15. In cases involving weapons systems based on emerging technologies in the area of LAWS not covered by the Convention 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 GGE Report 17g).

V. Weapons Prohibited from Use in All Circumstances

16. A weapons system based on emerging technologies in the area of LAWS must not be used if it is of a nature to cause superfluous injury or unnecessary suffering, if it is inherently indiscriminate, or if it is otherwise incapable of being used in accordance with international humanitarian law (Sixth RevCon Declaration 19).

17. To prevent the development of such weapons systems based on emerging technologies in the area of LAWS that could not, under any circumstances, be used in compliance with international humanitarian law:

(a) weapons systems must not be designed to be used to conduct attacks against the civilian population, including attacks to terrorize the civilian population;

(b) weapons systems must not be designed to cause incidental loss of civilian life, injury to civilians, and damage to civilian objects that would invariably be excessive in relation to the concrete and direct military advantage expected to be gained;

(c) the autonomous functions in weapons systems must not be designed to be used to conduct attacks that would not be the responsibility of the human command under which the weapon system would be used; and

(d) weapons systems are to be developed such that their effects in attacks can be anticipated and controlled, as may be required, in the circumstances of their use, by the principles of distinction and proportionality and such that attacks conducted with reliance upon their autonomous functions will be the responsibility of the human command under which the system was used.

VI. Other Prohibitions or Restrictions on the Use of Weapons Systems Based on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems

18. The potential use of weapons systems based on emerging technologies in the area of LAWS must be conducted in accordance with applicable international law, in particular international humanitarian law and its requirements and principles, including, inter alia, distinction, proportionality, and precautions in attack (2019 GGE Report 17a).

(a) These international humanitarian law requirements and principles 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 LAWS (based on 2019 GGE Report 17d).

(b) Compliance with these international humanitarian law requirements and principles in the potential use of weapons systems based on emerging technologies in the area of LAWS 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 (based on 2019 GGE Report 17f).
19. Distinction. Civilians and civilian objects must not be made the object of attacks involving the use of weapons systems based on emerging technologies in the area of LAWS. Attacks involving the use of weapons systems based on emerging technologies in the area of LAWS may only be directed against military objectives.
20. Proportionality. The expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to attacks involving the use of weapons systems based on emerging technologies in the area of LAWS must not be excessive in relation to the concrete and direct military advantage expected to be gained.
21. Precautions in attack. Feasible precautions must be taken in planning and conducting attacks involving the use of weapons systems based on emerging technologies in the area of LAWS to spare, as far as possible, civilians and civilian objects from the loss of life, injury, and damage or destruction. Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.

VII. Responsibility and Accountability

22. General Considerations. The following principles related to accountability and responsibility, although not exhaustive, should be considered across the entire life cycle of weapons systems based on emerging technologies in the area of LAWS:
(a) Human responsibility for decisions on the use of weapons systems must be retained since accountability cannot be transferred to machines (Guiding Principle (b)).
(b) Humans must at all times remain accountable in accordance with applicable international law for decisions on the use of force (Sixth RevCon Declaration 20/2018 GGE Report 23a).
23. Responsibility and International Humanitarian Law. International humanitarian law imposes obligations on States, parties to armed conflict, and individuals, not machines. (2019 GGE Report 17b).
(a) States, parties to armed conflict, and individuals remain at all times responsible for adhering to their obligations under applicable international law, including international humanitarian law.
(b) 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 LAWS in accordance with their obligations under international humanitarian law (2019 GGE Report 17c).
24. State Responsibility. Under principles of State responsibility:
(a) Every internationally wrongful act of a State, including such conduct involving the use of a weapons system based on emerging technologies in the area of LAWS, entails the international responsibility of that State.
(b) The conduct of a State's organs such as its agents and all persons forming part of its armed forces, is attributable to the State. This includes any such acts and omissions involving the use of a weapons system based on emerging technologies in the area of LAWS, in accordance with applicable international law.

VIII. Good Practices Related to Human-Machine Interaction

25. 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 LAWS is in compliance with applicable international law, in particular international humanitarian law. 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)).
26. At various stages of the life-cycle of a weapon, the following good practices related to human-machine interaction can strengthen compliance with international humanitarian law, strengthen accountability, and mitigate risks in the use of weapons systems based on emerging technologies in the area of LAWS:
(a) Conducting legal reviews (2019 GGE Report 23b), including the practices described in paragraph 30;
(b) Conducting rigorous testing and evaluation of systems (2019 GGE Report 23b), such as to ensure that they function as anticipated in realistic operational environments;
(c) Providing for physical security and appropriate non-physical safeguards, including cyber security against hacking or data spoofing (Guiding Principle (f));
(d) Incorporating readily understandable human-machine interfaces and controls (2019 GGE Report 23b);
(e) Establishing policies, doctrine and procedures (based on 2019 GGE Report 23b), such as guidance on the ethical development and use of emerging technologies;
(f) Training personnel (2019 GGE Report 23b), such as training to enable system operators and commanders to understand the functioning, capabilities, and limitations of the system's autonomy in realistic operational conditions;
(g) Ensuring a domestic legal framework under which a State can hold its personnel accountable;
(h) Circumscribing weapons use through appropriate rules of engagement (2019 GGE Report 23b);
(i) Conducting operations under a responsible command;
(j) Reporting incidents that may involve violations;
(k) Conducting assessments, investigations, or other reviews of incidents that may involve violations; and
(l) Taking measures to mitigate the risk of unintended engagements, such as those described in paragraph 35.

IX. Legal Reviews

27. In accordance with States' obligations under international law, in the study, development, acquisition, or adoption of a new weapon, means, or method of warfare, including such potential weapons systems based on emerging technologies in the area of LAWS, determination must be made whether its employment would, in some or all circumstances, be prohibited by international law (based on Guiding Principle (e)).
28. 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 LAWS 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 GGE Report 17i).
29. Weapons systems based on emerging technologies in the area of LAWS under development, or modification that significantly changes the use of existing weapons systems, must be reviewed as applicable to ensure compliance with international humanitarian law (based on 2018 GGE Report 23(c)).

30. Legal reviews of weapons systems based on emerging technologies in the area of lethal autonomous weapons systems can include the following good practices:
(a) The legal review considers 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 international humanitarian law (Building on and implementing paragraph 10 above).
(b) If the use of the weapon is not prohibited, the legal review considers whether the use of the weapon is subject to the rules in any CCW Protocols or other rules applicable to certain types of weapons, applicable to the State in question.
(c) The legal review is conducted with an appropriate understanding of the weapons' capabilities and limitations, its planned uses, and its anticipated effects in those circumstances.
(d) The legal review advises on potential practical measures that would assist in ensuring compliance with international humanitarian law, such as the practices described in paragraph 26.

X. Risk Assessments and Mitigation Measures

31. Risk assessments and mitigation measures should be part of the design, development, testing, and deployment cycle of weapons systems based on emerging technologies in the area of LAWS (based on Guiding Principle (g)).
32. During the design, development, testing, and deployment of weapons systems based on emerging technologies in the area of LAWS, 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 GGE Report 23a).
33. 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 and restrictions on commercial proprietary information (based on 2018 GGE Report 23d).
34. Where feasible and appropriate, interdisciplinary 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 GGE Report 23b).
35. Measures to mitigate the risk of unintended engagements (e.g., engagements against civilians, civilian objects, or unintended military targets) involving weapons systems based on emerging technologies in the area of LAWS, can include measures across the life-cycle of the weapons system to:
(a) control, limit, or otherwise affect the types of targets that the system can engage;
(b) control, limit, or otherwise affect the duration, geographical scope, and scale of the operation of the weapons system, such as the incorporation of self-destruct, self-deactivation, or self-neutralization mechanisms into munitions and weapons systems;
(c) reduce automation bias in system operators as well as unintended bias in artificial intelligence capabilities relied upon in connection with the use of the weapon system; and
(d) otherwise enhance control or improve decision-making over the use of force, including relating to timing, precision, and accuracy.

XI. Implementation

36. The High Contracting Parties to the Convention intend to:

(a) Implement, as appropriate, these principles and good practices within each Party's respective national system;
(b) Share, on a voluntary basis, their national policies and experiences relevant to the implementation of these principles and good practices, bearing in mind national security considerations and restrictions on commercial proprietary information; and
(c) Keep these principles and good practices under review, and elaborate them by consensus as appropriate, while also continuing to consider and elaborate by consensus other possible measures and options related to the normative and operational framework on emerging technologies in the area of LAWS.

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On March 7, 2022, the Deputy Legal Adviser Joshua Dorosin delivered the opening statement at the first session of the 2022 GGE on LAWS in Geneva. The U.S. opening statement is excerpted below and available at https://geneva.usmission.gov/2022/03/08/u-s-statement-group-of-governmental-experts-lethal-autonomous-weapons/.

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Mr. Chair, it is essential that we stay focused on fulfilling our mandate, which is to "consider proposals and elaborate by consensus possible measures" related to the normative and operational framework on emerging technologies in the area of LAWS. The GGE will make progress by continuing to build upon the significant work that this Group has accomplished in previous years.

Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States have submitted a proposal for consideration by the GGE titled "Principles and Good Practices on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems." While our proposal could inform the development of proposals and concepts for a legally binding instrument in the future, to be clear, the proposal we have submitted, along with the other delegations I mentioned, would not be a legally binding instrument.

This proposal is designed to accomplish three objectives.

First, this proposal is intended to transform our GGE's extensive body of past consensus work into a document that could guide State practice. This document would provide measures that States could implement immediately to strengthen the implementation of international humanitarian law and promote responsible behavior.

Second, this proposal seeks to elaborate and progress the GGE's work by proposing additional conclusions in the many areas where we have found consensus. For example, our proposal includes more granular understandings of how IHL applies. It includes additional characteristics and concepts. It includes good practices in human-machine interaction and risk mitigation measures. We've sought to be ambitious in progressing the GGE's work, but also realistic in proposing advancements that we believe can be adopted this year.

Third, this proposal is a vehicle for further substantive work. The GGE's work focuses on complex issues that are affected by continuing technological developments as well as ongoing

developments in how people understand and use technology. Our proposal calls for exchanges of national practice. It also provides for continued elaboration of these principles and good practices as well as continued consideration and elaboration of other possible options and measures.

We have provided this proposal to the ISU for circulation to this group, and look forward to presenting this proposal and discussing it in greater detail this week. We welcome the opportunity to consider any other proposals that may be submitted. Focusing on substantive, concrete text will help this Group build further common understandings and progress.

Mr. Chair, despite our different perspectives, over the last five years, the GGE has reached consensus on 11 guiding principles and numerous other substantive conclusions in various reports that have furthered our collective understanding of emerging technologies in the area of LAWS. The United States urges this GGE to continue to focus on finding areas of consensus, of which we are confident there are many if we focus on substantive issues.

We look forward to working with you and other delegations to make as much progress this week as possible on considering the proposal we have submitted and the other proposals that may be put forward. With only ten days of work in 2022, we must stay focused on fulfilling our mandate.

Before closing, our delegation feels compelled to recognize the calamity that has continued to befall Ukraine. The United States stands steadfastly with Ukraine and its people and condemns in the strongest terms Russia's premeditated, unprovoked, and unjustifiable attack. We call on Russia to cease its aggression against Ukraine and its flagrant violations of international law.

As much as we share a deep sense of shock, sadness, and anger, we also want to commend the bravery, resilience, and determination that we have seen from the Ukrainian people in defending their country, homes, rights, and freedoms. This attack on their country should never have happened, but the response of Ukraine and the Ukrainian people has been truly inspiring.

Russia's unlawful actions remind us of the importance of the GGE's work both in process and substance. As a matter of process, it's critical that States resolve their differences and address issues through multilateral frameworks like the CCW. The ongoing armed conflict in Ukraine also reminds us of the importance of the substance of the CCW and the GGE's work. What we do here can matter a great deal. The GGE's work this year can strengthen the implementation of international humanitarian law in future armed conflicts. Because the United States believes deeply in multilateralism and in strengthening the implementation of IHL, the United States seeks a robust, substantive outcome for this GGE.

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2. Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons

On November 16, 2022, Deputy Legal Adviser Joshua Dorosin, Head of the U.S. Delegation to the 2022 Annual Meeting of the High Contracting Parties to the Convention on Certain Conventional Weapons ("CCW HCP") in Geneva from November 16-18, delivered the U.S. statement regarding

agenda item 6 (general exchange of views). The statement is available at https://geneva.usmission.gov/2022/11/18/ccw-hcp-annual-meeting-agenda-item-6-general-exchange-of-views/.

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The United States places great value on the CCW as an international humanitarian law treaty that brings together a group of States with diverse security interests to discuss issues related to weapons that may be deemed to be excessively injurious or to have indiscriminate effects. The CCW is a forum that is uniquely situated to address these issues due its mix of diplomatic, military, legal, policy, and technical expertise. The United States would especially like to recognize the role and contributions of civil society in this forum. The participation of civil society greatly enhances our work, and we look forward to hearing your perspectives during this meeting.

Mr. President, the United States is grateful for your efforts to engage with those States who have not yet joined the Convention, and we join others in welcoming Malawi on becoming the latest High Contracting Party to the convention. The United States is a party to the CCW and all five of its protocols. Promoting universalization and full implementation of the Convention and each of its protocols is of great importance to us. Russia's war of aggression in Ukraine and its devastating consequences for civilians clearly demonstrates the imperative for States to fully implement their obligations under international humanitarian law, including obligations under Amended Protocol II and Protocol V.

Mr. President, 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). Our delegation would like to thank all of the other delegations that have submitted proposals to the LAWS GGE in 2022. We also wanted to express our deep appreciation to Ambassador Flavio Soares Damico of Brazil for his skilled Chairmanship of the Group.

Although our delegation was disappointed that many substantive elements that were initially proposed for inclusion in the 2022 LAWS GGE report were unable to gain consensus, we appreciated the report's accounting of the proposals that had been submitted. The ten proposals represent a wide range of viewpoints, in both form and substance. Our delegation strongly supports the Group's recommended mandate to intensify the consideration of these proposals in 2023, and we look forward to continuing to engage substantively on all of the proposals. We continue to believe that the joint proposal, co-sponsored by Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States, represents the best path forward for the GGE to make substantive progress in 2023. This proposal builds on the past work of recommendations and conclusions of the GGE and provides a foundation for further international work. We are ready to engage with all States on the substance of this proposal, and are eager to work with other States to build consensus in the GGE.

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Also on November 16, 2022, Deputy Legal Adviser Dorosin delivered the U.S. statement regarding agenda item 7 (2022 Lethal Autonomous Weapons (LAWS) Group of Governmental Experts (GGE) Report) at the 2022 CCW HCP meeting. The statement is available at https://geneva.usmission.gov/2022/11/18/ccw-hcp-agenda-item-7-2022-lethal-autonomous-weapons-group-of-governmental-experts-report/.

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As noted in our general statement, we were disappointed that we were unable to gain consensus on a number of additional substantive elements that were proposed and seriously evaluated by the GGE this year. At the same time, 2022 gives us reason to be optimistic about the possibilities of 2023 – as summarized in paragraph 17 of the report, the GGE received ten proposals by the end of the second session. These include a proposal for a legally binding Protocol VI, proposals for non-binding instruments, and discussion papers that continue to develop our collective understanding of the application of existing IHL to LAWS. And it is also important to note that the quality of the technical discussions in the July session was high, and there is no question that it will be important to maintain that level of quality as we intensify our efforts next year.

Given the number and breadth of proposals that have been submitted, our delegation fully supports the GGE's recommended mandate for 2023 for the Group to "intensify the consideration of proposals and elaborate, by consensus, possible measures … and other options related to the normative and operational framework" on LAWS. The GGE must be given time to adequately consider the proposals that are now before it, as the Group was unable to devote sufficient time – in part because many arrived late in the session – to assessing the proposals in 2022. For these reasons, the United States believes that the mandate should direct the GGE to meet for 20 days in 2023. Ten days, as the GGE had in 2022, is simply not enough time to do justice to the proposals.

Mr. President, we continue to believe that the joint proposal, co-sponsored by Australia, Canada, Japan, the Republic of Korea, the United Kingdom, and the United States, represents the best path forward for the GGE to gain consensus on a substantive outcome in 2023. It is intended to transform the GGE's past consensus work into a document that could guide State practice and seeks to progress the GGE's work by proposing new conclusions in areas of consensus, such as conclusions reflecting the two-tier approach.

We acknowledge that many States have called for the negotiation of a legally binding instrument. However, as is evident from today's statements, there are also many other States that believe it is premature to do so. The GGE's work focuses on complex issues that are affected by continuing technological developments. There are likely to be significant changes in emerging technologies in the years to come. There also continue to be divergences among States on fundamental issues.

The United States has been clear that consideration of the joint proposal does not preclude future work on a legally binding instrument. In fact, the issues addressed in the joint

proposal, such as clarifying how existing IHL applies to LAWS and identifying whether there are any gaps in existing law, is work that would need to be done in preparation for negotiating a legally binding instrument.

We welcome the opportunity to engage with all delegations on any aspects of the joint proposal, and to work collaboratively within the GGE to make further progress on this important issue. Thank you.

* * * *

On November 17, 2022, the United Kingdom delivered a joint statement on reports of Russia's failure to comply with its obligations under the CCW and it Protocols during its war of aggression against Ukraine at the 2022 CCW HCP meeting on behalf of the United States and : Albania, Austria, Australia, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Ireland, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Ukraine, and the European Union. The joint statement is excerpted below and available at https://geneva.usmission.gov/2022/11/18/high-contracting-parties-to-the-convention-on-certain-conventional-weapons-joint-statement-on-ukraine/.

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We are gravely concerned about increasing reports of Russia's failure to comply with its obligations under the CCW and its Protocols during its manifestly unlawful war of aggression against Ukraine. All CCW High Contracting Parties must adhere to their obligations. We remind Russia in particular of its obligations, under Article 14 of Amended Protocol II and Article 11 of Protocol V, to take effective steps to ensure its personnel comply with these Protocols and to cooperate with High Contracting Parties to the CCW to effectively address any noncompliance.

Russia's aggression against Ukraine has exposed millions of civilians to the risks posed by explosive remnants of war (ERW). According to preliminary estimates, since February 24, 2022, 160,000 square kilometers of Ukraine are now contaminated with ERW, creating a grave humanitarian crisis. Ukrainian agricultural lands have been rendered unusable due to ERW, mines and booby-traps planted by Russian forces, which has contributed to hunger and the threat of famine around the world. Even as we meet the risks posed by ERW are increasing due to Russia's unconscionable attacks against civilian infrastructure and residential areas.

We also express grave concern regarding the large number of civilians, including children, killed and injured by mines, Improvised Explosive Devices (IEDs), and explosive ordnance used by Russian forces in Ukraine. In this regard, we condemn any use of mines, booby traps, and other devices prohibited by Amended Protocol II. Survivors of these incidents are in need of greater assistance. Humanitarian demining and mine risk education remains essential to decrease the number of casualties in the future.

Mr. Chair, we greatly appreciate the assistance provided by numerous States to Ukraine since the beginning of this war. As Ukraine continues to regain control over its territory, more assistance will be needed in clearing and removing ERW and supporting victims. We urge all States to commit to further assisting Ukraine in its efforts to clear its territory from explosive ordnance and mines, mark areas where possible, conduct mine risk education campaigns, and assist the victims.

We also welcome the United Nations General Assembly Resolution "Furtherance of remedy and reparation for the aggression against Ukraine" adopted on November 14, 2022 at the UN General Assembly 11th Emergency Special session which recognised the need for a mechanism to provide reparations to Ukraine for all damage that has been done by Russia's illegal invasion. We will continue our efforts to ensure accountability for any violations of this Convention and other atrocities committed by Russian forces in Ukraine, such as those documented by the International Independent Commission of Inquiry on Ukraine.

Mr. Chair, we conclude by calling on Russia to take all appropriate steps to prevent and suppress violations of this Convention and its Protocols and to end its senseless and illegal invasion of Ukraine, in accordance with its obligations under international law, and in particular under the Convention on Certain Conventional Weapons.

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C. DETAINEES

1. Transfers

The number of detainees remaining at Guantanamo Bay declined further in 2022 as part of U.S. government efforts to close the facility. As of March 7, 2022, 38 detainees remained at Guantanamo Bay. As of October 29, 2022, there were 35.[*]

On March 7, 2022, the Department of Defense announced the repatriation of Mohammad Mani Ahmad al-Qahtani from the detention facility at Guantanamo Bay to the Kingdom of Saudi Arabia. Al-Qahtani was recommended for transfer by the Periodic Review Board established by Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force." 76 Fed. Reg. 13,277 (Mar. 10, 2011). See *Digest 2011* at 576-77. The March 7, 2022 DOD release is available at https://www.defense.gov/News/Releases/Release/Article/2957801/guantanamo-bay-detainee-transfer-announced/.

On April 2, 2022, the Department of Defense announced the repatriation of Sufiyan Barhoumi from the detention facility at Guantanamo Bay to Algeria. Barhoumi was recommended for transfer by the Periodic Review Board established by E.O. 13567. The April 2, 2022 DOD release is available at https://www.defense.gov/News/Releases/Release/Article/2987202/guantanamo-bay-detainee-transfer-announced/.

[*] Editor's note: As of April 20, 2023, 30 detainees remained at Guantanamo Bay.

On June 24, 2022, the Department of Defense announced the transfer of Asadullah Haroon al-Afghani also known as "Gul" from the detention facility at Guantanamo Bay to facilitate his repatriation to Afghanistan, his native country. Gul was transferred in accordance with the 2021 U.S. District Court for the District of Colombia order granting his writ of habeas corpus. See *Digest 2021* at 798-807 for a discussion of *Gul v. Biden*, 16-cv-01462 (D.D.C.). The June 24, 2022 DOD release is available at https://www.defense.gov/News/Releases/Release/Article/3073210/guantanamo-bay-detainee-transfer-announced/.

On October 29, 2022, the Department of Defense announced the repatriation of Saifullah Paracha from the detention facility at Guantanamo Bay to Pakistan. Paracha was recommended for transfer by the Periodic Review Board established by E.O. 13567. The October 29, 2022 DOD release is available at https://www.defense.gov/News/Releases/Release/Article/3204199/guantanamo-bay-detainee-transfer-announced/.

2. Litigation: *Husayn v. Austin, et al.*

In 2021, Guantanamo detainee Zayn Husayn, also known as Abu Zubaydah, filed a motion for an order requiring immediate release and repatriation with the federal district court judge handling his petition for habeas corpus. *Husayn v. Austin, et al.*, 08-cv-01360 (D.D.C.). His motion pointed to the President's public remarks declaring the war in Afghanistan to be over in arguing that the end of hostilities in Afghanistan marked the end of the U.S. government's authority to detain Husayn. The U.S. government filed an opposition to Husayn's motion on July 9, 2021. On June 10, 2022, the court denied Husayn's motion finding that hostilities against al Qaeda and associated forces are ongoing and Husayn's detention remains authorized by the AUMF. The court's opinion is available at https://www.govinfo.gov/app/details/USCOURTS-dcd-1_08-cv-01360/USCOURTS-dcd-1_08-cv-01360-19/context. Excerpts from the court's opinion are below (citations omitted). Other Guantanamo detainees have raised arguments identical or similar to Husayn's, that the hostilities constituting the basis for their detention ceased with the U.S. withdrawal from Afghanistan. Relevant cases include *Gul v. Biden*, No. 16-cv-01462 (D.D.C.), *Qassim v. Biden*, No. 04-cv-01194 (D.D.C.), *Rahim v. Biden*, No. 09-cv-01385 (D.D.C), *Paracha v. Biden*, No. 20-5039 (D.C. Cir) and No. 21-cv-02567 (D.D.C.), and *Bihani v. Biden*, No. 22-cv-02845 (D.D.C.).

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A. Petitioner's Detention Is Authorized By the AUMF

Petitioner disputes that the authority to detain him derives from the AUMF because the Factual Return does not assert that he had any role in the September 11 attacks. Sursurreply, ECF No. 600 at 3, 18. Petitioner's position is, however, inconsistent with well-settled legal precedent. As explained above, "[t]he AUMF authorizes detention for the duration of the conflict between the United States and the Taliban and al Qaeda." *Al-Alwi*, 901 F.3d at 299. Respondents' Factual Return alleges that "Petitioner is detained because he was part of and substantially supported [al

Qaeda] and associated forces." Opp'n, ECF No. 578 at 24. While Petitioner disputes that he was a part of or substantially supported al Qaeda, clearly the asserted basis for the Executive Branch's authority to detain him is the AUMF.

B. The Authority to Detain Individuals Under the AUMF Is Not Limited To the Conflict in Afghanistan

Petitioner contends that the authority to detain under the AUMF is limited to the conflict in Afghanistan. Reply, ECF No. 585 at 18-19. However, the AUMF contains no geographical limitation. As persuasively explained by another Judge on this Court:

> 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)(1), 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 [Petitioner's] argument that the 2001 AUMF is limited to hostilities in Afghanistan.

Gul v. Biden, Case No. 16-CV-01462 (APM), 2021 WL 5206199, * 2 (D.D.C. November 8, 2021).

Turning to caselaw, Petitioner points out that in *Hamdi*, the Supreme Court interpreted the 2001 AUMF to authorize "detention of [those] individuals ... ***for the duration of the particular conflict in which they were captured,***" 542 U.S. at 518 (emphasis added); and argues that "[i]n every case considering the 'end of hostilities' question raised by a Guantanamo detainee, the court has always conducted the analysis with respect to whether the U.S. forces were engaged in hostilities in Afghanistan," Reply, ECF No. 585 at 18 (citing *Al-Alwi,* 901 F.3d at 298; *Al-Bihani*, 590 F.3d at 874).

For the reasons explained below, the Court does not read these authorities to limit geographically the "sweeping delegation of power" in the AUMF. Furthermore, the cases upon which Petitioner relies are distinguishable because it is unclear whether in any of the cases an argument was made that either the AUMF or the particular conflict for which the respective Petitioners were detained was limited to Afghanistan.

In *Hamdi*, the Petitioner was an American citizen alleged to have taken up arms with the Taliban in Afghanistan the aftermath of the terrorist attacks of September 11, 2001. *See Hamdi*, 542 U.S. at 510. This factual underpinning informed the Supreme Court's conclusion that his detention was authorized by the AUMF: "The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are

still involved in active combat in Afghanistan, those detentions are part of the 'necessary and appropriate force,' and therefore are authorized by the AUMF." *Id.* at 521.

In *Al-Alwi*, the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rejected the Petitioner's argument that the authority to detain him had "unraveled" due to the duration of the "Afghanistan-based conflict" on the grounds that " '[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.' " *Al-Alwi*, 901 F.3d at 298 (quoting *Hamdi*, 542 U.S. at 521).

Finally, in *Al-Bihani*, the D.C. Circuit affirmed the denial of the petition for a writ of habeas corpus, disagreeing with Petitioner's argument there that the conflict with the Taliban had ended, citing the number of U.S. and Coalition troops in Afghanistan. 590 F.3d at 874. In response to a similar argument made to another Judge on this court, he persuasively concluded that:

> 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. [Petitioner] 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.").

Gul, 2021 WL 5206199, *3.

Petitioner notes that the Factual Return "focus[es] overwhelmingly on his alleged hostile activities in or related to Afghanistan and Khaldan training camp." Reply, ECF No. 585 at 14 n.70. However, the Factual Return alleges activities and plans beyond Afghanistan—specifically in Pakistan and Iran. *See* Factual Return, ECF No. 474-1 at 35-40 (travel between Pakistan and Afghanistan); 62 (entry in Petitioner's diary regarding creating a cell in Iran "and meet with group which [would] work in Palestine, without the knowledge of the Iranian government"). Furthermore, Petitioner is alleged to be part of and to have substantially supported al Qaeda, which as explained *infra*, operates out of Afghanistan and elsewhere.

Petitioner acknowledges that "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms again," Sursurreply, ECF No. 600 at 9 (quoting *Hamdi*, 542 U.S. at 518); but asserts that since the war in Afghanistan has ended, there is no battlefield for Petitioner to return to, *id.* The Court disagrees. Respondents have, as explained in detail below, provided ample support for the representation that al Qaeda still operates in Afghanistan and elsewhere.

For these reasons, the Court concludes that Respondents' authority to detain Petitioner is not limited to the conflict in Afghanistan.

C. Hostilities Against al Qaeda, and Associated Forces Remain Ongoing in Afghanistan and Elsewhere

Petitioner contends that "the United States has defeated al Qaeda in Afghanistan and there are no active hostilities." Pet'r's Mot., ECF No. 576-1 at 8.

As explained *supra*, "[t]he AUMF authorizes detention for the duration of the conflict between the United States and the Taliban and al Qaeda." *Al-Alwi*, 901 F.3d at 299. Where "the Executive Branch represents, with ample support from the record evidence, that the hostilities described in the AUMF continue," the Court must defer to the Executive Branch's

determination. *Id.* at 300. Here, as set forth below, the record amply supports the Executive Branch's representation that hostilities against al Qaeda have not ceased.

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3. Ukraine

At a June 16, 2022 press briefing, the State Department delivered remarks concerning the applicability of the law of armed conflict to Russia's prisoners of war, including third-country national volunteers incorporated into Ukraine's armed forces. The press briefing transcript is available at https://www.state.gov/briefings/department-press-briefing-june-16-2022/ and excerpted below.

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…Well, the Russians have certain obligations, and members of the Ukrainian armed forces, including volunteers who may be third-country nationals incorporated into the armed forces, should be treated as prisoners of war under the Geneva Conventions and afforded the treatment and protections commensurate with that status, including humane treatment and fundamental process and fair trial guarantees. Under the Geneva Convention, POWs are entitled to combatant immunity and cannot be prosecuted for participation in hostilities. Russia's obligations here are very clear: As a party to the Geneva Convention and the First Additional Protocol, they apply to its detention and treatment of anyone in the armed conflict, regardless of the status that person merits or that Russia purports to recognize of any such individual.

* * * *

…Well, of course, and we continue, as do our British partners, and we've been in touch with our British partners on specific cases and on the issue more broadly. The Russians have an obligation to afford humane treatment to anyone in their custody as a result of this conflict – humane treatment and fundamental process and fair trial guarantees. Anyone who is captured on the battlefield, who are members of the Ukrainian armed forces, including, again, volunteers who need not be Ukrainian nationals, who could be third-country nationals, should be afforded the full protections of the Geneva Conventions and the Laws of Armed Conflict.

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Cross References

Special Immigrant Visa program, **Ch. 1.B.3.c**
International crime issues relating to cyberspace, **Ch. 3.B.7**
NATO Accession Protocols for Finland and Sweden, **Ch. 4.B3&5**
HRC on international humanitarian law, **Ch. 6.A.6**
HRC on Afghanistan, **Ch. 6.A.6.c&d**
Human rights abuses in Ukraine, **Ch.6.A.7.c**
Children in Armed Conflict, **Ch. 6.C**
ILC work on protection of the environment in relation to armed conflicts, **Ch. 7.C.1**
IACHR hearing on precautionary measures for detainees in Guantanamo Bay, **Ch. 7.D.4.j**
Armenia and Azerbaijan, **Ch. 9.B.3**
Ukraine, **Ch. 9.B.1**
Request for import restrictions on cultural property of Afghanistan, **Ch. 14.A.1**
Iran, **Ch. 16.A.2**
Cyber activity sanctions, **Ch. 16.A.11**
Afghanistan, **Ch. 17.B.2**
Syria, **Ch. 17.B.3**
Ukraine, **Ch. 17.B.10**
Atrocities in Ukraine, **Ch. 17.C.5**
Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

Compliance Report

In April 2022, the State Department transmitted to Congress the unclassified version of the 2022 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 2022 report primarily covers the period from January 1, 2021 through December 31, 2021. The report is available at https://www.state.gov/adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/.

B. NONPROLIFERATION

1. Non-Proliferation Treaty

On January 20, 2022, the governments of the United States and Japan issued a joint statement on the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") reaffirming obligations under the NPT. The State Department media note is available at https://www.state.gov/u-s-japan-joint-statement-on-the-treaty-on-the-non-proliferation-of-nuclear-weapons/.

On July 1, 2022, Secretary Blinken released a statement reaffirming U.S. commitment to the NPT and marking the 54th anniversary of the date it opened for

signature. The statement follows and is available at https://www.state.gov/reaffirming-our-commitment-to-the-treaty-of-the-non-proliferation-of-nuclear-weapons/.

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On this day 54 years ago, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) opened for signature in London, Moscow, and Washington, DC. Today, the United States reaffirms its commitment to this critical treaty and celebrates the immeasurable contribution it has made to the security and prosperity of the nations and peoples of the world.

The NPT has provided the essential foundation for international efforts to stem the looming threat – then and now – that nuclear weapons would proliferate across the globe. In so doing, the NPT has served the interests of all its parties and limited the potential risk of a devastating nuclear war. It has also expanded access to the astonishingly diverse benefits of the peaceful uses of the atom, whether for electricity, medicine, agriculture, or industry.

When the 10th Review Conference of the NPT opens one month from today, the United States will highlight the treaty's enduring role in reducing global dangers – whether by facilitating arms control, safeguarding peaceful nuclear activities, or deterring violations – as we work toward our ultimate goal of a world without nuclear weapons. We look forward to working with all parties to preserve and strengthen this important treaty.

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As discussed in *Digest* 2021 809-11, the Tenth NPT Review Conference ("RevCon") was postponed to 2022 due to the COVID-19 pandemic. The Tenth NPT RevCon took place from August 1, 2022 to August 26, 2022 in New York. Secretary Blinken delivered remarks to the RevCon on August 1, 2022. The remarks are available at https://www.state.gov/secretary-antony-j-blinkens-remarks-to-the-nuclear-non-proliferation-treaty-review-conference/. On August 1, 2022, the Department issued a fact sheet regarding its approach to nonproliferation, disarmament, peaceful uses, and the NPT, available at https://www.state.gov/the-nuclear-non-proliferation-review-conference/.

On August 1, 2022, the governments of the United States, France, and the United Kingdom issued a ministerial statement as a State Department media note at https://www.state.gov/ministerial-statement-of-the-french-republic-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-united-states-of-america/, and excerpted below, reaffirming the NPT as the cornerstone of the nuclear nonproliferation regime.

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As the Tenth NPT Review Conference begins, we reaffirm its continued importance, and pledge to work positively toward the full implementation of all provisions and the full realization of its purposes. Among them is the furtherance of international peace and security, which we, as NPT nuclear-weapon states and Permanent Members of the UN Security Council, are committed to preserving and promoting.

The leaders of France, the United Kingdom, and the United States remain firmly committed to the objectives contained in the statement of 3 January 2022 on Preventing Nuclear War and Avoiding Arms Races. We recognize and act with a deep understanding that nuclear war cannot be won and must never be fought. We affirm the aspiration and high stakes associated with preserving the record of non-use of nuclear weapons since 1945. Nuclear weapons, for as long as they exist, should serve defensive purposes, deter aggression, and prevent war. We condemn those who would use or threaten to use nuclear weapons for military coercion, intimidation, and blackmail. Such actions are profoundly dangerous and contrary to the purposes of the NPT and the UN Charter. Following Russia's unprovoked and unlawful war of aggression against Ukraine, we call on Russia to cease its irresponsible and dangerous nuclear rhetoric and behaviour, to uphold its international commitments, and to recommit – in words and deeds – to the principles enshrined in the recent Preventing Nuclear War and Avoiding Arms Races Leaders' statement.

The NPT has reduced the risk of a devastating nuclear war, and further reduction of that risk must be a priority for all NPT states parties and for this Review Conference. We recognize that this risk is best addressed through concrete, substantive and purposeful steps and overcoming the strategic, political, and technical challenges necessary to achieve a world without nuclear weapons. The working paper we submitted describes principles and responsibilities of responsible practices for NPT Nuclear Weapon States, and illustrates ways in which our governments will carry forward implementation of the January 3rd statement.

By mandating ever stronger nuclear safeguards, implemented by the International Atomic Energy Agency to verify nonproliferation undertakings, we recall that the NPT has laid the necessary basis for preventing the spread of nuclear weapons and for the secure sharing of nuclear technology for peaceful purposes. The potential for further contributions in the fields of energy, agriculture, health, environment and other fields is vast. We renew our commitment to promote and expand their contribution to sustainable development and tackling climate change around the world.

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2. Country-Specific Issues

In 2022, the United States entered several country-specific legally binding arrangements related to nonproliferation. A selection of U.S. activity in 2022 is discussed below. This section does not discuss arrangements for exchange of technical information and cooperation in nuclear safety that the United States entered in 2022 are not listed herein. These arrangements are documented in https://www.state.gov/treaties-in-force/.

a. Australia-United Kingdom-United States ("AUKUS")

As discussed in *Digest* 2021 at 812-14, 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, signed at Canberra on November 22, 2021, (the "Agreement") was transmitted to Congress by the President in December 2021. The agreement entered into force on February 8, 2022, and is available at https://www.state.gov/multilateral-22-208.

b. Philippines

On March 10, 2022, the United States of America and the Philippines signed a Memorandum of Understanding Concerning Strategic Civil Nuclear Cooperation, also known as an NCMOU. The State Department media note regarding the signing of this NCMOU follows and is available at https://www.state.gov/the-united-states-of-america-and-the-republic-of-the-philippines-sign-a-memorandum-of-understanding-concerning-strategic-civil-nuclear-cooperation/.

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Today, the United States and the Philippines signed a Memorandum of Understanding Concerning Strategic Civil Nuclear Cooperation (NCMOU), which improves our cooperation on energy security and strengthens our diplomatic and economic relationship. Undersecretary of State for Arms Control and International Security Bonnie Jenkins signed for the United States, and Mr. Gerardo Erguiza Jr., Undersecretary of Energy, signed for the Philippines.

The United States and the Philippines have an enduring alliance and maintain long-standing cooperation in the fields of security, energy, commerce, and nonproliferation. Deepening our cooperation in nuclear energy, science and technology has the potential to make a significant contribution to our shared clean energy goals, agricultural development, availability of clean water, medical treatments, and more. Our nuclear cooperation rests on a strong nonproliferation regime and the Philippines' steadfast commitment to nonproliferation.

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 and a mutually aligned approach to nonproliferation on civil nuclear issues and for engagement between experts from government, industry, national laboratories, and academic institutions.

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c. Mexico

On November 2, 2022, the Agreement between the Government of the United States of America and the Government of the United Mexican States for Cooperation in Peaceful Uses of Nuclear Energy, signed at Washington on May 7, 2018, entered into force. The agreement is available at https://www.state.gov/mexico-22-1102. The State Department media note regarding entry into force of the agreement follows and it available at https://www.state.gov/u-s-mexico-civil-nuclear-cooperation-agreement-enters-into-force/.

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Today, the United States and Mexico's Agreement for Cooperation in Peaceful Uses of Nuclear Energy entered into force. The agreement will enhance our cooperation on energy security and strengthen our diplomatic and economic relationship.

This is the first bilateral agreement for peaceful nuclear cooperation between the United States and Mexico. The Agreement builds on the nearly 80 years of peaceful nuclear cooperation between our two countries and establishes the conditions for continued U.S. civil nuclear trade with Mexico.

Civil nuclear cooperation agreements, also known as 123 agreements, provide a legal framework for exports of nuclear material, equipment, and components from the United States to another country. This agreement provides a comprehensive framework for peaceful nuclear cooperation with Mexico based on a mutual commitment to nuclear nonproliferation. It will permit the transfer of nuclear material, equipment (including reactors), components, and information for nuclear research and nuclear power production.

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d. Kenya

On December 15, 2022, the United States of America and the Republic of Kenya signed an NCMOU. The State Department media note regarding the signing of the NCMOU is below and available at https://www.state.gov/the-united-states-of-america-and-the-republic-of-kenya-sign-a-memorandum-of-understanding-concerning-strategic-civil-nuclear-cooperation/.

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Today, the United States and Kenya signed a Memorandum of Understanding Concerning Strategic Civil Nuclear Cooperation (NCMOU), which improves our cooperation on energy security and strengthens our diplomatic and economic relationship.

Under Secretary of State for Arms Control and International Security Bonnie D. Jenkins signed for the United States, and Foreign Minister Alfred Mutua, Cabinet Secretary of Foreign and Diaspora Affairs, signed for Kenya.

The United States and Kenya have an enduring diplomatic relationship and long-standing cooperation in the fields of security, energy, and commerce. Our cooperation in nuclear energy, science, and technology also has the potential to make a significant contribution to clean energy goals, agricultural efforts, the availability of clean water, medical treatments, and more.

NCMOUs are diplomatic mechanisms that strengthen and expand strategic ties between the United States and a partner country by providing a framework for cooperation on civil nuclear issues and for engagement between experts from government, industry, national laboratories, and academic institutions.

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e. Iran

As discussed in *Digest 2021* at 812, 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"), were ongoing as of the end of 2021. The talks continued in 2022. See State Department January 31, 2022 special briefing, available at https://www.state.gov/senior-state-department-official-on-the-jcpoa-talks/.

On June 9, 2022, Secretary Blinken issued a press statement expressing support for the IAEA Board of Governors Resolution on Iran. The statement follows and is available at https://www.state.gov/the-iaea-board-of-governors-resolution-on-iran/.

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Yesterday, we joined the overwhelming majority of the IAEA Board of Governors in expressing support for the IAEA's essential mission of safeguarding nuclear material to prevent nuclear proliferation. Iran must cooperate with the IAEA and provide technically credible information in response to the IAEA's questions, which is the only way to remove these safeguards issues from the Board's agenda.

The resolution is at the heart of the IAEA's mandate and Iran's core obligations under the Nuclear Non-Proliferation Treaty, not about the Joint Comprehensive Plan of Action (JCPOA). The United States remains committed to a mutual return to full implementation of the JCPOA. We are prepared to conclude a deal on the basis of the understandings we negotiated with our European Allies in Vienna over many months. Such a deal has been available since March, but we can only conclude negotiations and implement it if Iran drops its additional demands that are extraneous to the JCPOA.

Unfortunately, Iran's initial response to the Board's action has not been to address the lack of cooperation and transparency that prompted a negative report from the IAEA Director General and such strong concern in the Board, but instead to threaten further nuclear provocations and further reductions of transparency. Such steps would be counterproductive and

would further complicate our efforts to return to full implementation of the JCPOA. The only outcome of such a path will be a deepening nuclear crisis and further economic and political isolation for Iran. We continue to press Iran to choose diplomacy and de-escalation instead.

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f. Ukraine

The 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 (the G7) issued a joint statement on August 10, 2022 in support of the International Atomic Energy Agency's (IAEA) efforts to promote nuclear safety and security at the Zaporizhzhyza Nuclear Power Plant in Ukraine. The G7 statement follows and is available as a State Department media note, at https://www.state.gov/g7-foreign-ministers-statement-in-support-of-the-iaeas-efforts-to-promote-nuclear-safety-and-security-at-the-zaporizhzhya-nuclear-power-plant-in-ukraine/.

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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, reiterate our strongest condemnation of the ongoing unprovoked and unjustifiable war of aggression of the Russian Federation against Ukraine. The Russian Federation must immediately withdraw its troops from within Ukraine's internationally recognized borders and respect Ukraine's territory and sovereignty.

In that context, we demand that Russia immediately hand back full control to its rightful sovereign owner, Ukraine, of the Zaporizhzhya Nuclear Power Plant as well as of all nuclear facilities within Ukraine's internationally recognized borders to ensure their safe and secure operations. Ukrainian staff operating the Zaporizhzhya Nuclear Power Plant must be able to carry out their duties without threats or pressure. It is Russia's continued control of the plant that endangers the region.

We remain profoundly concerned by the serious threat that the seizure of Ukrainian nuclear facilities and other actions by Russian armed forces pose to the safety and security of these facilities, significantly raising the risk of a nuclear accident or incident and endangering the population of Ukraine, neighboring states, and the international community. It also undermines the IAEA's ability to monitor Ukraine's peaceful nuclear activities for safeguarding purposes.

We welcome and support IAEA Director General Grossi's efforts to strengthen nuclear safety and security in Ukraine and we thank the Director General and the IAEA staff for their steadfast commitment in this regard. Against this background, we underline the importance of facilitating a mission of IAEA experts to the Zaporizhzhya Nuclear Power Plant to address nuclear safety, security, and safeguard concerns, in a manner that respects full Ukrainian sovereignty over its territory and infrastructure. We strongly endorse the importance of the Seven Pillars of Nuclear Safety and Security as outlined by Director General Grossi.

We reiterate our full and continued support for the IAEA. IAEA staff must be able to access all nuclear facilities in Ukraine safely and without impediment, and engage directly, and without interference, with the Ukrainian personnel responsible for the operation of these facilities. The safety of all individuals implementing these efforts must be addressed to strengthen nuclear safety, security, and safeguards in Ukraine.

We encourage all countries to support the IAEA's efforts.

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C. ARMS CONTROL AND DISARMAMENT

1. North Korea

In 2022, the Democratic People's Republic of Korea conducted multiple ballistic missile launches.

On March 24, 2022, the United States condemned the DPRK's ballistic missile launch in a press statement, available at https://www.state.gov/the-democratic-peoples-republic-of-koreas-ballistic-missile-launch/. On March 25, 2022, 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 condemned the continued testing of ballistic missiles by DPRK, including the Intercontinental Ballistic Missile (ICBM) launch conducted on March 24, 2022. The statement released as a media note is available at https://www.state.gov/g7-foreign-ministers-statement-on-the-dprks-launch-of-an-intercontinental-ballistic-missile/, and excerpted below.

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Since the beginning of 2022, the DPRK has conducted an unprecedented series of missile tests which build on ballistic missile tests conducted in 2021, including launches of new so-called hypersonic missiles, and has claimed a submarine-launched ballistic missile test. These tests demonstrate the DPRK's continued efforts to expand and further develop its ballistic missile capabilities. We deeply regret that the DPRK, with the most recent launches, has also abandoned its self-declared moratorium on ICBM launches. We strongly condemn these acts which are in blatant violation of the DPRK's obligations under numerous UN Security Council resolutions including resolution 2397 (2017). These reckless actions threaten regional and international peace and security, pose a dangerous and unpredictable risk to international civil aviation and maritime navigation in the region, and demand a united response by the international community, including by further measures to be taken by the UN Security Council.

We strongly urge the DPRK to fully comply with all legal obligations arising from the relevant Security Council resolutions. We call on the DPRK to accept the repeated offers of dialogue put forward by all parties concerned, including the United States, the Republic of Korea and Japan. We, the G7 foreign ministers and the High Representative of the European Union, also call on the DPRK to abandon its weapons of mass destruction and ballistic missile programs in a complete, verifiable, and irreversible manner.

We are clear that the dire humanitarian situation in the DPRK is the result of the DPRK's diversion of the DPRK's resources into weapons of mass destruction and ballistic missile programs rather than into the welfare of its people.

We call on all States to fully and effectively implement all restrictive measures relating to the DPRK imposed by the UN Security Council and to address the risk of weapons of mass destruction proliferation from the DPRK as an urgent priority. We note with concern the report by the Panel of Experts established in pursuant to resolution 1874 (2009) that illicit ship-to-ship transfers continue to take place. We remain ready to assist in and strengthen capacities for effective sanctions implementation. In the context of the Covid-19 pandemic, we commend the work of the 1718 Committee, which has swiftly approved all Covid-19 related sanctions exemption requests for humanitarian assistance for the DPRK.

The G7 are committed to working with all relevant partners towards the goal of peace on the Korean Peninsula and to upholding the rules-based international order.

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On May 9, 2022, the G7 Non-Proliferation Directors Group issued a statement on nuclear disarmament and non-proliferation, including a condemnation of DPRK's continued testing of ballistic missiles. The statement is available at https://www.diplomatie.gouv.fr/en/french-foreign-policy/security-disarmament-and-non-proliferation/news/2022/article/statement-of-the-g7-non-proliferation-directors-group-09-may-2022, and excerpted below.

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24. The G7 strongly condemns the continued testing of ballistic missiles by the Democratic People's Republic of Korea (DPRK), including the recent Intercontinental Ballistic Missile (ICBM) launch conducted on 24 March 2022, which are blatant violations of the DPRK's obligations under numerous UNSCRs. Since 2021, the DPRK has conducted an unprecedented series of missile tests, including launches of alleged hypersonic weapons using ballistic missiles and a submarine-launched ballistic missile test. These tests demonstrate the DPRK's continued efforts to expand and further develop its ballistic missile capabilities. We deeply regret that the DPRK has abandoned its self-declared moratorium on ICBM launches. In addition, nuclear activities (such as restarting nuclear reactors and behaviour consistent with fissile material production) have been observed at several nuclear sites since 2020, suggesting an ongoing nuclear program development. All these reckless actions threaten regional and international peace and security, pose a dangerous and unpredictable risk to international civil aviation and maritime navigation in the region and demand a united response by the international community, including further measures to be taken by the UN Security Council.

25. The G7 remains fully committed to the complete, verifiable, and irreversible dismantlement by the Democratic People's Republic of Korea of all its nuclear weapons, other weapons of mass destruction and ballistic missiles of all ranges, as well as related programs and facilities, consistent with UNSCRs. We strongly urge the DPRK to fully comply with all obligations arising from the relevant UNSCRs, to abandon its weapons of mass destruction and

ballistic missile programs in a complete, verifiable and irreversible manner and to return at an early date to, and fully comply with, the NPT and IAEA safeguards. We call on the DPRK to accept the repeated offers of dialogue put forward by all parties concerned, including the United States, the Republic of Korea, and Japan.

26. The G7 is committed to working with all relevant partners towards the goal of peace on the Korean Peninsula and to upholding the rules-based international order. We call on all states to fully and effectively implement all restrictive measures relating to the DPRK imposed by the UN Security Council and to address the risk of proliferation of weapons of mass destruction, and related delivery systems, from the DPRK as an urgent priority, particularly through additional UN Security Council action. We note with concern the report by the Panel of Experts established pursuant to UNSCR 1874 (2009) that illicit ship-to-ship transfers continue to take place. We remain ready to assist in and strengthen capacities for effective sanctions implementation. We are clear that the dire humanitarian situation in the DPRK is primarily the result of the diversion of the DPRK's resources into unlawful weapons of mass destruction and ballistic missile programs rather than into the welfare of its people. In the context of the Covid-19 pandemic, we commend the work of the 1718 Committee, which has swiftly approved all Covid-19 related sanctions exemption requests for humanitarian assistance for the DPRK.

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On May 26, 2022, Ambassador Linda Thomas-Greenfield delivered remarks before the vote on a U.S.-drafted UN Security Council resolution strengthening sanctions on the DPRK ballistic missile launches. The statement is excerpted below and available at https://usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-before-the-vote-on-a-u-s-drafted-un-security-council-resolution-on-the-dprk/.

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Colleagues, today's vote could not be more clear. Here are the facts. The DPRK's May 25 launch of three ballistic missiles included yet another ICBM launch. The United States assesses this is DPRK's sixth ICBM launch since the beginning of 2022. This is a threat to the peace and security of the entire international community.

It is undeniable that the DPRK continues to illustrate its commitment to advancing its WMD and ballistic missile programs in violation of multiple Security Council resolutions. And this Council made a commitment to respond to exactly this kind of escalation. We cannot allow the DPRK to normalize these unlawful and destabilizing actions, nor let the DPRK divide the Security Council, and exhaust our capacity to respond decisively.

The DPRK has now conducted six ICBM tests without any response from the Security Council, despite the commitment the Council made in Resolution 2397 to take further measures in the event of an additional ICBM launch. Following this commitment by the Council, the DPRK suspended ICBM tests for five years. But its ICBM launches in recent months have tested the will and the integrity of this Council to carry out its commitments. Thus far, we have not.

We cannot let this become the new norm. We cannot tolerate such dangerous and threatening behavior.

Some Council members have argued that a PRST is the appropriate response to the DPRK's ICBM launches. May I remind my fellow Council members that we have tried to propose press elements and a press statement following many of the DPRK launches this year, including the March 24 ICBM launch. We were told, however, that any such statement could lead to escalation or destabilize the Korean Peninsula.

In fact, the exact opposite has happened. The DPRK has taken the Council's silence as a green light to act with impunity and escalate tensions on the Peninsula. It has engaged in an unprovoked series of 23 – and let me repeat that – 23 ballistic missile launches since the beginning of the year and is actively preparing to conduct a nuclear test.

Council action is not the reason for the DPRK's escalation. Because Council inaction is certainly enabling it. And today's vote is the Council's opportunity to stand by its word. It's the Council's responsibility to act in response to the DPRK's ICBM launches. And only through a resolution can we deliver on the Council's commitment in Resolution 2397.

With the adoption of this resolution, we can send a message to all proliferators that we will not stand for their actions that seek to undermine international peace and security. We took a deliberate and Council-wide approach to negotiations to ensure all members have a voice in this resolution. That certain Council members refused to engage, despite our commitment to and demonstration of inclusivity throughout this process, is their choice, and it's their choice alone.

If adopted, this action-oriented resolution will restrict the DPRK's ability to advance its unlawful WMD and ballistic missile programs, streamline sanctions implementation, and further facilitate the delivery of humanitarian aid. It also takes an urgently needed step to address the concerning COVID-19 outbreak in the DPRK.

We ask all Council members to stand with us against the DPRK's unlawful actions and vote for this resolution's adoption. This should continue to be an area of Council unity. And now is the time to act.

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On June 8, 2022, the UN General Assembly ("UNGA") held a first ever debate resulting from the landmark UNGA resolution adopted on April 26, 2022 establishing a standing mandate for a debate following the use of the veto in the UN Security Council by one or more of its permanent members. See U.N. Doc. A/RES/76/262, available at https://www.undocs.org/A/RES/76/262. The debate followed the May 26 vetoes by the PRC and Russia of the UN Security Council resolution introduced by the United States in response to DPRK ballistic missile launches. Ambassador Jeffrey DeLaurentis delivered the United States remarks at the June 8 meeting, which are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-following-vetoes-by-china-and-russia-on-a-un-security-council-resolution-on-the-dprk/.

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I want to start by thanking the many Member States that worked on and sponsored the "Standing mandate for a General Assembly debate when a veto is cast in the Security Council," including Liechtenstein, for all their efforts that brought us to today. This session is unprecedented in the

history of the UN. At a moment when the Security Council is under international scrutiny, this debate creates an opportunity for the General Assembly to promote transparency and accountability.

Today we have heard two delegations deliver explanations regarding the use of a veto on a critically important question of nonproliferation, one that concerns the safety and security of all Member States.

The DPRK has a long and dangerous history of proliferation. It could not be more important for all Member States to be united in confronting the DPRK's unlawful WMD and ballistic missile programs. Since the beginning of this year, the DPRK has launched 31 ballistic missiles, including six intercontinental ballistic missiles, an intermediate-range ballistic missile, at least two claimed hypersonic glide vehicles, and two so-called new tactical guided weapons intended for the operation of "tactical nukes." This is the largest number of DPRK ballistic missiles ever launched in a single year – and it is only June. Each and every one of these launches violated multiple Security Council resolutions that were adopted by consensus.

In response to these provocations, China and Russia's cast vetoes that gave the DPRK an implicit nod of approval. A mere nine days later, the DPRK was emboldened enough to launch eight more ballistic missiles – the highest number of ballistic missiles tested in a single event in DPRK history. What's more, all of this has occurred as the DPRK is finalizing preparations for a potential seventh nuclear test. And don't just take our word for it. The Secretary-General strongly condemned the DPRK's March 24 ICBM launch – the same launch that the vetoed resolution sought to address. And the Director General of the International Atomic Energy Agency has reported observations that the DPRK's is preparing its nuclear testing site.

These actions by the DPRK have been unprovoked. President Biden and Secretary Blinken have repeatedly and publicly said that we seek a dialogue with Pyongyang, without preconditions. We have passed this message on through private channels as well – including high-level personal messages from senior U.S officials to senior DPRK officials. We have sent this message through third parties, in writing, and with specific proposals. We have encouraged our allies and partners and others, including China, to convey our openness to diplomacy with the DPRK and to make it clear that we seek serious and sustained diplomacy that addresses both the concerns of the DPRK as well as those of the international community.

We have offered humanitarian aid to the people of North Korea. And after the recent COVID outbreak in the DPRK, we offered to help the DPRK deal with the COVID-19 challenge and deliver vaccines to the North Korean people. China is are well aware of our efforts because we have asked them to convey our message to the DPRK. Unfortunately, we did not receive a response to that offer – or to any of our offers for dialogue and diplomacy without preconditions. Instead, the DPRK responds with repeated and destabilizing launches that threaten not only the region, but the world.

For a long time, the Security Council has been united on the question of non-proliferation in the DPRK. This consensus has been codified in multiple resolutions since 2006 – each of them negotiated and unanimously agreed by all members of the Security Council. The resolutions worked. Over the years, the sanction measures have undeniably slowed down the DPRK's unlawful WMD and ballistic missile developments. But for these resolutions to be fully effective, all Member States must fully implement them.

Now let me be clear: sanctions are not a substitute for diplomacy. And they are not designed to be permanent. The United States is more than prepared to discuss easing sanctions to achieve the complete denuclearization of the Korean Peninsula. I know many of our Security

Council colleagues would agree. Nor are sanctions the cause of escalatory behavior. They are a response to escalatory behavior. There is only one country that is escalating tensions on the Korean Peninsula with unprovoked launches and threatening rhetoric and that is the DPRK.

But until the DPRK engages in diplomacy and undertakes meaningful actions toward denuclearization, we must work together to restrict its unlawful WMD and ballistic missile programs. And that is exactly what the Security Council, as a whole, committed to do in 2017. The Council determined in resolution 2397 that we would further tighten sanctions in the event of another ICBM launch by the DPRK.

Multiple ICBM launches later, the United States proposed a Security Council resolution to simultaneously curb the DPRK's unlawful WMD and ballistic missile advancements and to alleviate the DPRK's humanitarian situation. We did this because providing humanitarian aid and addressing threats to international peace and security are not, and never have been, mutually exclusive. And because a new resolution was the only way to effectively address the full scope of these pressing challenges. The United States also included a provision in its draft resolution to facilitate pandemic-related aid to the DPRK and remains committed to supporting the 1718 exemptions process, which – to date – has approved 89 packages for assistance.

The United States actively worked towards a consensus resolution. You heard from our colleagues that we held an inclusive and flexible process that considered all Council members' inputs. Thirteen Security Council members, representing every region in the world, constructively engaged to carry out the Council's responsibilities to maintain international peace and security. And on May 26, thirteen Council members, expressed their commitment to protecting the global nonproliferation regime through their votes. Thirteen Council members chose to send a strong message to the DPRK that its unlawful WMD and ballistic missile development will not be tolerated, and to send a signal to all proliferators that there should be consequences for their behavior.

Two did not. Unfortunately, their explanations for exercising the veto were insufficient, not credible, and not convincing. The vetoes were not deployed to serve our collective safety and security. Earlier this year, Russia and China pledged a "no limits partnership." We hope these vetoes are not a reflection of that partnership – of a partnership elevated above the collective interests of this body, or of the multilateral institutions mandated to ensure the safety and security of us all.

After the Second World War, our countries came together, collectively, in support of a set of principles that would prevent conflict and alleviate human suffering – that would recognize and promote respect for human rights – and that would foster an ongoing dialogue to uphold and improve a system that benefited all people. The most powerful countries in the world agreed to exercise a form of self-restraint. That led to our rules-based international order – the system of laws, agreements, principles, and institutions that the world has built together to manage relations between states, prevent conflict, and uphold the rights of all people. Nonproliferation is a critical part of this. As Secretary Blinken recently said, and I quote, "on nonproliferation and arms control, it's in all of our interests to uphold the rules, the norms, the treaties that have reduced the spread of weapons of mass destruction."

Sending a clear message to the DPRK that its destabilizing launches are unacceptable – and working to stop its nuclear weapons program – is in all of our interests. So the United States will continue discussing our respective responsibilities as permanent Security Council members – the responsibilities entrusted to us by those here in this Assembly. For our part, the United States will continue to work regularly, diligently, and transparently with the Security Council,

our allies and partners, and all Member States who seek to stop the DPRK's unlawful WMD and ballistic missile programs and uphold the values of non-proliferation enshrined in the very first resolution adopted by this General Assembly.

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2. New START Treaty

No sessions of the Bilateral Consultative Commission under the New START Treaty were convened in 2022. Further information on the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, also known as the New START Treaty, is available at https://www.state.gov/new-start/ and https://www.state.gov/new-start-treaty-fact-sheets/.

D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons in Syria

a. Anniversary of Attack in Ghouta

On August 21, 2022, the State Department issued a press statement marking the ninth anniversary of the Ghouta chemical weapons attack. The statement follows and is available at https://www.state.gov/ninth-anniversary-of-the-ghouta-syria-chemical-weapons-attack/.

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Nine years ago, early in the morning of August 21, 2013, the Assad regime released the nerve agent sarin on Syrian civilians in the Ghouta district of Damascus, killing more than 1,400 people — many of them children. Today, we recall with continuing horror this tragic event and we recommit ourselves to accountability for the perpetrators.

The United States remembers and honors the victims and survivors of the Ghouta attack and the many other chemical attacks we assess the Assad regime has launched. We condemn in the strongest possible terms any use of chemical weapons anywhere, by anyone, under any circumstances. There can be no impunity for those who use chemical weapons; the United States uses all available tools to promote accountability for such attacks.

The United States calls on the Assad regime to fully declare and destroy its chemical weapons program, in accordance with its international obligations, and for the regime to allow the Organization for the Prohibition of Chemical Weapons' Declaration Assessment Team access to the country to confirm Syria has resolved all remaining concerns about the regime's chemical weapons program.

The United States strongly supports international and Syrian-led efforts to seek justice for the innumerable atrocities committed against the people of Syria, some of which rise to the level

of war crimes and crimes against humanity. We also reaffirm our support for an inclusive political resolution to the Syrian conflict in line with UN Security Council resolution 2254.

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b. UN Security Council Briefing

On September 29, 2022, Ambassador Richard Mills delivered the U.S. statement at a UN Security Council briefing on chemical weapons in Syria. His remarks are excerpted below and available at https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-chemical-weapons-in-syria-2/.

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As we noted last month, August 2022 marked the ninth anniversary of the Assad regime's vicious deployment of the nerve agent sarin on Syrian civilians in the Ghouta district of Damascus. Since then, the OPCW, this Council, and the global community have witnessed many egregious violations of the Chemical Weapons Convention and continued malign behavior by the Syrian regime. These violations include not only the use of chemical weapons, but also the Assad regime's failure to completely declare its entire chemical weapons program and its continued interference with the work of the OPCW's Declaration Assessment Team.

Our desire to end the outrageous behavior of the Assad regime and their Russian enablers is what brings us to these consultations each month, to speak truth and urge the Assad regime to comply with its international obligations.

So, here are a number of difficult truths that no volume of denial can counter. Over the last nine years, the OPCW-UN Joint Investigative Mechanism and the OPCW Investigation and Identification Team, IIT, have independently confirmed the Assad regime used chemical weapons on eight separate occasions. Our own assessment is that the Assad regime has used chemical weapons at least fifty times since Syria joined the Convention.

Despite our knowledge of these horrors, and our numerous efforts to reduce the risk that such an attack might ever happen again – the Assad regime and its backers, especially Russia, continue to stonewall efforts to account for Syria's chemical weapons.

The regime's continued refusal to provide answers or information requested years ago by the Declaration Assessment Team is an affront to this Council and to the OPCW. The fact is that Syria has not declared its entire chemical weapons program and it retains a hidden stockpile – a stockpile of chemical weapons. The risk remains that the Assad regime will again use chemical weapons against its own population. Syria continues to deny a visa to a member of the OPCW's Declaration Assessment Team, preventing its deployment. We again call on the Syrian regime to immediately permit the Declaration Assessment Team to return to Syria, resolve all discrepancies, and help ensure the verified elimination of Syria's chemical weapons program.

After nine years and 24 rounds of consultations, the Director-General of the OPCW tells us that Syria's declaration cannot be considered accurate and complete. The regime has shown it is willing to deploy inhumane measures. The threat of future attacks will remain until the regime

clearly and thoroughly answers the questions that have been posed by the OPCW, fully declares its chemical weapons program in accordance with its obligations under the CWC, and ceases its obstruction and provides visas to the OPCW experts so they can deploy to Syria.

Mr. President, in conclusion, our commitment to hold actors accountable for their use of chemical weapons is universal and shared – so it is said – by everyone on this Council and is not limited to Syria. We condemn in the strongest possible terms the use of chemical weapons anywhere, by anyone, under any circumstances. In that spirit, we call on the regime to end its intransigence and simply meet its chemical weapons obligations as quickly as possible. Doing so will reduce the risk of further chemical weapons use and help to ensure that we will never again be faced with the horrific scenes we have witnessed over the last nine years.

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2. Chemical Weapons Convention

a. Anniversary of the Chemical Weapons Convention Entry into Force

On April 29, 2022, Secretary Blinken issued a press statement marking the twenty-fifth anniversary of the entry into force of the Chemical Weapons Convention ("CWC"). The statement follows and is available at https://www.state.gov/twenty-fifth-anniversary-of-the-chemical-weapons-conventions-entry-into-force/.

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Today marks the twenty-fifth anniversary of the entry into force of the Chemical Weapons Convention (CWC). For a quarter of a century, the United States has worked with its Allies and partners to help rid the world of chemical weapons and deter their use by anyone, anywhere, and under any circumstances. Our collective goal is to exclude completely the possibility of the use of chemical weapons, which are abhorrent tools of war. On this anniversary, we renew our commitment to upholding the CWC and note the Convention's important role in contributing to U.S. national security. Unfortunately, this anniversary reminds us that the world continues to be threatened by the specter of these weapons.

In recent years, the world has witnessed chemical weapons use that challenges the CWC's core prohibitions: by the Assad regime and ISIS in Syria, by Russian government operatives against the Skripals in the UK and Aleksey Navalny in Russia, and by the DPRK against Kim Jong Nam in Malaysia. Syria remains in noncompliance with the CWC, and we will continue to work to hold the Assad regime accountable for its repeated use of chemical weapons against its own people. We will also continue our efforts to hold the Kremlin accountable for its noncompliance with the CWC, repeated use of chemical weapons, and ongoing efforts to shield the Assad regime from accountability for its CW use. Further, we have made very clear that the Russian government would face profound consequences were it to use chemical weapons in Ukraine.

Despite these challenges, the Convention, which President Biden has championed since his time in the U.S. Senate, has shown time and again its utility, demonstrated by the

commitment of the majority of States Parties to compliance and their willingness to take actions to uphold it and hold accountable those who violate it.

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b. Organization for the Prohibition of Chemical Weapons

On June 17, 2022, the State Department issued a media note detailing a meeting between Under Secretary of State Bonnie Jackson and Assistant Secretary of State Mallory Stewart and the Director-General of the Organization for the Prohibition of Chemical Weapons ("OPCW") on strengthening the CWC. The media note is excerpted below and available at https://www.state.gov/senior-u-s-officials-discuss-strengthening-the-chemical-weapons-convention-with-director-general-of-the-organization-for-the-prohibition-of-chemical-weapons/.

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Under Secretary of State Bonnie Jenkins and Assistant Secretary of State Mallory Stewart met with Director-General of the Organization for the Prohibition of Chemical Weapons (OPCW), Ambassador Fernando Arias and thanked the Director-General for his outstanding leadership of the Organization. The Under Secretary and Assistant Secretary reaffirmed the United States' unwavering support for the OPCW and the norm against the use of chemical weapons, and commended the independence, professionalism, and dedication of the OPCW Technical Secretariat staff. They also discussed the OPCW readiness to provide assistance and advice in case of chemical weapons use in Ukraine.

Leadership of the Defense Threat Reduction Agency, senior officials at the Departments of Defense, and Commerce, and the National Security Council also met with Director Arias during his two-day visit. They discussed the future of the Organization in anticipation of the completion of the U.S. chemical weapons stockpile destruction in 2023, how to counter disinformation about chemical weapons, as well as the timeline for the opening of the new OPCW ChemTech Centre whose expanded laboratory and training capabilities will help the OPCW adapt to rapid changes in the chemical weapons science and technology landscape.

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On December 1, 2022, the Department held a special briefing with Ambassador Joseph Manso, U.S. Permanent Representative to the Organization for the Prohibition of Chemical Weapons. The audio and transcript for the online press briefing is available at https://www.state.gov/online-press-briefing-with-ambassador-joseph-manso-u-s-permanent-representative-to-the-organization-for-the-prohibition-of-chemicals-weapons-opcw/.

3. Biological and Toxin Weapons Convention

a. Article V and VI Proceedings

On June 13, 2022, the Russian Federation transmitted a diplomatic note to the United States with an attached Aide Memoire on "questions regarding the compliance of the United States with the obligations under the [Biological and Toxin Weapons Convention] in the context of the activities of biological laboratories in the territory of Ukraine." The United States responded with a diplomatic note on June 23, 2022. The text of the Russian note of June 13, the U.S. response of June 23, and subsequent exchanges are available at https://undocs.org/en/BWC/CONS/2022/WP.51. U.S. diplomatic note of June 23 is excerpted below.

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The June 13 Aide Memoire contains a subset of a wide range of unsubstantiated allegations and speculations previously made by Russian officials in press briefings, interviews, and various international fora. The Aide Memoire, however, is the first official bilateral request from the Government of Russia for a U.S. response to most of these allegations.

As the Department has stated publicly on multiple occasions, the United States is in full compliance with the Biological and Toxin Weapons Convention. The United States wishes again to assure the Russian Federation that all of the biological-related activities of the United States, including its cooperation with the Government of Ukraine, are for peaceful purposes and fully consistent with its obligations under the Biological and Toxin Weapons Convention. Nevertheless, the United States takes seriously its obligations to the Convention and will provide a substantive response to the Aide Memoire.

To do so, however, the Department of State requests that the Russian Federation provide legible copies of the documents appended to the Aide Memoire on an expedited basis. Several documents (specifically pages 49-59) are unreadable or virtually unreadable. Legible copies will permit the United States to respond to these allegations, which the Department intends to do within 30 days of receiving them.

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On June 28, 2022, the Russian Federation transmitted a diplomatic note in response indicating that it would be requesting the convening of a consultative meeting of States Parties to the Biological and Toxin Weapons Convention ("BWC"). Accordingly, on June 29, 2022, the Russian Federation submitted a request to convene a formal consultative meeting under Article V of the BWC "with a view to

resolving the issues with the United States and Ukraine regarding their compliance with their obligations under the BTWC in the context of operation of biological laboratories" in Ukraine. On August 22, 2022, the U.S. submitted a response to the Russian Federation's request for a consultative meeting under Article V. On September 6, 2022, U.S. Special Representative Kenneth D. Ward delivered the U.S. opening statement to the Article V consultative meeting. The August 22 submission, the September 6 opening statement, and an additional statement delivered on September 6 are available at https://www.state.gov/article-v-biological-weapons-convention-consultative-process/.

On September 13, 2022, the State Department issued a press statement at the conclusion of the Article V consultative meeting. The statement is available at https://www.state.gov/conclusion-of-article-v-formal-consultative-meeting-under-the-biological-weapons-convention/, and included below.

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On Friday, September 9, the Biological Weapons Convention Article V Formal Consultative Meeting, called by Russia, ended in Geneva. The United States delegation, led by Special Representative Kenneth D. Ward, effectively exposed Russia's disinformation tactics and dispelled Russia's spurious allegations seeking to malign peaceful U.S. cooperation with Ukraine.

In the presence of delegations from 89 countries, the United States and Ukraine presented a thorough, in-depth series of presentations that strongly refuted Russia's absurd and false claims of U.S. biological weapons development and bio-labs in Ukraine. Technical experts from the U.S. and Ukrainian delegations unambiguously explained their cooperation and U.S. assistance related to public health facilities, biosafety, biosecurity, and disease surveillance as part of the broader U.S. Cooperative Threat Reduction Program. The United States and Ukraine also highlighted how such activities are consistent with—and further support—the provisions of the BWC, particularly Article X, which promotes cooperation and assistance by States Parties. States Parties affirmed and supported the United States in this regard, with over 35 of the 42 countries that spoke noting the importance of such work.

The United States takes seriously its obligations under the BWC and therefore participated fully, transparently, and with integrity in the Article V process. The same cannot be said for the Russian delegation, who distributed a proposed "joint statement" to select delegations with its conclusions from the meeting before the United States and Ukraine even began our presentations.

The United States will continue to fulfill our obligations under the BWC, including by assisting partners around the world to strengthen global health security and reduce the impacts of infectious diseases on our societies, and we condemn Russia's ongoing disinformation campaign to try to distract from—and justify—its unprovoked and brutal war against Ukraine.

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Following conclusion of the Article V formal consultative meeting, on October 24, 2022, the Russian Federation submitted a complaint to the UN Security Council under Article VI of the BWC. On November 2, 2022, the Security Council considered and rejected a proposed resolution by the Russian Federation related to its Article VI complaint. The proposed resolution received the affirmative vote of only the Russian Federation and the People's Republic of China. The United States, France, and the United Kingdom voted against the resolution, and the remaining 10 members abstained. Ambassador Linda Thomas-Greenfield provided the explanation of vote on the resolution, which follows, and is available at https://usun.usmission.gov/explanation-of-vote-delivered-by-ambassador-thomas-greenfield-on-a-un-security-council-resolution-proposed-by-russia-on-alleged-bioweapons-in-ukraine/.

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The United States voted against this resolution because it is based on disinformation, dishonesty, bad faith, and a total lack of respect for this body. The Biological Weapons Convention is important. It addresses the grave threat posed by biological weapons. The United States takes its responsibility seriously, and fully complies with and fulfills its obligations under the BWC. That includes assisting partners around the world to strengthen global health security and reduce the impact of infectious diseases on their societies.

Colleagues, we cannot allow such lifesaving cooperation to be stigmatized. Russia tried, and failed, to claim that we had violated the BWC at the Article 5 meeting in Geneva this past September. Russia failed to provide any credible evidence to support these false allegations. Despite Russia's abuse of the process, and precisely because we respect the BWC and its provisions, the United States and Ukraine went through Russia's allegations in Geneva, point by point, and debunked every single one.

Russia knows our Cooperative Threat Reduction efforts are not for military purposes. We know Russia knows this, because for nearly two decades, Russia participated in this very kind of cooperation with us, including on biological threats. The truth is that Russia's questions are not sincere, and Russia is not interested in our answers.

Russia said this is a milestone. It is. It is a milestone for Russia's deception and lies. And the world sees it. An overwhelming number of the States Parties that spoke at the Geneva meeting considered that the issues raised by Russia were unsubstantiated and had been conclusively addressed. But that wasn't enough for Russia.

Instead, when Russia failed in Geneva, it inappropriately raised the same false claims here, abusing its position and abusing us, and they should not be surprised or disappointed by what happened here today. Russia showed zero appreciation for the precedent it has set in invoking Article VI of the BWC for the first time in the Convention's history. And as you can see from the vote today, no one is buying it except China.

I will not devote any more time, energy, or resources to these lies from Russia. Nor should the rest of the Security Council. Not while troops still occupy Ukrainian territory. And not while Russian forces continue to attack Ukrainian civilians and commit war crimes. Instead of letting Russia waste our time, we should focus on the truth and the horrors Russia has inflicted upon the Ukrainian people.

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b. Ninth Review Conference

The Ninth Review Conference ("RevCon") of the Biological Weapons Convention ("BWC") took place in Geneva from November 28, 2022 to December 16, 2022. On November 29, 2022, Under Secretary of State for Arms Control and International Security Bonnie Jenkins delivered remarks. The remarks are available at https://geneva.usmission.gov/2022/11/29/bwc-9th-review-conference-u-s-national-statement/ and are excerpted below.

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We meet in challenging times. Last year, I called COVID-19 a wake-up call for humanity. It still is. It showed us what is at stake and why we must act in the BWC and elsewhere to address biological threats, whether natural, accidental, or intentional.

Since then, new challenges have emerged. Some may ask if it is possible for us to reach agreement on anything under the present circumstances.

I believe it is. It will take hard work, patience, and compromise. Above all, it will require us to heed that wake-up call and respond. Disease knows no boundaries and effective response requires international cooperation. My delegation has come here to work constructively, and I pledge our full support for your efforts, Mr. President, over the next three weeks.

There are proposals that are ripe for action at this Review Conference – proposals that can be adopted now, with real, near-term benefits for States Parties:

- First, progress has been made in reconciling different approaches to a review mechanism for science and technology. We can and we should establish such a mechanism at this Conference.
- Second, proposals by South Africa, France, and India provide practical tools for States Parties seeking assistance under Article VII if they are harmed by a violation of the Convention. We should address any remaining questions about these proposals and adopt them.
- Third, rapid advances in biotechnology and increasing numbers of laboratories working with high-consequence pathogens offer important benefits, but they are not without risks. We should collaboratively strengthen biosafety and biosecurity around the world.
- Fourth, many States Parties have called for the establishment of a voluntary fund for technical cooperation. We agree. President Biden's budget request for fiscal year 2023 includes five million dollars for the first year of voluntary support to the BWC. I call on States Parties to establish such a fund.
- And finally, we should seek to clarify the role and authority of annual meetings. Proposals like those I have just described will require ongoing management to be effective, which may require decisions on next steps. We must be able to act more

than twice a decade. This can be done in a way that respects the special authority associated with Review Conferences.

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There are also harder issues before us; issues that will take more time and effort to address. How do we strengthen implementation of the Convention and enhance mutual assurance of compliance? These are not simple questions. Approaches from over twenty years ago are unlikely to work today. We need to examine how technology has changed and what the bioweapons threats of today and tomorrow looks like. We also need to explore what measures – yes, including possible verification measures – might be effective in today's context.

We therefore support the proposal made by Canada, the Netherlands, and the 27 cosponsors to create an expert working group to study these issues and recommend next steps. Such an approach could take us beyond the intersessional process we have followed and pave the way for important progress.

Individually, these proposals are modest. Together, they reflect a commitment to revitalize this forum. By showing that we can work together to get things done, these proposals build trust and set the BWC on a new path. We must recognize, however, that these steps will require new resources for additional meeting time and additional personnel. Yes, national budgets are tight. But the BWC is one of the smallest and — dare I say — cheapest, of all multilateral efforts, with a staff of just three, and only twelve days of meeting time each year. We simply cannot get more out of this forum without putting more in.

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On December 20, 2022, the State Department issued a press statement on the conclusion of the BWC RevCon. The statement follows and is available at https://www.state.gov/the-ninth-biological-weapons-convention-review-conference/.

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The Ninth Biological Weapons Convention (BWC) Review Conference concluded on December 16 with the adoption by consensus of a final document, which launches a new, expert-led process to strengthen the BWC to address the challenges of the future. We congratulate Special Representative Ken Ward and his team for their hard work during the three weeks of the Review Conference and the numerous preparatory meetings over the past year. We also commend Ambassador Leonardo Bencini, President of the Review Conference, for his dedication in bringing the States Parties to consensus on a final document.

The Review Conference established a new Working Group that will make recommendations on measures to strengthen the BWC. These will address advances in science and technology, confidence-building and transparency, compliance and verification, as well as national implementation measures, international cooperation, and preparedness and response.

While the final consensus document did not include all the improvements proposed by the United States, we are confident this document is a step forward in improving implementation of the Convention. We will continue to work with other countries who share the goal of a world

free of biological weapons, while ensuring that legitimate biological and public health research continues under effective safety and security guidelines and assisting other countries to meet that goal.

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Cross References

Anti-satellite missile tests in space, **Ch. 12.B.2**
Iran-related sanctions, **Ch. 16.A.2**
Nonproliferation sanctions, **Ch. 16.A.9**
North Korea sanctions, including nonproliferation sanctions, **Ch. 16.A.15.j**
Actions in Response to Iran and Iran-Backed Militia Groups, **Ch. 18.A.4**