

DIGEST OF  
UNITED STATES PRACTICE  
IN INTERNATIONAL LAW

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## Introduction

It is my pleasure to introduce the 2016 edition of the *Digest of United States Practice in International Law*. The State Department publishes the on-line *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume includes key speeches Legal Adviser Brian J. Egan delivered during 2016. Mr. Egan spoke on the future of international agreements at Yale Law School, where Deputy National Security Adviser Avril Haines also spoke on the importance of treaties. He responded to the work of the International Law Commission on protection of persons in the event of disasters; identification of customary international law; and subsequent agreements and subsequent practice in relation to the interpretation of treaties. He also delivered a talk entitled “The Next Fifty Years of the Outer Space Treaty” at a space law symposium; addressed the International Bar Association on the subject of private international law; discussed international law, legal diplomacy, and the counter-ISIS campaign at the annual meeting of the American Society of International Law (“ASIL”); and spoke at Berkeley Law School on international law and stability in cyberspace.

In addition to Mr. Egan’s speeches, other representatives of the U.S. government explained U.S. international legal views on current world events in 2016. Secretary of State John Kerry announced that, in his judgment, ISIS is responsible for genocide in Iraq against groups in areas under its control, including Yezidis, Christians, and Shia Muslims, and for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities. The United States responded to papers China circulated after the decision in the arbitration between the Philippines and China on the South China Sea with a diplomatic note identifying contradictions between China’s claims and the international law of the sea. The United States also sent a diplomatic note to the Republic of the Marshall Islands regarding U.S. sovereignty over Wake Island. And the Obama administration issued its Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations. All of these enunciations of U.S. legal views contributed to efforts to promote understanding of and compliance with international law.

There were numerous developments in 2016 relating to U.S. international agreements and treaties at all stages, from negotiation to entry into force. The President transmitted eleven treaties to the U.S. Senate for its advice and consent to ratification in 2016, including extradition treaties, two intellectual property treaties, several private international law treaties, maritime boundary treaties, and the Arms Trade Treaty. The Senate provided its advice and consent to ratification of seven treaties in 2016, including extradition treaties, mutual legal assistance treaties, the International Treaty on Plant Genetic Resources for Food and Agriculture, and the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an

Intermediary (the “Hague Securities Convention”). The United States ratified and joined the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in 2016. And on January 16, 2016, the 2015 Joint Comprehensive Plan of Action with Iran (“JCPOA”) reached its “Implementation Day,” when the International Atomic Energy Agency confirmed that Iran had satisfied the required nuclear commitments and the United States and European Union took steps to lift nuclear-related sanctions against Iran. The United States signed new extradition treaties with Kosovo and Serbia; an agreement “On the Protection of Personal Information Relating to the Prevention, Investigation, Detention, and Prosecution of Criminal Offenses” (“DPPA”) with the European Union; an asset sharing agreement with Colombia; several air transport agreements; and agreements pursuant to the 1970 UNESCO Convention on cultural property. The United States successfully led the way to renegotiate the South Pacific Tuna Treaty and amend the Montreal Protocol to phase down the production and consumption of hydrofluorocarbons (“HFCs”). And, the President also submitted to Congress for its review an Agreement for Cooperation with Norway Concerning Peaceful Uses of Nuclear Energy.

In the area of diplomatic relations, the United States engaged with Cuba in claims talks, conclusion of an aviation arrangement, and amendments to the Cuban Assets Control Regulations, among other initiatives. As a reflection of Burma’s democratic transition, the United States terminated the national emergency with respect to Burma, which had provided the basis for economic and financial sanctions. Also in 2016, the President terminated the national emergency with respect to Côte d’Ivoire. And in 2016, the United States swore in its first ambassador to Somalia in a quarter century after recognizing the government of Somalia in 2013. The United States took several steps in response to Russian interference in the 2016 U.S. election and increasing Russian harassment of U.S. diplomats overseas.

In the area of human rights, the United States followed up on its accepted recommendations after its 2015 Universal Periodic Review (“UPR”) before the UN Human Rights Council by organizing six interagency UPR working groups to consult with civil society and discuss and coordinate implementation efforts during 2016. The United States submitted to the Committee on the Rights of the Child its Combined Third and Fourth Periodic Reports on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography. And the United States supported the adoption by the Human Rights Council of a resolution on the human rights of lesbian, gay, bisexual, and transgender (“LGBT”) persons, creating an independent expert on violence and discrimination based on sexual orientation and gender identity. U.S. leadership was critical to reforming the Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”) and to efforts toward enhancing the participation of indigenous peoples in relevant UN bodies.

The U.S. government also participated in litigation and arbitration involving issues related to foreign policy and international law in 2016. The United States government filed briefs

in cases before the U.S. Supreme Court, including *Lynch v. Morales-Santana*, regarding when a child born abroad out of wedlock should be granted U.S. citizenship at birth; *Tuaua v. United States*, addressing the argument that U.S. nationals residing in American Samoa—an “outlying possession” of the United States—should be granted U.S. citizenship; *Thomas v. Lynch*, examining whether children born on U.S. military bases abroad are citizens at birth; *Meshal v. Higgenbotham*, opposing review of the appeals court decision that factors including extraterritoriality, national security, and foreign policy make unavailable a *Bivens* remedy for detention and interrogation in foreign countries in the context of counterterrorism investigations; *Venezuela v. Helmerich & Payne*, *Helmerich & Payne v. Venezuela*, and *Odhiambo v. Kenya*, regarding the appropriate standard for establishing jurisdiction under the Foreign Sovereign Immunities Act and interpretation of the expropriation and commercial activity exceptions to immunity; and *Belize v. Belize Social Development Ltd.*, involving issues related to the enforcement of an arbitral award. The United States also participated in several cases in the aftermath of the 2015 Supreme Court decision in *Kerry v. Din*, confirming the doctrine of consular nonreviewability with the application of the “facially legitimate and bona fide reason” standard articulated in *Din*. The United States and Iran settled an outstanding claim at the Iran-U.S. Claims Tribunal in The Hague regarding the \$400 million Trust Fund for military sales.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. At the United Nations, the United States joined in adopting the New Urban Agenda at the Habitat III conference on housing and, separately, the New York Declaration for Refugees and Migrants. In the Security Council, U.S. priorities and efforts were reflected in Resolution 2322 on information sharing and international judicial cooperation to counter threats caused by terrorist acts; as well as resolutions on North Korea, establishing the strongest sanctions the Security Council has imposed in more than two decades in response to nuclear tests and ballistic missile launches. Regarding the International Criminal Court (“ICC”), the United States welcomed the conviction of Ahmed al-Mahdi for intentional destruction of cultural property in Mali; the opening of the trial of Dominic Ongwen, of the Lord’s Resistance Army; and the conviction of Jean-Pierre Bemba for war crimes and crimes against humanity, including rape, as well as the subsequent additional conviction of Bemba and four associates for offenses against the administration of justice, including witness intimidation. The United States also welcomed the conviction of Radovan Karadzic by the International Criminal Tribunal for the Former Yugoslavia. The United States was a strong supporter of the Extraordinary African Chambers proceedings that led to the conviction of former Chadian President Habré, the newly created Specialist Chambers in Kosovo, and the Special Criminal Court being developed by authorities in the Central African Republic. At the Inter-American Commission on Human Rights (“IACHR”), the United States responded to petitions and participated in hearings in 2016. U.S. voluntary contributions to the IACHR in 2016 kept the IACHR fully operative, but the United States also prevailed on the Commission to adopt new management procedures in the fall of 2016 and reduce its backlog. The United States government accepted an amendment to the International Monetary Fund (“IMF”) Articles of Agreement to reform its Executive Board and

changes to the New Arrangements to Borrow (“NAB”), and also provided U.S. consent to the increase in the U.S. quota at the IMF. And the United States actively pressed at the Organization for the Prohibition of Chemical Weapons (“OPCW”) and Security Council for an appropriate response to the use of chemical weapons in Syria.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2016 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Jay Bischoff, Julianna Bentes, Dorothy Patton, Virginia Frasure, Jennifer Gergen, Monica Jacobsen, Michael Jacobsohn, Meredith Johnston, Steve Kerr, Jeffrey Kovar, Oliver Lewis, Lorie Nierenberg, Megan O’Neill, Alexis Ortiz, Judy Osborn, Phillip Riblett, Shana Rogers, Tim Schnabel, Lela Scott, Gabriel Swiney, Niels von Deuten, Amanda Wall, and Vanessa Yorke. Sean Elliott at the Foreign Claims Settlement Commission also provided valuable input. I express very special thanks to Joan Sherer, the Department’s Senior Law Librarian, and to Jerry Drake and Rickita Smith for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

*Richard C. Visek*  
*Acting Legal Adviser*  
*Department of State*

## Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2016 is published exclusively on-line 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 timely release of this year's *Digest*.

The 2016 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through April 2017) 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 2017 where they relate to the discussion of developments in 2016.

Updates on most other 2017 developments, including those both before and after the change in administrations on January 20, 2017, are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm) where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://www.un.org/en/documents/ods/>. For UN-related information generally, the UN's home page at [www.un.org](http://www.un.org) also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>. 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](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

The U.S. Government Printing Office (“GPO”) provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at <https://www.gpo.gov/fdsys/> is GPO’s online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President’s transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC> and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <http://www.state.gov/s/l/treaty> 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>.

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

U.S. Court of Appeals for the District of Columbia Circuit:

<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>

U.S. Court of Appeals for the First Circuit:

<http://www.ca1.uscourts.gov/opinions/main.php>

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://pacer.ca4.uscourts.gov/opinions/opinion.htm>

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:

<http://www.ca6.uscourts.gov/opinions/opinion.php>

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:

<http://www.ca8.uscourts.gov/all-opinions>

U.S. Court of Appeals for the Ninth Circuit:

[www.ca9.uscourts.gov/opinions/](http://www.ca9.uscourts.gov/opinions/) (opinions) and [www.ca9.uscourts.gov/memoranda/](http://www.ca9.uscourts.gov/memoranda/)

(memoranda and orders—unpublished dispositions);

U.S. Court of Appeals for the Tenth Circuit:

<http://www.ca10.uscourts.gov/clerk/opinions/daily>

U.S. Court of Appeals for the Eleventh Circuit:

<http://www.ca11.uscourts.gov/published-opinions>

U.S. Court of Appeals for the Federal Circuit:

<http://www.cafc.uscourts.gov/opinions-orders/0/all>

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

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

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

CarrieLyn D. Guymon

# CHAPTER 1

## Nationality, Citizenship, and Immigration

### A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

#### 1. Derivative Citizenship: *Morales-Santana*

As discussed in *Digest 2015* at 1-6, the *Morales-Santana* case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Plaintiff Morales-Santana was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. His U.S. citizen father did not have the physical presence required under the relevant provision of the Immigration and Nationality Act (“INA”) to transmit U.S. citizenship to Morales-Santana; later, while living in the United States as a lawful permanent resident, Morales-Santana committed a crime and was ordered deported. Morales-Santana challenged the deportation, arguing that the differing requirements for out of wedlock citizen fathers and mothers to transmit U.S. citizenship violate the Fifth Amendment’s equal protection clause. The Court of Appeals for the Second Circuit invalidated the ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show the same one-year continuous physical presence required for out of wedlock mothers. The U.S. request for *en banc* review in the Court of Appeals was denied.

On March 22, 2016, the United States filed a petition for a writ of certiorari, which the Supreme Court granted on June 28, 2016. *Lynch v. Morales-Santana*, No. 15-1191. The U.S. brief submitted to the Supreme Court on August 19, 2016, seeking reversal of the Second Circuit’s decision, is excerpted below (with footnotes omitted). The case was argued before the Supreme Court on November 9, 2016.

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...The court of appeals ... erred in holding that the relevant provisions of 8 U.S.C. 1401 and 1409 violate equal protection. The court compounded its error when it remedied the perceived constitutional problem by extending U.S. citizenship to respondent—and to an untold number of

other individuals who never had reason to consider themselves U.S. citizens. In doing so, the court of appeals exceeded its constitutional authority and ignored congressional intent.

\* \* \* \*

As this Court has long held, the Fourteenth Amendment “contemplates two sources of citizenship, and two only: birth and naturalization.” *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). ...[T]he Constitution’s vesting in Congress of plenary authority to decide which persons born abroad should be granted U.S. citizenship requires that judicial review of Congress’s judgments be highly deferential.

\* \* \* \*

The court of appeals erred in declining to adhere to that principle. The ... power to grant or deny citizenship to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is a different aspect of the same overarching sovereign power. ...

\* \* \* \*

In exercising its plenary authority over naturalization, Congress has been cautious in extending U.S. citizenship at birth to foreign-born individuals, consistently requiring that they satisfy statutory criteria designed to ensure that they have a sufficiently robust connection to the United States to warrant the conferral of citizenship. This Court in *Nguyen [v. INS]*, 533 U.S. 53 (2001) recognized that Congress has a legitimate “desire to ensure some tie between this country and one who seeks citizenship.” 533 U.S. at 68. Of particular relevance here, when a foreign-born child is presumptively subject to competing claims of national allegiance because his parents have different nationalities, Congress has required a stronger connection to the United States than it has when the child’s national allegiance is likely to be exclusively to the United States. The physical-presence requirements codified in Sections 1401 and 1409 are constitutionally sound means of serving that interest.

\* \* \* \*

...Since 1790, Congress has, “by successive acts,” provided “for the admission to citizenship of \* \* \* foreign-born children of American citizens, coming within the definitions prescribed by Congress.” *Wong Kim Ark*, 169 U.S. at 672. From the outset, Congress has sought to ensure that children born abroad would not become citizens by virtue of a mere blood relationship to a U.S. citizen, without any other tie to this country. Congress has accomplished that goal primarily by extending citizenship to foreign-born children *only* if a U.S.-citizen parent satisfied a statutory requirement that the parent was physically present in (or had a residence in) the United States for a specified period of time.

\* \* \* \*

...In 1940, Congress (at President Roosevelt's request) undertook a comprehensive overhaul of the Nation's nationality laws. The resulting Nationality Act of 1940, ch. 876, 54 Stat. 1137, again addressed the circumstances in which a foreign-born child of at least one U.S.-citizen parent would be granted U.S. citizenship from birth. Congress crafted that law against the backdrop of World War I, ... at a time when ...the United States faced grave difficulties in defending its interests and citizens abroad. ...

The provisions of the 1940 Act governing the citizenship of foreign-born children of married parents imposed varying physical-presence or residency requirements depending on the citizen status of the child's parents. The least demanding requirement applied when a foreign-born child had two U.S.-citizen parents...

In contrast, when a foreign-born child had connections to two different countries through parents with different nationalities, and therefore was likely to have competing national allegiances, Congress required a more established connection between the U.S.-citizen parent and the United States. Thus, when a child was born abroad to married parents of different nationalities, Congress provided that the child would be a U.S. citizen from birth only if the U.S.-citizen parent had ten years' residence in the United States, at least five of which were after attaining age 16. 1940 Act § 201(g), 54 Stat. 1139.

The requirement of that greater connection to the United States in part reflected a concern that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," notwithstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 37* (printed 1945) (1940 Hearings); see *Nationality Laws of the United States* 14. The 1940 Act thus embodied a determination to "prevent the perpetuation of United States citizenship by citizens born abroad who remain there, or who may have been born in the United States but who go abroad as infants and do not return to this country." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940) (1940 Senate Report). "Neither such persons nor their foreign-born children," Congress concluded, "would have a real American background, or any interest except that of being protected by the United States Government while in foreign countries." *Ibid.* And conferring citizenship at birth on foreign-born children of parents of different nationalities presented "greater difficulties" and "require[d] correspondingly stricter limitations." 1940 Hearings 423.

...Congress also was reluctant to create dual citizens except in rare cases. This Court has recognized on several occasions that "Congress has an appropriate concern with problems attendant on dual nationality." *Bellei*, 401 U.S. at 831; see *Kawakita v. United States*, 343 U.S. 717, 733 (1952) ...

This Court has recognized the risk that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship." *Kawakita*, 343 U.S. at 736. "An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation," *id.* at 734, and he could be conscripted into military service against the United States. Congress therefore had compelling reasons to limit the extension of citizenship from birth to only those children born abroad to parents of different nationalities who could establish, through a U.S.-citizen parent, a sufficiently strong connection to the United States.

\* \* \* \*

...Before the 1940 Act, none of the laws granting citizenship to foreign-born children had expressly addressed the status of children born abroad out of wedlock. ...

...Congress took up that issue in its overhaul of the Nation's nationality laws in 1940. The first paragraph of Section 205 of the 1940 Act stated that "[t]he provisions of section 201" (which set forth the rules applicable to foreign-born children of married parents) "hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 1940 Act § 205, 54 Stat. 1139. The second paragraph of Section 205 further stated that, "[i]n the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 1940 Act § 205, 54 Stat. 1140 (emphasis added).

The first paragraph of Section 205 thus treated children born out of wedlock to U.S.-citizen mothers and those born to U.S.-citizen fathers the same (in terms of a physical-connection or residence requirement) in cases where the father legitimated the child before the child reached the age of majority—treating the children as if their parents had been married when the child was born. If both parents were U.S. citizens, the more lenient rule in Section 201(c) applied, requiring only prior U.S. residence by one parent. But if, as in respondent's case, only one parent was a U.S. citizen, the longer residence requirements in Section 201(g) applied, just as they would have if the child's parents had been married when the child was born.

But in addition to that general rule, the second paragraph of Section 205 provided that, when the unwed father (whether U.S.-citizen or alien) failed to take the steps necessary to legally establish his relationship to his child, the child was (at least retroactively) considered to have acquired U.S. citizenship from birth if the child's unwed mother was a U.S. citizen and had previously resided in the United States or an outlying possession. But Section 205 was ambiguous in one important respect: the use of the phrase "in the absence of legitimation or adjudication" left open the possibility that the citizenship of a child born out of wedlock abroad to a U.S.-citizen mother could not be determined until either the child's father legitimated him or he reached the age of majority, or that he would be divested of citizenship upon legitimation. See *Matter of M—*, 4 I. & N. Dec. 440, 442-445 (B.I.A. 1951).

Under the 1940 Act, when a child had two legally recognized U.S.-citizen parents, Congress required only a minimal physical connection (prior residency of any length) between at least one U.S.-citizen parent and the United States. 1940 Act §§ 201(c), 205, 54 Stat. 1138-1139. A similarly minimal physical connection was deemed sufficient when a foreign-born child had only one legally recognized parent at birth and that parent was a U.S. citizen. 1940 Act § 205, 54 Stat. 1140. By contrast, when a foreign-born child had two legally recognized parents, only one of whom was a U.S. citizen—because his parents were married at the time of his birth or were unmarried but his father later legitimated him—Congress understood that the child would likely be subject to competing national loyalties. In those instances (like respondent's), Congress required that the U.S.-citizen parent establish a stronger physical connection to the United States as a means of ensuring that the child would form a stronger cultural and emotional tie and allegiance to the United States to offset any competing connection to another country.

A decade later, Congress revisited the subject of children born abroad out of wedlock when it enacted Section 309 of the INA, 66 Stat. 238 (8 U.S.C. 1409), in 1952. Congress made

two relevant changes: (1) it required that, in order for a child born abroad out of wedlock to a U.S.-citizen mother to be granted U.S. citizenship at birth, the mother must have been physically present in the United States for one continuous year (rather than merely residing in the United States at some point) before the child's birth; and (2) made clear that the foreign-born child whose U.S.-citizen mother satisfied that physical-presence requirement would retain U.S. citizenship from birth regardless of whether his father later legitimated him. 8 U.S.C. 1409(a) and (c).

The first change ensured a somewhat stronger connection between the U.S.-citizen mother and the United States in order for her child to obtain citizenship. The second change eliminated the qualifier “[i]n the absence of such legitimation or adjudication” that had created uncertainty in Section 205 of the 1940 Act, 54 Stat. 1140, which had granted citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother. The new provision replaced that qualifier with the phrase “[n]otwithstanding the provision of” subsection (a) of 8 U.S.C. 1409, which provided that the rule for the children of married parents would apply to the children of unmarried parents upon legitimation. That amendment made explicit that a child born out of wedlock to a U.S.-citizen mother could have his citizenship definitively determined at birth— without regard to whether the father's paternity was later legally established, through legitimation, which otherwise could have triggered the ten- and five-year physical-presence requirements under Sections 1401(a)(7) and 1409(a) applicable when there were two parents of different nationalities.

Although Section 1409(c) used gendered terms by referring to “the mother” of a child born out of wedlock, the differential treatment under that provision, as under the 1940 Act, turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.

Respondent errs in disputing (Br. in Opp. 14-16) that, at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent. Although the father of such a child could establish a legally recognized relationship by marrying the mother or taking another step prescribed by law, in most of the world his relationship to his child was not legally recognized at the time of the child's birth. ...

When Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth. ... Congress had before it a comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State, which determined that 30 of the countries studied had enacted laws governing the citizenship of children born out of wedlock. The laws of 29 of those 30 countries provided that the child acquired the citizenship of his mother at birth (assuming the mother was a citizen of the relevant country), and in 19 of those 29 countries, the child would take the father's citizenship upon legitimation. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258- 259 & n.38 (1935) (Sandifer) (cited in 1940 Hearings 431). The study recognized that in most countries a child could not obtain his father's citizenship unless or until the father took “any act *legally establishing* filiation.” *Id.* at 258 (emphasis added). ...

This Court has similarly recognized that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr v. Robertson*, 463 U.S. 248, 266-268 (1983); *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.); cf.

*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558-2559 (2013). Indeed, this Court explained in *Nguyen* that a “significant difference” exists “between the[] respective relationships” of those mothers and fathers “to the potential citizen at the time of birth.” 533 U.S. at 62. In particular, the Court explained that, while “the fact of parenthood” is established for an unwed mother “at the moment of birth,” *id.* at 68, “that legal determination with respect to fathers” may constitutionally be subject to “a different set of rules” because the two parents are not similarly situated, *id.* at 63. See *Miller*, 523 U.S. at 443 (Stevens, J.) (“[I]t is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a *legal relationship* between parent and child—the birth itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring.”) (emphasis added).

When respondent was born out of wedlock in the Dominican Republic, his mother was not a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*, much less a claim to U.S. citizenship. When respondent’s U.S.-citizen father later legitimated respondent by marrying respondent’s mother, respondent then had two legal parents, one of whom remained an alien. The general rule in 8 U.S.C. 1409(a) and 1401(a)(7) for that two-parent situation therefore applied. Respondent’s father thus was not similarly situated to a U.S.-citizen mother of a child born abroad out of wedlock, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child’s birth, would have been a legally recognized parent and typically the only such parent, and there accordingly would have been no competing parental claim of a connection to a foreign country. By contrast, when respondent was born, he had no *legal* relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legally recognized parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to *married* couples of different nationalities.

Because a U.S.-citizen mother and U.S.-citizen father were therefore not similarly situated in their relationship to a child born abroad out of wedlock, the separate provision in 8 U.S.C. 1409(c) for acquisition of citizenship by the child of an unwed U.S.-citizen mother does not violate equal protection, even under intermediate scrutiny. See *Heckler v. Mathews*, 465 U.S. 728, 745-750 (1984) (*Mathews*).

C. **The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government’s Important Interest In Reducing The Risk That A Foreign-Born Child Of A U.S. Citizen Would Be Born Stateless**

The challenged statutory provisions also served a second important interest: reducing the risk that the child of a U.S. citizen would be stateless at birth. Although the court of appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it erroneously concluded that such an interest did not justify the statutory provisions Congress enacted. Pet. App. 25a-34a.

\* \* \* \*

The differences embodied in the physical-presence requirements in Sections 1409 and 1401 reflect the reality that children born out of wedlock abroad to a U.S.-citizen mother were at

risk of having no citizenship at birth. When Congress enacted the comprehensive nationality code in 1940 and substantially revised it in 1952, that risk was greater for those children than it was for children born out of wedlock to an alien mother and a U.S.-citizen father who only later legitimated the child.

Unlike the United States, which affords citizenship on a “*jus soli*” basis to all who are born in the United States and subject to its jurisdiction, many other countries apply “*jus sanguinis*” rules, under which a child’s citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In most of those countries (as in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child’s parent at the time of the birth usually was the mother. ... As a result, there was a substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother. The court of appeals rejected this important government interest because it was not convinced “that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers.” Pet. App. 31a. That was error.

When a child was born in a *jus sanguinis* country to parents of different nationalities, the child was stateless unless either the laws of that country or the laws of the country of one parent’s nationality conferred citizenship on him at the time of his birth. ... Experts in nationality and international law have long agreed that the risk of being born stateless was particularly high for a child born out of wedlock in a *jus sanguinis* country unless the child could obtain his mother’s citizenship. See, e.g., *Treatise on International Law* § 69, at 238 (quoted at p. 28, *supra*). Thus, when a U.S.-citizen mother had a child out of wedlock abroad in a *jus sanguinis* country, her child was at great risk of being born stateless unless U.S. law provided U.S. citizenship for the child.

The circumstances were different for a child born abroad out of wedlock to an alien mother and a U.S.-citizen father who only later established his paternal status. The same foreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father’s citizenship at birth) would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother’s citizenship.

\* \* \* \*

The court of appeals compounded its error by rejecting the government’s submission that Congress “enacted the 1952 Act’s gender-based physical presence requirements out of a concern for statelessness.” Pet. App. 31a; see *id.* at 26a-32a. Abundant evidence demonstrates that Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions in 1952 with the specific intent of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless.

During and following the First and Second World Wars, Congress and the world became acutely aware of the problem of statelessness. See, e.g., United Nations, *A Study of Statelessness* 4-7 (1949), <http://www.unhcr.org/3ae68c2d0.pdf>. The 1952 legislative overhaul enacted as the INA was undertaken pursuant to a 1947 Senate resolution that directed the Senate Judiciary Committee “to make a full and complete investigation of our entire immigration system” and to submit a report “with such recommendations for changes in the immigration and naturalization laws as [the Committee] may deem advisable.” S. Res. No. 137, 80th Cong., 1st Sess. (1947),

*reprinted in* S. Rep. No. 1515, 81st Cong., 2d Sess. 803 (1950) (1950 Senate Report). The same resolution directed the Committee to investigate “the situation with respect to displaced persons in Europe and all aspects of the displaced-persons problem,” which encompassed the problem of statelessness, and to submit a separate report on that topic. *Ibid.* Congress thus viewed the task of addressing problems of statelessness as part and parcel of the 1952 overhaul of the Nation’s immigration and naturalization laws.

Section 205 of the 1940 Act on its face presented a real risk of statelessness. Section 205 provided that, “[i]n the absence of such legitimation or adjudication” “during minority,” a child born out of wedlock abroad to a U.S.-citizen mother would “be held to have acquired at birth” the U.S. citizenship of his mother if his mother “had previously resided in the United States or one of its outlying territories.” 1940 Act § 205, 54 Stat. 1139-1140 (emphasis added). On its face, that language suggested that the acquisition of U.S. citizenship by a child born abroad to an unmarried U.S.-citizen mother could not be determined definitively either until the father legally established his parental relationship through legitimation or adjudication or until the child reached the age of majority and no such legitimation or adjudication had occurred. Under that view of the 1940 Act, such a child would have been at great risk of having no nationality (*i.e.*, being stateless) from the time of his birth until either legitimation or majority. Although in 1951 the BIA interpreted Section 205 as granting U.S. citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother, regardless of later legitimation (and the Department of State now concurs in that interpretation of the statute), the Department of State held the view that such a child would not be a citizen upon legitimation by his father unless his mother or father could satisfy the applicable residence requirement in Section 201. See *Matter of M—*, 4 I. & N. Dec. at 442-445. And Congress understood that the text of Section 205 of the 1940 Act could be interpreted to render such a child stateless from his birth until such time as his father legally established paternity— or until the child reached age 21 if the father’s paternity had not been legally established. See 1950 Senate Report 676 (explaining that a child born abroad out of wedlock would “have the nationality status of [his] mother,” but only “in the absence of legitimation”).

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on a U.S.-citizen mother’s one year of continuous physical presence in the United States was effective at the time of the child’s birth and was not contingent on whether the child’s father later established his own legal relationship. The enactment in the INA of 8 U.S.C. 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: “This provision establishing the child’s nationality as that of the [U.S.-citizen] mother *regardless* of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*” S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphases added). The court of appeals dismissed that clear statement of congressional purpose: “Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue.” Pet. App. 29a n.10. That reasoning cannot be reconciled with the Report’s words, which directly link the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such children “shall have a nationality at birth.” 1952 Senate Report 39.

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...The court of appeals dismissed the government's interest in reducing the risk of statelessness based in part on speculation that the different physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Pet. App. 31a. The statutory scheme reflects no such gender-based generalizations.

The challenged distinctions turned instead on rules establishing the legal status of parent and child, both abroad and in this country. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same when they are not similarly situated. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held in *Nguyen*, a case also involving Section 1409, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr*, 463 U.S. at 266-268; *Parham*, 441 U.S. at 355 (opinion of Stewart, J.). The difference in each parent's treatment under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between their respective relationships to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

The court of appeals apparently speculated that the domestic and international laws that recognized the mother of a child born out of wedlock as the only legally recognized parent at the time of birth were developed based on stereotypes about which parent of such a child *should* care for and be responsible for the child. See Pet. App. 31a n.13. But such speculation about motivations for other laws here and abroad cannot be a basis for invalidating an Act of Congress, and Congress cannot be expected to ignore the relevant foreign and domestic laws that did exist. Indeed, Congress obviously has no authority to override the citizenship or paternity laws of other countries; and Congress has historically left it to the States to regulate familial relationships in the United States. Congress therefore did not engage in "impermissible stereotyping," *id.* at 32a, when it legislated against the reality that, in most of the world (as in the United States), when a child was born out of wedlock, his mother was his only legally recognized parent at the time of birth and therefore the only possible source of citizenship through a legally recognized parent.

...The implications of the constitutional rule respondent seeks could be far-reaching. If this Court were to find that Congress may not treat the parental relationship of unwed citizen fathers at the moment of a child's birth differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where Congress has particularly broad discretion, there surely would be a flood of litigation contending that the States must revise their laws—including those governing adoption, inheritance, wrongful death, and residency—that similarly distinguish between those two relationships.

Even today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father. For mothers, parental status is generally established by the act of giving birth. See *Nguyen*, 533 U.S. at 64. The fact that respondent's arguments would call into question the constitutionality of laws in every State of the Union is an additional reason to reject respondent's position.

#### D. Congress Chose Appropriate Means To Achieve Its Important Interests

In enacting the challenged laws, Congress faced a complex task: to craft a set of uniform rules that would apply to individuals not located in the United States and that would serve important, but sometimes competing, government interests. Even in the context of considering gender-based equal protection challenges in the domestic context, this Court has never required a perfect fit between means and ends. Flexibility is especially necessary in the context of

naturalization, where the rules Congress enacts must operate in combination with the rules of other nations—rules over which Congress has no control and that are likely to change over time. Here, as this Court concluded with respect to another aspect of Section 1409, “[t]he fit between the means [Congress chose] and the important end[s] is ‘exceedingly persuasive.’” *Nguyen*, 533 U.S. at 70 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

...The court of appeals erroneously concluded that the government’s important interest in reducing statelessness was not sufficient to justify the statutory scheme because, it reasoned, “effective gender-neutral alternatives” were available at the time of the statute’s enactment. Pet. App. 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

*Id.* at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull’s proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same manner as Section 1409(c). It was only when the child was born out of wedlock to a U.S.-citizen mother that the child would have only one legally recognized parent. That was clear to observers at the time. See 1933 Hearing 56 (testimony of Burnita S. Williams, National Woman’s Party) (noting that “[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women”). For purposes of assessing respondent’s equal protection challenge, the salient fact is how the challenged law *operates*, not the words it uses. As this Court explained in *Nguyen*:

The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64. The court of appeals therefore erred in relying on a proposal Congress declined to adopt more than 80 years ago to invalidate a statutory framework that has governed the acquisition of U.S. citizenship in this context since 1940.

During a hearing on Secretary Hull’s proposed amendment, moreover, Congress considered an objection (from a member of the National Women’s Party) to the amendment based on the fact that it would “require[]” State Department personnel “to know what the law is on the subject of illegitimacy in every country of the world” because “[t]hey would have to know what the law is on the subject of illegitimacy in order to determine whether or not at the place of birth there was a legal parent, or whether one or the other was a legal parent.” 1933 Hearing 56. Such a requirement, the witness testified, “would create an extraordinary situation” in which “we would not know where we were.” *Ibid.* As a practical matter, official determinations about the

U.S. citizenship of foreign-born children are often made many years after the child's birth, as was the case here. A post-hoc inquiry into the laws and informal interpretations that a foreign nation applied many years earlier could be quite difficult. Such a system also would not have provided notice to an expectant U.S.-citizen parent about the consequences of choosing to have the child born abroad rather than in the United States.

This court acknowledged in *Nguyen* that Congress has leeway in crafting citizenship laws to “enact[] an easily administered scheme,” 533 U.S. at 69, instead of requiring more specific inquiries. It is worth noting, moreover, that the provision suggested in 1934 would offer no help to respondent, who has never even suggested that he was stateless at the time of his birth in the Dominican Republic.

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... Finally, as this Court recognized in *Nguyen*, the rules set out in Sections 1401 and 1409 were not (and are not) the exclusive means by which a foreign-born child could become a U.S. citizen. Under Section 322(a) of the INA, 66 Stat. 246, for example, if the foreign-born child of a U.S.-citizen parent did not secure U.S. citizenship at birth because his parent(s) did not satisfy the applicable physical-presence requirement, the citizen parent could petition to naturalize the child if the child was under the age of 18 and was residing permanently in the United States in the custody of the citizen parent, pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433(a) (1958). That option was presumably available to respondent's father when respondent was admitted to the United States as a lawful permanent resident in 1975. And under current law, if the foreign-born child of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient physical presence in the United States, the child is *automatically* a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before turning 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through permanent residence in the United States, may apply to become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity, see Pet. App. 46a). ...

## II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

This Court has noted that, when a court sustains an equal protection claim, it “faces ‘two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.’ ” *Mathews*, 465 U.S. at 738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, “a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.” *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) (“The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here,

supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers).”). The court of appeals chose to remedy the equal protection violation it perceived by “replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c).” Pet. App. 40a. In other words, the court extended what it viewed as the more favorable treatment to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers). The court erred in choosing that remedy because it flouts congressional intent and exceeds the court’s authority with respect to naturalization.

...If made generally applicable, the court of appeals’ choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set by Congress and who grew up with no expectation that they were citizens of the United States—and would do so in order to remedy the perceived violation of their *parents’* rights, rather than their own. That result is inconsistent with this Court’s cases holding that “the power to make someone a citizen of the United States has not been conferred upon the federal courts \* \* \* as one of their generally applicable equitable powers.” *INS v. Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States v. Ginsberg*, 243 U.S. 472, 474 (1917) (“An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.”). Indeed, this Court acknowledged in *Nguyen* that “[t]here may well be potential problems with fashioning a remedy” if the Court were to find that the additional requirements applicable to unwed citizen fathers pursuant to Section 1409(a) violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O’Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) (“[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.”).

In this context, any judicially crafted remedy must be carefully tailored to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization. If this Court were to conclude that the existing scheme violates equal protection, it should remedy such a violation by extending, on a prospective basis, the longer physical-presence requirements in Section 1401(a), made applicable through Section 1409(a), to children born out of wedlock to U.S.-citizen mothers. Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children born out of wedlock to U.S.-citizen mothers and fathers who do not meet the physical-presence requirements in Sections 1401(a). In contrast, the court of appeals’ chosen solution would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, and other descendants.

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## 2. *Tuaua*: Notation on Passports Issued to Non-Citizen U.S. Nationals

As described in *Digest 2015* at 6-11 and *Digest 2014* at 22-26, *Tuaua et al. v. United States*, 788 F.3d 300 (D.C. Cir. 2015) is an action challenging the notation on the U.S. passports of American Samoan individuals indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an “outlying possession” of the United States. Plaintiffs argued that children born in American Samoa are citizens at birth by virtue of the Citizenship Clause of the 14th Amendment. The district court dismissed all claims. The U.S. Court of Appeals for the D.C. Circuit affirmed the district court and subsequently denied a petition for rehearing. On February 1, 2016, the plaintiffs below filed a petition for writ of certiorari in the Supreme Court of the United States. *Tuaua v. United States*, No. 15-981. On May 11, 2016, the federal respondents filed their brief in opposition. Excerpts follow from the opposition brief (with footnotes omitted). The petition for certiorari was denied on June 13, 2016.

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Petitioners seek review (Pet. 15-35) of the court of appeals’ conclusion that persons born in American Samoa are not entitled to United States citizenship at birth under the Citizenship Clause of the Fourteenth Amendment to the Constitution. The court of appeals correctly rejected petitioners’ constitutional challenge to the Act of Congress governing the nationality status of persons born in American Samoa. The decision below is consistent with the decisions of four other courts of appeals that have held that persons born in unincorporated territories of the United States do not acquire U.S. citizenship at birth under the Citizenship Clause. Petitioners’ contrary position also is inconsistent with Congress’s longstanding practice under the Citizenship Clause.

Further, the democratically elected government of American Samoa and its delegate in Congress oppose petitioners’ constitutional claim. To the extent that the people of American Samoa may in the future desire to obtain U.S. citizenship, the proper course is to seek that result from Congress, through enactment of a law conferring citizenship. That is the manner in which U.S. citizenship has been conferred on residents of other unincorporated territories of the United States. Further review is therefore unwarranted.

1. The Fourteenth Amendment’s Citizenship Clause provides that “[a]ll 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, Cl. 1. The question in this case is whether persons born in the United States territory of American Samoa are born “in the United States” within the meaning of this Clause.

Like the court of appeals below, every other court of appeals that has considered the issue has held that the Citizenship Clause does not apply to unincorporated territories of the United States, meaning territories that are not destined for statehood. See *Valmonte v. INS*, 136 F.3d 914, 917-920 (2d Cir.) (holding that the Citizenship Clause does not apply to individuals born in the Philippines while it was a U.S. territory), cert. denied, 525 U.S. 1024 (1998); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (same); *Nolos v. Holder*, 611 F.3d 279, 282-284

(5th Cir. 2010) (per curiam) (same); *Rabang v. INS*, 35 F.3d 1449, 1451-1453 (9th Cir. 1994) (same), cert. denied, 515 U.S. 1130 (1995); see also *Eche v. Holder*, 694 F.3d 1026, 1027-1028, 1030-1031 (9th Cir. 2012) (construing “the United States” in the Naturalization Clause, U.S. Const. Art. I, § 8, Cl. 4, not to apply to the Northern Mariana Islands because “federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories”), cert. denied, 133 S. Ct. 2825 (2013). Petitioners acknowledge (Pet. 34) that every court of appeals that has considered the question whether the Citizenship Clause applies to an unincorporated territory has held that it does not.

2. The court of appeals correctly concluded that persons born in American Samoa do not obtain citizenship at birth under the Citizenship Clause. The Clause extends citizenship to persons who are “born or naturalized in the United States” and “subject to the jurisdiction thereof.” U.S. Const. Amend. XIV, § 1, Cl. 1. By constitutional design, a U.S. territory is under the sovereignty of the United States, and Congress has plenary power to administer the territory. See U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Accordingly, persons born in the territories are “subject to the jurisdiction” of the United States. Cf. *Elk v. Wilkins*, 112 U.S. 94, 99-103 (1884) (explaining that members of Indian Tribes did not obtain citizenship under the Citizenship Clause because Tribes are not “subject to the jurisdiction” of the United States in the relevant sense). But there remains another, prior question: whether U.S. territories are “in the United States” for purposes of the Clause.

a. The best reading of the Citizenship Clause is that U.S. territories are not “in the United States” within the meaning of the Clause because “in the United States” means in the 50 States and the District of Columbia. At the time the Constitution was adopted, “the United States” consisted of the 13 States, and the Constitution contemplated creation of a district carved out of those States to “become the Seat of the Government of the United States.” U.S. Const. Art. I, § 8, Cl. 17...

The Constitution expressly distinguishes between States and territories of the United States. The Constitution reserves to the States all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States,” U.S. Const. Amend. X, thereby recognizing that States have “sovereignty concurrent with that of the Federal Government,” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Territories, on the other hand, are defined as lands “belonging to the United States” that are under the plenary authority of Congress. U.S. Const. Art. IV, § 3, Cl. 2 (Territory Clause). The Constitution itself therefore sets out a fundamental distinction between “the United States” and the territories belonging to the United States.

Further, while the Citizenship Clause of the Fourteenth Amendment is confined to individuals born “in the United States, *and* subject to the jurisdiction thereof,” U.S. Const. Amend. XIV, § 1, Cl. 1 (emphasis added), the Thirteenth Amendment prohibits slavery “within the United States, *or* any place subject to their jurisdiction,” U.S. Const. Amend. XIII, § 1 (emphasis added). The Thirteenth Amendment’s broader language demonstrates that “there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.” *Downes v. Bidwell*, 182 U.S. 244, 336-337 (1901) (White, J., concurring); see also *id.* at 251 (opinion of Brown, J.). At a minimum, this textual distinction underscores the soundness of the settled understanding that unincorporated territories, while subject to the jurisdiction *of* the United States, are not “*in* the United States” for purposes of the Citizenship Clause.

b. The meaning of “in the United States” under the Citizenship Clause is further informed by this Court’s decisions concerning application of the Constitution to U.S. territories. The Court has long recognized that the Constitution does not automatically apply in full to all territories of the United States. In the *Insular Cases*—a series of decisions about the application of the Constitution to territories the United States acquired at the turn of the 20th century, such as Puerto Rico, Guam, and the Philippines—the Court explained that the Constitution has more limited application in “unincorporated Territories” that are not intended for statehood than it does in States and “incorporated Territories surely destined for statehood.” *Boumediene v. Bush*, 553 U.S. 723, 756-757 (2008). In those cases, the Court set out a “general rule” that in an “unincorporated territory,” the Constitution does not necessarily apply in full. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Such a rule is necessary to provide the United States with flexibility in acquiring, governing, and relinquishing territories. For example, the Court has explained that some territories (such as the former Spanish colonies) operated under civil-law systems quite unlike our own, and in some cases, like the Philippines, “a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory.” *Boumediene*, 553 U.S. at 757-758.

The *Insular Cases* invoked the distinction between incorporated and unincorporated territories both to determine the reach of constitutional provisions that are silent as to geographic scope, see, e.g., *Dorr v. United States*, 195 U.S. 138, 144-149 (1904) (Sixth Amendment jury-trial right), and to interpret constitutional provisions that specify a geographic reach, see *Downes*, 182 U.S. at 287 (opinion of Brown, J.) (Tax Uniformity Clause). Here, the Citizenship Clause confers citizenship on those born “in the United States,” and the Court’s decision in *Downes* confirms that “in the United States” excludes unincorporated territories.

The particular question in *Downes* was whether the requirement that “all Duties, Imposts and Excises shall be uniform throughout the United States,” U.S. Const. Art. I, § 8, Cl. 1, applies to Puerto Rico, a U.S. territory. 182 U.S. at 249 (opinion of Brown, J.). The Court held that Puerto Rico is not part of “the United States” for purposes of that provision. *Id.* at 263, 277-278, 287 (opinion of Brown, J.); *id.* at 341-342 (White, J., concurring); *id.* at 346 (Gray, J., concurring). ...

As particularly relevant here, the Court recognized in *Downes* that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories. Justice Brown explained that “the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants.” 182 U.S. at 279; see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring). The right to acquire territory “could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States.” *Id.* at 306 (White, J., concurring). The Justices in the majority thus recognized that when the United States acquires various territories, the decision to afford citizenship is to be made by Congress. *Id.* at 280 (opinion of Brown, J.) (“In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.”); see *id.* at 306 (White, J., concurring); *id.* at 345-346 (Gray, J., concurring).

Petitioners suggest (Pet. 29-30) that this reasoning is inapplicable to American Samoa because it has been a territory of the United States for many years. But the relevant point is that the Constitution grants Congress plenary power with respect to the territories and that this Court has recognized that reading the Constitution to mandate citizenship for residents of

unincorporated territories would be a significant and unwarranted limitation on that power. And an unincorporated territory does not lose that status by passage of time. See, *e.g.*, *Torres v. Puerto Rico*, 442 U.S. 465, 468-470 (1979) (recognizing Puerto Rico to be an unincorporated territory 80 years after its acquisition). Petitioners also suggest (Pet. 33) that the *Insular Cases* “should be modified or overruled,” but this Court has reaffirmed their core principle, which is that the political Branches determine whether newly acquired territory is incorporated into the United States. See *Boumediene*, 553 U.S. at 756-757; *Torres*, 442 U.S. at 469; *Reid v. Covert*, 354 U.S. 1, 8-9 (1957) (plurality opinion); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

c. American Samoa is an unincorporated territory of the United States. The agreements by which American Samoa was acquired did not contemplate that it would become a State, and Congress has not enacted any law that provides a path to statehood. Persons born in American Samoa therefore are not born “in the United States” for purposes of the Citizenship Clause.

The Constitution grants Congress plenary power to administer the territories, U.S. Const. Art. IV, § 3, Cl. 2, and that power, combined with Congress’s broad authority over naturalization, U.S. Const. Art. I, § 8, Cl. 4, inform the meaning of “in the United States” under the Citizenship Clause. In particular, Congress must have flexibility, when it acquires territories, to determine whether and when the inhabitants of those territories become citizens or nationals. *Downes*, 182 U.S. at 279-280 (opinion of Brown, J.).

That flexibility has proven important when the United States has acquired territories. For example, in 1898, when the United States acquired Puerto Rico and the Philippines from Spain in the Treaty of Paris, the Treaty provided that “[t]he civil rights and political status of the native inhabitants of the[se] territories \* \* \* shall be determined by the Congress.” Treaty of Paris, Dec. 10, 1898, U.S.-Spain, Art. IX, 30 Stat. 1759. Congress later extended U.S. citizenship to residents of Puerto Rico, see Organic Act of 1917 (Jones Act), ch. 145, § 5, 39 Stat. 953; see also Nationality Act of 1940, § 202, 54 Stat. 1139, but it provided that residents of the Philippines would be “citizens of the Philippine Islands,” rather than citizens of the United States, Autonomy Act, ch. 416, § 2, 39 Stat. 546; see *Barber v. Gonzales*, 347 U.S. 637, 639 n.1 (1954). As this Court has recognized, it was important for Congress to have the authority to make different arrangements for these territories, particularly because a territory (such as the Philippines) may not permanently remain under the sovereignty of the United States. See *Boumediene*, 553 U.S. at 757-758; see also *Downes*, 182 U.S. at 318 (White, J., concurring). As the court of appeals recognized, there would be “vast practical consequences” if the Citizenship Clause now were applied to unincorporated territories, including that such a development would raise questions about “the United States citizenship status of persons born in the Philippines during the territorial period,” and “potentially their children through operation of statute.” Pet. App. 9a n.6.

The “years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional, right” confirm that the Citizenship Clause does not apply to American Samoa. Pet. App. 42a; see *id* at 14a n.7. Congress has long understood that it has the authority to decide whether and when to deem residents of U.S. territories (particularly residents of unincorporated territories) to be U.S. citizens or nationals, and Congress has exercised that authority to fashion rules for individual territories based on their particular characteristics and political futures. *Downes*, 182 U.S. at 251-258, 267-270 (opinion of Brown, J.). Congress’s longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress’s plenary powers with respect to the territories—at least with respect to unincorporated territories like American Samoa. See *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (“If a thing has been practiced for two hundred years by common

consent, it will need a strong case for the Fourteenth Amendment to affect it.”).

3. Petitioners contend (Pet. 3, 5, 24-27) that this Court has recognized that the Citizenship Clause applies in U.S. territories. They are mistaken. This Court recognized in *Downes* that application of the Clause to the territories would substantially impair Congress’s constitutional authority to administer the territories, especially newly acquired territories. See pp. 14-15, *supra*. And the Court has continued to assume that persons born in U.S. territories obtain citizenship only by Act of Congress, not through the Constitution. *Barber*, 347 U.S. at 639 n.1; see *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting); see also *Rabang v. Boyd*, 353 U.S. 427, 432 (1957) (reiterating Congress’s power to “prescribe upon what terms the United States will receive [a territory’s] inhabitants, and what their status shall be” (emphasis and citation omitted)).

Petitioners primarily rely (Pet. 25-27) on *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), where the Court held that the Citizenship Clause conferred citizenship at birth on a child born in California whose parents were citizens of China. *Id.* at 705. As the court of appeals explained (Pet. App. 8a-9a), it was undisputed that the plaintiff in *Wong Kim Ark* was born in the United States because he was born in a State. 169 U.S. at 652. ...

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4. There are two additional factors that counsel against further review in this case. First, “the American Samoan people have not formed a collective consensus in favor of United States citizenship.” Pet. App. 18a. As a result, the democratically elected government of American Samoa and the territory’s delegate in Congress have participated in this case to oppose application of the Citizenship Clause to American Samoa. As the court of appeals explained, the people of American Samoa have been reluctant to seek citizenship because they fear it would upset “the traditional Samoan way of life,” including the territory’s longstanding “system of communal land ownership.” *Ibid.* This is not to say that the wishes of the people of American Samoa are controlling with respect to the application of the Citizenship Clause. But the opposition of the government of American Samoa (which represents the people of American Samoa) counsels strongly against reaching out to upset the settled constitutional understanding. See *id.* at 22a-23a (declining to “mandate an irregular intrusion into the autonomy of Samoan democratic decision-making”)....

Second, and relatedly, the ability to resolve the question of citizenship for American Samoans through the political process makes clear that there is no occasion for this Court’s review. ...

If a consensus view on citizenship were to develop in American Samoa, the territory’s delegate could bring the issue to Congress. By contrast, if this Court were now to extend the Citizenship Clause to impose U.S. citizenship on all persons born in American Samoa, that would eliminate the opportunity for democratic consideration and consensus by the people of American Samoa. It also would disrupt the long-settled understanding with respect to all of the territories, including territories (like the Philippines) that are no longer under the sovereignty of the United States. The appropriate course under our constitutional structure, which affords Congress broad authority over the administration of the territories, is to permit the people of American Samoa to continue to assess whether they wish to obtain U.S. citizenship, and perhaps to seek citizenship through an Act of Congress, rather than construing the Constitution to mandate U.S. citizenship based on the urging of the petitioners in this case. For these reasons as

well, further review is unwarranted.

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### 3. Citizenship Transmission on Military Bases: *Thomas*

As discussed in *Digest 2015* at 11-14, in *Jermaine Amani Thomas v. Loretta Lynch*, 796 F.3d 535 (5<sup>th</sup> Cir. 2015), the Fifth Circuit considered the argument that children born on U.S. military bases abroad are citizens at birth by virtue of the Citizenship Clause of the 14th Amendment. Petitioners argue that *Tuaua* (discussed above) creates a circuit split (and potentially opens the door for children born on military bases to acquire U.S. citizenship under the Constitution) with its holding that the meaning of “in the United States” in the Citizenship Clause is ambiguous. The Fifth Circuit rejected that claim and denied rehearing. Thomas petitioned the U.S. Supreme Court for a writ of certiorari on January 12, 2016. On May 18, 2016, the United States filed its brief in opposition to the petition for certiorari. Excerpts follow (with footnotes omitted) from the U.S. opposition brief. The Supreme Court denied certiorari on June 27, 2016.

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Petitioner does not identify any court that has held that a person born on a U.S. military base outside the United States and its territories acquires citizenship at birth under the Constitution. So far as the government is aware, only one other court of appeals has addressed a claim that birth on a U.S. military installation abroad confers citizenship under the Citizenship Clause, and that court also rejected the claim. In *Williams v. Attorney General of the United States*, 458 Fed. Appx. 148 (2012) (per curiam), the Third Circuit held that a person born at the U.S. Naval Station at Guantanamo Bay, Cuba, was not born “in the United States” for purposes of the Citizenship Clause. *Id.* at 152. The court explained that, as a general matter, military installations abroad “are not part of the United States within the meaning of the Fourteenth Amendment.” *Ibid.* The court also explained that Guantanamo Bay, in particular, is not “in the United States” because “Cuba retains de jure sovereignty over Guantanamo Bay.” *Ibid.*

The courts of appeals also have addressed the meaning of “in the United States” in the Citizenship Clause in the context of persons born in United States territories. As an initial matter, U.S. territories are meaningfully different from U.S. military bases abroad, because the United States exercises sovereignty over U.S. territories. See, *e.g.*, *Simms v. Simms*, 175 U.S. 162, 168 (1899); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). But in any event, the circuit decisions addressing U.S. territories do not aid petitioner, because every court of appeals that has considered the issue has held that the Citizenship Clause does not apply to unincorporated territories of the United States (meaning territories that are not destined for statehood). . . .

Petitioner contends (Pet. 8-13) that there is disagreement in those decisions warranting this Court’s review. He is mistaken: every court of appeals to consider the question has reached the same conclusion, namely, that birth in an unincorporated U.S. territory is not birth “in the United States” under the Citizenship Clause. And even if there were disagreement about the application of the Citizenship Clause to persons born in U.S. territories, this would not be an

appropriate case in which to address that issue, because petitioner was not born in a U.S. territory.

2. The court of appeals correctly concluded that a person born on a U.S. military base in Germany does not obtain citizenship at birth under the Citizenship Clause. The Clause confers citizenship at birth on persons who are “born or naturalized in the United States” and “subject to the jurisdiction thereof.” U.S. Const. Amend. XIV, § 1, Cl. 1. Even assuming that a person born on a U.S. military base in a foreign country is “subject to the jurisdiction” of the United States within the meaning of the Citizenship Clause, such a person does not meet the first condition for U.S. citizenship at birth under that Clause, namely, that he be “born \* \* \* in the United States.”

a. Under the plain text of the Citizenship Clause, a U.S. military base in a foreign country—Germany—is not “in the United States.” The phrase “the United States” generally refers to the 50 States and the District of Columbia. See, *e.g.*, *Black’s Law Dictionary* 1769 (10th ed. 2014) (defining “United States of America” as a republic comprised of the 50 States and the District of Columbia). That meaning reflects the constitutional design: at the time the Constitution was adopted, “the United States” consisted of the 13 States, and the Constitution contemplated creation of a district carved out of those States to “become the Seat of the Government of the United States.” U.S. Const. Art. I, § 8, Cl. 17.

The Constitution distinguishes between “the United States” and its territories and “foreign Nations,” “[f]oreign State[s],” or “foreign Power[s].” See, *e.g.*, U.S. Const. Art. I, § 8, Cl. 3; U.S. Const. Art. I, § 9, Cl. 8; U.S. Const. Art. I, § 10, Cl. 3; U.S. Const. Art. III, § 2, Cl. 1; U.S. Const. Amend. XI. And the Constitution recognizes the sovereignty of foreign nations when it empowers the President (with the advice and consent of the Senate) to make treaties with them and to receive their ambassadors. U.S. Const. Art. II, § 2, Cl. 2. Nothing in the Constitution suggests that when the Framers of the Fourteenth Amendment referred to “the United States,” they meant to include an area within “foreign Nations” where a U.S. military installation is located.

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Indeed, Congress has long exercised its authority to specify when persons born outside of the United States acquire U.S. citizenship. . . . That longstanding congressional practice confirms that the Constitution does not automatically confer U.S. citizenship on a person born on a U.S. military base in a foreign country. See also 7 *Foreign Affairs Manual* § 1113(c) (noting that “U.S. military installations abroad and U.S. diplomatic or consular facilities abroad are not part of the United States within the meaning of the 14th Amendment,” and “[a] child born on the premises of such a facility is not born in the United States and does not acquire U.S. citizenship by reason of birth”).

b. A U.S. military installation abroad is not “in the United States” under the Citizenship Clause because it is not part of the sovereign territory of the United States. The courts of appeals have uniformly held that unincorporated U.S. territories are not “in the United States” for purposes of the Citizenship Clause, and that is consistent with this Court’s teachings and with longstanding congressional practice of conferring citizenship or nationality at birth in those territories by statute. But even if the Citizenship Clause were read to include an incorporated territory of the United States, the Clause still would not encompass a U.S. military base in Germany. That is because the Citizenship Clause would at least require that an individual be

born in U.S. sovereign territory, and as the court of appeals correctly recognized, the United States does not exercise sovereignty over a U.S. military base in Germany.

When the United States and a foreign nation agree that the United States may place a military installation within the foreign nation's territory, that does not make the United States "sovereign" over that territory. Rather, the host nation retains sovereignty, and the extent to which the United States exercises jurisdiction on the land depends on terms of the agreement with the host nation. This Court has long recognized that a U.S. military base in a foreign country is "beyond the limits of national sovereignty." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948) (applying federal labor law to a U.S. military base in Bermuda even though the base was in "foreign territory"); see *Johnson v. Eisentrager*, 339 U.S. 763, 777-778 (1950) (prisoners of U.S. military forces held at Landsberg Prison in Germany "at no relevant time were within any territory over which the United States is sovereign"); *United States v. Spelar*, 338 U.S. 217, 221-222 (1949) (recognizing that placement of U.S. military base in Newfoundland "effected no transfer of sovereignty" and that base was in a "foreign country" for purposes of Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*). Like the court below (Pet. App. 11-12), the courts of appeals have recognized that U.S. military bases in foreign countries are not part of the sovereign territory of the United States. And as this Court has recognized, the "determination of sovereignty over an area is for the legislative and executive departments." *Vermilya-Brown*, 335 U.S. at 380; see *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) ("[Q]uestions of sovereignty are for the political branches to decide.").

Petitioner relies (Pet. 26) on *Boumediene*, but that decision does not establish that a U.S. military installation in Germany is "in the United States" under the Citizenship Clause. In *Boumediene*, the Court held that aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, could challenge their detention through habeas corpus, in part because of the particular degree of control the United States exercised over that base. 553 U.S. at 739-771. But the Court recognized that "Guantanamo Bay is not formally part of the United States," and that under the lease between the United States and Cuba, "Cuba retains ultimate sovereignty over the territory while the United States exercises complete jurisdiction and control." *Id.* at 753 (internal quotation marks omitted); see *id.* at 755 ("Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay.").

Further, the text of the Citizenship Clause itself demonstrates that United States jurisdiction or control in a foreign country is not sufficient to confer citizenship, because the Clause requires *both* that a person be "born \* \* \* in the United States" and be "subject to [its] jurisdiction." U.S. Const. Amend. XIV, § 1, Cl. 1. While the Citizenship Clause of the Fourteenth Amendment is thus confined to individuals born "in the United States, *and* subject to the jurisdiction thereof," *ibid.* (emphasis added), the Thirteenth Amendment prohibits slavery "within the United States, *or* any place subject to their jurisdiction," U.S. Const. Amend. XIII, § 1 (emphasis added). The Thirteenth Amendment's broader language demonstrates that "there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words." *Downes v. Bidwell*, 182 U.S. 244, 336-337 (1901) (White, J., concurring); see *id.* at 251 (opinion of Brown, J.); see also Pet. App. 9.

The court of appeals therefore correctly concluded that a U.S. Army base in Germany is not "in the United States" for purposes of the Citizenship Clause. Pet. App. 9-12. Germany, not the United States, possesses sovereignty over that area. The United States is able to operate the installation because of an agreement with Germany. At the end of the agreement, the area of the

base would revert to Germany's sole control. And even while the agreement remains in effect, Germany retains jurisdiction over the base to enforce certain of its own laws in accordance with the terms of the agreement.

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## **B. IMMIGRATION AND VISAS**

### **1. Consular Nonreviewability**

#### **a. Sidhu v. Kerry**

On January 26, 2016, the U.S. District Court for the Western District of Washington issued its decision in *Sidhu v. Kerry*, No. 15-1470 (W.D.Wash. 2016). Plaintiff challenged the finding that his sister, along with her husband and son as derivative beneficiaries, were ineligible for immigrant visas pursuant to 8 U.S.C. § 1182(a)(3)(B), which relates to terrorist activities. Section 1182(a)(3)(B) was also the basis for the visa eligibility determination at issue in the Supreme Court's 2015 decision in *Kerry v. Din*, discussed in *Digest 2015* at 15-20. The district court's opinion dismissing Sidhu's claims and referencing *Din* is excerpted below with footnotes omitted.

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#### *1. Plaintiff Lacks Standing*

Standing is a threshold element of subject matter jurisdiction without which plaintiff cannot maintain a suit in federal court. See *White v. Lee*, 227 F.3d 1214, 1242. To satisfy this requirement, plaintiff must show that "he has suffered, or will imminently suffer, a concrete and particularized injury to a judicially cognizable interest." *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (internal quotations omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). The injury must be "fairly traceable" to defendants' conduct, such that it is likely that the injury would be redressed by a favorable decision. *Id.* The Court concludes that plaintiff has not suffered an injury to a judicially cognizable interest.

Ms. Samra is an unadmitted and nonresident alien, and thus has no right to sue to further press her claim for admission. See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Plaintiff seeks to evade this clear jurisdictional issue by reframing his challenge as based on a violation of his own constitutional rights. Construing the Complaint in the light most favorable to plaintiff, the Court understands the alleged harm to be the separation of plaintiff and his sister. However, there is no liberty interest in the companionship of one's sibling. See *Ward v. City of San Jose*, 967 F.2d 280, 283-84 (9th Cir. 1991); see also *Adeyemo v. Kerry*, 2013 WL 498169, \*3 (D. Md. Feb. 7, 2013) (dismissing due process claim brought by sister of alien whose visa application was denied). Plaintiff has not alleged any other possible harm. Lacking a cognizable injury, plaintiff cannot establish standing and therefore the case must be dismissed.

## 2. Due Process Was Satisfied

Even if plaintiff had a liberty interest sufficiently harmed to satisfy standing, defendants have satisfied their due process burden. In *Kerry v. Din*, the American wife of an unadmitted alien brought a suit challenging the denial of her husband’s visa. 135 S. Ct. 2128 (2015). Just as in this case, the government denied the visa application by citing to § 1182(a)(3)(B) without providing further explanation. *Id.* at 2139. Justice Kennedy’s concurrence, which the parties agree controls, held that even if the wife had a liberty interest, “the Government satisfied due process when it notified Din’s husband that his visa was denied under the immigration statute’s terrorism bar, § 1182(a)(3)(B).” *Id.* No more than a bare citation to the basis for denial was necessary, which the government has satisfied in this case.

Plaintiff is correct that Justice Kennedy’s opinion left available a more searching analysis of the government’s decision where there was “an affirmative showing of bad faith on the part of the consular officer.” *Id.* at 2141. However, plaintiff has failed to allege with particularity how the government denied his sister’s visa application in bad faith. He suggests the failure to provide any specific reasons for the denial “constitutes bad faith actions,” but this argument is foreclosed by *Din*. Beyond that, there is no allegation in the Complaint that could be interpreted as constituting bad faith.

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### b. Allen v. Milas

On February 23, 2016, the U.S. District Court for the Eastern District of California issued its decision in *Allen v. Milas*, No. 15-705 (E.D. Cal. 2016). The court’s reasoning relies on *Din* to reject plaintiff’s challenge to the denial of an application for an immigrant visa for his German wife. Excerpts follow from the court’s opinion with footnotes and record citations omitted.

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Here, Plaintiff asserts that his claim for relief implicates his fundamental liberty interest in his marriage and family life. While it is not at all clear that Plaintiff has a procedural due process right stemming from a constitutional right to live in the United States with his spouse, the Court assumes, for purposes of the pending Motion, that he does. Compare *Bustamante*, 531 F.3d at 1062 (“Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause.”) with *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (“Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence could we conclude that the denial of Berashk’s visa application implicates any of [his spouse’s] fundamental liberty interests.”) (Scalia, J.) (plurality opinion).

Assuming that the denial of Mrs. Allen’s visa application implicates Plaintiff’s liberty interest in marriage, the Court turns to whether the reasons offered for the denial were “facially legitimate and bona fide.” *Bustamante*, 531 F.3d at 1062; *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). Here, the consular officer who denied Mrs. Allen’s application gave two reasons for the denial. First, the consular office determined that she was ineligible for a visa under § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act because she was “convicted in a

German court of theft pursuant to paragraphs 242 and 248 of the German criminal code” in July 1998. Second, the officer determined that Mrs. Allen was ineligible for an immigrant visa because she was “convicted in a German court for illicit acquisition of narcotics pursuant to paragraphs 29, 35, 1, and 3 of the German criminal code” in March 1997.

These reasons are facially legitimate. Section 212(a)(2)(A)(i)(I) provides that an applicant is ineligible for a visa if she “was convicted of . . . a crime of moral turpitude (other than purely political offense) or an attempt or conspiracy to commit such a crime[.]” Plaintiff argues that Mrs. Allen’s criminal conviction for theft under paragraphs 242 and 248 of the German criminal code does not constitute a crime of moral turpitude.

Specifically, Plaintiff points to cases involving appeals from orders issued by the Board of Immigration Appeals for the proposition that this Court must undergo a multi-step process to determine whether Mrs. Allen’s theft conviction constitutes a crime of moral turpitude. . . . Such an inquiry may well be appropriate in the context of an appeal from the Board of Immigration Appeals, but none of the cases cited by Plaintiff involve a consular officer’s decision to deny an immigrant visa application. . . . In this context, the Court cannot revisit the consular officer’s statutory interpretation of the German criminal code.

Similarly, the consular officer’s citation of § 212(a)(2)(A)(i)(II) in the refusal letter, combined with Mrs. Allen’s conviction for illicit acquisition of narcotics, provided a facially legitimate reason for her denial. Plaintiff’s argument that Mrs. Allen was convicted by a juvenile court of violating paragraphs 29, 35, 1, and 3 of the German criminal code is unavailing. The Court may not second-guess the consular officer’s decision by analyzing the circumstances of Mrs. Allen’s narcotics conviction to determine its effect under German law. See *Din*, 135 S. Ct. at 2141 (explaining that courts may not look for additional factual details behind a decision to deny a visa application “beyond what its express reliance on [the statute] encompassed.”)...

Furthermore, Plaintiff has not alleged facts sufficient to establish that the consular officer who denied Mrs. Allen’s application did so in bad faith. See *Twombly*, 550 U.S. at 570. If Plaintiff has some reasonable basis for believing the consular officer denied his wife’s application in bad faith, he may amend his Complaint to incorporate the factual allegations necessary for his claim to survive another Motion to Dismiss. But here, Plaintiff’s failure to allege such facts prevents him from stating a due process claim at this time. See *id.*; see also *Din*, 135 S. Ct. at 2141. . . .

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### c. **Cardenas v. United States**

On June 21, 2016, the U.S. Court of Appeals for the Ninth Circuit revisited its application of the “facially legitimate and bona fide” standard of limited review after the Supreme Court’s decision in *Din*, which was on appeal from a decision of the Ninth Circuit. The court applied Justice Kennedy’s concurrence in *Din* to determine that the consular officer in this case satisfied the “facially legitimate and bona fide reason” test. In this case, plaintiff Cardenas’s spouse was found ineligible for a visa under 8 U.S.C. § 1182(a)(3)(A)(ii) as an alien who intends to enter with the intent to engage in “unlawful activity.” Excerpts follow from the court’s opinion. *Cardenas v. United States*, No. 13-35957 (9<sup>th</sup> Cir. 2016).

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Because no single rationale commanded a majority of the Court in *Din*, Cardenas urges us to re-adopt the standard in our opinion in that case. However, our *Din* approach was squarely rejected by a majority of the Supreme Court, *Din*, 135 S. Ct. at 2131, and therefore we are not free to return to it.

The government argues that Justice Kennedy’s concurrence controls. We agree. In *Marks v. United States*, the Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted). As we recently explained, “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” *United States v. Davis*, No. 13-30133, slip op. at 14 (9th Cir. June 13, 2016) (en banc) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)); accord *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012) (the narrowest opinion must be the “logical subset of other, broader opinions” (quoting *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005)). “Stated differently, Marks applies when, for example, ‘the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position.’” *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (quoting *King*, 950 F.2d at 782).

Justice Kennedy’s concurrence fits this description. The *Din* plurality’s broad position was that (1) “an unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission,” and (2) the Due Process Clause does not enable an alien’s citizen spouse to bring suit on his behalf. 135 S. Ct. at 2131. The Kennedy concurrence’s narrower position is that, even assuming a citizen spouse can bring such a challenge, the challenge fails as long as the consular officer has cited a valid statute of inadmissibility which implies a bona fide factual basis behind the denial. *Id.* at 2140–41. The plurality would necessarily agree that, when the consular officer cites such a statute, the denial stands, at least in a case only raising the due process rights of a citizen spouse. The Kennedy concurrence therefore represents the holding of the Court.

Under the *Din* concurrence, the facially legitimate and bona fide reason test has two components. First, the consular officer must deny the visa under a valid statute of inadmissibility. *Id.* (consular officer’s citation to § 1182(a)(3)(B) “suffices to show that the denial rested on a determination that Din’s husband did not satisfy the statute’s requirements,” and “the Government’s decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under *Mandel*”). Second, the consular officer must cite an admissibility statute that “specifies discrete factual predicates the consular officer must find to exist before denying a visa,” or there must be a fact in the record that “provides at least a facial connection to” the statutory ground of inadmissibility. *Id.* at 2141. Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an “affirmative showing of bad faith on the part of the consular officer who denied [ ] a visa.” *Id.*

### C. Application of the *Din* Test

As Cardenas implicitly recognizes by advocating for a broader standard of review, adoption of Justice Kennedy’s *Din* concurrence as the controlling opinion of the Court dooms her claims in this case. The consular officer gave a facially legitimate reason to deny Mora’s visa because he cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii), which denies entry to an alien who intends to enter with the intent to engage in “unlawful activity.” 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.

Cardenas argues that she properly alleged bad faith because, when Mora appeared for the second interview, the consular officer refused to accept or review the proffered expert opinion that Mora had never been a gang member or the letter showing his acceptance into a tattoo removal program. But, the allegations about the second interview obviously cannot raise a plausible inference that the officer acted in bad faith in making the original decision. And, although counsel’s purpose in arranging the second interview was to allow Mora to submit additional evidence, that the consular officer did not accept Mora’s new documents does not show bad faith. During his second interview, Mora was extensively questioned by two officials and was given the opportunity to argue that he had no ties to the Sureno gang.

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### d. Santos v. Lynch

In *Santos v. Lynch*, No. 15-979 (E.D. Cal. 2016), the court considered whether there is a liberty interest in residing with one’s adult child equivalent to the liberty interest in residing with one’s spouse that was at issue in *Din*. On June 29, 2016, the court issued its opinion, concluding that there was no equivalent right and proceeded to find that, applying the standard in *Din*, the visa application had been denied based on a facially legitimate and bona fide reason. Excerpts follow from the opinion, with footnotes and record citations omitted.

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Plaintiff argues that “[t]here is no support for Defendant’s proposition that the due process rights under the constitution[ ] are implicated only where the U.S. citizen’s right to reside with his or her spouse are implicated.” Defendants argue that a marriage relationship is not the equivalent of an adult child-parent relationship. Defendants cite *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 26 (D.D.C. 2010), in which the District Court of the District of Columbia found that “all circuits to address the issue have expressly declined to find a violation of the familial liberty interest where state action has only an incidental effect on the parent’s relationship with his adult child, and was not aimed specifically at interfering with the relationship.” Plaintiffs have not provided any authority, and the Court is not aware of any authority, that an adult child has a constitutional interest in living in the United States with his or her noncitizen parents. The Court finds that the Ninth Circuit’s use of the phrase “in matters of marriage and family life” when finding procedural due process protection for marriages in the context of the denial of a visa or admission and exclusion of aliens has not extended, and does not extend to adult children living

with their alien parents in the United States. The Court notes that the Federal Government is not attempting to forbid parents and adult children from living together. Plaintiff remains free to live with her parents anywhere in the world where they are permitted to reside.

At the hearing on June 22, 2016, and in her June 27, 2016 supplemental brief, Plaintiff argued that because the Citizen and Immigration Service (CIS) allows a quicker turn-around of visa applications for spouses and parents of United States citizens than for other relatives, an adult child's right to live with her alien parents in the United States should be the equivalent of spouses. In order for an alien to obtain an immigrant visa to enter and permanently reside in the United States, "the alien must fall within one of a limited number of immigration categories." *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191, 2197 (2014) (citing 8 U.S.C. §§ 1151(a)-(b)). The parents, spouses, and unmarried children under the age of 21 of United States citizens fall within the "immediate relatives" category. See *Scialabba*, 134 S.Ct. at 2197 (citing 8 U.S.C. §§ 1151(b)(2)(A)(i), 1101(b)(1)). The five less-favored categories are called "preference" categories for "family-sponsored immigrants" and are "distant or independent relatives of [United States] citizens, and certain close relatives of [legal permanent residents]." *Scialabba*, 134 S.Ct. at 2197 (citing 8 U.S.C. §§ 1151(a)(1), 1153(a)(1)-(4)). However, the fact that the Executive Branch includes parents and spouses of United States citizens in the "immediate relatives" category for purposes of visa applications does not mean that an adult child has a liberty interest in their parents living in the United States.

Therefore, the Court finds that Plaintiff does not have a liberty interest as an adult child to live in the United States with her parents. As the denials of Mr. and Mrs. Santos's visa applications do not implicate Plaintiff's liberty interest in family life, there is no process due to her under the United States Constitution. The Court does not need to conduct any further review of the reasons for the consular official's denials of Mr. and Mrs. Santos's visa applications.

Even if the Court was to find that Plaintiff stated a liberty interest in living in the United States as an adult child with her parents, Plaintiff has failed to allege that the reasons offered by the consular official for denying her parents' visa applications were not "facially legitimate and bona fide." *Bustamante*, 531 F.3d at 1062; *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). The Ninth Circuit in *Cardenas* found that based on the *Din* concurrence there are two components to the "facially legitimate and bona fide" test:

First, the consular officer must deny the visa under a valid statute of inadmissibility. [*Din*, 135 S.Ct. at 2140-41] (consular officer's citation to § 1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements," and "the Government's decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under Mandel"). Second, the consular officer must cite an admissibility statute that "specifies discrete factual predicates the consular officer must find to exist before denying a visa," or there must be a fact in the record that "provides at least a facial connection to" the statutory ground of inadmissibility. *Id.* at 2141. Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an "affirmative showing of bad faith on the part of the consular officer who denied [ ] a visa." *Id.*

See *Cardenas*, 2016 WL 3408047, at \*6.

Here, the consular officer who denied Mr. and Mrs. Santos's visa applications determined that they were ineligible for visas under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act because they lived unlawfully in the United States for a period exceeding 1 year. The

consular officer also denied Mr. Santos’s visa application under § 212(a)(6)(E), because as an alien, Mr. Santos knowingly encouraged, induced, assisted, abetted, or aided an alien to enter or to try to enter the United States in violation of law.

Plaintiff concedes that “the consular officer in this case provided a facially legitimate reason for denying visas to Plaintiff’s parents, [so] the “facially legitimate” prong of the *Bustamante* test is satisfied.” (ECF No. 24 at 13.) The consular officer cited a valid admissibility statute that “specifies discrete factual predicates the consular officer must find to exist before denying a visa.” *Cardenas*, 2016 WL 3408047, at \*6 (quoting *Din*, 135 S.Ct. at 2141). The burden then shifts to Plaintiff to make an “affirmative showing of bad faith on the part of the consular officer who denied [ ] a visa.” *Id.* Plaintiff alleges that the consular officer acted in bad faith in denying visas to Mr. and Mrs. Santos because the record showed that Mr. and Mrs. Santos were not inadmissible under INA § 212(a)(9)(B)(i)(II). Plaintiff argues that Mr. and Mrs. Santos qualified for the bona fide asylum exception to inadmissibility under INA § 212(a)(9)(B), and they applied and received employment authorization in the United States prior to April 1, 1997, and continued to receive employment authorization until they left the United States on September 29, 2013. Plaintiff also argues that the consular officer acted in bad faith because the consular officer only found that Mr. Santos was inadmissible under INA § 212(a)(6)(E) for allegedly assisting Mrs. Santos to enter the United States illegally after the complaint was filed in this Court.

However, the Court notes that Plaintiff has not alleged facts sufficient to establish that the consular officer who denied Mr. and Mrs. Santos’s applications did so in bad faith. See *Twombly*, 550 U.S. at 570. As Plaintiff has not plausibly alleged with sufficient particularity an affirmative showing of bad faith on the part of the consular officer who denied Mr. and Mrs. Santos’s visa applications, the Court may not second-guess the consular officer’s decision by analyzing the reasons for the denials of Mr. and Mrs. Santos’s visa applications. See *Din*, 135 S. Ct. at 2141 (explaining that courts may not look for additional factual details behind a decision to deny a visa application “beyond what its express reliance on [the statute] encompassed.”).

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## 2. Special Immigrant Visa Programs: *Nine Iraqi Allies v. Kerry*

The Refugee Crisis in Iraq Act of 2007 (“RCIA”) and the Afghan Allies Protection Act of 2009 (“AAPA”) established the Iraqi and Afghan Special Immigrant Visa (“SIV”) programs for nationals of Iraq and Afghanistan who experience an ongoing serious threat as a consequence of their employment by the U.S. government. Spouses and children of eligible applicants may also receive SIVs. See *Digest 2008* at 15 for background on the RCIA and *Digest 2009* at 7 for background on the AAPA.

In *Nine Iraqi Allies v. Kerry*, 168 F.Supp.3d 268 (D.D.C. 2016), the U.S. District Court for the District of Columbia considered claims by Iraqi and Afghan nationals (proceeding using pseudonyms) that the U.S. government improperly failed to adjudicate or grant their applications for SIVs. The court granted the U.S. motion to dismiss with respect to counts 1 and 2 of the complaint and denied the U.S. motion to dismiss with respect to Counts 3-6 with respect to all but three of the plaintiffs (for whom the claims were moot). Counts 3 and 4 sought an order under the Mandamus

Act, 28 U.S.C. § 1361, directing adjudication of plaintiffs' SIV applications. Counts 5 and 6 similarly asked the court to compel agency action within a reasonable time under 5 U.S.C. § 706(1) of the Administrative Procedure Act ("APA"). Excerpts follow from the court's opinion (with footnotes and record citations omitted).

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## 1. Standing

The Government contends that Plaintiffs lack standing to litigate Counts 3-6. ...

As alleged in the Amended Complaint, Plaintiffs' primary injury is the deprivation of final decisions on their SIV applications within a reasonable time as required by RCIA § 1242 (c) (1), AAPA § 602 (b) (4) (A), and the APA, 5 U.S.C. § 555 (b). Plaintiffs also allege that the Government's failure to provide timely adjudication of their applications has exposed them and their families to serious, imminent threats to their life and well-being as a result of their service to the United States.

The Government argues that Plaintiffs lack standing to pursue their claims because their applications have, in fact, been finally refused. According to the Government, because Plaintiffs have received final refusals, they have received everything to which they are entitled and have suffered no redressable injury.

The Government is incorrect. Because the Government's contention that Plaintiffs' SIV applications have already been finally adjudicated is intricately intertwined with its other jurisdictional argument based on the doctrine of consular nonreviewability, it can only be unraveled with close scrutiny of the factual record. Accordingly, the Court addresses this issue in detail in section [2].

For present purposes, however, the Court notes the following conclusions that are fully explained below: RONALDA, FOXTROT, INDIA, JULIET, ALICE, HOTEL, and LIMA's SIV applications have not been finally refused and instead, remain in "administrative processing," see *infra* section III.B.2.a.; MIKE and KILO's SIV applications likewise await additional actions by the Government and thus, have not been finally refused, see *infra* section III.B.2.c.; ALPHA, BRAVO, and DELTA's applications have been granted, and thus, their claims are moot, see *infra* section [2]. Accordingly, RONALDA, FOXTROT, INDIA, JULIET, ALICE, HOTEL, LIMA, MIKE, and KILO have suffered an injury in fact: the failure to receive final decisions on their SIV applications within a reasonable period.

Having shown that they have suffered an injury, Plaintiffs must also show that their alleged injury is caused by the complained of conduct. The Government raises no argument with respect to causation. Plaintiffs' alleged injury—the lack of final decisions on their SIV applications—is quite clearly caused by Defendants' conduct (*i.e.*, Defendants' failure to adjudicate the applications). Thus, Plaintiffs have satisfied the causation prong of the standing inquiry.

Finally, the Government argues that a favorable decision by this Court would not redress Plaintiffs' injury. The Government first contends that Plaintiffs are not entitled to redress because the timelines set out by Congress for the adjudication of SIV applications are discretionary. This argument, like the Government's contention that Plaintiffs' applications have been finally refused, is also deeply interwoven with other jurisdictional arguments, which will be

fully discussed and rejected below in section III.B.3. In summary, the APA, 5 U.S.C. § 555(b), creates a duty for the Government to reach a final decision on Plaintiffs' applications "within a reasonable period," and RCIA § 1242(c) (1) and AAPA § 602(4) (A) clarify that that duty is non-discretionary and must "ordinarily" be completed within nine months. See *infra* section III.B.3.

The Government also argues that the Court may not redress Plaintiffs' injuries because courts are not free to fashion their own "coercive sanctions" to bring about compliance with statutory deadlines. . . .

. . . Plaintiffs do not seek to construct any sanction for the Government's failure to process their SIV applications, nor do they seek review of any substantive decisions by the Government. Instead, Plaintiffs ask the Court to do just what the APA and the Mandamus Act authorize: issue an order to adjudicate their applications, whatever the substantive results may be. See 5 U.S.C. § 706(1); 28 U.S.C. § 1361. Such an order would directly redress Plaintiffs' injury caused by the Government's failure to decide.

In short, Plaintiffs have been injured by the failure to obtain final decisions on their SIV applications, that injury is caused by the Government's failure to act, and the injury would be redressed by an order from this Court. Accordingly, Plaintiffs have made the injury, causation, and redressability showings required to establish standing to pursue their claims. *Lujan*, 504 U.S. at 560-61.

## 2. The Doctrine of Consular Nonreviewability

As already discussed, the Government's major argument is that Plaintiffs' applications have already been finally refused and the doctrine of consular nonreviewability precludes any further review of those decisions. This fact, the Government contends, deprives Plaintiffs of standing to bring their claims, and deprives the Court of jurisdiction to hear them.

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In support of their contention that their applications have not received a final decision, Plaintiffs put forth a significant body of evidence. First and foremost, the Government's own Case Status Tracker states that Plaintiffs' applications remained in "administrative processing" as of September 24, 2015.

\* \* \* \*

Despite the convincing evidence Plaintiffs cite to show that Defendants have not finally adjudicated their SIV applications, which still remain in "administrative processing," the Government contends that the Court should treat those applications as finally denied as a matter of law. . . . The Court disagrees.

The Government contends that because regulations and State Department guidance documents governing the visa process require consular officers to "either issue or refuse the visa" when presented with a complete application, the Court should treat Plaintiffs pending applications as refused. . . . However, it is clear that visa applications are not always being finally refused in any meaningful sense immediately upon presentation of a completed application. The Foreign Affairs Manual's statement that "[t] here is no such thing as an informal refusal or a pending case once a formal application has been made[.]" 9 FAM 42.81 N1, simply does not accord with Defendants' practices, as the record demonstrates.

The Government also cites 8 U.S.C. § 1201(g) itself for the proposition that Plaintiffs have all received final refusals as a matter of law. . . . But § 1201(g) merely contains the (expansive) criteria for refusing an application; it does not establish when or whether, as a matter of law, an application has been refused.

The Government next turns to case law, arguing that “Plaintiffs fail to meet their burden to demonstrate standing because there is a long line of cases explaining that non-resident aliens lack standing to challenge the determinations associated with their visa applications, which belong to the political and not judicial branches of government.”

\* \* \* \*

The Government also makes much of a passage in Justice Kennedy’s concurrence in *Kerry v. Din*, 135 S.Ct. 2128, 2141 (2015), in which he states that the Government satisfies any due process duty owed to visa applicants and their citizen relatives when it cites the statutory basis for a visa application’s denial. But again, the Government’s reliance is misplaced. Plaintiffs do not contend that they were entitled to a more fulsome explanation of the Government’s decision on each of their SIV applications they merely claim that they are entitled to a decision.

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In short, the doctrine [of consular nonreviewability] holds only that “there may be no judicial review of [] decisions to exclude aliens unless Congress has expressly authorized this[,]” *Saavedra Bruno*, 197 F.3d at 1162 (emphasis added and internal quotation marks omitted), but does not preclude Plaintiffs from challenging the Government’s failure to decide, *Patel*, 134 F.3d at 932. Accordingly, because the applications of Ronaldo, Foxtrot, India, Juliet, Alice, Hotel, and Lima remain in “administrative processing” and, therefore, have not been finally refused, the doctrine of consular nonreviewability does not bar their claims. See *Maramjaya*, 2008 WL 9398947, at \*4; *Patel*, 134 F.3d at 931-32.

\* \* \* \*

### 3. Judicially Manageable Standards to Enforce a Non-discretionary Duty

The Government next contends that Counts 3-6 must be dismissed for lack of jurisdiction because Plaintiffs fail to identify a non-discretionary duty owed them as well as judicially manageable standards by which the Court may measure compliance with that duty.

The APA provides that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Thus, “[t]he APA imposes a general but nondiscretionary duty upon an administrative agency to pass upon a matter presented to it ‘within a reasonable time,’ 5 U.S.C. § 555(b), and authorizes a reviewing court to ‘compel agency action unlawfully withheld or unreasonably delayed,’ *id.* § 706 (1).” *Fort Sill Apache Tribe v. Nat’l Indian Gaming Comm’n*, No. CV 14-958, 2015 WL 2203497, at \*4 (D.D.C. May 12, 2015) (citing *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1100 (D.C. Cir. 2003)).

The RCIA and AAPA provide additional guidance, instructing that Defendants shall process SIV applications within nine months. RCIA § 1242 (c) (1); AAPA §§ 602 (4) (A). The text of the statutes makes clear that the nine-month timeline applies to “all steps” under Defendants’ control “incidental to the issuance of such [SIV] visas[.]” *Id.* Thus, the timeline

applies to each of the 14 steps in the SIV adjudication process identified in the Joint Reports that are within Defendants' control, including "administrative processing" and "[Chief of Mission or] COM Approval." ... Simply put, the APA imposes a duty on Defendants to act within a "reasonable" time on Plaintiffs' applications, and the RCIA and AAPA provide manageable standards (an explicit timeline) by which a Court may assess the Government's compliance. ...

Finally, the Government actually acknowledges that its duty to eventually reach a decision on pending SIV applications is non-discretionary. ...

Nevertheless, the Government contends that the pace at which it adjudicates SIV applications is entirely discretionary, citing *Beshir v. Holder*, 10 F. Supp. 3d 165 (D.D.C. 2014) for support.

Admittedly, *Beshir* takes an expansive view of the Government's power to decide certain immigration applications on its own timeline. *Beshir*, 10 F. Supp. 3d at 174 (holding that "the pace of adjudication is discretionary"). However, the *Beshir* court based its conclusion on factors which are not present in this case. First, the *Beshir* court relied on "[t]he absence of a congressionally-imposed deadline or timeframe to complete the adjudication of [immigrant] adjustment [of status] applications [as] support[] [for] the conclusion that the pace of adjudication is discretionary and thus not reviewable[.]" *Id.* at 176. In the case at bar, Congress has provided a clear nine-month timeline for the adjudication of SIV applications.

Second *Beshir* relied on relevant statutory language permitting the Government to consider certain applications "in the Secretary [of Homeland Security] or the Attorney General's discretion and under such regulations as the Secretary or Attorney General may prescribe." *Id.* at 173 (quoting 8 U.S.C. § 1159(b)). The Government points to no similarly explicit grants of discretion applicable to Plaintiffs' applications. Thus, the *Beshir* Court's reasoning is wholly inapplicable.

The Government also contends that the pace of adjudication of SIV applications is discretionary because Congress provided for the possibility that "national security concerns" might cause some applications to require additional time. See RCIA § 1242 (c) (2) ("Nothing in this section [which includes the nine-month timeline quoted above] shall be construed to limit the ability of [the] Secretary [of State and the Secretary of Homeland Security] to take longer than 9 months to complete those steps incidental to the issuance of such visas in high-risk cases for which satisfaction of national security concerns requires additional time."); see also AAPA § 602 (4) (B) (same).

As the Government reads them, the statutes' mention of national security returns absolute discretion to the Government's hands. ...

The RCIA and AAPA follow the same structure. Both statutes introduce the nine-month timeline and define its application in one paragraph and then introduce the safety valve for "high-risk cases" in the very next paragraph. RCIA § 1242(c) and AAPA § 602 (b) (4). The statute sets forth that additional time may be permitted when national security issues arise. Obviously, Congress would not have adopted this rule-and-exception structure if it expected the exception to apply in every case. Moreover, the words "high-risk bases" indicate a distinction between the run-of-the-mill case, which must be adjudicated within nine months, and a subset of cases presenting "national security concerns" that do not arise in the typical application. RCIA § 1242(c); AAPA § 602(b) (4). The Government's reading would allow the national security exception to swallow the nine-month rule in its entirety.

Moreover, the presence of the national security exception does not eliminate the judicially-manageable standards described above. If the Government credibly claimed that a particular case was “high-risk” because it presented “national security concerns[.]” RCIA § 1242(c)(2); AAPA § 602(b)(4)(B), a court should, of course, appropriately defer to the Government’s expertise in the area of foreign policy and national security.

In this case, the Government has not even attempted to show that Plaintiffs’ applications fall into the “high-risk” exception. To be sure, the Government has stated that national security concerns are present in this case..., but the Government has never specified in any way what those concerns are.

The Government has suggested that because the applications of Charlie and Golf, named as Plaintiffs in the initial Complaint, were refused on terrorism-related grounds, the current Plaintiffs’ applications are also suspect. ... However, the Government never even describes what relationship Charlie and Golf have to the other Plaintiffs that would cause such concern.

It is implied by the Government that “national security concerns,” as the term is used in RCIA § 1242 (c) (2) and AAPA § 602(b) (4) (B), are present in all SIV applications by Iraqis and Afghan citizens. But such an interpretation conflicts with Congress’s statutory design. The RCIA applies only to SIV applications by Iraqis, and the AAPA, likewise, applies only to applications by Afghans. If Iraqi or Afghan citizenship were enough to render an application “high-risk,” the nine-month timeline would, again, be rendered a dead letter.

\* \* \* \*

### C. Counts 1 & 2: Failure to Protect

RCIA § 1244(e) provides that “[t]he Secretary of State, in consultation with the heads of other relevant Federal agencies, shall make a reasonable effort to provide an alien described in this section who is applying for a special immigrant visa with protection or the immediate removal from Iraq, if possible, of such alien if the Secretary determines after consultation that such alien is in imminent danger.” AAPA § 602 (b) (6) contains nearly identical language with respect to Afghan SIV applicants.

Plaintiffs contend that this passage gives rise to two related duties: “(1). [to] consult with the heads of other relevant Federal agencies to assess whether the threats faced by Plaintiffs are imminent; and, if so, (2) make a reasonable effort to provide protection or the immediate removal of Plaintiffs from such threats, if possible.” ... Counts 1 and 2 of Plaintiffs’ Amended Complaint allege that Defendants have failed to fulfil these duties. ...

As already discussed, the APA empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed[.]” ... Plaintiffs ask the Court to compel Defendants to undertake the duties described in RCIA § 1244(e) and AAPA § 602(b) (6).

The Government contends that this Court is without jurisdiction to hear Claims 1 and 2. The Court agrees for the following reasons.

“[A] claim under section 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1098 (D.C. Cir. 2015) (emphasis and brackets omitted) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Moreover, the APA expressly precludes judicial review of agency action that is “committed to agency discretion by law.” 5 U.S.C. § 701(a) (2). Agency action is committed to agency discretion by law when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion[.]” *Sierra Club v. Jackson*, 648 F.3d

848, 855 (D.C. Cir. 2011) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1984)). If no “judicially manageable standard” exists by which to judge the agency’s action, meaningful judicial review is unavailable under the APA. *Id.*

The statutory duties that Plaintiffs cite are of the type described in *Sierra Club*. Plaintiffs point to no standards by which the Court could assess whether Defendants have adequately assessed the dangers that Plaintiffs face.

The language of RCIA § 1244(e) and AAPA § 602(b) (6) strongly indicates that significant discretion has been left to the Secretary of State as to how to carry out his mandate. Under the statutes the Secretary “shall make a reasonable effort” to provide protection or removal to SIV applicants. *Id.* What efforts are reasonable will depend upon “complex concerns involving security and diplomacy” far beyond the expertise of the Court but squarely within that of the Secretary. *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). In addition, Plaintiffs fail to point to any standards by which the Court may assess whether Plaintiffs are in “imminent danger” or whether the Secretary has adequately acted ...

\* \* \* \*

In short, under RCIA § 1244 (e) and AAPA § 602 (b) (6), “the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and diplomacy” that are “peculiarly with the agency’s expertise[.]” *Vietnamese Asylum Seekers*, 104 F.3d at 1353. Counts 1 and 2 of Plaintiffs’ Amended Complaint must be dismissed.

\* \* \* \*

### 3. Visa Waiver Program

In 2016, the United States began implementing the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. See *Digest 2015* at 20 for background on the Act. A January 21, 2016 State Department media note, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251577.htm> explains the changes to the Visa Waiver Program under the Act.

\* \* \* \*

...Under the Act, travelers in the following categories are no longer eligible to travel or be admitted to the United States under the Visa Waiver Program (VWP):

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions for travel for diplomatic or military purposes in the service of a VWP country).
- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria. These individuals will still be able to apply for a visa using the regular immigration process at our embassies or consulates. For those who need a U.S. visa for urgent

business, medical, or humanitarian travel to the United States, U.S. embassies and consulates stand ready to process applications on an expedited basis.

Beginning January 21, 2016, travelers who currently have valid Electronic System for Travel Authorizations (ESTAs) and who have previously indicated holding dual nationality with one of the four countries listed above on their ESTA applications will have their current ESTAs revoked.

Under the new law, the Secretary of Homeland Security may waive these restrictions if he determines that such a waiver is in the law enforcement or national security interests of the United States. Such waivers will be granted only on a case-by-case basis. As a general matter, categories of travelers who may be eligible for a waiver include:

- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of international organizations, regional organizations, and sub-national governments on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria on behalf of a humanitarian NGO on official duty;
- Individuals who traveled to Iran, Iraq, Sudan or Syria as a journalist for reporting purposes;
- Individuals who traveled to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015); and
- Individuals who have traveled to Iraq for legitimate business-related purposes.

Again, whether ESTA applicants will receive a waiver will be determined on a case-by-case basis, consistent with the terms of the law. In addition, we will continue to explore whether and how the waivers can be used for dual nationals of Iraq, Syria, Iran and Sudan.

Any traveler who receives notification that they are no longer eligible to travel under the VWP are still eligible to travel to the United States with a valid nonimmigrant visa issued by a U.S. embassy or consulate. Such travelers will be required to appear for an interview and obtain a visa in their passports at a U.S. embassy or consulate before traveling to the United States.

The new law does not ban travel to the United States, or admission into the United States, and the great majority of VWP travelers will not be affected by the legislation.

\* \* \* \*

#### **4. Visa Restrictions and Limitations**

##### ***a. Caribbean***

On February 4, 2016 the United States government announced changes to entry requirements for certain Caribbean residents coming to the United States as H-2A agricultural workers. See February 4, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252167.htm> New rules, effective February 19, 2016, require certain Caribbean residents seeking to come to the United States as H-2A agricultural workers to have both a valid passport and visa. The change applies to a British, French, or Netherlands national, or a national of Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean, or has residence in Barbados, Grenada, Jamaica, or Trinidad and Tobago.

The State Department media note explains:

Eliminating this visa exemption, which was originally created to address labor shortages during World War II, will ensure those traveling to the United States, like other H-2A agricultural workers, have been sufficiently screened via the Department of State's visa issuance process prior to their arrival. This visa requirement will also better ensure that these workers are protected from potential employment and recruitment-based abuses. The spouses and children who travel with these workers to the United States will also be required to have both a valid passport and visa.

**b. *Revised definition of "immediate family" for certain visas***

On December 7, 2016, the State Department issued a rule amending the definition of "immediate family" for purposes of A, C-3, G, and NATO visa classifications. 81 Fed. Reg. 88,101 (Dec. 7, 2016). The Federal Register notice provides supplementary background information on the change:

This rule amends the definition of immediate family in the A, C-3, G, and relevant NATO nonimmigrant visa classifications so that unmarried adult sons and daughters who reside with the principal will not be automatically classified as immediate family for visa purposes irrespective of their age. Unmarried sons and daughters residing with the principal who are under the age of 21, or under the age of 23 and in full-time attendance as students at post-secondary educational institutions, will continue to be considered immediate family. However, any other unmarried son or daughter residing with the principal will only qualify if he or she meets the same criteria the rule imposes on other family members. In particular, he or she must be recognized as an "immediate family member" by the sending government or international organization for purposes of eligibility for rights and benefits and be individually authorized by the Department. An adult son or daughter who is no longer recognized as an immediate family member may be eligible to apply for another visa classification or seek a change of status to another nonimmigrant status. This rule also clarifies that for purposes of G-4 visa classification, the employing international organization recognizes immediate family members. . . .

Prior to this amendment, an unmarried adult son or daughter who is not part of any other household and resides regularly in the household of the principal alien must be classified in A or G visa classifications, even if otherwise eligible for another nonimmigrant classification and regardless of age or the intention of the sending government or international organization. Yet for purposes of privileges and immunities, the Department of State accepts only unmarried children under the age of 21, or unmarried sons and daughters under the age of 23 and in full-time attendance as students at post-secondary educational institutions, as dependents. Similarly, under 8 CFR 214.2(a)(2) and

(g)(2) for employment authorization purposes, Department of Homeland Security (DHS) regulations generally only consider unmarried children under the age of 21, or unmarried sons and daughters under the age of 23 and in full-time attendance as students at post- secondary educational institutions, to be dependents. (Under certain circumstances, DHS, under its regulations, may also recognize as dependents sons and daughters up to the age of 25 or of any age if physically or mentally challenged.) In practice, requiring A or G classification for sons and daughters above these age limits precludes them from obtaining a nonimmigrant classification that would enable them to accept employment in the United States.

As described in a circular note to foreign missions explaining the change:

The requirements for unmarried adult sons and daughters age 21 or older were revised under the regulations at 22 CFR 41.21(a)(3). ... Sons and daughters who do not meet these requirements may still qualify as immediate family under the third category for other individuals, but must be recognized as dependents of the principal alien by the sending government or international organization, as demonstrated by eligibility for rights and benefits, such as the issuance of a diplomatic or official passport, or travel or other allowance. An adult son or daughter who is no longer recognized as an immediate family member may be eligible to apply for another visa classification or seek a change of status to another nonimmigrant status.

## 5. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an obligation to accept the return of its nationals who cannot remain in the United States or any other country. In July 2016, Michelle T. Bond, Assistant Secretary for the Bureau of Consular Affairs, testified on the issue of removals before the House of Representatives Committee on Oversight and Government Reform. Her written statement is available at

<https://oversight.house.gov/wp-content/uploads/2016/07/Bond-DOS-Statement-Recalcitrant-Countries-7-14.pdf>.

## C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

### 1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act (“INA” or “Act”), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with

appropriate agencies, to designate a state (or any part of a state) for temporary protected status (“TPS”) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; *Digest 2010* at 10–11; *Digest 2011* at 6–9; *Digest 2012* at 8–14; *Digest 2013* at 23–24; *Digest 2014* at 54–57; and *Digest 2015* at 21–24. In 2016, the United States extended TPS designations for Sudan, Honduras, Nicaragua, Nepal, and El Salvador; extended and redesignated South Sudan and Syria; and extended and announced the termination of TPS for Guinea, Liberia, and Sierra Leone, as discussed below.

**a. South Sudan**

On January 25, 2016, the Department of Homeland Security (“DHS”) announced the extension of the designation of South Sudan for TPS for 18 months, from May 3, 2016 through November 2, 2017, and redesignated South Sudan for TPS for 18 months, effective May 3, 2016 through November 2, 2017. 81 Fed. Reg. 4051 (Jan. 25, 2016). The extension and redesignation are based on the determination that the conditions in South Sudan that prompted the 2014 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted, and in some cases deteriorated, and these conditions pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country. *Id.*

**b. Sudan**

Also on January 25, 2016, DHS announced the extension of the designation of Sudan for TPS for 18 months from May 3, 2016 through November 2, 2017. 81 Fed. Reg. 4045 (Jan. 25, 2016). The extension was based on the determination that the conditions in Sudan that prompted the 2013 TPS redesignation continue to exist, specifically there continues to be ongoing armed conflict and extraordinary and temporary conditions within the country that prevent its nationals from returning to Sudan in safety. *Id.*

**c. Guinea**

On March 22, 2016, DHS announced the extension of the designation of Guinea for TPS for six months from May 22, 2016 through November 21, 2016. 81 Fed. Reg. 15,339 (Mar. 22, 2016). The extension is based on the determination that conditions supporting the 2014 determination due to the epidemic of Ebola Virus Disease, although improved, continue to prevent Guinean nationals (or aliens having no nationality who last habitually resided in Guinea) from returning to Guinea in safety. *Id.*

On September 26, 2016, DHS announced, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, the determination that conditions in Guinea no longer support its designation for TPS. DHS extended TPS benefits for six more months “for the purpose of orderly transition before the TPS designation of Guinea terminates,” effective May 21, 2017. 81 Fed. Reg. 66,064 (Sep. 26, 2016).

**d. Liberia**

Also on March 22, 2016, DHS announced the extension of the designation of Liberia for TPS for six months from May 22, 2016 through November 21, 2016. 81 Fed. Reg. 15,328 (Mar. 22, 2016). The extension is based on the determination that conditions supporting the 2014 determination due to the epidemic of Ebola Virus Disease, although improved, continue to prevent Liberian nationals (or aliens having no nationality who last habitually resided in Liberia) from returning to Liberia in safety. *Id.*

On September 26, 2016, DHS announced, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, the determination that conditions in Liberia no longer support its designation for TPS. DHS extended TPS benefits for six more months “for the purpose of orderly transition before the TPS designation of Liberia terminates,” effective May 21, 2017. 81 Fed. Reg. 66,059 (Sep. 26, 2016).

**e. Sierra Leone**

As with Guinea and Liberia, the designation of Sierra Leone for TPS was extended for six months from May 22, 2016 through November 21, 2016 based on lingering conditions relating to the epidemic of Ebola Virus Disease. 81 Fed. Reg. 15,334 (Mar. 22, 2016). TPS for Sierra Leone was also extended for six additional months later in the year to prepare for the termination of Sierra Leone’s TPS designation, effective May 21, 2017. 81 Fed. Reg. 66,054 (Sep. 26, 2016).

**f. Honduras**

On May 16, 2016, DHS announced the extension of the designation of Honduras for TPS for 18 months from July 6, 2016 through January 5, 2018. 81 Fed. Reg. 30,331 (May 16, 2016). The extension was based on the determination that conditions in Honduras supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, which struck Honduras in 1998, and subsequent environmental disasters, and Honduras remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

**g. Nicaragua**

Also on May 16, 2016, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from July 6, 2016 through January 5, 2018. 81 Fed. Reg. 30,325 (May 16, 2016). The extension was based on the determination that conditions in Nicaragua supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting from Hurricane Mitch, which struck Nicaragua in 1998, and subsequent environmental disasters, and Honduras remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

**h. El Salvador**

On July 8, 2016, DHS announced the extension of the designation of El Salvador for TPS for 18 months from September 10, 2016 through March 9, 2018. 81 Fed. Reg. 44,645 (July 8, 2016). The extension was based on the determination that conditions in El Salvador supporting the TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

**i. Syria**

On August 1, 2016, DHS announced that it was extending the designation of the Syrian Arab Republic (Syria) for TPS for 18 months, from October 1, 2016 through March 31, 2018, and redesignating Syria for TPS for 18 months, effective October 1, 2016 through March 31, 2018. 81 Fed. Reg. 50,533 (Aug. 1, 2016). The extension and redesignation are based on the determination that that the ongoing armed conflict and other extraordinary and temporary conditions that prompted the 2015 TPS redesignation have not only persisted, but have deteriorated, and the ongoing armed conflict in Syria

and other extraordinary and temporary conditions would pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.*

**j. Nepal**

On October 26, 2016, DHS announced the extension of the designation of Nepal for TPS for 18 months, through June 24, 2018. 81 Fed. Reg. 74,470 (Oct. 26, 2016). Nepal was designated in 2015 on environmental disaster grounds due to a severe earthquake on April 25, 2015. As explained in the notice of the extension in the Federal Register, recovery and reconstruction from the 2015 earthquake were delayed due to civil unrest and obstruction of Nepal's border with India. As a result, Nepal continues to have a large number of its population without permanent or safe housing and strains on its infrastructure impacting housing, food, medicine, and education. DHS accordingly determined that Nepal continues to be unable to handle adequately the return of aliens who are nationals of Nepal and the conditions supporting its designation for TPS in 2015 continue to be met. *Id.*

**2. Refugee Admissions in the United States**

On January 13, 2016, President Obama issued a memorandum for the Secretary of State conveying Presidential Determination No. 2016-05 regarding unexpected urgent refugee and migration needs. 81 Fed. Reg. 68,925 (Oct. 4, 2016). The memorandum states:

By the authority vested in me as President by the Constitution and the laws of the United States, including section 2(c)(1) of the Migration and Refugee Assistance Act of 1962 (the "Act") (22 U.S.C. 2601(c)(1)), I hereby determine, pursuant to section 2(c)(1) of the Act, that it is important to the national interest to furnish assistance under the Act, in an amount not to exceed \$70 million from the United States Emergency Refugee and Migration Assistance Fund, for the purpose of meeting unexpected urgent refugee and migration needs related to the U.S. Refugee Admissions Program, through contributions and other assistance to international and nongovernmental organizations funded through the Bureau of Population, Refugees, and Migration of the Department of State. Funds will be used by the Department of State to meet the unexpected urgent need for additional resources within the U.S. Refugee Admissions Program, in light of the unprecedented number of refugees in need of resettlement.

On September 28, 2016, President Obama issued a memorandum for the Secretary of State, conveying Presidential Determination No. 2016-13 regarding refugee admissions for fiscal year 2017. 81 Fed. Reg. 70,315 (Oct. 11, 2016). The Presidential Determination is excerpted below.

\* \* \* \*

In accordance with section 207 of the Immigration and Nationality Act (the “Act”) (8 U.S.C. 1157), and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 110,000 refugees to the United States during Fiscal Year (FY) 2017 is justified by humanitarian concerns or is otherwise in the national interest; provided that this number shall be understood as including persons admitted to the United States during FY 2017 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below.

The admissions numbers shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided that the number of admissions allocated to the East Asia region shall include persons admitted to the United States during FY 2017 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100– 202 (Amerasian immigrants and their family members):

Africa .....	35,000
East Asia .....	12,000
Europe and Central Asia .....	4,000
Latin America and the Caribbean .....	5,000
Near East and South Asia .....	40,000
Unallocated Reserve .....	14,000

\* \* \* \*

Additionally, upon notification to the Judiciary Committees of the Congress, you are further authorized to transfer unused admissions allocated to a particular region to one or more other regions, if there is a need for greater admissions for the region or regions to which the admissions are being transferred. Consistent with section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, I hereby determine that assistance to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose.

Consistent with section 101(a)(42) of the Act (8 U.S.C. 1101(a)(42)), and after appropriate consultation with the Congress, I also specify that, for FY 2017, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

- a. Persons in Cuba
- b. Persons in Eurasia and the Baltics
- c. Persons in Iraq
- d. Persons in Honduras, Guatemala, and El Salvador

e. In exceptional circumstances, persons identified by a United States Embassy in any location.

\* \* \* \*

### 3. Migration

On September 9, 2016, the United States provided an explanation of position on the outcome document for the UN General Assembly's summit on large movements of refugees and migrants, held on September 19, 2016. The outcome document is referred to as the New York Declaration for Refugees and Migrants. U.N. Doc. A/71/L.1. The U.S. explanation of position follows.

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\* \* \* \*

The United States is pleased to have joined consensus on the resolution entitled “Draft outcome document of the high-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants” which the General Assembly adopted on September 9. The United States looks forward to the General Assembly’s high-level plenary meeting on addressing large movements of refugees and migrants on September 19 and to adopting the “New York Declaration for Refugees and Migrants” at that meeting. The United States previously had joined consensus when Member States concluded negotiations on that declaration on August 2. The United States further understands that the final text of the New York Declaration that member states adopt on September 19 will be set out in a new U.N. document that reflects minor editorial corrections to the text included as the annex to A/70/L.61. These modifications include the restoration of references by name to the Special Representative of the Secretary-General for International Migration, Peter Sutherland, in paragraph 62 of the declaration and paragraph 13 of Appendix 2.

The General Assembly is convening this high-level meeting on September 19 in recognition that more and more people today are on the move to escape persecution, conflict, severe human rights abuses, extreme poverty, and other perilous situations. Given the present scale of these movements and the vulnerability of those undertaking these journeys, global cooperation to protect and assist refugees, internally displaced persons, victims of human trafficking, and vulnerable migrants is critical. Importantly, the New York Declaration affirms key principles of responsibility-sharing and international cooperation and states’ commitments to protect and assist refugees and to work toward durable solutions to address their plight. The declaration and its appendices set out important principles that, when applied, will make the international response to humanitarian crises more effective. Since addressing the needs of affected individuals is paramount, responses must be fine-tuned and adapted to reflect specific circumstances on the ground.

The declaration also reflects a growing recognition that large numbers of highly vulnerable migrants are not refugees as defined under international law, but are nevertheless in need of protection and assistance. It highlights the benefits of migration and underscores the importance of respecting the human rights of all migrants, regardless of immigration status, and

of combating xenophobia, discrimination against refugees and migrants, trafficking in persons, and migrant smuggling. Above all, the declaration calls on all of us, first and foremost, to save lives and ensure protection for those who need it. We embrace that goal.

In joining consensus on the New York Declaration, we would like to clarify our views on several elements in the text. First, we underscore our understanding that none of the provisions in this declaration or its accompanying appendices create or affect rights or obligations of States under international law, as paragraph 21 recognizes. The United States will pursue the commitments, including those aspiring to changed circumstances, in the declaration and its appendices consistent with U.S. law and policy and the federal government's authority. In pursuing these important goals, the United States will also continue to take steps to ensure national security, protect territorial sovereignty, and maintain the health and safety of its people, including by exercising its rights and responsibilities to prevent irregular migration and control its borders, consistent with international obligations.

In this context, we note the document's important commitments concerning humanitarian financing, which is central to meeting humanitarian needs. The United States has long been the world's largest humanitarian donor and has provided more than \$6 billion in each of our last two fiscal years—providing life-saving assistance to millions of the world's most vulnerable people. Our commitment to meeting life-saving needs is an enduring one, and we will pursue the declaration's commitments relating to financing or national budgets within and subject to our appropriations process.

The declaration also contains numerous commitments concerning migration and lays out a process for member states to elaborate a Global Compact on Safe, Orderly, and Regular Migration in keeping with the 2030 Agenda for Sustainable Development for adoption in 2018. A strong role for the International Organization for Migration (IOM), which will become strengthened upon the entry into force on September 19 of the relationship agreement between the United Nations and the IOM, is essential to this follow-on process. IOM is uniquely positioned for this role as the sole global organization with an exclusive mandate on migration. By relying on its policy and secretariat expertise on all aspects of the preparatory process and ensuing negotiations, member states will gain immeasurably from IOM's broad and deep knowledge and be better positioned to respond to crises and protect the most vulnerable among them. This in turn will enhance their deliberations and avoid potentially unnecessary parallel processes and costly duplication of efforts. Finally, we believe it is critical to hold the negotiations in Geneva, where states can benefit not only from IOM's expertise but also the proximity of other Geneva-based organizations with migration and refugee expertise, including the International Labor Organization, the UN High Commissioner for Refugees, and the UN Office for the High Commissioner for Human Rights. We will engage in discussions on modalities and subsequent negotiations of the new global compact on this understanding.

We are pleased the declaration refers to the "Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster" (MICIC) initiative. The MICIC Initiative, an important state-led effort, resulted in guidelines that states and other stakeholders can use as they see fit and that may serve as a useful model for subsequent state-led efforts on broader issues.

We are pleased to see specific language on persons in vulnerable situations and emphasize that LGBTI persons fall within this category. The United States strongly supports any language on protecting the rights of members of vulnerable groups, including LGBTI persons, persons with disabilities, women, children, and indigenous persons, among others.

We are also pleased that the declaration includes specific language reaffirming the principle of non-refoulement. We underscore the importance of the core principle of non-refoulement to the protection of refugees and asylum-seekers and regret that Appendix I (Comprehensive refugee response framework) does not refer to it. Protection must remain central in all refugee responses, which includes ensuring the voluntary nature of any refugee return.

While the declaration and its Appendix I rightly emphasize the importance of finding durable solutions for refugees, including voluntary return and resettlement, we are disappointed that local integration is not mentioned. Local integration continues to be important, and it is statistically the most likely of the three durable solutions for refugees.

The declaration correctly emphasizes the particular vulnerabilities and needs of refugee and migrant children. Efforts to protect and promote the well-being of children in our country and abroad are a longstanding priority for the United States. We underscore our unwavering commitment to children around the world, evidenced in part by our annual contributions as UNICEF's largest donor—totaling more than \$868 million last year and our recent pledge of \$20 million to support “Education Cannot Wait”—a fund to strengthen education in emergencies and protracted crises. In addition, U.S. initiatives such as “Let Girls Learn” support girls around the world so they can transition to and succeed in secondary school. In advance of the Leaders’ Summit for Refugees on September 20, the United States is also providing nearly \$37 million to the UN High Commissioner for Refugees to allow tens of thousands of refugee children to enroll in school and to support education-related Summit commitments by refugee-hosting countries.

The U.S. government draws from a wide range of available resources to safely process migrant children, in accordance with applicable laws. In the limited circumstances in which migrant children are placed in custody of the U.S. government, the United States is committed to ensuring that they are treated in a safe, dignified, and secure manner. The United States believes that current practices with respect to children are consistent with this commitment. Further, the United States does provide appropriate procedural safeguards for all migrants and asylum seekers, whether or not they are in U.S. government custody, and we interpret the declaration’s references to due process and other protections, including for persons seeking to cross an international border and in the context of returns, to be consistent with our existing national laws and policies in this regard.

Additionally, while delegates showed flexibility in reaching an outcome of which we can all be proud, we regret that some important topics were omitted. More than 40 million internally displaced persons (IDPs) globally form one of the world’s most vulnerable populations, and the declaration should have included stronger and more specific language on their protection and assistance needs. Nonetheless, many of the solutions the declaration outlines for refugees are equally relevant for IDPs; the causes of displacement are often the same while the vulnerabilities they face are often life-threatening. We encourage States to draw on the commitments in this text in their efforts to protect and assist IDPs, to adopt laws and policies to do so, and to promote the inclusion of IDPs in their development strategies. The UN system needs to remain focused on this critical issue, mindful of the Human Rights Council’s recognition, in its recently adopted resolution on IDPs, of the need for further consideration of reestablishing the position of Special Representative of the Secretary-General on IDPs.

Lastly, we are pleased that the declaration includes language on the problem of statelessness. Together with a cross-regional group of 107 co-sponsors, the United States was proud to introduce a resolution on women’s equal nationality rights at the Human Rights Council’s June session. That resolution highlights the discrimination against women in their

ability to confer nationality to their spouses and children, a problem that persists in every region of the world, and increases the risk of statelessness. Statelessness, in turn, increases vulnerability of people to human rights abuses and violations, including those involving human trafficking, arbitrary detention, and restrictions on movement. We underscore the importance of resolving existing situations of statelessness to address protracted refugee crises, to avoid discrimination against women as well as racial or ethnic discrimination in nationality laws, and to ensure robust civil registration—particularly birth registration—for all.

As we look ahead, we intend to build upon the elements of this declaration to improve the lives of millions of refugees and vulnerable migrants. The United States looks forward to cooperating with other Member States and the United Nations to advance these objectives, including through the development and adoption of the compacts on refugees and on safe migration that the declaration envisions.

\* \* \* \*

**Cross References**

*Evacuation of U.S. citizens in Yemen*, **Chapter 5.C.1.**

*Lin v. United States (nationality of residents of Taiwan)*, **Chapter 5.C.3**

*Asylum and non-refoulement at IACHR*, **Chapter 7.D.1.f.**

*Diplomatic relations*, **Chapter 9.A.**

*World Bank Global Crisis Response Platform (response to refugee crisis)*, **Chapter 11.J.4.a.**

## CHAPTER 2

### Consular and Judicial Assistance and Related Issues

#### A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

##### Lawsuits Seeking Evacuation from Yemen

See discussion in Chapter 5.

#### B. CHILDREN

##### 1. Adoption

###### a. *Report on Intercountry Adoption*

In April 2016, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2015 Annual Report, as well as past annual reports, can be found at <https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2015, average times to complete adoptions, and median fees charged by adoption service providers.

###### b. *U.S. Adoption Service Providers*

On July 11, 2016, the Department of State entered into a Memorandum of Agreement with the Council on Accreditation (“COA”), renewing for five years COA’s designation as the U.S. accrediting entity for adoption service providers under the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”), the Intercountry Adoption Act of 2000, and the Intercountry Adoption Universal Accreditation Act (“UAA”). 81 Fed. Reg. 47,231 (July 20, 2016). The text of the agreement, which is available in the Federal Register notice, is similar to the original agreement signed with COA in 2006, with some changes, including

those made to reflect enactment of the UAA and updates to the intercountry adoption accreditation regulations.

On September 8, 2016, the Department of State published a notice in the Federal Register inviting public comment on proposed amendments to the regulations setting forth the requirements for accreditation of agencies and approval of persons to provide adoption services in intercountry adoption cases. 81 Fed. Reg. 62,322 (Sep. 8, 2016). On October 28, 2016, the Department extended the comment period for 15 days, until November 22, 2016. 81 Fed. Reg. 74,966 (Oct. 28, 2016).\*

On December 16, 2016, the Department of State temporarily debarred adoption service provider European Adoption Consultants, Inc. (“EAC”) from accreditation for a period of three years. The debarment cancels EAC’s accreditation and directs that EAC cease to provide any intercountry adoption services, in both Hague Convention and non-Hague Convention countries. The debarment was issued pursuant to the adoption accreditation regulations (22 CFR Part 96), which implement the Intercountry Adoption Act of 2000 and the Universal Accreditation Act of 2012. As explained in a Bureau of Consular Affairs news release, available at

<https://travel.state.gov/content/adoptionsabroad/en/about-us/newsroom/EuropeanAdoptionConsultantsDebarred.html>

The Department found substantial evidence that the agency is out of compliance with the standards in subpart F of the accreditation regulations, and evidence of a pattern of serious, willful, or grossly negligent failure to comply with the standards and of aggravating circumstances indicating that continued accreditation of EAC would not be in the best interests of the children and families concerned.

**c. Hague Convention**

On July 25, 2016 Kyrgyzstan deposited its instrument of accession to the *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption Convention* (“Hague Convention”) with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The Convention entered into force for Kyrgyzstan on November 1, 2016. The United States began processing intercountry adoptions from the Kyrgyz Republic initiated on or after November 1, 2016 under the Hague Adoption Convention.

**d. Litigation**

As discussed in *Digest 2010* at 30-31, the Department of State and the Department of Homeland Security, U.S. Citizenship and Immigration Services, suspended adoptions based on abandonment in Nepal. In 2016, the United States filed a motion to dismiss a

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\* Editor’s note: In April 2017, the Department withdrew its proposed rule amending the regulations, noting that “the comments provided in response to the [September 8, 2016 notice] will be considered in drafting a new rule, which is expected to be published later this year.” 82 Fed. Reg. 16,322 (Apr. 4, 2017).

federal complaint challenging the suspension. *Skalka et al. v. Johnson et al.*, No. 16-107 (D.D.C.). The suspension halted the adjudication of immediate relative visa petitions (“I-600 petitions”) filed on behalf of children from Nepal. Excerpts follow (with footnotes omitted) from the U.S. brief in support of the motion to dismiss, which is available in full, with the reply brief, at <https://www.state.gov/s/l/c8183.htm>

\* \* \* \*

The Court should dismiss this case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for the following reasons explained further below. First, most of the Plaintiffs lack standing and thus their claims should be dismissed. Second, Plaintiffs’ claim that the Suspension is itself unlawful fails as a matter of law because it is within Defendants’ statutory grant of authority and is neither prohibited by nor conflicts with any other provision of law. Third, Plaintiffs’ challenge to prudence and propriety of Defendants’ decision to impose the Suspension poses a nonjusticiable political question. Finally, Plaintiffs’ mandamus claim should be dismissed both because they cannot show that Defendants owe them a clear, nondiscretionary duty, and as a matter of the Court’s discretion.

I. Plaintiffs should be dismissed for lack of Article III standing.

\* \* \* \*

C. Frank Adoption Center lacks organizational standing because it has failed to establish an injury-in-fact that is fairly traceable to Defendants.

Like the individual Plaintiffs, the claims of organizational Plaintiff Frank Adoption Center should also be dismissed for lack of standing. As an organization, Frank Adoption Center “can assert standing on its own behalf, on behalf of its members or both.” *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Based on the allegations in the [complaint or] FAC, Frank Adoption Center only asserts standing on its own behalf. . . .

When asserting standing on its own behalf, an organization must meet the standing requirements applied to individuals. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). Thus, to establish standing, an organization “must demonstrate that it has suffered injury in fact, including such concrete and demonstrable injury to the organization’s activities—with a consequent drain on the organization’s resources—constituting more than simply a setback to the organization’s abstract social interests.” *Nat’l Ass’n of Home Builders v. E.P.A.*, 667 F.3d 6, 11 (D.C. Cir. 2011) (internal quotes and alterations omitted). Where the objectives of an organization are merely “frustrated,” the concerns are too abstract and standing is not imparted. *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

In the FAC, Frank Adoption Center asserts that it is “a non-profit organization dedicated exclusively to facilitating . . . American families through the Nepalese adoption process.” . . . The organization asserts that it “has been, and will continue to be, unable to fulfill this mission since the Blanket Suspension halted all adoptions by U.S. citizens of abandoned Nepalese children in August 2011” and will remain unable to do so “unless and until the Blanket Suspension is lifted.” . . .

Frank Adoption Center's allegations fail to establish that it has suffered an injury-in-fact for two reasons. First, Frank Adoption Center does not provide any specific allegations detailing how it has been harmed by the Suspension. . . . This is precisely "the type of abstract concern that does not impart standing." *Nat'l Taxpayers Union*, 68 F.3d at 1433 ("allegation that [statute] has 'frustrated' NTU's objectives" insufficient basis for standing). Indeed, Frank Adoption Center has failed to allege the "concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources" that is required for standing. *Nat'l Ass'n of Home Builders*, 667 F.3d at 11 (internal quotes and alterations omitted).

Second, any impact on Frank Adoption Center's resources is not "fairly traceable" to Defendants because it has been "self-inflicted." See *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (holding that an injury that is self-inflicted "is not really a harm at all" and is not fairly traceable to the government). Frank Adoption Center did not handle any Nepali intercountry adoption cases until 2013, when it "re-opened its doors as an entirely new agency, working in Nepal and employing a new staff, as well as a new Board of Directors." See Exhibit A (noting that prior to 2013 the organization "worked . . . to place children from Eastern Europe with families living in the US and abroad," until such adoptions "ceased in 2012"). As it acknowledges in the FAC and on its website homepage, the Suspension went into effect in 2010. *Id.*; FAC ¶ 3. Thus, at the time it began working on Nepali adoptions, Frank Adoption Center knew of the very limitation it now claims has rendered it "unable to fulfill [its] mission." FAC ¶ 61; see Exhibit A (claiming that "Frank Adoption Center is now the only US agency authorized to work in Nepal" because all other organizations stopped handling such adoptions following the Suspension in 2010). To the extent Frank Adoption Center is "unable to fulfill [its] mission," therefore, it is solely because it defined its "mission" as facilitating the very adoptions prohibited by the Suspension is seeks to challenge. This kind of "self-inflicted" injury does not establish standing for an organizational plaintiff. . . .

Similarly, to the extent Frank Adoption Center has suffered any harm, it is due to "the mere expense of testing" the legal sufficiency of the Suspension, and has resulted not from any actions taken by Defendants, but rather from the Frank Adoption Center's "efforts to increase legal pressure" on the government to lift the Suspension. See *Fair Employment Council*, 28 F.3d at 1276. Accordingly, Plaintiff Frank Adoption Center's cannot establish that it has suffered an injury-in-fact sufficient for Article III standing, and its claims should be dismissed for lack of subject matter jurisdiction.

11. **Plaintiffs' claim that the Suspension is unlawful fails to state a claim on which relief may be granted.**

To the extent Plaintiffs challenge that the Suspension "is not in accordance with the law," see FAC ¶ 68, such challenge must be dismissed for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). The INA provides ample authority for Defendants to suspend adjudication of adoption-based immediate relative visa petitions from a particular country where the procedures and documents from that country are not sufficiently reliable to enable them to determine whether prospective adoptees from that country are "orphans" within the meaning of the law. Moreover, Defendants' imposition of the Suspension was a legitimate exercise of Defendants' authority, and is not prohibited by or in conflict with any other provision of law.

A. Defendants acted within their statutory authority in implementing the Suspension.

First, as a matter of law the Suspension falls within the respective authorities of the Secretary of Homeland Security and the Secretary of State under the INA. The Secretary of

Homeland Security is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, except those laws explicitly delegated within the INA to another portion of the Executive Branch. 8 U.S.C. § 1103(a)(1). The Secretary of State is charged with the administration and enforcement of all “immigration and nationality laws relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States.” *Id.* § 1104(a)(1). Both Secretaries have the authority to “establish such regulations; . . . issue such instructions; and perform such other acts as [they] deem[] necessary for carrying out” their respective responsibilities. *Id.* §§ 1103(a)(3) and 1104(a).

Immigration to the United States on the basis of an intercountry adoption, including the adoption of abandoned children from Nepal, undoubtedly implicates the authorities of both the Secretary of Homeland Security and the Secretary of State. . . . And both USCIS and the Department of State determined that the Suspension was necessary after concluding that the U.S. Government could “no longer reasonably determine whether a child documented as abandoned qualifies as an orphan” and “due to a lack of confidence that children presented as orphans are actually eligible for intercountry adoption.” See ECF No. 11-6 at 2. Thus, imposing the Suspension was a legitimate exercise of the authorities granted to the Secretaries by statute.

B. The requirement of an I-604 “investigation” does not conflict with or prohibit the Suspension.

Despite the foregoing statutory grants of authority, Plaintiffs allege that the Suspension is in violation of law because 8 U.S.C. § 1154(b) and 8 C.F.R. § 204.3(k) mandate that an “investigation” be conducted in every case. See FAC ¶ 38. Plaintiffs argue that Defendants are not carrying out this duty with respect to I-600 petitions subject to the Suspension. . . .

As a threshold matter, Defendants are not contesting that § 1154(b) requires an “investigation” in every immigrant visa petition case. Notably, § 1154(b)’s requirement applies to all immediate relative cases under 8 U.S.C. § 1151(b)(2)(A)(i) and family-based cases under 8 U.S.C. § 1153(a). Importantly, however, § 1154(b) does not impose any specific timeframe within which the investigation must be completed—but rather indicates that no petition can be approved until after the investigation has been done and eligibility has been verified. See 8 U.S.C. § 1154(b) (“After an investigation of the facts in each case . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative . . . approve the petition”). Thus, the scope and depth of any given investigation can vary from case to case. . . .

Accordingly, Plaintiffs’ argument that § 1154(b) somehow prohibits the Suspension (and resulting administrative closure of their I-600 petitions) fails as a matter of law. . . .

Section 1154(b) also does not specifically require that the investigation in an orphan case must be the I-604 orphan determination provided for in 8 C.F.R. § 204.3(k)(3). The use of the I-604 orphan determination as the vehicle for the § 1154(b) process in orphan cases exists only by regulation. An important distinction exists, moreover, between whether an I-604 orphan determination must take place and when such determination must occur. This is particularly relevant in the case at hand, which involves a suspension of adjudication and not a requirement that all I-600 petitions be denied.

Like § 1154(b), the regulation does not impose any specific timeframe within which the I-604 orphan determination must be completed, but only that completion must occur “before a petition is adjudicated abroad.” 8 C.F.R. § 204.3(k). Thus, both the regulation and § 1154(b) clearly link the duty to conduct I-604 orphan determination to the adjudication of the petition,

not its filing. Indeed, interpreting the regulation and § 1154(b) to require an I-604 orphan determination the moment an I-600 petition is submitted, would lead to absurd results. . . .

Moreover, Plaintiffs' argument fails as a matter of law even if there were an obligation to conduct an I-604 orphan determination in cases subject to the Suspension. Indeed, the documents attached to Plaintiffs' FAC show that an I-604 orphan determination is occurring even in cases subject to the Suspension. See ECF No. 11-2 at 2 ("USCIS has reviewed your Form I-600, the Form I-604, Determination on the Child, and supporting documents . . .") (underlining added). This determination, albeit limited to determining whether the child identified in the petition was reported as abandoned and thus whether the Suspension applies, satisfies any "investigation" obligation that Defendants may have had under the applicable statute or regulation. See 8 U.S.C. § 1154(b); 8 C.F.R. § 204.3(k) (providing that the scope of the I-604 orphan determination "depend[s] on the circumstances" of the particular case).

Thus, the Suspension does not prevent Defendants from complying with any duty they may have to investigate the circumstances of an I-600 petition. The Suspension (as the name implies) merely "suspend[s] adjudication of new adoption petitions and related visa issuance for children who are described as having been abandoned in Nepal"—it does not require the denial of such petitions. See ECF No. 11-6 at 2; see also ECF No. 11-2 at 4 ("[I]f the suspension is lifted, USCIS will notify you and reopen your case for processing."). Similarly, the Suspension does not eliminate the requirement that an I-604 orphan determination be completed in every case. Indeed, the U.S. Embassy in Kathmandu is still completing a Form I-604 in every case involving adoption of children from Nepal. But in cases where the alleged orphan child was reported as having been found abandoned, Defendants have determined that the systemic problems in Nepal preclude processing an orphan petition to completion. See ECF No. 11-6 at 2 ("Without reliable documentation, it is not possible for the United States Government to process an orphan petition to completion."). Thus, only an I-604 orphan determination limited in scope and nature may be completed for cases subject to the Suspension. If and when the Suspension is lifted Defendants will conduct another full I-604 orphan determination in each affected case, resulting in a complete adjudication of the I-600 petition.

Because the Suspension is an exercise of Defendants' duly authorized authority and is not prohibited by any law, Plaintiffs' claim that the Suspension is not in accordance with law should be dismissed.

**III. Plaintiffs' challenge to the prudence and propriety of the Suspension should be dismissed because it presents a political question beyond the Court's jurisdiction.**

As an alternative argument, Plaintiffs contend that even if imposing the Suspension was within the Defendants' legal authority, Defendants "abused [their] discretion" in determining that the circumstances in Nepal and the unreliability of documents related to Nepali children reported as having been found abandoned warranted the Suspension. See, e.g., FAC ¶¶ 37-39. The decision to impose the Suspension, however, and the considerations relevant to whether and when the Suspension should be lifted, touch on sensitive matters of foreign relations that are committed to the prudence and discretion of the political branches, and are thus beyond the jurisdiction of this Court.

\* \* \* \*

**B. Plaintiffs' challenge to the propriety of the Suspension is not subject to judicial inquiry or decision.**

Plaintiffs' challenge to the joint decision by USCIS and the Department of State to impose the Suspension presents a political question outside the jurisdiction of this Court. To be

clear, regardless of how Plaintiffs have styled their claims, they ultimately challenge the propriety of Defendants' decision that the Suspension was the most appropriate response to the troubling circumstances and problems posed in Nepal. See FAC ¶ 37 (arguing that "[t]he Blanket Suspension . . . is an abuse of agency discretion"). This is precisely the type of sensitive question of foreign relations that is committed exclusively to the prudence and discretion of the political branches. . . .

As the Supreme Court noted nearly a century ago, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); see also *El-Shifa*, 607 F.3d at 843 ("[T]he strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches."). The judiciary has a similarly limited role in the areas of immigration and naturalization policy. *Mathews v. Diaz*, 426 U.S. 67 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) ("Deciding and implementing immigration policy has been textually committed to the political branches, and there exists no judicially manageable standards to decide how best to implement immigration laws."). Indeed, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.*

Here, the policy Plaintiffs challenge—the Suspension—relates intimately to foreign affairs and its intersection with immigration and naturalization. As discussed above, Defendants determined that the procedures and documents presented to describe and prove abandonment were not sufficiently reliable to permit the conclusion that supposed "orphans" were in fact abandoned. . . . Having made this determination, the Executive Branch then weighed the range of permissible means available to it to address these important concerns, and settled on a modest and appropriate response: suspension of processing immigrant visa petitions related to intercountry adoption of children reported to be abandoned in Nepal. Foreign relations, including consultation and coordination with other foreign governments and consideration of the actions taken by other foreign governments and of the potential impact of various options on diplomatic relations with Nepal, played a significant part in Defendants' decision to implement the Suspension over other alternatives. Indeed, requiring Defendants to continue processing and adjudicating these cases, without sufficient confidence in the integrity of the underlying procedures and documentation, has the potential to engender unnecessary tensions with the government of Nepal and to impede coordination with other foreign governments that are collectively working to improve the systemic issues affecting Nepal's adoption procedures, so that intercountry adoptions can reliably be resumed.

The prudence of Defendants' joint decision to impose the Suspension, which is a legitimate exercise of the authorities granted to the Secretaries by statute, . . . implicates foreign policy and immigration and naturalization concerns, and is thus not subject to judicial review.

See *Oetjen*, 246 U.S. at 302 (“[T]he propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”); *El-Shifa*, 607 F.3d at 843 (“[T]he strategic choices directing the nation’s foreign affairs are constitutionally committed to the political branches.”).

Finally, prudential considerations counsel against judicial intervention in this case. This Court’s inquiry into the propriety of the Suspension would require review, analysis, and, potentially, criticism of Nepal’s internal laws, policies, and practices, a function “for which the Judiciary has neither aptitude, facilities[,] nor responsibility.” *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). That is particularly the case where, as here, Plaintiffs seek judicial review exclusively on basis of the APA. The remedies available pursuant to the APA are discretionary and equitable. As such, they provide weak authority for judicial interjection into sensitive matters of foreign affairs, and the Court should exercise the discretion provided to it under the APA to decline Plaintiffs’ invitation to opine on sensitive foreign policy decisions. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (“[W]here the authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it would be an abuse of our discretion to provide discretionary relief.”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 42-43 (D.D.C. 2010) (same).

The U.S. Government, through its Embassy in Kathmandu and other officers in executive agencies, continues to evaluate whether the Suspension remains appropriate. See ECF No. 11-3 at 4 (discussing 2014 joint delegation to Nepal). USCIS and the Department of State have both the unique expertise and the constitutional responsibility to make that determination based on their assessment of the situation in Nepal, their consultations with other governments, and the political and foreign policy considerations implicated both by the Suspension and by any possible resolution. Accordingly, “[w]hether or not [the Suspension] is a matter so entirely committed to the care of the political branches as to preclude [the Court’s] considering the issue at all, . . . it at least requires the withholding of discretionary relief.” *Sanchez-Espinoza*, 770 F.2d at 208; *Al-Aulaqi*, 727 F. Supp. 2d at 42-43.

In light of the sensitive, political nature of the questions presented by Plaintiffs’ claim, and given the great deference given to the political branches in regards to both foreign policy and immigration issues, the Court should dismiss the claim as non-justiciable.

\* \* \* \*

## **2. Abduction**

### **a. Annual Reports**

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act (“ICAPRA”), signed into law on August 8, 2014, increased the State Department’s annual Congressional reporting requirements pertaining to countries’ compliance with the 1980 Hague Convention on the Civil Aspects of International Child {“Convention”}. In accordance with ICAPRA, the Department submits an Annual Report on International Parental Child Abduction to Congress by April 30 of each year and a report to Congress on the actions taken toward those countries determined to have a pattern of noncompliance in the Annual Report by July 30 of each year. See

International Parental Child Abduction page of the State Department Bureau of Consular Affairs, <https://travel.state.gov/content/childabduction/en/legal/compliance.html>.

The 2016 Report on International Parental Child Abduction (IPCA) is available at

[https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20\(July%2011\).pdf](https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf).

The 2016 report on actions taken is available at

<https://travel.state.gov/content/dam/childabduction/complianceReports/Child%20Abduction%20Action%20Report%202016.pdf>.

The 2016 action report summarizes actions the Department of State took in countries cited in the annual report for demonstrating a pattern of noncompliance: Argentina, the Bahamas, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Guatemala, Honduras, India, Jordan, Lebanon, Nicaragua, Oman, Pakistan, Peru, Romania, and Tunisia. ICAPRA defines a pattern of noncompliance as the persistent failure: (1) of a Convention country to implement and abide by provisions of the Hague Abduction Convention; (2) of a non-Convention country to abide by bilateral procedures that have been established between the United States and such country; or (3) of a non-Convention country to work with the Central Authority of the United States to resolve abduction cases.

**b. *Hague Abduction Convention Partners***

On April 1, 2016, the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention) entered into force between the United States and Thailand. Thailand became the 74<sup>th</sup> partner of the United States under the Convention. As described in an April 1, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255408.htm)

[2017.state.gov/r/pa/prs/ps/2016/04/255408.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255408.htm).

The Convention is a valuable civil law mechanism for parents seeking the return of children who have been wrongfully removed from or retained outside their country of habitual residence by another parent or family member. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is critically important because it establishes a legal framework between partner countries to resolve parental abduction cases.

**c. *Congressional Testimony***

On July 14, 2016, Karen L. Christensen, Deputy Assistant Secretary of State for Overseas Citizens Services in the Bureau of Consular Affairs, testified before the U.S. House of Representatives, Committee on Foreign Affairs, Subcommittee on Africa, Global Health, Global Human Rights and International Organizations. Deputy Secretary Christensen discussed abductions in her testimony, which follows.

\* \* \* \*

We appreciate your continued interest in the work we do to prevent and resolve international parental child abductions and your efforts to advocate on behalf of the parents affected by the heartbreak of abductions. We share with you the goals of preventing international parental child abductions, of the expeditious return of children to their countries of habitual residence, and of the strengthening and expansion of our partnerships under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention). We use the tools you gave us in the Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (the Act) to continue to leverage our diplomatic engagement with countries and we are getting results.

Every day, my colleagues in the Bureau of Consular Affairs advance the foreign policy goals of the Department by assisting thousands of U.S. citizens affected by political crises, natural disasters, abuse, mental illness, and crime in all parts of the world. One of our priorities is international parental child abduction. In 2015, more than 600 children were reportedly abducted by a parent from the United States to another country. The State Department's Bureau of Consular Affairs leads the U.S. government's work in attempting to prevent and aid in the resolution of international abductions.

In these heartbreaking cases and in others, we work consistently and tirelessly attempting to perform welfare and whereabouts checks when we have concerns for the well-being of U.S. citizens, issuing passports to U.S. citizens, including to children returning to the United States, and issuing visas, including to parents traveling to the United States to attend custody hearings in their child's habitual residence, where appropriate.

As we undertake long-term efforts to elicit cooperation from foreign governments on abduction cases, we actively encourage countries to become party to the Convention, which, in addition to being one of the best options for parents seeking the return of their children, is also the best means of ensuring other countries adhere to the same standards we do when addressing abduction and access cases.

We work with parents, with counterparts in foreign governments, and with other U.S. government agencies to help resolve individual international parental child abduction cases. Each country, like our own, has its own judicial system, law enforcement entities, and cultural and family traditions. We tailor our strategy to deploy the most effective approach toward resolving each abduction case, including securing a child's return to the place of habitual residence or parental access to children.

Much of the day-to-day diplomatic engagement on abduction matters is handled by the Country Officers in the Office of Children's Issues. Our team of experts, based in Washington, is continuously in direct touch with counterparts in foreign government central authorities. On a regular basis, they also work with foreign governments through foreign embassies in Washington and our U.S. diplomatic missions overseas.

Senior U.S. officials often engage with their foreign counterparts to press for a prompt resolution to abduction cases. In the 2016 Annual Report on International Parental Child Abduction, Secretary Kerry emphasizes the U.S. commitment to combating international parental child abduction.

In 2015, Assistant Secretary for Consular Affairs Ambassador Michele Thoren Bond pressed foreign governments on abduction issues in Washington and overseas. She made public statements, delivered protests to foreign ambassadors, and held meetings in foreign capitals and in Washington to voice U.S. concerns over international parental child abduction.

Ambassador Susan Jacobs, the Secretary's Special Advisor for Children's Issues, visited more than 15 countries and attended multilateral conferences to discuss abduction issues. She promoted accession to or ratification of the Convention, and other arrangements to promote the return of and access to abducted children, such as Memoranda of Understanding, including one between the United States and Egypt. Ambassador Jacobs also encouraged countries for which the Convention is already in force with respect to the United States, also known as "partner" countries, to improve their treaty implementation.

And our embassies and consulates around the world play an important role in the Department's campaign to address international parental child abduction. U.S. ambassadors raise concerns to host governments, and U.S. consular and political officers regularly work on abduction matters, through liaising with local officials and by providing consular services, such as checking on the welfare of children who were abducted overseas.

#### The Annual Report on International Parental Child Abduction 2016

We have prepared Congressional reports on our international parental child abduction work since at least 2007. Our 2015 report was the first report issued under the new requirements of the Act. That report was a solid response to the call for data and information about the Department's work on international parental child abduction. In preparing this year's report, we integrated feedback from Congress, parents, judges, and such partners as the National Center for Missing and Exploited Children, and incorporated more country specific narrative and fewer tables of data. Building on last year's work since the Act became law, we believe that the 2016 Report is significantly more responsive and a helpful tool for all stakeholders.

The 2016 Annual Report reflects the number of cases reported to our office and how the Office of Children's Issues and our counterparts in foreign countries work together to resolve them. This information is challenging to compile and to present but can serve as a valuable resource for those affected by international parental child abduction.

However, each abduction case is unique. To reflect the complexities, this year we have included narratives in our report that offer context to the statistics on international parental child abduction throughout the world. We also included supplemental data in order to give additional context to the statistics that the Act requires.

For example, the report provides statistical information about each country for which there were five or more pending abduction cases reported during 2015. The report also provides information about our bilateral relationship with that country on abduction matters, recommendations for improved work to resolve abductions, and comments on the country's compliance with the Convention if applicable.

In the data pages we have added statistics beyond those required by the Act when we believed including them may be useful for the reader. For example, we provided the number of abductions and access requests reported to the Department, reflecting the overall caseload for that country, regardless of whether a particular case meets the definition of abduction under the Convention or under the Act.

Throughout the report, we have discussed topics that relate to our work on international parental child abduction cases. For example, we explained the International Visitor Leadership Program, which gives decision-makers and practitioners in other countries a first-hand view of how we work to resolve international parental child abduction cases, and we included information on our training and outreach to U.S. judges and U.S. Armed Forces legal assistance personnel, military chaplains, and military family support.

In 2015, we continued our diplomatic engagement with countries that have become party to the Convention but for whom the Convention is not yet in force with respect to the United States. As a result of those efforts, in early 2016, we welcomed Thailand as our 74th partner under the Convention, and we began reviewing the Philippines for potential partnership after the country acceded to the Convention.

In the report, we noted that, in 2015, 299 abducted children whose habitual residence was the United States were returned to the United States. The majority, 213 children, returned from Convention countries, while 86 were returned from countries adhering to no protocols with respect to international parental child abduction, as defined in the Act.

Last year, we worked on 136 abduction cases that were resolved without the abducted children being returned to the United States. These included cases that were sent to the Foreign Central Authority and were later closed for the following reasons: the judicial or administrative authority complied with the Convention; the parents reached a voluntary arrangement; the left-behind parent withdrew the application for return; the left-behind parent could not be located for greater than one year; or the left-behind parent or child passed away.

Of the 136 cases, 134 involved Convention countries, and two involved non-Convention countries.

#### Cited Countries

Despite this good news, there are families that continue to suffer as their children remain across an international border. In the 2016 report, we cited 13 Convention partner countries that either demonstrated a pattern of noncompliance, or failed to comply with one or more of their obligations under the Convention in 2015, as defined by the Act: Argentina, Austria, The Bahamas, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Japan, Peru, and Romania; and eight non-Convention countries that demonstrated a pattern of noncompliance in 2015 as defined by the Act: Egypt, India, Jordan, Lebanon, Nicaragua, Oman, Pakistan, and Tunisia.

Of particular interest to this subcommittee will be the citations for Brazil, India, and Japan based on activity in 2015. Brazil demonstrated a pattern of noncompliance because 30 percent or more of the total abduction cases were unresolved abduction cases as defined by the Act. In addition, the Brazilian judicial authority failed to regularly implement and comply with the provisions of the Convention. India demonstrated a pattern of noncompliance by persistently failing to work with the United States to resolve abduction cases. Japan failed to comply with its obligations under the Convention in the area of enforcement of return orders. In the case of Japan, we are pleased to report that in 2016 there have been two successfully enforced returns under the Convention. In the first case, four U.S. citizen children were returned to their mother. In a second case, a U.S. citizen child was returned to his father. We are optimistic that the successful resolution of these cases signals a turning point in Japan's ability to comply with its obligations under the Convention.

We have provided a narrative analysis of the state of Convention compliance in each country we cite, in addition to the information provided in the country data pages for countries with five or more cases. It is our hope that the fuller picture of international parental child abduction in individual countries in the 2016 Annual Report will serve as a guide for traveling parents, judges, and family law attorneys. But more than that, we believe, as you do, that citing a country in the report can be a powerful tool for resolving cases in the future.

### Our Engagement with Partners

Strategically, a key focus for us is to prevent abductions. From a child's first U.S. passport application, we work to protect children from international parental child abduction. U.S. law and regulation generally requires the consent of both parents for passport issuance to children under the age of 16. This minimizes the possibility that a passport could be issued to a child without the consent of both parents. In addition, enrolling a child in the Department's Children's Passport Issuance Alert Program (CPIAP) provides notification to the enrolling parent to ensure they are aware of the passport application. When a child is enrolled in CPIAP, the Prevention Branch of the Office of Children's Issues reviews the passport application and all supporting documents prior to any passport issuance. Prevention officers reach out to the requesting parent to notify them of the application and confirm their consent to the passport application. The Department will only issue a passport to a minor if we have the consent of both parents or the documents submitted with the passport application demonstrate the legal authority to issue without such consent.

In 2015 we enrolled 4,064 children in CPIAP and helped enroll 127 children in the Department of Homeland Security's program aimed at preventing international parental child abduction. We work with U.S. and foreign law enforcement agencies, airlines, and others to prevent children from being unlawfully removed from the United States. Our prevention officers are available 24/7 and through our broad public affairs campaign we encourage parents to reach out to us for information that can help avoid abductions before they happen. We fielded 1,560 inquiries in 2015 from parents, attorneys, support organizations, and foreign governments seeking prevention information.

The Department of State works closely with U.S. Customs and Border Protection (CBP) to help ensure that parents who have court orders that prohibit the international travel of a child can request assistance from CBP and U.S. law enforcement to prevent outbound abduction attempts. Key to the program's success, and a byproduct of the Act's mandated interagency working group, has been streamlined communications and information sharing among agencies on child abduction prevention initiatives. These new measures were instrumental in preventing more than 140 potential abductions since the law took effect.

In April and October of 2015, we hosted Prevention of International Parental Child Abduction Interagency Working Group meetings to discuss strategies to enhance international parental child abduction prevention measures. Special Advisor for Children's Issues Susan Jacobs chaired both meetings; officials from the U.S. Central Authority, the Department of Homeland Security, the Department of Justice, the Federal Bureau of Investigation, and the Department of Defense participated. Participants discussed ways to enhance current interagency abduction prevention strategies. At the October meeting, the U.S. Central Authority provided English- and Spanish-language Preventing International Parental Child Abduction brochures to all participants to distribute within their agencies. The working group will continue to meet regularly to streamline and improve interagency cooperation when working to prevent international parental child abduction cases originating from the United States.

### Conclusion

Mr. Chairman, Ranking Member Bass, distinguished Members of the subcommittee, the Act has reinforced significantly our work to address the complex problem of international parental child abduction.

In our efforts to return abducted children to their places of habitual residence we are using all effective means available to us under the law. This is our mission. The Department of

State weaves our concerns about international parental child abduction into our diplomatic discourse with nations around the globe. We want to set the Convention's framework as a standard around the world for addressing and resolving abduction cases. Where that may not be an option, we can work toward bilateral and other arrangements to resolve abductions that take children from their homes and families in the United States. We can advance this through persistent diplomatic engagement, an approach that has produced results with many countries around the world. The Act specifies actions that include tactics and strategies that already figure into how the Department wields diplomacy, persuasion, and negotiation to advance U.S. interests throughout the world.

We take actions based on the Annual Report and on the Act, and take action any time we consider it to be timely and effective. We frequently deliver demarches and discuss cases with senior government officials in countries that are not complying. These are very frank conversations, and we are adamant that each country is aware of the importance of this issue. The Act directs us to raise with the governments of the countries we cite in our report the reasons why we think they are not living up to their obligations with regard to international parental child abduction. We will report on those approaches and our continuing engagement with foreign countries in the follow up Action Report.

We constantly strive to increase our effectiveness and our compliance and always look for ways to collaborate with our partners, including you, members of Congress who've committed so much time and energy to addressing this very important and urgent issue.

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**Cross References**

*Evacuations from Yemen*, **Chapter 5.C.1.**

*Children*, **Chapter 6.C.**

*IACHR petition regarding consular notification*, **Chapter 7.D.1.g.**

*Enhanced consular immunities*, **Chapter 10.E.3.**

*Family law*, **Chapter 15.**

## CHAPTER 3

### International Criminal Law

#### A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

##### 1. Extradition Treaties

###### a. *Dominican Republic*

On February 10, 2016, President Obama transmitted the Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic to the U.S. Senate for its advice and consent to ratification. The treaty was signed on January 12, 2015. See *Digest 2015* at 55. The President's transmittal letter explains:

The Treaty would replace the extradition treaty between the United States and the Dominican Republic, signed at Santo Domingo on June 19, 1909. The Treaty follows generally the form and content of other extradition treaties recently concluded by the United States. It would replace an outmoded list of extraditable offenses with a modern "dual criminality" approach, which would enable extradition for such offenses as money laundering and other newer offenses not appearing on the list. The Treaty also contains a modernized "political offense" clause and provides that extradition shall not be refused based on the nationality of the person sought. Finally, the Treaty incorporates a series of procedural improvements to streamline and speed the extradition process.

On July 14, 2016, the Senate gave its advice and consent to ratification with one declaration (that the Treaty is self-executing). 162 Cong. Rec. S5182 (July 14, 2016). The instruments of ratification were exchanged on December 15, 2016, and the Treaty entered into force on that date.

**b. Kosovo**

On March 29, 2016, U. S. Ambassador to the Republic of Kosovo Greg Delawie and President of the Republic of Kosovo Atifete Jahjaga signed a new extradition treaty between the two countries. See press release, available at

<https://xk.usembassy.gov/ambassador-delawies-remarks-signing-extradition-treaty-march-29-2016/>.

The new treaty replaces one dating back to 1901 between the United States and the Kingdom of Serbia, which applied to Kosovo as a successor state to the former Socialist Federal Republic of Yugoslavia. It expands the scope of extraditable offenses and establishes more up-to-date extradition procedures. The language of the new treaty was principally negotiated in November of 2014 between delegations of technical experts from both governments. The United States delegation was comprised of attorneys from the U.S. Department of State and the U.S. Department of Justice. The Kosovar delegation included experts from the Ministry of Justice and the Ministry of Foreign Affairs.\*

**c. Chile**

On July 14, 2016, the Senate approved the resolution providing advice and consent to ratification of the Extradition Treaty Between the United States of America and the Republic of Chile, signed at Washington on June 5, 2013, with the declaration that the Treaty is self-executing. 162 Cong. Rec. S5182 (July 14, 2016). The instruments of ratification were exchanged on December 14, 2016, and the Treaty entered into force on that date.

**d. Serbia**

On August 15, 2016, U. S. Ambassador to the Republic of Kosovo Kyle Scott and Minister of Justice of the Republic of Serbia Nela Kuburović signed a new extradition treaty between the two countries. The new treaty replaces one dating back to 1901 between the United States and the Kingdom of Serbia, which applied to Serbia as a successor state to the former Socialist Federal Republic of Yugoslavia. It expands the scope of extraditable offenses and establishes more up-to-date extradition procedures. The language of the new treaty was negotiated by technical experts from both governments, with negotiations continuing through September 2015. The United States negotiators were attorneys from the U.S. Department of State and the U.S. Department of Justice. The Serbian negotiators included experts from the Ministry of Justice and the Ministry of Foreign Affairs.\*\*

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\* Editor's note: Both the extradition treaty with Kosovo and the extradition treaty with Serbia were transmitted to the Senate in January 2017 for advice and consent.

\*\* Editor's note: Both the extradition treaty with Kosovo and the extradition treaty with Serbia were transmitted to the Senate in January 2017 for advice and consent.

## 2. Mutual Legal Assistance Treaties

### a. *Kazakhstan*

On September 15, 2016, the Senate approved the resolution providing advice and consent to ratification of the Treaty Between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 20, 2015 (S. Treaty Doc. 114–11), subject to the declaration that the Treaty is self-executing. 162 Cong. Rec. S5865 (Sep. 15, 2016). The instruments of ratification were exchanged on December 6, 2016, and the Treaty entered into force on that date.

### b. *Algeria*

Also on September 15, 2016, the Senate approved the resolution providing advice and consent to ratification of the Treaty Between the Government of the United States of America and the Government of the People’s Republic of Algeria on Mutual Legal Assistance in Criminal Matters, signed at Washington on April 7, 2010 (S. Treaty Doc. 114–3), subject to the declaration that the Treaty is self-executing. 162 Cong. Rec. S5865 (Sep. 15, 2016).<sup>\*\*\*</sup>

### c. *Jordan*

On September 15, 2016, the Senate also approved the resolution of advice and consent to ratification of the Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 1, 2013 (S. Treaty Doc. 114–4), subject to the declaration that the Treaty is self-executing. 162 Cong. Rec. S5865 (Sep. 15, 2016).

## 3. Extradition Cases

### a. *Munoz Santos*

As discussed in *Digest 2015* at 62-67, Mexico sought the extradition of Jose Luis Munoz Santos on kidnapping for ransom charges relating to the kidnapping of a woman and her two daughters in Mexico, which resulted in the death of one of the daughters. In concluding that there was probable cause to believe that Munoz Santos had committed the criminal offenses for which Mexico sought his extradition, the magistrate judge relied in part on witness statements from the fugitive’s alleged co-conspirators, the

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<sup>\*\*\*</sup> Editor’s note: The instruments of ratification were exchanged on April 20, 2017, and the Treaty entered into force on that date.

adult kidnapping victim and her husband, and another person who was allegedly invited to join the kidnapping conspiracy but declined. In attempting to challenge the evidence in support of probable cause, Munoz Santos sought to introduce evidence that the testimony against him from his alleged co-conspirators (Rosas and Hurtado) had been obtained through torture and had subsequently been recanted. The extradition judge excluded the torture allegations and recantations and issued a certification of extraditability. Munoz Santos filed a *habeas* petition challenging the certification in part on the ground that the torture allegation and recantations should not have been excluded. The district court denied the *habeas* petition; the U.S. Court of Appeals for the Ninth Circuit affirmed that denial; and Munoz Santos filed a petition for a rehearing *en banc*. On rehearing, the Court of Appeals determined that the torture allegations should have been considered by the district court in establishing whether there was probable cause. *Munoz Santos v. Thomas*, 830 F.3d 987 (9<sup>th</sup> Cir. 2016). Excerpts follow from the opinion of the *en banc* court.

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Our task is to determine whether there is any competent evidence supporting the extradition court’s finding of probable cause. The extradition court found probable cause based largely on inculpatory statements made by Rosas and Hurtado, Munoz’s alleged co-conspirators. We took this case *en banc* to clarify whether evidence that these statements were obtained by torture or other coercion constitute “contradictory” evidence inadmissible in an extradition proceeding, or admissible “explanatory” evidence.

There can be little question that, standing by themselves, Rosas’s March 27, 2006 statement and Hurtado’s March 14, 2006 statement, whether considered separately, together, or together with statements from Hermosillo (the victim), Castellanos (her husband), and Andrade (who may have heard early plans for the kidnapping) constitute probable cause to believe that Munoz participated in the kidnapping of Hermosillo and her daughters. The statements were detailed and authenticated. Hurtado gave his statement in the presence of his public defender and under oath to a deputy district attorney in Mexico. Rosas submitted his statement in writing to the judge presiding over his case and asked that it be included in the court’s record.

The extradition court, however, refused to consider subsequent statements by Rosas and Hurtado in which they recanted their initial statements, claiming that the Mexican police had coerced them into making those statements. The extradition court, and the district court on *habeas*, concluded that the allegations of torture were inadmissible because, as the district court described it, the claims were “inextricably intertwined” with the recantation statements. App. at 19–20; *Extradition of Munoz Santos*, 795 F.Supp.2d at 988–90. In other words, both courts reasoned that it was impossible to determine the credibility of the allegations of torture without determining the credibility of Rosas’s and Hurtado’s recantation statements. Because the credibility of the recantation statements could not be determined without a trial, those statements were inadmissible as “contradictory” evidence. App. at 19–20; *Id.* at 990.

As we review Rosas’s and Hurtado’s various subsequent statements, which are quite detailed, their claims are of two types (and here we are simplifying): (1) I wasn’t involved, and (2) the reason I previously said I was involved is that I was tortured or otherwise coerced. The first type of statement is a recantation of the kind that courts have properly refused to consider.

For example, in *Barapind* we considered whether there was evidence to support Barapind's extradition to India for crimes in connection with his activities as a leader in the All India Sikh Student Federation. In support of the charges, India produced an affidavit from a police inspector, who claimed that Nirmal Singh, an eyewitness, had identified Barapind as one of the principals in a shootout with government officials. *Barapind*, 400 F.3d at 752. Barapind produced a second affidavit from Nirmal in which he denied having identified Barapind at all. "The extradition court determined that Barapind's evidence was insufficient to destroy probable cause, concluding that a trial would be required to determine who was telling the truth." *Id.* We concluded that the court made the proper decision. *Id.*

Similarly, in *Bovio v. United States*, the petitioner argued that probable cause was lacking, in part, because the major witness on which the government relied had admitted to lying during the investigation. 989 F.2d 255, 259 (7th Cir.1993). The Seventh Circuit rejected this argument, noting that "Bovio [had] no right to attack the credibility of witnesses," because "issues of credibility are to be determined at trial." *Id.* Consistent with both *Barapind* and *Bovio*, in *Shapiro v. Ferrandina*, the Second Circuit upheld the extradition court's refusal to admit evidence "that one declarant of an inculpatory statement had once blackmailed Shapiro's father and that certain fraudulent statements alleged to have been made by Shapiro had not in fact been made." 478 F.2d at 905. The court noted that "such statements would in no way 'explain' ... the government's evidence, but would only pose a conflict of credibility." *Id.*

Rosas's and Hurtado's recantations of their prior confessions are, indeed, contradictory. But their claims that their prior statements implicating themselves and Munoz were obtained under duress are not contradictory, but explanatory. Recanting statements contest the *credibility* of the original statements, presenting a different version of the facts or offering reasons why the government's evidence should not be believed. Reliable evidence that the government's evidence was obtained by torture or coercion, however, goes to the *competence* of the government's evidence.

The Supreme Court has long held that the Due Process Clause of the Fifth and Fourteenth Amendments bars the admission of coerced confessions. ...

We and other courts have sometimes explained the inadmissibility of coerced confessions in terms of their unreliability. ... But the Supreme Court has made clear that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence *whether true or false.*" *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941) (emphasis added). ...

The Court's clarity on this point gives us a different perspective on Munoz's claim that the principal evidence against him was obtained through coercion that may have amounted to torture. His claims of coerced testimony are independent of the truthfulness of the testimony. It is irrelevant whether Rosas's and Hurtado's statements about their involvement in the kidnapping are true; we do not care if they have indicia of reliability or whether they are corroborated by other evidence. If they were obtained by coercion in violation of the principles in the Due Process Clause of the Fifth Amendment, the statements are not competent and cannot support probable cause. In the language of the extradition cases, such statements are not "contradictory" because the truthfulness of the statements is not the issue. The fact of coercion is "explanatory" because, as the district court stated, it "addresses the circumstances under which the government's witnesses made inculpatory statements." App. at 12.

An allegation of coercion is essentially a second-order question—a question about questions; the allegation undermines the process by which the evidence was obtained, not the credibility of the evidence itself. There are a number of examples in which we and other courts have distinguished between the evidence and the process. This is true even where the allegations of torture or coercion appear alongside claims that a previously made incriminating statement is not true—*i.e.*, where the allegations of coercion include recantation statements. In these cases, once the evidence of coercion is admitted, courts weigh whether the allegations of coercion are credible, and if so, whether probable cause still exists once the tainted evidence is excluded from the analysis. ...

In sum, we have treated allegations of torture or coercion differently from a recantation statement, even where the allegations of coercion are made in conjunction with a claim that a previous incriminating statement was false. Contrary to what the district court and the extradition court concluded here, it is possible to separate the two inquiries. Indeed, to hold otherwise would create an odd rule in which allegations of coercion would only be admissible when the witness admits that the incriminating statements were true. This makes little sense, because the question of whether a recantation statement is *credible* or not is irrelevant to the question of whether the incriminating statement—recanted or not—was obtained under coercion, *i.e.*, is *competent* evidence. We conclude that evidence that a statement was obtained under torture or other coercion constitutes “explanatory” evidence generally admissible in an extradition proceeding. An extradition court may properly consider evidence of torture or coercion in considering the competency of the government's evidence, even when the claim of coercion is intertwined with a recantation.

Our decision in *Barapind* supports our conclusion. We observed in that case that the extradition court had conducted “a careful, incident-by-incident analysis as to whether there was impropriety on the part of the Indian government” in obtaining the statements on which probable cause rested. *Barapind*, 400 F.3d at 748. On two of the eleven charges brought against the petitioner, the extradition court found that allegations of torture undermined probable cause. With respect to one of the charges, the single witness alleged that his previous incriminating statement was involuntarily obtained and that he had never identified Barapind or the other alleged assailants in the case. *Extradition of Singh*, 170 F.Supp.2d at 1021–22. India declined to challenge the witness's explanation. The extradition court weighed the credibility of this statement and concluded that, under the totality of the circumstances, the later affidavit “destroy[ed] the competence of the evidence and obliterate[d] probable cause” for the charge. *Id.* at 1023. On the second charge, India had submitted the confession of a co-conspirator, who was later killed. Barapind submitted affidavits from three witnesses who stated that the confession had been obtained by torture while the co-conspirator was in police custody. India apparently did not dispute this evidence, and the court again concluded that the three witness statements alleging torture were reliable and the confession should be excluded. *Id.* at 1028–29.

The portion of our decision in *Barapind* that appears to have presented a stumbling block for both the extradition court and the district court here involved a different charge based on the inculpatory affidavit of Makhan Ram. Barapind offered a second affidavit from Ram in which Ram claimed that police had forced him to sign blank pieces of paper, on which statements incriminating Barapind were later written. Ram said his statement implicating Barapind was a “falsification.” *Id.* at 1024; *see also Barapind*, 400 F.3d at 749–50. The extradition court analyzed this statement and factors going to its reliability, and ultimately concluded that, under the circumstances, the court could not determine Ram’s credibility. Accordingly, the extradition

court concluded that Ram’s statement did not undermine probable cause. *Extradition of Singh*, 170 F.Supp.2d at 1024–25. We affirmed, finding that Ram’s statement constituted “conflicting evidence,” because its credibility could not be determined without a trial, and that it would have been improper for the extradition court to engage in the kind of review that would have been necessary to determine the statement’s credibility. *Barapind*, 400 F.3d at 749–50.

The extradition court and the district court here relied on this section of *Barapind* in concluding that Rosas’s and Hurtado’s statements alleging coercion were *inadmissible* evidence. But what the extradition court did here is different from what the extradition court did in *Barapind*. In *Barapind*, the extradition court first *considered* the allegations of coercion, before concluding that it could not determine their reliability without exceeding the scope of its review. Here, however, the extradition court refused to consider Rosas’s and Hurtado’s statements *in the first instance*. This was error. A petitioner in an extradition proceeding has the right to introduce evidence that “explains away” or “obliterates” probable cause, and credible evidence that a statement was obtained under coercion does just that by undermining the competence of the government’s evidence.

\* \* \* \*

We wish to be clear, however, that the scope of our holding here is limited, and that our decision should not be taken as a license to engage in mini-trials on the question of coercion or torture. The extradition court does not have to determine which party’s evidence represents the truth where the facts are contested. Where an extradition court first considers evidence that a statement was improperly obtained, but concludes that it is impossible to determine the credibility of the allegations without exceeding the scope of an extradition court’s limited review, the court has fulfilled its obligation— as the extradition court did in *Barapind*. If the court cannot determine the credibility of the allegations (or other evidence) once it has examined them, the inquiry ends. Probable cause is not undermined, and the court must certify the extradition. *See* 18 U.S.C. § 3184.

The extradition court, of course, may consider other evidence, separate from potentially tainted evidence, that will satisfy the probable cause requirement. *See, e.g., Barapind*, 400 F.3d at 749–50; *Mainero*, 164 F.3d at 1206; *cf. Hoxha*, 465 F.3d at 561–62 (holding that exclusion of evidence of coercion was proper where other competent evidence supported probable cause). Furthermore, we note that the fact that evidence of torture can properly be considered by the extradition court as “explanatory” evidence does not mean that *all* evidence of torture must be admitted. The extradition court still has broad discretion to determine the admissibility of the evidence before it. *See Mainero*, 164 F.3d at 1206; *Hooker*, 573 F.2d at 1369; *see also In re Extradition of Sindona*, 450 F.Supp. 672, 685 (S.D.N.Y.1978) (“The extent of such explanatory evidence to be received is largely in the discretion of the judge ruling on the extradition request.”).

Our holding today is narrow: Evidence that a statement was obtained by coercion may be treated as “explanatory” evidence that is admissible in an extradition hearing.

#### B. Probable Cause

Although we have concluded that the extradition court improperly excluded Rosas’s and Hurtado’s subsequent statements alleging that their initial inculpatory statements had been obtained by coercion, our inquiry is not at an end. Our inquiry on habeas review is whether *any* competent evidence supports the extradition court’s probable cause finding. *Vo*, 447 F.3d at

1240; *see Fernandez*, 268 U.S. at 312, 45 S.Ct. 541. Evidentiary error alone is not a sufficient basis on which to grant a writ of habeas in the extradition context. *See Collins*, 259 U.S. at 316, 42 S.Ct. 469 (“It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal.”).

The district court carefully considered whether, if the court excluded Rosas’s and Hurtado’s statements, there remained sufficient evidence to support a probable cause finding against Munoz. It concluded that the matter was “close,” but that there was not. App. at 17–18 n.41. We share the district court’s doubts. Neither Castellanos’s nor Hermsillo’s statements mention Munoz; at best they connect Rosas to the kidnapping, but only Rosas’s and Hurtado’s statements implicate Munoz. Without Rosas’s and Hurtado’s statements, only Andrade’s statement that Rosas and Munoz approached him about a “job” to extort “Beto” for two million pesos potentially connects Munoz to the kidnapping. This statement, however, lacks any other specifics that would suggest the “job” was a kidnapping involving Roberto Castellanos’s family. Standing alone, Andrade’s statement is insufficient to support probable cause. This is not a case in which there is overwhelming evidence available from other sources. Nevertheless, because the question is a close one, we think the extradition court should decide this question in the first instance, when it will have the opportunity to redetermine the admissibility of Munoz’s evidence and then consider all of the evidence together.

\* \* \* \*

**b. Cruz Martinez**

The United States filed a supplemental brief on January 8, 2016 in *Avelino Cruz Martinez v. United States*, No. 14-5860 (6th Cir.), discussed in *Digest 2015* at 67-70. The supplemental brief further supports the U.S. petition for rehearing of the appellate court’s decision to reverse the district court’s denial of *habeas* relief to a fugitive who claimed his extradition violated the lapse of time provision in the extradition treaty. Excerpts follow (with footnotes omitted) from the supplemental U.S. brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>

\* \* \* \*

The Sixth Amendment’s speedy trial clause, by its terms, applies only to “criminal prosecutions.” Cruz contends, however, that dozens of extradition treaties (including the U.S.-Mexico Treaty here) incorporate the speedy trial right into extradition proceedings. He is wrong. All the traditional interpretive devices employed by this Court—including text, drafting history, post-ratification practice, official State Department views, and canons of construction—negate the suggestion that U.S. negotiators and their foreign counterparts imported Sixth Amendment protections into these treaties. The lapse-of-time phrase that Cruz clings to addresses limitations defenses, no more.

**1. The lapse-of-time phrase relates only to statute-of-limitations defenses.**

Article 7 of the U.S.-Mexico Treaty proscribes extradition where the fugitive’s prosecution or punishment “has become barred by lapse of time according to the laws of” either country. The language implies that “time” alone guides the inquiry. Or more simply, “*time* must

do the barring.” *Martinez*, 793 F.3d at 558 (Sutton, J., dissenting). Contrast that description with the Sixth Amendment, which identifies “no fixed point in the criminal process” at which a trial must commence. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). The “amorphous quality of the right” instead turns on “a functional analysis” of, not just time, but the promptness of the defendant’s objections, the reason for the delay, and the prejudice to the defendant’s trial strategy, *id.* at 522, 530; *see also United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (treating “the reason for delay” as the critical factor in the Sixth Amendment inquiry). This mismatch between the Treaty’s hard-and-fast focus on “time” and the Sixth Amendment’s “ad hoc” “balancing” of other non-time factors dispels the notion that the former incorporates the latter. *Barker*, 407 U.S. at 530.

The “history of the treaty” provides the other crucial clue as to meaning. *Air France v. Saks*, 470 U.S. 392, 396 (1985) (citation omitted). The previous U.S.-Mexico treaty prohibited extradition where the prosecution or penalty “had become barred by limitation,” whereas the current treaty proscribes extradition where the prosecution or penalty “has become barred by lapse of time.” Cruz believes the old language captured only statute of limitations defenses, whereas the new language authorizes Speedy Trial Clause (and other) claims. Supp. Br. 7.

Cruz’s linguistic distinction is illusory. These two phrases—“barred by limitation” and “barred by lapse of time”—carried the same historical meaning.

For example, the 1882 U.S.-Belgium extradition treaty foreclosed extradition where the prosecution had become “barred by limitation.” The United States captioned this provision, “Exemption by reason of lapse of time,” when formally publishing the treaty in statute. *U.S.-Belg.*, art. IX, June 13, 1882, 22 Stat. 972.

And when the United States switched course and adopted the lapse-of-time phrase as its preferred language around 1908, it referred to the phrase as a “limitation of time” provision in statutory publication. *U.S.-Hond.*, art. v, Jan. 15, 1909, 37 Stat. 1616.

This practice of freely interchanging the “limitation” and “lapse of time” phrases was hardly novel. A leading nineteenth century extradition treatise viewed the two variants as synonyms. *See* 1 J. Moore, A Treatise of Extradition § 373, at 569-570 (1891) (treaty provisions that prohibit extradition where prosecution is “barred by lapse of time” or “barred by limitation” incorporate the statutes of limitations of the requesting (or requested) country). The Government of Mexico interchanged these terms as well. In 1934, Mexico refused to extradite a fugitive, Alfonso Davila, to the United States to face embezzlement charges. The treaty then in force between the countries forbade extradition requests “barred by limitation,” but the Mexican government’s communication to the United States refusing extradition explained that Davila’s “punishment or the penal action is fulfilled by the simple lapse of time.” Ltr. from Mexican Minister of Foreign Affairs, Nov. 13, 1934, *reprinted in* G.H. Hackworth, 4 Digest of Int’l L. § 339, at 194 (1942).

These historical practices confirm the government’s textual reading. If the “barred by limitation” phrase refers only to limitations defenses (as Cruz readily admits, *see* Supp. Br. 6-7), then the “barred by lapse of time” phrase is similarly constrained to limitations defenses. Relying on these same guideposts, the Eleventh Circuit rejected the claim that Cruz now raises. “[F]or over a century,” the court observed, “the term ‘lapse of time’ has been commonly associated with a statute of limitations violation.” *Yapp v. Reno*, 26 F.3d 1562, 1567; *id.* at 1569 (Carnes, J., dissenting) (agreeing on this point).

Cruz does not address this historical record. He instead retorts (Supp. Br. 5, 6 n.3, 18) that the lapse-of-time phrase linguistically embraces any delay-based claim, be it the Speedy Trial Clause, the Speedy Trial Act, or common-law laches. But his effort takes “[t]he definition of words in isolation,” *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006), which is itself a perilous venture, but even more so in the field of treaty construction, where “the context in which the written words are used” carries particular force, *Air France*, 470 U.S. at 397. The fact that litigants and courts might employ similar phrasing when discussing other legal doctrines does not establish that the drafters of this country’s extradition treaties engraved those doctrines into the treaties.

#### II. The lapse-of-time phrase does not incorporate speedy trial rights.

Cruz’s effort to incorporate speedy trial protections into the U.S.-Mexico Treaty’s lapse-of-time phrase also ignores constitutional history. As recounted above, the lapse-of-time phrase first appeared when the United States negotiated extradition treaties with Spain and the Netherlands in 1877 and 1880. The ratifying histories of these treaties contain no mention of the Speedy Trial Clause. Moreover, the drafters of these agreements—State Department officials and their foreign counterparts—would not have understood any connection between the lapse-of-time language and the Sixth Amendment. The Supreme Court did not announce the constitutional speedy trial right until 1905, *see Beavers v. Haubert*, 198 U.S. 77 (1905), and a full exposition emerged only in 1972, *see Barker*, 407 U.S. at 515, long after the United States had adopted the lapse-of-time phrase as standard treaty language.

To view the lapse-of-time language as incorporating the Speedy Trial Clause, as Cruz urges, would mean that State Department officials in the 1870s deliberately seeded a dormant, yet-to-be-recognized federal right into this country’s extradition treaties, which sprouted only when the Supreme Court engaged the issue decades later. That fantastic proposition, where the State Department covertly bound our foreign treaty partners to an inchoate U.S. constitutional principle, lacks support.

The renegotiation of U.S. extradition agreements in the 1970s and 1980s (including the 1978 U.S.-Mexico Treaty here) further undermines Cruz’s position. While the Senate Report accompanying the U.S.-Mexico Treaty does not address the issue, the Senate Reports accompanying other contemporaneous treaties—which also contain the lapse-of-time phrase—announced that the language innocuously referred to “statute of limitation” bars. *See* S. Exec. Rep. No. 93-19, at 3 (1973) (Paraguay); S. Exec. Rep. No. 96-20, at 24 (1979) (Germany); S. Exec. Rep. No. 98-29, at 5 (1984) (Thailand); S. Exec. Rep. No. 98-30, at 6 (1984) (Costa Rica); S. Exec. Rep. No. 98-31, at 6 (1984) (Jamaica). And at no point did the Reports mention constitutional speedy trial considerations when listing the substantive changes envisioned by the renegotiation process. *See* S. Exec. Rep. No. 96-21, at 19 (1979) (Mexico) (highlighting the various “changes in the new treaty,” but omitting any mention of speedy trial rights).

Cruz dismisses the significance of Senate Reports in treaty disputes. Supp. Br. 21. The Supreme Court has, however, consulted them when construing the intent of a treaty’s signatories. *See United States v. Stuart*, 489 U.S. 353, 366-368 (1989). The renegotiated U.S.-Germany extradition treaty, which the Senate considered at the same time as the U.S.-Mexico Treaty under review here, bears special mention. Congressional documents associated with the U.S.-Germany treaty (*see* T.I.A.S. 9785) show that the relevant Senate Report reflected official State Department testimony. The State Department had testified before the Senate that the lapse-of-time phrase in the U.S.-Germany treaty “discusses statute of limitations” and “is a standard provision in U.S. extradition treaties.” *Hearing on Nine U.S. Treaties on Law Enforcement and*

*Related Matters Before the S. Comm. on Foreign Relations*, 96th Cong. 24 (1979) (statement of Deputy Legal Adviser James Michel). The State Department's interpretation of the lapse-of-time treaty language—which the Senate Report embraced—“is entitled to great weight.” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (citation omitted).

Cruz's other objections lack merit. He observes that the cited Senate Reports address “treat[ies] other than the one at issue.” Supp. Br. 21. But these other treaties, which were negotiated and ratified during the same time period, contain the same phrase as the U.S.-Mexico Treaty. It defies logic to suggest that three simple words—“lapse of time”—refer only to limitations defenses in some agreements, but to the Speedy Trial Clause in the U.S.-Mexico Treaty. Cruz alternatively casts the Senate Reports' commentary as illustrative, “naming the prototypical example of a lapse-of-time law, *i.e.*, a statute of limitations,” but still contemplating an expansion of the treaties to authorize Speedy Trial Clause claims. Supp. Br. 21. To accept Cruz's view would mean that the State Department and the Senate weaved Sixth Amendment protections into this country's extradition proceedings quietly and under everybody's nose, including those of our foreign partners. Because this novel theory is unsupported in fact, law, or practice, the Court should reject it.

III. The *Mylonas* decision is neither binding, nor relevant to this dispute.

As a final matter, Cruz promotes (Supp. Br. 8-10) his capacious interpretation of the U.S.-Mexico Treaty by referencing the decision in *In re Extradition of Mylonas*, 187 F. Supp. 716 (N.D. Ala. 1960), where a district court concluded that the lapse-of-time provision in the U.S.-Greece extradition treaty incorporated Speedy Trial Clause protections and, on that basis, refused to certify the fugitive's extradition. The government could not appeal *Mylonas*, but in later cases, the Eleventh Circuit “expressly disapprove[d]” the decision. *Martin v. Warden*, 993 F.2d 824, 829 n.8 (11th Cir. 1993); *see also Yapp*, 26 F.3d at 1567 (“[W]e do not find [*Mylonas*] persuasive.”). Cruz nevertheless asserts that the *Mylonas* decision was the “final say” on lapse-of-time clauses between 1960 and 1993. Supp. Br. 8. Because the U.S.-Mexico Treaty employs a lapse-of-time phrase, and because the Senate advised and consented to its ratification during this period, the Treaty (in his view) necessarily imports the *Mylonas* interpretation.

Not so. *Mylonas* “[wa]s a district court opinion and as such ha[d] no binding precedential value.” *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 649 (6th Cir. 2004). As a result, the decision's mere existence at the time of the U.S.-Mexico Treaty's ratification does not control or inform the proper construction of the Treaty's lapse-of-time provision. Of course, this Court may examine *Mylonas*'s analysis of the issue and, if persuaded, adopt it. Unfortunately, *Mylonas* contains no legal reasoning, just a cursory statement asserting that the fugitive's speedy trial rights had been violated by the extradition process. *See* 187 F. Supp. at 721 (“I am of the opinion that the accused has not been afforded a speedy trial, and that extradition should be denied on that ground.”). The dearth of analysis reveals the flaws in the *Mylonas* decision and, by extension, Cruz's position here.

One last point: The government disputes Cruz's assertion that the State Department renegotiated the U.S.-Mexico Treaty in 1978 “to echo the clause interpreted in *Mylonas*.” Supp. Br. 9. The State Department has long advanced the view that lapse-of-time provisions in extradition instruments refer only to limitations defenses. In 1968, the State Department published an official digest of U.S. extradition procedures. Under the heading “Statute of Limitation,” the digest remarked, “One of the most common exemptions from extradition relates to offenses for which prosecution or punishment is *barred by lapse of time*.” M. Whiteman, 6 Digest of Int'l L. § 17, at 859 (1968) (emphasis added). It then supplied examples of courts

adjudicating limitations defenses in extradition proceedings, with no mention of the Speedy Trial Clause. *Id.* at 860-865. As to *Mylonas*, the digest repeated guidance from the Justice Department: “[T]he provisions of the Sixth Amendment . . . obviously apply to criminal prosecutions tried in the United States and not to fugitives whose extradition is sought for trial under treaties with foreign countries whose laws may be entirely different.” *Id.* § 40, at 1059-1060 (quoting Ltr. from Assistant Attorney General Wilkey, July 15, 1960).

When the State Department renegotiated the U.S.-Mexico Treaty in 1978 to include the lapse-of-time language, it hewed to this position. The non-precedential, twice-discredited *Mylonas* decision did not guide the State Department’s efforts then. It should not sway this Court now.

#### IV. Various interpretative canons support the government’s position.

The government agrees (*see* Cruz Supp. Br. 10) that this Court need not resort to interpretive canons. The text, drafting history, post-ratification practice, and official State Department views all confirm that lapse-of-time provisions address limitations defenses, and not the Speedy Trial Clause. To the extent interpretive canons carry any relevance, they further buttress the government’s reading of the U.S.-Mexico Treaty.

First up is *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933), where in the context of an extradition dispute, the Supreme Court stated that treaty “obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.” Thus, where a “treaty fairly admits of two constructions,” courts should adopt the interpretation that “enlarg[es]” “the rights which may be claimed under it.” *Id.* at 293-294. As four neighboring circuits have observed, *Factor* demands that ambiguities in an extradition treaty be construed in favor of the state signatories—that is, “in favor of surrendering a fugitive to the requesting country.” *Nezirovic v. Holt*, 779 F.3d 233, 239 (4th Cir. 2015); *accord King-Hong*, 110 F.3d at 110; *Ludecke v. U.S. Marshal*, 15 F.3d 496, 498 (5th Cir. 1994); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984). That means in this case, as in *Factor*, construing a treaty’s enumerated defenses to extradition narrowly.

Second, courts shun treaty interpretations that require “[f]oreign powers . . . to be versed in the niceties of our criminal laws.” *Grin v. Shine*, 184 U.S. 181, 184 (1902); *see also Skافتourous v. United States*, 667 F.3d 144, 156 (2d Cir. 2011) (noting “the reluctance of our courts to fastidiously examine foreign law in extradition proceedings”); *Matter of Assarsson*, 635 F.2d 1237, 1244 (7th Cir. 1980). The interpretation urged by Cruz runs headlong into that principle. Under the U.S.-Mexico Treaty, extradition is prohibited where the prosecution or punishment is “barred by lapse of time according to the laws of *the requesting or requested Party*” (emphasis added). Under Cruz’s preferred construction then, a fugitive in Mexico could fight extradition to the United States by invoking the Speedy Trial Clause, the Speedy Trial Act, common-law laches, or some other delay-based claim. Mexican judges would have to resolve these often complex U.S. legal claims. Likewise, Cruz and other fugitives in this country could invoke any analogous Mexican doctrines to U.S. judges in an effort to halt their extradition to Mexico. Courts rightly bristle at such invitations to adjudicate foreign law, fearing “the chance of error . . . when we try to construe the law of a country whose legal system is much different from our own.” *Assarsson*, 635 F.2d at 1244.

Finally, courts have acknowledged that the comity principles undergirding the extradition system “would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts.” *Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991); *see also Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990); *Assarsson*, 635 F.2d

at 1224. Importing the Speedy Trial Clause inquiry into extradition proceedings would throw that caution to the wind, requiring courts to issue “determinations of negligence” as to the foreign prosecutors, judges, and ministry officials who investigated the crime, issued the arrest warrant, and sought U.S. extradition assistance. *Doggett v. United States*, 505 U.S. 647, 652 (1992). For example, Cruz seeks an inquiry into whether his Mexican prosecutors spuriously pursued his extradition in response to a “statistics-orientated initiative” or “individual malice.” Supp. Br. 11. Even worse, our foreign counterparts would apparently be held to Sixth Amendment benchmarks developed for American criminal investigations and proceedings. *See* Cruz Principal Br. 41-46. The obvious perils of this inquiry should lead the Court to question its application here. *See Yapp*, 26 F.3d at 1562 (“A speedy trial inquiry would require a district judge or magistrate judge, generally unfamiliar with foreign judicial systems and the problems and circumstances facing them, to assess the reasonableness of a foreign government’s actions in an informational vacuum.”).

In response, Cruz asks this Court to read the Speedy Trial Clause into the U.S.-Mexico Treaty to “secure equality and reciprocity” between the countries. Supp. Br. 10. The government is unclear what Cruz means here. The Treaty already authorizes fugitives to raise limitations defenses grounded in either U.S. or Mexican law; it accordingly treats both countries equally. To be sure, the U.S. and Mexican limitations periods carry different triggering rules, end points, and tolling considerations, but that reflects the particularities of each country’s legal system, and not any Treaty-generated inequity.

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The Court of Appeals for the Sixth Circuit granted rehearing and on July 7, 2016, issued its decision affirming the denial of habeas and holding that the lapse of time provision in the extradition treaty with Mexico did not incorporate speedy trial rights under the U.S. Constitution. *Cruz Martinez v. United States*, 828 F.3d 451 (6<sup>th</sup> Cir. 2016). Excerpts follow from the majority opinion of the court of appeals.

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\* \* \* \*

...Cruz Martinez argues that his prosecution has become barred by (1) the relevant American statute of limitations and (2) the Speedy Trial Clause of the Sixth Amendment to the United States Constitution. We consider each argument in turn.

A.

...[F]or the reasons forcefully expressed in the panel majority’s opinion, the statute of limitations did not expire .... *Cruz Martinez v. United States*, 793 F.3d 533, 542– 44 (6th Cir. 2015).

... Because statutes of limitations protect defendants from excessive delay between the time of the offense and the time of prosecution, they stop running when the prosecution begins—which means, in American federal courts, when an indictment or information is returned. ...

The only other circuit to consider this question agrees. It held that “a Mexican arrest warrant is the equivalent of a United States indictment and may toll the United States statute of

limitations” for purposes of an extradition treaty. *Sainez v. Venables*, 588 F.3d 713, 717 (9th Cir. 2009). The *Third Restatement of Foreign Relations Law* echoes the point. “For purposes of applying statutes of limitation to requests for extradition,” it notes, courts generally calculate the limitations period “from the time of the alleged commission of the offense to the time of the warrant, arrest, indictment, or similar step in the requesting state, or of the filing of the request for extradition, whichever occurs first.” *Restatement (Third) of the Foreign Relations Law of the United States* § 476 cmt. e (1987).

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Cruz Martinez separately argues that the treaty’s “barred by lapse of time” provision picks up the Speedy Trial Clause of the Sixth Amendment to the United States Constitution, which says that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” At the outset, it is worth clarifying what he does, and does not, argue in this respect. He does not argue that the speedy-trial guarantee applies to an American (like Cruz Martinez) who is tried in a Mexican court for violating Mexican law. When the Sixth Amendment says “all criminal prosecutions,” it refers to all prosecutions in this country, not anywhere in the world. *See United States v. Balsys*, 524 U.S. 666, 672–75, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998). And he does not argue that the guarantee applies to extradition proceedings, which are not “criminal prosecutions.” *See Martin v. Warden*, 993 F.2d 824, 829 (11th Cir. 1993). He instead argues that the treaty’s “barred by lapse of time” language incorporates the speedy-trial guarantee and prohibits extradition when a Mexican prosecution would violate that right. As he sees it, a non-speedy trial is one that takes too long to start and to finish, which creates a lapse-of-time defect in the prosecution. It is not that easy. The text and context of the treaty provision, the illuminating history behind it, and all precedential authority and scholarly commentary establish that the phrase “barred by lapse of time” does not incorporate the American Constitution’s speedy-trial guarantee.

*Text.* Article 7, recall, prohibits extradition “when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party.” Extradition Treaty, U.S.- Mex., *supra*, art. 7, 31 U.S.T. at 5064–65. Put less passively, *time* must do the barring. Yet the Sixth Amendment does not create a fixed time bar on trial initiation—a time limit after which the trial must be called off. As the Supreme Court has explained, the speedy-trial right is “*consistent* with delays” (and thus consistent with lapses of time) and “depends upon circumstances,” as it is “impossible to determine with precision when the right has been denied” in our system of “swift but deliberate” justice. *Barker v. Wingo*, 407 U.S. 514, 521–22, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (emphasis added) (quotation omitted). The right is a “relative,” “amorphous,” and “slippery” one. *Id.* at 522, 92 S.Ct. 2182 (quotation omitted). Because the Sixth Amendment does not establish a time limit, fixed or otherwise, before a trial must start, it does not create a rule that “bar[s]” criminal prosecutions due to “lapse of time.”

Not only does Cruz Martinez’s argument require us to add something to the Sixth Amendment that does not exist (a time bar), it requires us to subtract requirements of the Sixth Amendment that do exist. A criminal defendant cannot win a Sixth Amendment challenge by pointing to a calendar and counting off the days. He instead must show that, by balancing the four factors the Supreme Court has instructed us to consider in speedy-trial cases, he should receive relief. *Id.* at 530–33, 92 S.Ct. 2182. The “[l]ength of delay,” it is true, is *one* of those

factors—but only one. *Id.* at 530, 92 S.Ct. 2182. Courts also must weigh “the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant” in determining whether a speedy-trial violation occurred. *Id.* Even if there has been considerable delay, for example, “a valid reason” for that delay, “such as a missing witness, should serve to justify” it. *Id.* at 531, 92 S.Ct. 2182. If a defendant fails to object contemporaneously to the lapse of time, the Supreme Court has told us, that will also “make it difficult for [him] to prove that he was denied a speedy trial.” *Id.* at 532, 92 S.Ct. 2182. “[N]one of the four factors”—not even delay of a specified length—is “a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.” *Id.* at 533, 92 S.Ct. 2182. The Court could not be clearer: Lapse of time, standing alone, does not —*cannot*—violate the Speedy Trial Clause in the absence of at least some of the other factors. We know of no case in which a lapse of time by itself created a speedy-trial violation—or, to put it in the words of the treaty, in which the prosecution was “barred by lapse of time.”

Another textual clue points in the same direction. The treaty does not cover any and all “lapse[s] of time” that may occur in a criminal case. It applies only to time lapses with respect to “the prosecution or the enforcement of the penalty” for the charged offense. Extradition Treaty, U.S.-Mex., *supra*, art. 7, 31 U.S.T. at 5064–65. That language naturally applies to statutes-of-limitations periods that “bar[ ]” the commencement of a “prosecution” or “enforcement” proceeding. It also naturally applies to limitations periods that “bar[ ]” “penalt[ies]” already handed down from being “enforce[d]” to the extent any exist—limitations periods that, while generally unknown in the United States, are common in civil law countries like Mexico. *See Yapp v. Reno*, 26 F.3d 1562, 1568 (11th Cir. 1994). The same is not true for guarantees that apply *after* an indictment (or its equivalent) through the end of trial. Just as this treaty provision would not cover criminal procedure guarantees that apply to a trial already begun, it does not naturally apply to speedy-trial requirements that prohibit the criminal process, once started, from continuing. The speedy-trial right after all operates not by barring the initiation of a prosecution but by preventing it from continuing, *see Marion*, 404 U.S. at 320–23, 92 S.Ct. 455, and may not apply to the execution of sentences already pronounced, *cf. United States v. Melody*, 863 F.2d 499, 504–05 (7th Cir. 1988). These rights, like trial guarantees, usually kick in outside the two periods in which extradition limits apply: (1) the initiation of a prosecution and (2) the enforcement of a “judicially pronounced penalty of deprivation of liberty.” Extradition Treaty, U.S.-Mex., *supra*, art. 1(1), 31 U.S.T. at 5061.

Another linguistic clue supports this interpretation. In this case, as in many cases involving treaty interpretation, we have not one official text but two—the English and Spanish versions of the treaty, each of which is “equally authentic.” *Id.*, 31 U.S.T. at 5075. The English version of Article 7 bears the title “Lapse of Time,” while the Spanish version says “Prescripción.” *Compare id.*, art. 7, 31 U.S.T. at 5064, *with id.*, art. 7, 31 U.S.T. at 5083. And the phrase “barred by lapse of time” reads, in the Spanish version of the text, “haya prescrito,” using a verb form related to the noun “prescripción.” *Compare id.*, art. 7, 31 U.S.T. at 5065, *with id.*, art. 7, 31 U.S.T. at 5083. We must interpret the translated documents in tandem, because, “[i]f the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.” *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88, 8 L.Ed. 604 (1833). In unearthing the best translation of non-English terms, we may refer to foreign “cases,” “dictionaries,” “legislative provisions,” “treatises and scholarly writing,” and other “legal materials,” as the Supreme Court has done when assessing the “legal meaning” of

foreign words. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 536–40, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991); *Air France v. Saks*, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985).

The English and Spanish texts of the 1978 extradition treaty “conform [ ]” quite easily, it turns out, because “prescripción” means “statute of limitations.” Bilingual legal dictionaries tell us as much, with one Spanish–English dictionary providing “[s]tatute of limitations” as the first definition of “prescripción.” Henry Saint Dahl, *Dahl’s Law Dictionary* 385 (6th ed. 2015). Mexican legal provisions tell us as much, because Article 88 of the Code of Criminal Procedure of Oaxaca—the state where Cruz Martinez’s alleged crimes occurred—uses the phrase “[c]ómputo de la prescripción” to describe the “[c]alculation of the [s]tatute of [l]imitations.” R. 2-19 at 2, 7. Previous treaties tell us as much, because the 1899 United States–Mexico extradition treaty translates the phrase “has become barred by limitation” (a phrase that, as Cruz Martinez concedes, refers only to statutes of limitations) as “la prescripción impida.” Treaty of Extradition, U.S.–Mex., art. III(3), Feb. 22, 1899, 31 Stat. 1818, 1821. The Department of State tells us as much, because, in a 1959 letter to the Department of Justice, it used the phrases “prescription” and “statute of limitations” interchangeably. 6 Marjorie M. Whiteman, *Digest of International Law* § 17, at 864 (1968). And English legal dictionaries tell us as much, indicating that the word “prescription” means “[t]he effect of the *lapse of time* in creating and destroying rights” and that the phrase “liberative prescription” refers to “the civil-law equivalent of a statute of limitations.” *Black’s Law Dictionary* 1373 (10th ed. 2014) (emphasis added). When writing the words “lapse of time” in Spanish, the treaty’s drafters thus chose language that reflected the phrase’s status as a term of art within the law of extradition—a term of art interchangeable with the phrase “statute of limitations.”

*Context.* Article 7’s neighbors reinforce this conclusion. Article 10(2) of the treaty sets forth the extradition procedures that a requesting State must follow and requires every request to include “[t]he text of the legal provisions relating to the *time limit* on the prosecution or the execution of the punishment of the offense.” Extradition Treaty, U.S.–Mex., *supra*, art. 10(2)(d), 31 U.S.T. at 5066 (emphasis added). This disclosure requirement provides an enforcement mechanism for Article 7, allowing the requested State to verify whether extradition is “barred by lapse of time” without embarking on a self-guided tour of another country’s laws. Article 10(2) in other words interprets “lapse of time” to mean “time limit,” confirming that the language covers only statutes of limitations. *See* Cruz Martinez Principal Br. 11 (equating “time limit” and “statute of limitations”).

*History.* A few pages of history confirm the logic of this interpretation. Extradition treaties have been a part of American international relations since 1794, when Jay’s Treaty provided that “his Majesty and the United States, on mutual requisitions, ... will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other.” Treaty of Amity, Commerce and Navigation, U.S.–Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116, 129. Mexico entered the picture in 1861, when the United States signed an extradition treaty with its southern neighbor at the start of the Civil War. Treaty for the Extradition of Criminals, U.S.–Mex., Dec. 11, 1861, 12 Stat. 1199. The parties agreed to a new treaty in 1899, adding a provision that forbade extradition “[w]hen the legal proceedings or the enforcement of the penalty for the act committed by the person demanded has become *barred by limitation* according to the laws of the country to which the requisition is addressed.” Treaty of Extradition, U.S.–Mex., *supra*, art. III(3), 31 Stat. at 1821 (emphasis added). The parties renegotiated yet again in the late 1970s, producing the treaty that still governs extraditions between the United States and Mexico.

Extradition Treaty, U.S.-Mex., *supra*, 31 U.S.T. 5059. That treaty revised the “barred by limitation” provision into its current form, prohibiting extradition “when the prosecution or the enforcement of the penalty” for the charged offense “has become barred by lapse of time according to the laws of the requesting or requested Party.” *Id.*, art. 7, 31 U.S.T. at 5064–65.

When the treaty drafters incorporated the phrase “lapse of time” into the United States-Mexico extradition agreement, they were not working on a blank slate. A “lapse of time” provision appeared as early as the United States’ 1877 extradition treaty with Spain, which prohibited extradition when “prosecution or punishment” for the charged offense was barred by “lapse of time or other lawful cause.” Convention on Extradition, U.S.-Spain, art. V, Jan. 5, 1877, 19 Stat. 650, 653; *see also* Convention for the Extradition of Criminals, U.S.-Neth., art. V, May 22, 1880, 21 Stat. 769, 772. From the start, that language bore a close relationship to statutes of limitations. An 1891 treatise, for example, described the Spanish treaty’s “lapse of time” provision as a rule of “prescription,” employing a synonym for “statute of limitations” in English and Spanish, and went on to use the phrases “lapse of time,” “barred by limitation,” and “statutes of limitation” interchangeably in the course of a single paragraph. I John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* § 373, at 569–70 (1891); *see Black’s Law Dictionary, supra*, at 1321, 1373 (defining “period of prescription,” “prescription,” and “liberative prescription”); Henry Saint Dahl, *Dahl’s Law Dictionary, supra*, at 385.

The practice of using these terms as synonyms within the law of extradition continues today. Take our treaty with South Korea, which, in a section titled “Lapse of Time,” permits the parties to deny extradition “when the prosecution or the execution of punishment” for the charged offense “would have been barred because of the statute of limitations of the Requested State.” Extradition Treaty, U.S.-S. Kor., art. 6, June 9, 1998, T.I.A.S. No. 12,962, at 4; *see* Extradition Treaty, U.S.-Arg., art. 7, June 10, 1997, T.I.A.S. No. 12,866, at 5 (stating, in an article titled “Lapse of Time,” that “[e]xtradition shall not be denied on the ground that the prosecution or the penalty would be barred under the statute of limitations in the Requested State”); *see also* Extradition Treaty, U.S.-Costa Rica, art. 7, Dec. 16, 1982, S. Treaty Doc. No. 98-17, at 3 (1984) (stating, in an article titled “Statute of Limitations,” that “[e]xtradition shall not be granted when the prosecution or the enforcement of the penalty ... has become barred by lapse of time”); Extradition Treaty, U.S.-Colom., art. 6, Sept. 14, 1979, S. Treaty Doc. No. 97-8, at 3 (1981) (same). Or take our treaty with France, which forbids extradition if prosecution is “barred by *lapse of time*” in the requested State but qualifies that prohibition by requiring the requested State to account for certain “[a]cts in the Requesting State that would interrupt or suspend the *prescriptive period*.” Extradition Treaty, U.S.-Fr., art. 9, Apr. 23, 1996, T.I.A.S. No. 02-201, at 8 (emphasis added); *see* Extradition Treaty, U.S.-Bulg., art. 6, Sept. 19, 2007, S. Treaty Doc. No. 110-12, at 9 (2008) (using similar language); Extradition Treaty, U.S.-Rom., art. 6, Sept. 10, 2007, S. Treaty Doc. No. 110-11, at 7 (2008) (similar); Extradition Treaty, U.S.-Lux., *supra*, art. 2(6), T.I.A.S. No. 12,804, at 4 (similar); *see also Black’s Law Dictionary, supra*, at 1321 (defining “period of prescription”).

... Cruz Martinez offers no contrary drafting or signatory history with respect to these ... treaties ... in which anyone thought that the phrase “lapse of time” incorporated the Sixth Amendment’s speedy-trial guarantee.

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Viewed against this backdrop—against over a century of law equating “lapse of time” with statutes of limitations— Article 7 of the United States-Mexico Extradition Treaty comes into focus. The article’s “lapse of time” language does not incorporate the Sixth Amendment’s speedy-trial protections.

*Precedent.* Every case on the books has concluded that this phrase encompasses only statutes of limitations. The Eleventh Circuit faced Cruz Martinez’s precise argument and rejected it. Here is what the court said: “Weighing heavily against [the accused’s] position is the fact that for over a century, the term ‘lapse of time’ has been commonly associated with a statute of limitations violation. ... Thus, we hold that the ‘lapse of time’ provision in Article 5 of the [United States-Bahamas] Extradition Treaty refers to the running of a statute of limitations and not to a defendant’s Sixth Amendment right to a speedy trial.” *Yapp*, 26 F.3d at 1567–68. ...

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*Commentary.* So far as our research and the research of the parties have revealed, all scholars see it the same way. The *Third Restatement of Foreign Relations Law* notes that, “[u]nder most international agreements, state laws, and state practice,” an individual “will not be extradited ... if the applicable period of limitation has expired.” *Restatement, supra*, § 476. The commentary to that provision notes that some treaties prohibit extradition if prosecution “has become barred by lapse of time,” “if either state’s statute of limitations has run,” or if there is a “time-bar.” *Id.* § 476 cmt. e. Eliminating any doubt, the section concludes by noting that, “[i]f the treaty contains no reference to the effect of a lapse of time, neither state’s statute of limitations will be applied.” *Id.* The only way to make sense of the *Restatement*’s discussion is to recognize that each of these terms—“period of limitation,” “lapse of time,” “time-bar,” “statute of limitations”—means the same thing.

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*Default rule.* All of these interpretive indicators reveal that the phrase “lapse of time” excludes speedy-trial protections. But even if there were ambiguity about the point, that would not change things. For ambiguity in an extradition treaty must be construed in favor of the “rights” the “parties” may claim under it. *Factor v. Laubenheimer*, 290 U.S. 276, 293–94, 54 S.Ct. 191, 78 L.Ed. 315 (1933). The parties to the treaty are countries, and the right the treaty creates is the right of one country to demand the extradition of fugitives in the other country— “to facilitate extradition between the parties to the treaty.” M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 142 (6th ed. 2014). As the First Circuit explained, *Factor* requires courts to “interpret extradition treaties to produce reciprocity between, and expanded rights on behalf of, the signatories.” *In re Extradition of Howard*, 996 F.2d 1320, 1330–31 (1st Cir. 1993); *see also Nezirovic*, 779 F.3d at 239; *Ludecke v. U.S. Marshal*, 15 F.3d 496, 498 (5th Cir. 1994); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984). The point of an extradition treaty after all is to facilitate extradition, as any country surely would agree at the time of signing. *See, e.g., Ludecke*, 15 F.3d at 498. In the face of one reading of “lapse of time” that excludes the speedy-trial right and another reading that embraces it, *Factor* says we must prefer the former.

This default rule accords with comity considerations that lurk beneath the surface of all extradition cases. Courts must take care to avoid “supervising the integrity of the judicial system of another sovereign nation” because doing so “would directly conflict with the principle of comity upon which extradition is based.” *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir. 1976). Respect for the sovereignty of other countries explains why an American citizen who “commits a crime in a foreign country ... cannot complain if required to submit to such modes of trial ... as the laws of that country may prescribe for its own people.” *Neely v. Henkel*, 180 U.S. 109, 123, 21 S.Ct. 302, 45 L.Ed. 448 (1901). And it explains why “[w]e are bound by the existence of an extradition treaty to assume that the trial [that occurs after extradition is granted] will be fair.” *Glucksman v. Henkel*, 221 U.S. 508, 512, 31 S.Ct. 704, 55 L.Ed. 830 (1911). These constraints reflect the reality that “political actors,” not judicial ones, are best equipped to make the “sensitive foreign policy judgments” an extradition request demands. *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006). The habeas power does not come with the authority to interfere with proceedings “inevitably entangled in the conduct of our international relations” unless the treaty demands it. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 383, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959). Just last year, the Supreme Court reminded Congress to tread carefully before entangling itself in American foreign policies customarily overseen by the Executive Branch. *Zivotofsky ex rel. Zivotofsky v. Kerry*, — U.S. —, 135 S.Ct. 2076, 2094–96, 192 L.Ed.2d 83 (2015).

Interpreting this treaty in a way that suddenly sweeps speedy-trial rights into its coverage does not honor these objectives and would affirmatively disserve them. Because the constitutional speedy-trial right has no fixed time limit, in contrast to statutes of limitations, what extraditee will not raise the claim in all of its indeterminate glory? The mutability of the right makes it impossible to know how much delay is too much delay. Take the alleged delay in Cruz Martinez’s case: around six years. Although a delay of one year or more is presumptively prejudicial, six years may not be enough to state a speedy-trial claim in view of other considerations, our court has said, when the government is not to blame for the delay and the defendant does not identify any evidence of prejudice. *See United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006). But it very well could be enough to state a claim, another court has said, when the government is to blame and does not “overcome the presumption of general prejudice that applies with considerable force in a case of such extraordinary delay.” *See United States v. Velazquez*, 749 F.3d 161, 174, 186 (3d Cir. 2014). What of the question of fault? Whether the State or a defendant is more to blame for untoward delays is “[t]he flag all litigants seek to capture” in a speedy-trial case. *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). Before we task the courts of both countries with refereeing these elusive and deeply sensitive inquiries, we should be sure the negotiating countries wanted them as umpires.

In the final analysis, Cruz Martinez’s argument comes up short. No matter where we look—to the text of this treaty (in English and Spanish), to the text of other treaties, to historical principles underlying those treaties, to judicial decisions interpreting those treaties, to commentaries explaining those treaties, to guidance explaining how to draft those treaties, to the *Factor* default rule—all roads lead to the same conclusion. The United States and Mexico did not impose a speedy-trial limit when they forbade the extradition of fugitives whose “prosecution” was “barred by lapse of time.”

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#### 4. Data Protection Agreement with the EU

On June 2, 2016 in Amsterdam, the United States and the European Union signed an agreement “On the Protection of Personal Information Relating to the Prevention, Investigation, Detention, and Prosecution of Criminal Offenses” (“Agreement” or “DPPA”). The text of the Agreement is available at <https://www.justice.gov/opcl/DPPA/download>. The United States has entered into bilateral agreements on preventing and combating serious crime (“PCSC”) that include provisions for exchange of personal data for use in criminal investigations, including agreements with the European Union and EU. See, e.g., *Digest 2012* at 30; *Digest 2011* at 52; *Digest 2010* at 57-58; *Digest 2009* at 66; and *Digest 2008* at 80–83 for discussion of PCSC agreements. The DPPA establishes general protections for personal information exchanged for the purpose of preventing, detecting, investigating, and prosecuting criminal offenses. The Agreement supplements, as appropriate, but does not replace, provisions concerning the protection of personal information in other international agreements between the United States and the European Union, or the United States and EU Member States, that address matters that fall within its scope. Moreover, it does not authorize the transfer of personal information, but rather requires that authorization be derived from domestic law or international agreements that authorize the transfer of information. On December 2, 2016, the EU General Secretariat informed the United States that the EU had completed its internal procedures necessary for entry into force of the Agreement.\*\*\*\*

#### 5. Universal Jurisdiction

On October 11, 2016, Emily Pierce, Counselor to the U.S. Mission to the UN, delivered remarks at the 71st Session of the General Assembly Sixth Committee on the principle of universal jurisdiction. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7492>.

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Despite the importance of this issue and its long history as part of international law relating to piracy, basic questions remain about how jurisdiction should be exercised in relation to universal crimes and States’ views and practices related to the topic. The submissions made by States to date, the work of the Working Group in this Committee, and the Secretary-General’s reports are

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\*\*\*\* Editor’s note: The process of exchanging notes between the parties informing each other of the completion of internal procedures necessary for entry into force of the Agreement, which began in December 2016, was completed in January 2017, causing the Agreement to enter into force on February 1, 2017, in accordance with Article 29, Paragraph 1 of the Agreement.

extremely useful in helping us to identify differences of opinion among States as well as points of consensus on this issue.

Each year since the Committee took up this issue, we have had thoughtful discussions on a variety of important topics regarding universal jurisdiction, including its definition and the scope of the principle. We have found these conversations to be useful and look forward to continuing and deepening our discussion this year.

We remain interested in further exploring issues related to the practical application of universal jurisdiction. For instance, we are interested in discussing further what criteria states use in determining whether to exercise universal jurisdiction, how they address competing jurisdictional claims by other states, and issues related to due process. We are also interested more broadly in what conditions or safeguards states have placed on the exercise of universal jurisdiction. The United States believes that appropriate safeguards should be in place to ensure responsible use of universal jurisdiction, where it exists.

The United States continues to analyze the contributions of other states and organizations. We welcome this group'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.

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## **B. INTERNATIONAL CRIMES**

### **1. Terrorism**

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

On May 10, 2016, Secretary Kerry issued his determination and certification, pursuant to, *inter alia*, section 40A of the Arms Export Control Act (22 U.S.C. § 2781), that certain countries “are not cooperating fully with United States antiterrorism efforts.” 81 Fed. Reg. 35,436 (June 2, 2016). The countries are: Eritrea, Iran, Democratic People's Republic of Korea, Syria, and Venezuela.

#### ***b. Country reports on terrorism***

On June 2, 2016, the Department of State released the 2015 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at <http://2009-2017.state.gov/j/ct/rls/crt/index.htm>. On the day the report was released, Acting Coordinator for Counterterrorism Justin Siberell delivered remarks on key aspects of the reports, which are available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258013.htm>, and excerpted below.

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In 2015, the United States faced a dynamic and evolving terrorist threat environment. The international community made important progress in degrading terrorist safe havens—in particular, a sizeable reduction in the amount of territory held by the Islamic State in Iraq and the Levant, or ISIL, in Iraq and Syria, as well as the finances and foreign terrorist fighters available to it. At the same time, however, instability in key regions of the world, along with weak or nonexistent governance, sectarian conflict, and porous borders continue to provide terrorist groups like ISIL the opportunity to extend their reach, terrorize civilians, and attract and mobilize new recruits.

According to the statistical annex prepared by the University of Maryland and appended to the report, the total number of terrorist attacks in 2015 decreased by 13 percent when compared to 2014. Total fatalities due to terrorist attacks decreased by 14 percent, principally as a result of fewer attacks and deaths in Iraq, Pakistan, and Nigeria. This represents the first decline in total terrorist attacks and resulting fatalities worldwide since 2012. At the same time, there were several countries, including Afghanistan, Bangladesh, Egypt, Syria, and Turkey, where terrorist attacks and total deaths increased in 2015.

Although terrorist attacks took place in 92 countries in 2015, they were heavily concentrated geographically, as they have been for the... past several years. More than 55 percent of all attacks took place in five countries: Iraq, Afghanistan, Pakistan, India, and Nigeria. And 74 percent of all deaths due to terrorist attacks took place in five countries: Iraq, Afghanistan, Nigeria, Syria, and Pakistan.

While I cite these statistics, which are compiled by the University of Maryland and are not a U.S. Government product, I must emphasize that the numbers alone do not provide the full context. This is a point we consistently make whether the numbers rise or fall on a year-to-year basis. The United States and our partners around the world face a significant challenge as we seek to contend with the return of foreign terrorist fighters from Iraq and Syria, the risk of terrorist groups exploiting migratory movements, and new technology and communications platforms that enable terrorist groups to more easily recruit adherents and inspire attacks. ISIL remain the greatest terrorism threat globally. Despite the losses it sustained last year, ISIL continued to occupy large areas of Iraq and Syria. ISIL's territorial control in Iraq and Syria reached a high point in spring 2015 and began to diminish thereafter. It is worth noting that ISIL did not have a significant battlefield victory in Iraq after May of last year, and by the end of 2015, 40 percent of the territory ISIL once controlled in Iraq had been liberated. This number has continued to increase in 2016.

ISIL-aligned groups have established branches in parts of the Middle East, North Africa, West Africa, the Russian North Caucasus, and South Asia. Most of these branches are made up of pre-existing terrorist networks, many of which have their own local goals. The al-Qaida core, which has been degraded severely since 2001 but still poses a threat, and al-Qaida affiliates—notably al-Shabaab, al-Nusra Front, and al-Qaida in the Indian Subcontinent, al-Qaida in the Islamic Maghreb—as well as ISIL and its branches were responsible for a number of high-profile, mass-casualty attacks in 2015. These included attacks in Paris, the January attack on the offices of Charlie Hebdo, and the multiple attacks in November at a music concert, on restaurant terraces, and outside a sporting event.

Other such attacks occurred in Beirut, Burkina Faso, Mali, and Tunisia, and the bombing of a Russian passenger plane in Egypt. There were also a number of attacks here in the United States carried out by lone offenders and, in some cases, inspired by ISIL, including in San Bernardino, California; Chattanooga, Tennessee; and Garland, Texas. Although ISIL did not claim responsibility, we believe that it is responsible for several sulfur mustard attacks in Iraq and Syria, including a sulfur mustard attack in Marea, Syria on August 21st of last year. ISIL's loss of territory in Iraq and Syria also had the effect of diminishing the funds available to it. ISIL relies heavily on extortion in the levying of taxes on local populations under its control, as well as oil smuggling, kidnapping for ransom, looting, antiquities theft and smuggling, foreign donations, and human trafficking. Coalition airstrikes targeted ISIL's energy infrastructure, modular refineries, petroleum storage tanks, and crude oil collection points, as well as bulk cache storage sites. These airstrikes degraded ISIL's ability to generate revenue.

The United States continues to work to disrupt Iran's support for terrorism. Iran remains the leading state sponsor of terrorism globally. As explained in the report, Iran continues to provide support to Hizballah, Palestinian terrorist groups in Gaza, and various groups in Iraq and throughout the Middle East. Confronting Iran's destabilizing activities and its support for terrorism was a key element of our expanded dialogue with the countries of the Gulf Cooperation Council, following the leaders summit at Camp David in May of last year. We've also expanded our cooperation with partners in Europe, South America, and West Africa to develop and implement strategies to counter the activities of Iranian-allied and sponsored groups, such as Hizballah.

A key trend through 2015 was the increased level of international cooperation and coordination to address terrorist threats. The United States led a global coalition to counter ISIL, the Multinational Joint Task Force established by the Lake Chad Basin countries to confront Boko Haram, and the efforts of the Horn of Africa nations to coordinate efforts against al-Shabaab in Somalia are examples of this ongoing cooperation and evidence both of an increased appreciation for the importance of a coordinated effort and of the political will to bring it about.

We've seen countries across the international community mobilize to put in place fundamental reforms to address the supply and transit of foreign terrorist fighters attempting to reach the conflict in Syria and Iraq. United Nations Security Council Resolution 2178, adopted at a UN Security Council session in September 2014 chaired by President Obama, provided the framework for this effort. In line with that resolution, 45 countries have passed or updated existing laws to more effectively identify and prosecute foreign terrorist fighters. The United States has concluded information-sharing arrangements with 55 international partners to identify and track the travel of suspected terrorists. And the number of countries contributing foreign terrorist fighter profiles to INTERPOL has increased 400 percent over a two-year period.

As countries have taken these steps, it has become more challenging for foreign terrorist fighters to travel unimpeded to Iraq and Syria. We are beginning to see the flow of foreign terrorist fighters to this conflict zone decrease. This decrease, we assess, reflects the combined effects of sustained battlefield losses, recruiting shortfalls, and increased border security efforts by source and transit countries. These challenges were acknowledged in reported remarks by ISIL spokesperson Abu Mohammad al-Adnani just last month.

Another trend to note in 2015 was the increased global realization of the need for an expanded response to the challenge of international terrorism. In February 2015, President Obama convened the White House Summit on Countering Violent Extremism, which brought together government, private sector, and civil society leaders from around the world to raise

awareness of the importance of an expanded effort to counter violent extremism and radicalization to violence. Leaders and community-based representatives from the United States and countries around the world came together at the summit and in a series of follow-on meetings in Algiers, Astana, Nairobi, Nouakchott, Oslo, Singapore, Sydney, and Tirana in acknowledgement that our combined efforts, however successful in many respects, are not sufficient and must also include a more deliberate focus on the drivers of radicalization and recruitment to terrorist groups.

Building on this work, last week we released the first-ever Joint State Department-USAID Strategy to Counter Violent Extremism. And I invite you to take a look at it, if you haven't already. It's available on the State Department website. A key element of that strategy is to empower and amplify locally credible voices that can challenge the terrorist narrative and thereby weaken terrorists' ability to radicalize and recruit new members. This will be the focus of a newly established – of the newly established Global Engagement Center under the leadership of Michael Lumpkin.

Looking forward, our policies and programs will continue to be aligned to counter the evolving threats described in the report. We will continue to devote resources toward improving counterterrorism capabilities of key partners—countries, including by leveraging funding provided by the Congress through the Counterterrorism Partnerships Fund as well as focusing long-term efforts in addressing the underlying causes that contribute to violent extremism.

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**c. UN**

On October 3, 2016, Stephen Townley, Deputy Legal Adviser to the U.S. Mission to the United Nations, delivered remarks at the 71st session of the Sixth Committee on measures to eliminate international terrorism. Mr. Townley's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7469>.

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The United States reiterates both its firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation. An unwavering and united effort by the international community is required if we are to succeed in preventing these heinous acts. In this respect, we recognize the United Nations' critical role in mobilizing the international community, building capacity, and facilitating technical assistance to Member States in implementation of the United Nations Global Counter-Terrorism Strategy and relevant resolutions.

We note in particular the Security Council's adoption of a number of resolutions over the past two years including, most recently, Resolution 2309 on terrorist threats to civil aviation, Resolution 2253, which renamed the 1267/1989 Al-Qaida Sanctions Regime and List to the 1267/1989 ISIL—Da'esh—and Al Qaida Sanctions Regime and List and established 'association

with ISIL' as a new stand-alone criterion for imposing new sanctions designations, Resolution 2242 on women, peace and security, Resolution 2250 on youth, peace and security, and Resolution 2178 on Foreign Terrorist Fighters, FTFs, which created an important new policy and legal framework for international action in response to the FTF threat. One striking aspect of the Security Council's work is that the 'whole of government' has been mobilized. Thus, for instance, our Resolution 2253 was adopted at a meeting of the Council attended by Ministers of Finance, and in 2015, the Council reviewed progress in the implementation of Resolution 2178 at a meeting of Ministers of Interior. UNESCO has also engaged ministers of education on its education and preventing violent extremism projects.

We are seeing results. Over the last year, the flow of FTFs has declined substantially and that is in large part due to the global community's efforts to stem the flow of FTFs as required by UNSCR 2178. The United States now has information sharing arrangements with 56 international partners to help identify, track, and deter known and suspected terrorists, and at least 26 partners share financial information that could provide actionable leads to interdict or prosecute FTFs. At least 31 countries use enhanced traveler screening measures. Furthermore, approximately 60 countries have laws in place to provide the ability to prosecute and penalize FTF activities and at least 50 countries have prosecuted or arrested FTFs or FTF facilitators. We can all stand to learn from each other on this and we would welcome continued exchanges on the subject.

From aviation security to countering terrorist financing to addressing the phenomenon of FTFs, these resolutions are strong examples of the meaningful role the UN can play to address new challenges that arise in the fight against terrorism. We express our firm support for these UN efforts, as well as those of the Global Counterterrorism Forum, GCTF, and other multilateral bodies, civil society and non-governmental organizations, and regional and subregional organizations, aimed at developing practical tools to further the implementation of the UN counterterrorism framework. We call for continued coordination among UN entities and with external partners, including the GCTF and its related initiatives and platforms such as the International Institute for Justice and the Rule of Law in Malta, IIJ, Hedayah, and the Global Community Engagement and Resilience Fund, GCERF, which advance practical implementation of the UN Global Counter-Terrorism Strategy through training, capacity building and grant-making efforts for community-based preventing and countering violent extremism projects.

Despite some challenges during the negotiations, we were pleased to participate in the fifth review of the UN Global CT Strategy, which marked an important 10th anniversary this year. The strategy that we adopted by consensus 10 years ago remains just as valid and relevant today as it was then. The nature and the extent of terrorism may have changed over the past decade, but the strategy's four pillars, and its approach of supporting and promoting rule of law and respect for human rights, still serve as the best way to ensure, as the Secretary-General has cautioned, that "counterterrorism is not counterproductive." Of particular note was the General Assembly's recognition of the recommendations of the Secretary-General's Plan of Action to Prevent Violent Extremism and setting a concrete timeline for the General Assembly to review and decide on how to best shape the UN's architecture to more effectively implement the Global CT Strategy, including as related to preventing violent extremism. We look forward to reengaging on the UN's architecture and, in that regard, would note that we do not believe this year's Sixth Committee resolution should revisit discussions that were had during the CT strategy review. The Secretary General's PVE Plan is an important opportunity for the UN system to implement a comprehensive, global approach to countering violent extremism based

on the Global CT Strategy with all key actors, and we look forward to supporting efforts to encourage all Member States to develop national and regional strategies for countering violent extremism. We strongly welcome the efforts of the United Nations to facilitate the promotion and protection of human rights and the rule of law as central to effectively countering terrorism in a sustainable manner. We also welcome the UK's Joint Statement on "Principles for UN Global Leadership on Preventing Violent Extremism," including its emphasis on the need to revitalize the UN architecture to meet today's threats by enhancing coherence, coordination, and leadership in the UN on these issues, and we encourage other Member States to support it as well.

Domestically, we are also taking a "whole of government" to countering violent extremism, and the White House has set up a new Interagency Task Force on Countering Violent Extremism. The Task Force began operating in the early spring and has focused on four main lines of effort: 1, Engagement; 2, Research and Analysis; 3, Interventions; and 4, Communications. In the Interventions line of effort, for example, the Task Force is exploring new multidisciplinary intervention strategies for individuals headed down a path toward violent extremism. As we explore these options, including possible alternative dispositions for juveniles and those with mental health problems, one challenge that we face is the lack of existing deradicalization and violent extremism rehabilitation programming available in the United States. We are also looking at what happens when those convicted of terrorism-related offenses are held in prisons spread across our country. These offenders currently receive the same types of rehabilitation and reentry programming as other violent criminals. We look forward to continued exchanges on these issues as we seek to improve global CVE efforts.

As we work together to counter violent extremism, it is also critical that we recognize that the common goal of countering terrorism should never be used as an excuse to suppress political dissent and that the free flow of information can be part of an effective strategy.

To help achieve this comprehensive vision, we need all member states to better assist and sufficiently resource UN system actors and other relevant implementers in order to deliver needed technical assistance and generate more effective solutions. To do our part, we are pleased to note that we continue to make voluntary contributions to the UN Counter-Terrorism Centre, UNCCT, the UNODC Terrorism Prevention Branch, INTERPOL, and UNICRI for development of research, assistance and training. We encourage other interested member states in joining us to help further build the capacity of the UNCCT to allow it to provide assistance to member states across a range of issues addressed in the UN Strategy, including preventing and countering violent extremism, and relevant UNSCRs, including 2178, especially by funding programs included in the UN's Capacity Building Implementation Plan to Counter FTFs. We think that a growing pool of UNCCT donors can also have helpful benefits in coordinating our civilian counterterrorism assistance on shared priorities.

Beyond the UN, we should also partner with local communities and key civil society organizations. They will often be among the most effective in countering terrorist lies.

Focusing now on treaty developments, we recognize the great success of the United Nations, thanks in large part to the work of this Committee, in developing 18 universal instruments that establish a thorough legal framework for countering terrorism. The achievements on this front are noteworthy. We have witnessed a dramatic increase in the number of states that have become party to these important counterterrorism conventions. For example, 170 states have become party to the Terrorist Financing Convention.

The United States recognizes that while the accomplishments of the international community in developing a robust legal counterterrorism regime are significant, there remains much work to be done. The 18 universal counterterrorism instruments are only effective if they are widely ratified and implemented. In this regard, we fully support efforts to promote ratification and implementation of these instruments. We draw particular attention to the six instruments concluded since 2005—the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, Nuclear Terrorism Convention, the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material, CPPNM Amendment, the 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, SUA Protocols, and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft. While the work of the international community began with the negotiation and conclusion of those instruments, that work will only be completed when those instruments are widely ratified and fully implemented.

The United States is advancing in its own efforts to ratify these instruments, and recently, we have made significant progress. Last year we deposited our instruments of ratification and accession, as appropriate, for the Nuclear Terrorism Convention, the CPPNM Amendment, and the SUA Protocols. As we continue our own efforts to ratify these recent instruments, we urge other states not yet party to do likewise.

And as we move forward with our collective efforts to ratify and implement these instruments, the United States remains willing to work with other states to build upon and enhance the counterterrorism framework. Concerning the Comprehensive Convention on International Terrorism, we will listen carefully to the statements of other delegates at this session. We would highlight in this regard that 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. And as the world grapples with the atrocities Da'esh has committed, it must be unequivocally clear that actors such as Da'esh, even if they are engaged in armed conflicts, should be prosecuted as terrorists.

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On December 12, 2016, the UN Security Council adopted Resolution 2322 at a session on threats to international peace and security caused by terrorist acts. U.N. Doc. S/RES/2322. Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered remarks at the Security Council meeting, expressing U.S. support for the resolution and, in particular, its emphasis on information sharing and cooperation among Member States in countering terrorism. Ambassador Sison's remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7604>.

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Let's all think about the terrorist threat we face today. Terrorist organizations span borders. Terrorists hide in one country, before attacking in another. Terrorists may obtain funds from criminal enterprises that traffic people, illicit goods, narcotics, or cultural property across different continents.

When terrorists talk to each other, their emails may be transmitted from one city to another, but the records of these emails sit on servers scattered around the world. So how do you prosecute a terrorist captured in one state, but who is resident of another state—a terrorist who may be a citizen of yet a third country, and whose emails are scattered on servers in a fourth, fifth, or even sixth country?

The obvious answer is that prosecutors and judges need to cooperate with each other, and cooperate closely. The challenge that we must discuss today is how to make that cooperation effective. Let me address three ways we can do that.

First, each UN Member State needs to have the right laws and agreements on the books—right on both on substance and procedure. This Council has played an important role in enshrining the legal framework for countering terrorist activities through resolutions 1373 and 2178. These resolutions focused on ensuring that all Member States make terrorism a criminal offense; take action to cut off terrorist financing; and prosecute and penalize foreign terrorist fighters. The resolution we just adopted this afternoon builds on this progress. It reaffirms that all states should establish, as a serious criminal offense under each state's domestic law, willfully financing terrorist organizations or individual terrorists for any purpose.

But it is not enough that states have laws that permit them to prosecute terrorists. States may need to gather evidence held in other jurisdictions or even request the extradition of a terrorist. That's why this resolution's focus on mutual legal assistance—obtaining evidence from another country—and extradition—a form of transferring a defendant from one country to another—is so critical. You might assume that these are more or less straightforward processes. But the United States has invested considerable effort to streamline and update both tools to help fight terrorism.

In the past, mutual legal assistance was a slow and often cumbersome process. It was hard for states to talk to each other, and judges often had to authorize requests for evidence. In our modern mutual legal assistance treaties, prosecutors—through coordinating central authorities—can work with each other to make requests for evidence. Modern extradition treaties pave the way for the extradition of terrorists. The United States is working to make it easier for countries to share evidence and extradite terrorists, with robust legal safeguards.

That brings me to my second point—implementation.

We can strengthen our laws and our agreements, but actually disrupting terrorist networks requires that our law enforcement agencies talk to each other. Now, proximity helps here. The United States sends 60 resident legal advisers from the U.S. Department of Justice to our embassies around the world to offer training and technical assistance to prosecutors, along with nine Justice Attachés who focus on extradition and coordinating international cooperation on legal cases. The United States also supports assembling Joint Investigative Teams, in which investigators from different states come together to look at a specific incident.

We can talk a lot here in the Security Council about building cooperation on counterterrorism. And, of course, we as diplomats are used to speaking with representatives of other countries. But all of us need to do more to make sure our prosecutors and our law enforcement officials also have the chance to work directly with each other. That would go a long way toward speeding up the sharing of information, and resolving the highly technical issues that come with international requests for legal assistance.

It also goes without saying that our national law enforcement agencies should improve cooperation with existing multilateral entities and help share information, such as through INTERPOL. This is especially true when we talk about how to counter foreign terrorist

fighters—regularly uploading information on foreign terrorist fighters to INTERPOL’s “I - 24/7” secure global police communications system. Systematically checking against “I - 24/7” at points of entry can make a substantial difference in preventing foreign terrorist fighter travel.

The third thing we need to do is help each other build the requisite capacities. Judicial cooperation is no easy task. Our laws differ from country to country. Our courts, prosecutors, and law enforcement agencies also differ. The paperwork related to judicial cooperation can be complicated and time-consuming—and rightly so, since we are talking about arresting people and putting them on trial, so we do not want to make mistakes. But we do have a lot to learn from each other. We can help each other understand our requirements for sharing information. We can talk to each other about the ways we have disrupted terrorist organizations. We can share strategies for how to gather evidence and build a case against terrorist networks—networks that do their best to keep their activities hidden.

That’s why the United States strongly supported the calls in this resolution to make sure UN entities are helping to provide this expertise. There are many opportunities for Member States to work closely in fighting terrorism. But this cooperation does not come at the expense of human rights or civil liberties. We can find ways to share digital data, and we should—but we need to minimize the sharing of extraneous, private information, and ensure that these protocols do not suppress freedom of expression. Likewise, timely extraditions are important. But we need to ensure that Member States follow all the applicable legal requirements. Expediency cannot be an excuse for denying rights to the accused.

Now, there’s no question that this issue is technical. But let’s zoom out, and look at the big picture. Terrorism is a threat to our collective security. If a terrorist strikes any of us, we would want the tools that today’s resolution outlined to make sure that all of our investigators and prosecutors can work together. This debate should encourage each of us to re-examine what we are doing to bolster these ties.

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**d. U.S. actions against terrorist groups**

(1) *U.S. targeted sanctions implementing UN Security Council resolutions*

See Chapter 16.A.4.b.

(2) *Foreign terrorist organizations*

(i) *New designations*

In 2016, the Department of State announced the Secretary of State’s designation of three additional organizations and associated aliases as Foreign Terrorist Organizations (“FTOs”) under § 219 of the Immigration and Nationality Act. On January 14, 2016 the State Department announced the designation of ISIL-Khorasan (“ISIL-K”) as an FTO. See January 14, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251237.htm)

[2017.state.gov/r/pa/prs/ps/2016/01/251237.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251237.htm); see also 81 Fed. Reg. 1983 (Jan. 14, 2016). The media note describes ISIL-K as follows:

ISIL-K announced its formation on January 10, 2015. The group is based in the Afghanistan/Pakistan region and is composed primarily of former members of Tehrik-e Taliban Pakistan and the Afghan Taliban. The senior leadership of ISIL-K has pledged allegiance to Abu Bakr al-Baghdadi, the leader of ISIL. This pledge was accepted in late January 2015 and since then ISIL-K has carried out suicide bombings, small arms attacks and kidnappings in eastern Afghanistan against civilians and Afghan National Security and Defense Forces, and claimed responsibility for May 2015 attacks on civilians in Karachi, Pakistan.

On May 20, 2016, the State Department designated ISIL-Libya as an FTO. 81 Fed. Reg. 32,004 (May 20, 2016). On June 30, 2016, the State Department announced the designation of al-Qa'ida in the Indian Subcontinent ("AQIS") as an FTO. See June 30, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259219.htm> see also 81 Fed. Reg. 43,334 (July 1, 2016). As explained in the media note:

Al-Qa'ida leader Ayman al-Zawahiri announced the formation of AQIS in a video address in September 2014. The group is led by Asim Umar, a former member of U.S. designated Foreign Terrorist Organization Harakat ul-Mujahidin. AQIS claimed responsibility for the September 6, 2014 attack on a naval dockyard in Karachi, in which militants attempted to hijack a Pakistani Navy frigate. AQIS has also claimed responsibility for the murders of activists and writers in Bangladesh, including that of U.S. citizen Avijit Roy, U.S. Embassy local employee Xulhaz Mannan, and of Bangladeshi nationals Oyasiqur Rahman Babu, Ahmed Rajib Haideer, and A.K.M. Shafiul Islam.

See Chapter 16 for a discussion of simultaneous designations pursuant to Executive Order 13224. U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. See [www.state.gov/j/ct/rls/other/des/123085.htm](http://www.state.gov/j/ct/rls/other/des/123085.htm) for background on the applicable sanctions and other legal consequences of designation as an FTO.

The State Department also amended the designations of FTOs. The designation of al-Nusrah Front was amended to add new aliases, most notably, Jabhat Fath al Sham. 81 Fed. Reg. 79,554 (Nov. 14, 2016); see also State Department November 10, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264230.htm>. As explained in the media note:

In July 2016, al-Nusrah Front leader Abu Muhammed al-Jawlani announced his group would henceforth be known as Jabhat Fath al Sham. Despite attempts to distinguish itself from al-Nusrah Front by developing a new logo and flag, Jabhat Fath al Sham's principles continue to be the same as those of al-Qa'ida and the group remains committed to carrying out terrorist activity under this new name

On December 28, 2016, the State Department announced the amendment of the designation of Lashkar e-Tayyiba ("LeT") to include the alias Al-Muhammadia Students ("AMS"). 81 Fed. Reg. 96,565 (Dec. 30, 2016). See also State Department media note, available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266105.htm>. The media note identifies AMS as "the student wing of LeT," adding that it was "founded in 2009, ...and has worked with LeT senior leaders to organize recruiting courses and other activities for youth."

(ii) *Reviews of FTO designations*

During 2016, 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 Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and the national security of the United States did not warrant revocation: Al-Qa'ida in the Arabian Peninsula (81 Fed. Reg. 10,951 (Mar. 2, 2016)); Palestine Liberation Front (81 Fed. Reg. 12,776 (Mar. 10, 2016)); Ansar al Islam (81 Fed. Reg. 18,932 (Apr. 1, 2016)); Islamic Movement of Uzbekistan (81 Fed. Reg. 35,435 (June 2, 2016)); Harakat ul-Jihad-i-islami (81 Fed. Reg. 51,958 (Aug. 5, 2016)); Liberation Tigers of Tamil Elam ("LTTE") (81 Fed. Reg. 52,945 (Aug. 10, 2016)); Jemaah Islamiya (81 Fed. Reg. 59,029 (Aug. 26, 2016)); Kata'ib Hizballah (81 Fed. Reg. 61,290 (Sep. 6, 2016)); al-Aqsa Martyrs' Brigade (81 Fed. Reg. 66,118 (Sep. 26, 2016)); Tehrik-e Taliban Pakistan (TTP), Army of Islam, the Communist Party of the Philippines/ New People's Army, and Indian Mujahedeen (81 Fed. Reg. 72,639 (Oct. 20, 2016)).

(3) *Rewards for Justice Program*

On August 30, 2016, the State Department announced a reward offer of up to \$3 million for information leading to the location, arrest, and/or conviction of ISIL terrorist Gulmurod Khalimov. See August 30, 2016 media note, available at <http://2009->

[2017.state.gov/r/pa/prs/ps/2016/08/261373.htm](http://2017.state.gov/r/pa/prs/ps/2016/08/261373.htm). The media note describes Khalimov as follows:

Khalimov is a former Tajik special operations colonel, police commander, and military sniper. He was the commander of a police special operations unit in the Ministry of Interior of Tajikistan.

He is now an ISIL member and recruiter. In May 2015, he announced in a 10-minute propaganda video that he fights for ISIL and has called publicly for violent acts against the United States, Russia, and Tajikistan.

On September 29, 2015, the U.S. Department of State designated Khalimov as a Specially Designated Global Terrorist under Executive Order 13224. The United Nations Security Council ISIL (Da'esh) and al-Qaida Sanctions Committee added him to its sanctions list in February 2016. Khalimov is wanted by the Government of Tajikistan. On June 1, 2015, INTERPOL issued a Red Notice for Khalimov, alerting member nations that he is a wanted person and should be apprehended for extradition back to Tajikistan.

On December 16, 2016, the State Department announced an increased reward offer for information on ISIL leader Abu Bakr al-Baghdadi. See December 16, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265708.htm>. The reward offer was increased to \$25 million from the previous reward offer of \$10 million announced in October 2011. The media note provides background on al-Baghdadi:

In June 2014, ISIL, also known as Da'esh, seized control of portions of Syria and Iraq, self-declared a so-called Islamic caliphate, and named al-Baghdadi as caliph. In recent years, ISIL has gained the allegiance of jihadist groups and radicalized individuals around the world, and has inspired attacks in the United States.

Under al-Baghdadi, ISIL has been responsible for the deaths of thousands of civilians in the Middle East, including the brutal murder of numerous civilian hostages from Japan, the United Kingdom, and the United States. The group also has conducted chemical weapons attacks in Iraq and Syria in defiance of the longstanding global norm against the use of these appalling weapons, and has enabled or directed terrorist attacks beyond the borders of its self-declared caliphate.

In 2011, the Department of State designated Abu Bakr al-Baghdadi as a Specially Designated Global Terrorist under Executive Order 13224. Al-Baghdadi was also added to the United Nations Security Council ISIL (Da'esh) and al-Qaida Sanctions Committee in 2011. Al-Baghdadi was the leader of al-Qa'ida in Iraq (AQI), which subsequently morphed into ISIL.

For background on the Rewards for Justice program, more information about those for whom reward offers have been made, and the program's enhancements under the USA PATRIOT Act, see the Rewards for Justice website, [www.rewardsforjustice.net](http://www.rewardsforjustice.net) and Digest 2001 at 932-34.

## 2. Narcotics

### a. *Majors list process*

#### (1) *International Narcotics Control Strategy Report*

On March 2, 2016, the Department of State submitted the 2016 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). See March 2, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253905.htm)

[2017.state.gov/r/pa/prs/ps/2016/03/253905.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253905.htm). The report describes the efforts of foreign governments to address all aspects of the international drug trade in calendar year 2015. 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 INCSR is available at <http://2009-2017.state.gov/j/inl/rls/nrcrpt/2016/index.htm>

#### (2) *Major drug transit or illicit drug producing countries*

On September 12, 2016, President Obama issued Presidential Determination 2016-10 “Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2017.” 81 Fed. Reg. 64,749 (Sep. 20, 2016). In this year’s determination, the President named 22 countries: Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country’s presence on the “Majors List” is not necessarily an adverse reflection of its government’s counternarcotics efforts or level of cooperation with the United States. The President determined that Bolivia, 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 to aid the promotion of democracy in Burma and Venezuela is vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2017 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

### b. *Bilateral arrangements*

At the third United States-Cuba counternarcotics technical exchange, held on July 21, 2016 in Havana, the two countries signed a counternarcotics arrangement to facilitate cooperation and information sharing in efforts against illegal narcotics trafficking. See July 22, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/07/254405.htm)

[2017.state.gov/r/pa/prs/ps/2016/07/260396.htm](http://2017.state.gov/r/pa/prs/ps/2016/07/260396.htm). The counternarcotics technical exchanges are part of broader dialogues between the United States and Cuba that began after the restoration of U.S. relations with Cuba in 2015.

**c. *Interdiction assistance***

During 2016 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2016 DCPD No. 00512, p. 1, Aug. 4, 2016) that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama did not make this determination with respect to other countries in 2016. President Obama made his determination pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

**d. *UN***

On April 19, 2016, Secretary Kerry issued a press statement in the context of the UN General Assembly's special session on the world drug problem, on pragmatic reform of global drug policy. Secretary Kerry's remarks are excerpted below and available in full at <http://2009-2017.state.gov/secretary/remarks/2016/04/255954.htm>.

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This meeting takes place as heroin and new psychoactive substances are ravaging communities across the United States. At the same time, we are seeing tremendous advances in our understanding of drug dependency and our ability to address substance use disorders as a public health—rather than a strictly criminal justice—challenge.

Relying on decades of scientific research and lessons learned in our country's own struggle with drugs, the United States proposes a pragmatic approach that better balances public health and law enforcement.

\* \* \* \*

Now as Secretary of State, I am proud that the renewed U.S. focus on a public health approach to drugs is gaining traction in other parts of the globe.

In New York this week, the United States will seek international consensus on an

approach that upholds the three UN drug conventions—which continue to provide a solid foundation for international cooperation on drugs—and that fully integrates public health priorities, recognizing drug abuse as a chronic disease. This means implementing alternatives to incarceration where appropriate, the use of drug courts, and sentencing reform to channel those who suffer from substance use disorder into recovery and treatment, not just prisons. Finally, it means strengthening international law enforcement cooperation to combat violent drug trafficking organizations who threaten all nations and all peoples.

President Obama said that successfully addressing the drug problem is a national priority critical to promoting the safety, health, and prosperity of the American people. These same aspirations are shared by people of all the nations that will take part in the UN session. We have an opportunity to take an important step towards meeting the challenge posed by drugs around the world, and with the resolute commitment of our nation and other nations working together in common cause, we will.

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### 3. Trafficking in Persons

#### a. *Trafficking in Persons report*

In June 2016, the Department of State released the 2016 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 (“TVPA”), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covers the period April 2015 through March 2016 and evaluates the anti-trafficking efforts of countries around the world. Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The 2016 report lists 27 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State’s methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at <https://www.state.gov/documents/organization/258876.pdf> Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

Secretary Kerry delivered remarks on June 30, 2016 on the release of the report, which are excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/06/259227.htm)

[2017.state.gov/secretary/remarks/2016/06/259227.htm](http://2009-2017.state.gov/secretary/remarks/2016/06/259227.htm). Secretary Kerry also delivered remarks (not excerpted herein) at the annual meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons (“PITF”) on October 24, 2016, which are available at [\[2017.state.gov/secretary/remarks/2016/10/263476.htm\]\(http://2009-2017.state.gov/secretary/remarks/2016/10/263476.htm\).](http://2009-</a></p>
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... There's a lot of information in here; a lot of studious work goes into thinking it through. There are some tough calls—in the end, they come down to element of discretion—but not much, because we have a fixed set of rules that Congress has created, and we follow those rules. And therefore there are some folks in here who will obviously be concerned about the conclusions, but the conclusions are based on facts and based on a lot of analysis over a year.

So I'm very grateful to our team that doesn't just put this together in the last weeks. The work on next year's report has already begun, because it's a period that goes from April 1st to March 31st, and so we're already ... beginning to collect and build on the information we gained in the prior year, and work with countries—I want to say that to any country that evaluates this and says, "Well, why am I here?" Well, we work with these countries. I've made personally plenty of phone calls to my counterpart foreign ministers, to prime ministers, to presidents, and said, "Look, you're not cruising in the right direction here, and we need to start to move." And we send people to work with those countries, and our embassies are deeply engaged in helping to promote transformation.

So it is thanks to everybody, an all-hands-on-deck full team effort, that this document comes out. And it's not an insignificant document.

The tier rankings that I have designated reflect our department's best assessment of a government's efforts to eliminate human trafficking. They don't take into account political and other factors. As I say, they're based on a [set of] criteria. And in addition to the rankings, the report outlines our specific concerns as well as the ways we can improve our efforts. This is not meant to be a dunning report; it is meant to be a demarcation, an encouragement process, a process of evaluation and work towards changing rankings.

And as this is now the 16th report of the State Department, and one of the things that I have found is that we can always become more effective in fighting trafficking by working with the true experts, and those experts are sitting here. Those experts are also all of the survivors.

Last December, President Obama appointed an Advisory Council on Human Trafficking, giving survivors a direct line to offer recommendations and guidance on our strategy. And I've had the chance to meet with members of this council—some of whom are here today—and I know that every aspect of what we do—including in this report—is stronger because of the engagement of these folks.

Now, make no mistake...: When we talk about "human trafficking," we're talking about slavery—modern-day slavery that still today claims more than 20 million victims on any given time.

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...[T]he State Department and the global law firm DLA Piper have gotten together to increase the availability of pro-bono legal services and other tools to combat trafficking. And today, we are pleased to announce the release of two documents which our teams have developed: The first is a model contract for domestic workers to use with their employers, and the second is a memorandum of understanding between countries sending and welcoming migrant domestic workers, setting forth clear standards for those workers' protection. Both documents are based on international law and both are designed to prevent the abuses in domestic work.

My friends, this is the 21st century. We know that human civilization has had thousands of years to develop and make progress and establish rules, and discern the difference between right and wrong. And we are part of a community of nations proudly, particularly, that lives by

and advocates for and believes in the Universal Declaration of Human Rights. Frankly, it's stunning, it's outrageous that even today, the magnitude of the human trafficking challenge cannot be overstated. We all know the sad litany. Girls compelled into sex slavery. Women, sleeping in closets, let out only to cook, wash clothes, and scrub floors. Men and boys, forced to forgo sleep ...and sustenance so that they can work around the clock, often in blistering heat or otherwise appalling conditions.

And the good news is we have the ability to fight back and, believe me, we are determined to do so. This is reflected in the 2030 Sustainable Development Goals, which include an unprecedented commitment to halt human trafficking. It is reflecting in the Palermo Protocol, ratified by nearly 170 nations, and aimed at preventing, suppressing, and punishing these despicable crimes. And it is reflected in the steadily increasing efforts to cooperate and share information among law enforcement authorities on every continent. It is reflected in efforts by the media to cast a spotlight on the shadowy areas where traffickers exist and thrive. And it is reflected in a growing network of NGOs and advocacy groups who work hard every single day to bring modern-day slavery to a permanent end.

Assisting all of these efforts is what our annual report is all about. It is not, as I said earlier, just a catalogue of abuses. It is a detailed analysis of the challenges that we face. It's a targeted roadmap to measure how we can better overcome the challenges. ...

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**b. Presidential determination**

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

On September 27, 2016, President Obama issued a memorandum for the Secretary of State, “Presidential Determination With Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons.” 81 Fed. Reg. 70,311 (Oct. 11, 2016). The President’s memorandum conveys determinations concerning the countries that the 2016 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2016 report.

The Trafficking Victims Protection Act further requires that the President’s notification be accompanied by a certification by the Secretary of State regarding certain types of foreign assistance (“covered assistance”) that “no [such covered] assistance is intended to be received or used by any agency or official who has participated in, facilitated, or condoned a severe form of trafficking in persons.” Secretary Kerry signed the required certification in the 2016 Report and it was included with the President’s determination. 81 Fed. Reg. 70,311 (Oct. 11, 2016). Prior to obligating or expending covered assistance, relevant bureaus in the State Department are required to take appropriate steps to ensure that all assistance is provided in

accordance with the Secretary's certification.

**c. U.S. Leadership in Combating Trafficking in Persons**

On October 24, 2016, the State Department issued a fact sheet on U.S. leadership in combating trafficking in persons during the Obama Administration. The fact sheet is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263463.htm)

[2017.state.gov/r/pa/prs/ps/2016/10/263463.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263463.htm).

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Department officials have urged foreign governments to improve their anti-trafficking efforts through the annual Trafficking in Persons (TIP) Report and sustained diplomatic engagement in Washington, DC and overseas. The TIP Report has grown from covering 154 countries in 2008 to 188 today, and since 2010 has included an assessment of the United States anti-trafficking efforts to further advance U.S. diplomatic efforts worldwide. The Department has worked closely with governments to support the passage, amendment, and implementation of anti-trafficking laws. Since 2009, 194 pieces of anti-trafficking legislation have been passed in countries around the world. The most recent reporting period saw 238 percent more prosecutions and 58 percent more convictions and victims identified when compared to government-reported data from 2009.

The Department's TIP Office has awarded approximately \$200 million to fund more than 265 projects worldwide to address both sex and labor trafficking. Currently, the TIP Office has approximately 100 ongoing projects in 70 countries, totaling more than \$60 million. The TIP Office's largest bilateral grants are through the Child Protection Compact (CPC) Partnership program, which works to enhance capacity and improve coordination of government and civil society efforts to combat child trafficking. The first CPC Partnership was signed, with the Government of Ghana, in June 2015.

In December 2015, as President of the United Nations Security Council, the United States was instrumental in holding the first Security Council meeting dedicated to the issue of human trafficking in situations of conflict and called on Member States to improve implementation of obligations to criminalize, prevent, and otherwise detect and disrupt human trafficking in such times.

The Department supports training of both U.S. and foreign law enforcement officials to better understand and actively combat human trafficking. During the Obama Administration, the International Law Enforcement Academy Program has trained more than 30,000 foreign counterparts in methods to fight transnational crime, including 4,500 officers on issues related to trafficking in persons. The Department also led an interagency initiative in 2014 to train approximately 2,000 U.S. government employees at 10 overseas posts to increase information-sharing related to trafficking between the United States and host countries.

The Bureau of Diplomatic Security (DS) established an anti-trafficking unit in 2011 to investigate trafficking cases involving visa or passport fraud, and since has expanded its mission by participating in trafficking task forces, conducting specialized anti-trafficking training, coordinating centralized case referrals, and working jointly with other law enforcement agencies,

both overseas and across the United States, to combat this crime. These efforts and others, reflect our dedication to addressing a worldwide challenge and to increasing the prosecution of human traffickers, including those who exploit individuals in brothels, domestic work environments, and agricultural settings.

During the Obama Administration, the Bureau of Population, Refugees, and Migration's Return, Reintegration, and Family Reunification Program for Victims of Trafficking has helped 1,545 eligible family members join nearly 700 trafficking victims with T visa status in the United States and assisted 17 survivors to voluntarily return home.

The TIP Office worked with the Department of Labor and Office of Management and Budget to develop tools and guidance to help the federal procurement workforce implement the anti-trafficking protections set forth by Executive Order 13627 and the Federal Acquisition Regulation. In 2014, the TIP Office also funded research by the International Labor Organization and the United Nations Office on Drugs and Crime to expose abusive recruitment practices known to facilitate human trafficking, such as charging workers recruitment fees. This coordinated research included three stakeholder meetings and field surveys conducted in different countries and regions of the world.

The Office of Protocol has augmented its work to help protect domestic workers of foreign mission personnel in the United States by implementing a system to track allegations of abuse, encouraging NGOs and attorneys to report cases, establishing additional requirements pertaining to the treatment of domestic workers, and briefing both accredited diplomats and domestic workers employed by foreign diplomatic personnel in the Washington, D.C. area to apprise them of their rights and responsibilities. In 2015, the Office of Protocol launched the In-Person Registration Program, which enhances protections for domestic workers. Registrations are currently taking place in the Washington, D.C. area and will soon be expanded throughout the United States.

The Department led an interagency process to create a "Know Your Rights" pamphlet to inform applicants for certain nonimmigrant work visas about their rights in the United States and provide them the National Human Trafficking Hotline number ...

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The TIP Office and New Perimeter, DLA Piper's nonprofit affiliate that provides pro bono legal assistance in under-served regions globally, launched a public-private partnership in 2013 to increase the availability of pro bono legal resources to combat human trafficking. In 2016, the partners announced a package of model documents aimed at preventing the abuse of domestic workers, whose employment in private homes increases their vulnerability and isolation. The first two documents are a model contract and an addendum for domestic workers to use with their employers; the third is a memorandum of understanding between countries sending and receiving migrant domestic workers.

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#### 4. Piracy

On April 25, 2016, Ambassador Michele J. Sison, U.S. Deputy Representative to the United Nations, delivered remarks at a UN Security Council meeting on peace in West Africa, discussing efforts to combat piracy and armed robbery in the Gulf of Guinea. Her remarks are excerpted below and available at [http://2009-2017-](http://2009-2017-usun.state.gov/remarks/7243)

[usun.state.gov/remarks/7243](http://2009-2017-usun.state.gov/remarks/7243)

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Earlier this month, on April 11 at 7:56 p.m., pirates attacked a cargo vessel off the coast of Nigeria. They had waited for darkness before ambushing the vessel and boarded with force. The captain and crew sounded the alarm and hid in a protected space on the ship—only to discover when they emerged the following day that two of their crew were missing: a second officer from the Philippines and an electrician from Egypt. Both are still missing.

This was not the first pirate attack of the year, nor even the first attack that day. Earlier on April 11—the very same day—pirates had attacked a Turkish cargo ship off the coast of Nigeria, kidnapping six of the crew, including the vessel’s captain. Those men are also still missing.

Mr. President, piracy and armed robbery in the Gulf of Guinea are increasing at an alarming rate, with some industry experts recording at least 32 attacks off the coast of Nigeria alone in 2016, affecting many Member States, including the United States.

The economic consequences for the people of the region are devastating. According to a Chatham House report, as much as 400,000 barrels of crude oil are stolen each day in the Gulf of Guinea. By some estimates, Nigeria is losing about \$1.5 billion a month due to piracy, armed robbery at sea, smuggling, and fuel supply fraud. Illegal, unreported, and unregulated fishing also generates a sizeable income loss—in the hundreds of millions of dollars a year—for many countries and communities that depend on this sector to survive.

We have spoken many times in this chamber about the root causes of piracy—ineffective governance structures, weak rule of law, precarious legal frameworks and inadequate naval, coast guard, and maritime law enforcement. The absence of an effective maritime governance system, in particular, hampers freedom of movement in the region, disrupts trade and economic growth, and facilitates environmental crimes.

We have also acknowledged in our resolutions and in the presidential statement adopted this morning that the solution to these root causes lies in greater African stewardship of maritime safety and security at the continental, regional, and Member State level. Strong political will from African governments and leaders is needed to pursue and prosecute crimes at all levels within criminal enterprises.

Maritime crime flourishes under ineffective or complicit governance structures, but is diminished when rule of law is effective. Absent African ownership and action from national and local governments to tackle maritime security challenges, there is little reason to believe that attacks in the Gulf of Guinea will decline. International cooperation and integration among regional countries, international organizations, industry, and other entities that have a stake in maritime security are also critical to ensure the full range of lawful and timely actions to combat piracy and other maritime crime in the Gulf of Guinea.

In this regard, we welcome the Yaoundé Summit documents, which articulated a comprehensive view of maritime safety and security, including combating illegal fishing; trafficking of arms, people, and drugs, and maritime pollution.

We commend the UN offices of West and Central Africa for providing capacity building and technical assistance to governments in the region, as well as sub-regional organizations, including the Gulf of Guinea Commission, GGC, the Economic Community of Central African States, ECCAS, and the Economic Community of West African States, ECOWAS. We urge the Member States of the regional and sub-regional organizations to make the Interregional Coordination Center fully operational.

In this context, the United States is doing its part to support the efforts of our African partners in the Gulf of Guinea. Our approach is based on three guiding principles: the prevention of attacks, the response to acts of maritime crime, and enhancing maritime security and governance.

On prevention, we are supporting ECOWAS and ECCAS efforts to strengthen regional maritime strategies, including the completion of their Memorandum of Understanding and Code of Conduct for Central and West Africa. We are also encouraging nations to fully implement the Yaoundé Code of Conduct and the 2050 AU African Integrated Maritime Strategy.

We encourage states in the region to further enhance security by establishing pilot maritime Zone E, covering the coasts of Nigeria, Niger, Benin, and Togo, an area where the majority of attacks occur. Establishing Zone E would provide the means for an integrated approach to coordinating joint patrols, naval drills, training programs, and intelligence sharing among the naval forces of countries in the zone.

On responding to acts of maritime crime, the U.S. trains, equips, and conducts exercises and operations with African maritime forces through our African Partnership Station, APS. One month ago, APS held a multinational maritime exercise where the Gulf of Guinea, European, and South American nations worked together, shared information, and refined their tactics, techniques, and procedures to monitor and enforce their territorial waters and exclusive economic zones in the Gulf of Guinea.

Through our African Maritime Law Enforcement Partnership, we are also improving partner capacity to conduct maritime security operations off the coasts of Senegal, Cape Verde, Ghana, and Cameroon.

To enhance maritime security and governance, the U.S. is assisting with strengthening the judicial sectors of Gulf of Guinea nations and regional capacity to address impunity for piracy and related maritime crime, such as our support for the UN Office on Drugs and Crime. Technical assistance helps these countries put in place the necessary criminal laws to effectively prosecute armed robbery at sea and piracy cases.

In closing, I would like to underscore the importance of a comprehensive regional approach to addressing maritime insecurity. A comprehensive approach will help reduce the loss of national revenue, support socioeconomic development, and expand environmental protection in the region. We look forward to supporting the June G7 Friends of the Gulf of Guinea Plenary in Lisbon, as well as Togo's hosting the 2016 AU Maritime Security Summit this October. The U.S. sees these engagements as an opportunity to produce concrete timelines and actions to help form a robust national, regional, and global response to maritime security threats across Africa.

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## 5. Money Laundering and Asset Sharing Agreements

### a. *FBME as a financial institution of primary money laundering concern*

As discussed in *Digest 2015* at 92, the imposition of a special measure against FBME Bank Ltd. (“FBME”), on the basis of the finding by the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) that FBME is a financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act (“Section 311”), was enjoined by a U.S. district court before the rule’s effective date. Following a voluntary remand of the earlier proposed rule to FinCEN for further consideration, FinCEN imposed a substantively equivalent prohibition on U.S. financial institutions opening or maintaining a correspondent account for, or on behalf of, FBME, which became effective July 29, 2016. 81 Fed. Reg. 18,480 (Mar. 31, 2016). As explained in the Federal Register notice:

...FinCEN continues to find that reasonable grounds exist for concluding that FBME is a financial institution of primary money laundering concern. Based upon that finding, FinCEN is authorized to impose one or more special measures. Following the required consultations and the consideration of all relevant factors..., FinCEN proposed the imposition of a prohibition under the fifth special measure in an NPRM published on July 22, 2014. The fifth special measure authorizes a prohibition against the opening or maintaining of correspondent accounts by any domestic financial institution or agency for, or on behalf of, a financial institution found to be of primary money laundering concern.

After re-opening the comment period, FinCEN considered all of the special measures, as well as measures short of a prohibition, and concluded that a prohibition under the fifth special measure is still the appropriate choice. Consistent with the finding that FBME is a financial institution of primary money laundering concern and in consideration of additional relevant factors, this final rule imposes a prohibition on the opening or maintaining of correspondent accounts by covered financial institutions for, or on behalf of, FBME under the fifth special measure. The prohibition on the opening or maintenance of correspondent accounts imposed by the fifth special measure will help guard against the money laundering and terrorist financing risks that FBME presents to the U.S. financial system...

On September 20, 2016, the U.S. District Court for the District of Columbia remanded the above-described final rule to FinCEN, stating that the agency had not responded meaningfully to FBME’s comments regarding the agency’s treatment of aggregate Suspicious Activity Report (“SAR”) data. On December 1, 2016, FinCEN supplemented its final rule to explain “that FBME’s comments regarding FinCEN’s use of SARs in the rulemaking process reflect a misunderstanding of SARs generally and how FinCEN analyzed and used SARs in this rulemaking.” 81 Fed. Reg. 86,577 (Dec. 1, 2016).

**b. *North Korea as a jurisdiction of primary money laundering concern***

On May 27, 2016, the Director of FinCEN found that North Korea is a jurisdiction of primary money laundering concern pursuant to Section 311. 81 Fed. Reg. 35,441 (June 2, 2016). Excerpts follow from the finding.

While none of North Korea's financial institutions maintain correspondent accounts with U.S. financial institutions, North Korea does have access to the U.S. financial system through a system of front companies, business arrangements, and representatives that obfuscate the true originator, beneficiary, and purpose of transactions. We assess that these deceptive practices have allowed millions of U.S. dollars of DPRK illicit activity to flow through U.S. correspondent accounts.

Moreover, although U.S. and international sanctions have served to significantly isolate North Korean banks from the international financial system, the North Korean government continues to access the international financial system to support its WMD and conventional weapons programs. This is made possible through its use of aliases, agents, foreign individuals in multiple jurisdictions, and a long-standing network of front companies and North Korean embassy personnel which support illicit activities through banking, bulk cash, and trade. Front company transactions originating in foreign-based banks have been processed through correspondent bank accounts in the United States and Europe. Further, the enhanced due diligence required by United Nations Security Council Resolutions (UNSCRs) related to North Korea is undermined by North Korean-linked front companies, which are often registered by non-North Korean citizens, and which conceal their activity through the use of indirect payment methods and circuitous transactions disassociated from the movement of goods or services.

On the basis of that finding, FinCEN proposed a rule imposing the fifth special measure against North Korea, prohibiting covered financial institutions from opening or maintaining a correspondent account in the United States for or on behalf of a North Korean banking institution. 81 Fed. Reg. 35,665 (June 2, 2016). On November 9, 2016, a very similar rule became final with only minor definitional changes vis-à-vis the proposed rule. 81 Fed. Reg. 78,715 (Nov. 9, 2016).

**c. *Withdrawal of finding regarding JSC Credex Bank***

As of March 17, 2016, FinCEN withdrew its finding that JSC CredexBank ("Credex"), renamed JSC InterPayBank ("InterPay"), is a financial institution of primary money laundering concern pursuant to Section 311, on the grounds that "material subsequent developments...ha[d] mitigated the money laundering risks associated with" the bank.

81 Fed. Reg. 14,389 (Mar. 17, 2016). At the same time, FinCEN withdrew the special measure that had been imposed on the basis of the finding. 81 Fed. Reg. 14,408 (Mar. 17, 2016).

**d. *Asset sharing agreement with Colombia***

On November 21, 2016 the governments of the United States of America and the Republic of Colombia signed an agreement “concerning the Sharing of Forfeited Proceeds and Instrumentalities of Crime.” The purpose of the Agreement, as stated in Article 2, is “to enable the Parties to share Assets that have been forfeited in relation to criminal offenses.” Article 3 of the Agreement identifies the circumstances in which assets may be shared: when a) assets are confiscated through “Cooperation provided by the other Party;” b) assets are held due to an order received from or issued by the other Party. Article 4 relates to requests for sharing of assets. Articles 5 and 6 relate to the method of sharing and the terms of payment.

**6. Organized Crime**

**a. *General***

On June 16, 2016, Assistant Secretary of State William R. Brownfield of the Bureau of International Narcotics and Law Enforcement Affairs (“INL”) testified before the Senate Committee on Foreign Relations regarding responding to transnational criminal threats. Assistant Secretary Brownfield’s prepared testimony is excerpted below and available at <https://2009-2017.state.gov/j/inl/rls/rm/2016/258582.htm>.

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Chairman Corker, Senator Cardin, distinguished Members of the Committee; thank you for the opportunity to appear before you to discuss the Department of State’s work to prevent transnational organized crime from harming U.S. citizens and threatening our national interests.

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Transnational organized crime encompasses a wide variety of criminal threats, ranging from illegal trafficking in drugs, people and wildlife to cybercrime and money laundering. Any serious ongoing criminal activity that crosses international borders and involves three or more people meets the legal definition of transnational organized crime, and these activities threaten the interests of the United States on three broad, interrelated fronts.

First, transnational organized crime’s impact is felt directly on the streets of virtually every community in America. Drugs, counterfeit merchandise, and other contraband are illegally smuggled into the United States every year, undermining our border security and inflicting harm

on society and individuals. Heroin, fentanyl, and illicit opioids originating from abroad are perpetuating the national opioid epidemic. Cyber-enabled fraud and other forms of crime victimize American citizens of billions of dollars annually, and transnational criminal gangs commit crimes in collaboration with their peers located beyond our borders.

Second, American businesses and financial institutions are more affected than ever before by the impact of transnational organized crime. When international crime infiltrates legitimate commercial sectors, our companies and workers are deprived of a level playing field to compete globally. Markets for U.S. products are diminished, prices are distorted, and consumers are exposed to additional risks from unregulated (and in many cases unsafe) products. Counterfeiting and piracy cost the U.S. economy billions of dollars annually and expose consumers to dangerous and defective products. Transnational crime also corrupts international financial institutions that supply the credit and banking services that our global economy depends on.

Third, international criminals engage in a variety of activities that pose a grave threat to our national security and the stability of the global community. Corruption and the enormous flow of illicit profits generated by criminal activity are serious threats to the stability of democratic institutions, the rule of law, and sustainable economies around the world. Once imbedded within the political institutions of a society, transnational criminal networks weaken the bonds of trust between citizens and their state. Governments corrupted at senior levels by organized crime cannot be trusted to act as reliable partners of the United States, or as responsible stakeholders in the international community. The convergence of crime, corruption, and weak governments can also devolve into failed states and ungoverned spaces that provide a foothold for terrorism, insurgencies and unchecked human rights abuses.

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... Over the past two decades, with support from successive administrations and bipartisan backing from Congress, INL has recalibrated its work to focus on two mutually supportive strategic objectives; helping partner governments build, reform, and sustain judicial institutions that enhance the capacity of their criminal justice systems; and developing the global architecture necessary for cross-border law enforcement cooperation and preventing corruption.

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In addition to capacity building, INL has achieved substantial progress in developing frameworks for cross-border cooperation. Beginning in the late 1990s, thanks in large part to U.S. leadership, and working largely from U.S. models, the global community has developed a series of groundbreaking treaties that promote international law enforcement cooperation and reduce the advantage that criminals gain from crossing borders. The UN Convention against Transnational Organized Crime (UNTOC), which entered into force in 2003, is the first legally binding instrument that commits countries to common criminalization of a wide range of serious organized crimes and to cooperating with one another on criminal justice enforcement. It is supplemented by three Protocols to combat trafficking in persons, migrant smuggling and illicit trafficking in and manufacturing of firearms. The United States has used the UNTOC as the basis for mutual legal assistance and extradition cooperation with other countries on over 470 occasions, making the treaty a valuable tool for our criminal justice practitioners.

We've achieved similar progress in creating global standards against corruption, the great enabler and worst consequence of organized crime. The UN Convention against Corruption (UNCAC) entered into force in 2005 and provides a complementary framework to address both the supply and demand for corrupt international practices. The UNCAC lays out requirements for preventive anticorruption measures, criminalization of bribery and other corrupt practices. These requirements are only as good as governments' ability to enforce them, so INL also works with international law enforcement networks such as INTERPOL to target perpetrators of corruption and their ill-gotten gains. INL also leads efforts within the G-20 to prevent corrupt officials from traveling internationally and enjoying the benefits of their crimes.

These UN benchmarks have been complemented by treaties developed in other multilateral organizations that support global efforts to prevent transnational crime. The Council of Europe's Convention on Cybercrime, for example, provides a model for countries to develop domestic legislation and provides a platform for increased cooperation in cybercrime investigations. The Financial Action Task Force (FATF) serves as the global focal point for concrete cooperation to counter money laundering, which greases the wheels of international criminal activity. Taken collectively, this legal framework provides the foundation necessary for systemic, standardized law enforcement and judicial cooperation between governments. INL is committed to using all levers of diplomacy to encourage our international partners to take advantage of this framework, for the protection of their own citizens and interests as well as ours.

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**b. *Conference of the Parties to the UN Convention against Transnational Organized Crime***

On October 17, 2016, the State Department issued a media note summarizing U.S. participation at the Conference of the Parties to the UN Convention against Transnational Organized Crime ("UNTOC"), which commenced in Vienna on that day. The U.S. delegation to the Conference was led by INL Principal Deputy Luis Arreaga and joined by Ambassador Susan Coppedge, the lead for U.S. global engagement against human trafficking. Also included in the delegation were officials from the Department of Homeland Security, Department of Justice, and Department of State. The media note, available in full at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263205.htm> identifies U.S. goals for the meeting:

The UNTOC meeting will gather counterparts from around the world to advance international cooperation and share best practices in the fight against transnational crime.

U.S. goals for the meeting include enhancing the ability of investigators, prosecutors, and others on the front lines to work across borders and cooperate more closely in fighting transnational crime. The United States will take part in side events on the priority areas of combating trafficking in persons and promoting the sharing of electronic evidence.

**c. Sanctions Program**

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

**7. Corruption**

On May 12, 2016, Secretary Kerry delivered remarks at the Anti-Corruption Summit plenary in London. Secretary Kerry joined with heads of state from over forty countries, representatives of multinational organizations, and civil society leaders at the Summit to discuss anti-corruption efforts. Secretary Kerry's remarks are excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/05/257130.htm>.

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Criminal activity literally is a destroyer of nation-states because it contributes to drug trafficking, arms smuggling; it contributes to human trafficking; it becomes the facilitator of activities that create sub-states ... within states, and we're left struggling, fighting. It is a contributor to terrorism, my friends, in many different ways. And the extremism that we see in the world today comes in no small degree from the utter exasperation that people have with the sense that the system is rigged. And we see this anger manifesting itself in different forms in elections around the world, including ours. People are angry and the anger is going to grow unless we shut the doors and try to prove to people there's a fairness that can be established in the system.

Now, I know some people will say, "Oh, it's culture—the culture has grown that way and that's the way it's going to be." Well, culture can change. Culture can learn. Culture can adapt to modernity and to a global standard that requires something more. So we're pleased to be joining with the prime minister in this international center that will work in anti-corruption to share information, to facilitate law enforcement, to be able to provide a barrier to this rampant scourge that is really pandemic on a global basis.

And we are going to ourselves—President Obama just announced—all 50 states, legislation will be put in place to require transparency with respect to businesses that are registered there. We will in addition engage in additional efforts which were already—we're going to put \$70 million into additional integrity initiative to help with local police training in order to help provide additional ability for digital—for internet transmission of payments, which reduces the opportunity for bribery and graft. And there are many different things that we can do technologically to improve this.

... We have to get the global community to come together and have no impunity to corruption. ...

So that's why I view today as genuinely a very important moment. ... That's why accountability under the law is so critical and that's why I view this discussion as the beginning of something that can help us in the battle against extremism, help us in the battle for strengthening the commitment to rule of law, and giving people across the planet a sense that leaders at the highest level are not, in fact, part of the problem; they're part of the solution.

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Also on May 12, 2016, the State Department released a fact sheet summarizing U.S. commitments made at the Global Anti-Corruption Summit. The fact sheet is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257124.htm)

[2017.state.gov/r/pa/prs/ps/2016/05/257124.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257124.htm).

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The major initiatives include:

(1) Strengthening Law Enforcement Efforts and Working Across Borders to Hold Corrupt Actors Accountable:

- Global Asset Recovery Forum (GFAR) – The United States will co-host with the United Kingdom the first meeting of the GFAR in 2017 in Washington, DC. This forum will create a robust mechanism to work collaboratively on major asset recovery cases where there is emergent need to return assets for the benefit of the people harmed by corruption.
- International Anti-Corruption Coordination Center (IACCC) – The IACCC will coordinate cross-border investigative communication, increase data sharing between key financial hubs, and assist developing countries with corruption cases. The United States is also joined by several countries representing key financial centers in supporting the IACCC.

(2) Strengthening Capacity to Prevent and Fight Corruption in Countries Across the Globe:

- **An “Integrity Initiative” to Boost Capacity** – After doubling anti-corruption assistance in the past four years, the Department of State is committing an additional \$70 million, pending congressional approval, for capacity-building efforts globally, including training for thousands of law enforcement and justice-sector officials all over the world; platforms that mitigate opportunities for graft; efforts to tackle the security and corruption nexus; and a consortium to support civil society and media organizations.
- A Global Consortium of Civil Society and Investigative Journalists against Corruption – Building on our continued efforts to partner with and support non-governmental networks that work across borders to expose corruption globally, this new consortium will support the critical work of investigative journalists and civil society networks in driving public demand for political will and action by law enforcement.
- Maximizing Impact of the Open Government Partnership (OGP) – The United States will continue its active engagement in and support for OGP, a partnership between government and civil society across 70 countries to advance transparency and accountability through national commitments for reform.

(3) Greater Financial Transparency at Home to Prevent Perpetrators of Fraud, Tax Evasion, Illicit Funding from Hiding in the Shadows:

- New Beneficial Ownership Legislation – The Administration’s new legislative proposal would require all companies formed in the United States to report information about their beneficial owners to the Department of Treasury, for the first time making such information readily available to law enforcement.

- . Combating Transnational Corruption – Draft legislation would enhance and strengthen our efforts to combat transnational corruption through enhancing law enforcement’s ability to prevent bad actors from concealing and laundering illegal proceeds of transnational corruption, and would allow U.S. prosecutors to more effectively pursue such cases.
  - . Reciprocal Foreign Account Tax Compliance Act (FATCA) Legislation – The President has proposed providing full “reciprocity” under FATCA in the last three budgets he submitted Congress, which would strengthen the United States’ hand in pressing other countries to improve transparency and ensure we live up to our end of the bargain.
  - . Customer Due Diligence (CDD) Rules – Treasury regulations will enhance transparency and protect the integrity of the financial system by requiring financial institutions to know and keep records on who actually owns the companies that use their services.
  - . IRS Rule on Single-Owner LLCs – New proposed Treasury/IRS tax rules will close a loophole allowing foreigners to hide assets or financial activity behind anonymous entities established in the United States.
  - . Geographic Targeting Order (GTO) Rules for High-End Real Estate – In January, Treasury issued GTOs that will temporarily require certain U.S. title insurance companies to identify the natural persons who are the true owners behind the companies used to pay “all cash” for high-end real estate in certain geographic areas. The proposed beneficial ownership legislation would also expand the scope of future GTOs to include bank wires in addition to those paid by cash or other monetary instruments, such as cashier’s checks.
  - . International Tax Treaties – The Administration is also calling upon the Senate to finally approve tax treaties that have been pending for several years and that would help crack down on offshore tax evasion.
- (4) Tackling the Corruption-(In)Security Nexus:
- . Stronger Security Assistance Oversight – Corruption threatens national security. When security institutions are undermined through corruption, they are unable to protect citizens, defeat terrorists, or defend national sovereignty. The United States is working to address the security costs of corruption through integrating anti-corruption components into training for security forces; better assessing corruption risk throughout security cooperation with foreign security forces; and ensuring that our security assistance also addresses governance goals.

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On September 14, 2016, the State Department submitted its ninth report to Congress pursuant to the International Anticorruption and Good Governance Act (“IAGGA,” Pub. L. 106-309). The report summarizes U.S. anticorruption efforts and key counterpart efforts in priority countries from 2014-15. The 2016 report is available at <http://2009-2017.state.gov/j/inl/rls/rpt/264335.htm> and excerpted below.

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## I. U.S. INTERNATIONAL ANTICORRUPTION INITIATIVES

Work in 2014 laid the foundations for increased efforts and high-level political attention in 2015. Secretary Kerry gave significant prominence to anticorruption efforts in the State Department's 2015 Quadrennial Diplomacy and Development Review. To promote reform and implementation, the United States continues to fund bilateral and regional capacity building programs to strengthen law enforcement institutions, enhance civil society participation, and streamline bureaucratic systems. Policy initiatives complement capacity building programs to build political will, set standards, and enhance cooperation. Key emphases include:

**The UN Convention against Corruption (UNCAC):** The UNCAC, with 178 Parties by the end of 2015, has globalized the fight against corruption. Almost all Parties are in the process of completing a first round of peer reviews, which examined compliance with commitments on the criminalization of corruption and international cooperation, as defined by the Convention. The Conference of States Parties met in St. Petersburg in November 2015 and agreed to launch the second round of peer reviews in 2016.

**Regional, Special Initiatives and High-Level Commitments:** The United States co-chaired the G20 Anticorruption Working Group in 2015, shepherding important commitments on procurement transparency and open data, and launching the Denial of Entry Experts network. The United States continued to support the Arab Forum on Asset Recovery to coordinate cooperation in pursuit of stolen assets from the Middle East and North Africa stowed abroad; based on that model, the United States and United Kingdom co-organized the 2014 Ukraine Forum on Asset Recovery. The United States remains a leader of the Open Government Partnership (OGP), a multi-stakeholder effort to enhance transparency, citizen engagement, and accountability, and of the Extractive Industries Transparency Initiative, which the United States itself has committed to implement.

**Other U.S. Reports:** The Annual Country Reports on Human Rights Practices and the International Narcotics Control Strategy Reports contain additional anticorruption information that Department of State missions collect, including the work of host country partners. The Department's Investment Climate Statements provide country-specific assessments on investment laws and practices, including corruption. Information about U.S. foreign assistance levels can be found at the Foreign Assistance Dashboard. Information about trade volume can be found in Department of Commerce reports.

The U.S. Department of State and the U.S. Department of Commerce's Commercial Service join forces to include an anticorruption section in the Country Commercial Guides. Prepared by market experts located at U.S. embassies worldwide, it includes information for exporters on the Foreign Corrupt Practices Act (FCPA) and other international anticorruption instruments and initiatives.

**No Safe Haven:** The authorities of Presidential Proclamation 7750 and Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2015 (Div. J, P.L. 113-235) serve as tools to deny entry into the United States of qualifying corrupt officials, bribe payers, and benefitting family members.

## II. SELECT U.S. GOVERNMENT ASSISTANCE PROGRAMS

**Afghanistan – ...** In 2015, [USAID] launched the \$12.7 million Advancing Effective Reforms for Civic Accountability program to help government officials implement reforms to combat corruption and strengthen the ability of Afghan civil society organizations to perform watchdog functions. The Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) funded anti-corruption training for justice sector actors throughout

Afghanistan; provided training and mentoring for anti-corruption units at the Ministry of Interior and Attorney General's Office; supported a method to centralize and track legal cases, reducing opportunities for corruption; and created a citizen participation program fostering transparency within justice institutions.

Guatemala – The U.S. government has provided critical support, totaling \$36 million since 2008, to the UN's International Commission Against Impunity in Guatemala (CICIG) to help combat corruption by building the capacity of prosecutors, judges, and investigators working on high-profile, corruption-related cases. ...

Haiti – USAID assistance built an integrated financial management system which bolstered control of revenues and expenditures, facilitated audits and increased revenue collection by as much as 400 percent in key municipalities. With assistance from INL, the Haitian National Police Office of the Inspector General vetted officer files, recommending dismissal of more than 740 personnel for infractions and the removal of “phantom” officers from the payroll. The U.S. government supplied technical assistance to the Supreme Judicial Council that vetted and certified 1,000 judges. Through an INL grant, the American Bar Association (ABA) bolstered the capacity of Haitian judges and prosecutors, resulting in the first successful prosecution of a corrupt public official in December 2015, the first case since Haiti passed its anti-corruption law in 2014.

Honduras – In 2015, the U.S. Department of Commerce worked with the Honduran Ministry of Economy and international partners to sponsor regional government procurement workshops addressing transparency. USAID strengthened the Superior Accounts Tribunal and municipal auditors to carry out audits while addressing civil society-led initiatives to increase transparency and accountability in the use of public resources, resulting in a significant rise in the number of both internal audits and “social audits” over the last few years. INL support to the Public Ministry through embedded U.S. Department of Justice (DOJ) legal advisors and INL police advisors has helped advance corruption and money laundering cases, which resulted in the convictions of high level Honduran government officials and millions of dollars of assets and seized. In 2015, the United States supported the Organization of American States (OAS) Mission to Support the Fight against Corruption and Impunity in Honduras, which aims to combat corruption networks in Honduras.

Iraq – ... Through June 2015, a USAID program called Tarabot (linkages) provided the Government of Iraq with broad support for strengthening public management and service delivery through improved management of human and fiscal resources. This program included civil service reform, national policy management, and administrative decentralization among a wide range of government agencies across 15 provinces, excluding the Kurdish Regional Government.

Jamaica – ... USAID provided anticorruption training to justice sector actors and supported public awareness through the National Integrity Action (NIA). In 2015, NIA's first documentary on corruption won the Audience Award at the 1st Annual Caribe Film Fest in Miami. Training sponsored by NIA included a series for journalists, investigators, and prosecutors on investigating and prosecuting financial crime taught by an assistant U.S. attorney.

...

Morocco – ... The State Department's Middle East Partnership Initiative (MEPI) funds an ABA project to create opportunities for citizens to play an active role in local governments and for communities to better respond to citizen demands. INL also funded an ABA project to increase citizen access to justice and reduce corruption, which provided information on the

criminal justice system to more than 140,000 citizens and an estimated five million individuals through national and regional radio shows.

**Mozambique** – As part of a wider package of assistance, INL funded a DOJ legal advisor, who worked with the Mozambican Attorney General’s Office to combat corruption by developing the capacity of its financial management, procurement, planning and human resources departments. ...

**Nigeria** – U.S. assistance to Nigerian election authorities helped lead to more transparent, credible election processes, culminating in the relatively violence-free 2015 national elections, which brought about the first peaceful democratic transition of power from one political party to another in Nigerian history. INL worked with the Ministry of Justice and the Economic and Financial Crimes Commission to strengthen Nigeria’s anticorruption and financial crimes framework to track, investigate, and prosecute money laundering cases and seize assets, and to develop internal affairs, polygraph, and anti-terrorism financing units. ...

**Tunisia** – ...U.S. programs under MEPI seek to combat corruption through government-to-citizen engagement. With U.S. support, the OECD promotes governance reforms to implement Tunisia’s OGP transparency and accountability commitments while the Financial Service Volunteer Corps implemented a training program for civil society and government officials on public finance and transparent budgeting. INL assistance, through the United Nations Development Program, is helping the Tunisian Anti-Corruption Agency build its capacity to deter, detect, and punish acts of corruption.

**Ukraine** – The U.S. Department of Commerce’s Commercial Law Development Program helped Ukraine improve transparency in trade and facilitated its accession to the World Trade Organization (WTO) Government Procurement Agreement. In 2015, with INL funding, DOJ legal advisors provided input into a comprehensive anti-corruption legislative package which established a National Anti-Corruption Bureau charged with investigating high level corruption, created a national agency to prevent corruption, and created a specialized anti-corruption unit within the Prosecutor General’s Office. An INL-funded DOJ law enforcement advisor introduced ethical standards and internal investigation units within law enforcement. ...

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## **C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS**

### **1. International Criminal Court**

#### ***a. Overview***

On October 31, 2016, Valerie Biden Owens, Senior Advisor for the U.S. Mission to the United Nations, delivered remarks at the UN General Assembly on the report of the International Criminal Court (“ICC”). Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7530>.

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The United States continues to view the end of impunity for mass atrocities as both a moral imperative and a stabilizing force in international affairs. To this end, we continue to work with bilateral partners, regional organizations, bodies of the United Nations, and—on a case-by-case basis and in a manner consistent with U.S. law and policy—with the International Criminal Court to identify practical ways to advance accountability for the worst crimes known to humanity. As is so often the case, the past year has seen both remarkable progress and deeply frustrating setbacks in that regard, reinforcing how important it is that the international community strive to find ways to intensify our collaboration in support of justice and to reflect and take stock of our common efforts.

As reflected in the President’s report, there have been a number of successes for accountability at the International Criminal Court, reflecting the many ways in which it and other courts like it can act. The United States has welcomed the conviction in September of Ahmed al-Mahdi for destroying mausoleums and shrines in Timbuktu—a verdict that emphasized the seriousness with which the international community views the purposeful destruction of cultural property. We have welcomed the upcoming opening of the trial of Dominic Ongwen, who will be the first commander of the Lord’s Resistance Army to answer charges for his role in that vicious armed group’s crimes against civilians. And most recently, Jean-Pierre Bemba’s conviction in March for war crimes was followed just two weeks ago by a verdict finding him and four associates guilty of offenses against the administration of justice, showing that the ICC can also act to protect the integrity of its own proceedings.

Given recent developments, it seems appropriate to note that all of these landmarks occurred in situations where the ICC acted at the invitation of a national government that was unable to investigate, bring charges, and help vindicate the rights of victims itself.

We welcome the report of continued collaboration between the Court and peacekeeping missions authorized by the Council to support appropriate national efforts to pursue justice and accountability, as well as the continued work by UN-Women, the Special Representative of the UN Secretary General on Sexual Violence in Conflict, and the Office of the Prosecutor to ensure that sexual and gender-based violence receives the attention and the focused effort toward accountability that it too rarely receives.

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Clearly, there remains much to be done in our work together to prevent mass atrocities and bring to justice those who commit crimes against humanity, war crimes, and genocide. Facing limited resources and increasing demands, it will be important for the ICC to make prudent decisions about the cases it pursues and declines to pursue and ensure that its choices are guided by justice, rigor, fairness, and care. And the international community should strive to ensure that the Court is able to remain focused on its core mandate to address war crimes, crimes against humanity, and genocide.

We note in this regard that the United States continues to have serious concerns about the Rome Statute amendments on the crime of aggression adopted in 2010 at Kampala. We believe it is in the interest of both peace and justice to ensure that any decision to activate the Court’s jurisdiction over that crime be preceded by concrete steps to provide greater clarity regarding certain critical issues, including regarding what conduct and which states would be covered by the amendments. We continue to believe that a decision to activate the amendments without clarification of these issues will further chill the willingness of states to take action aimed at stopping the very atrocities that prompted the Court’s creation, and will compound the

challenges already facing the Court by enmeshing it in disputes of a far more political character than it currently faces.

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**b. Assembly of States Parties**

On November 17, 2016, Todd Buchwald, Ambassador-at-Large for Global Criminal Justice issues, delivered remarks at the annual ICC Assembly of States Parties meeting.

His remarks are excerpted below and available at [https://2009-2017.state.gov/j/gcj/us\\_releases/remarks/2016/264404.htm](https://2009-2017.state.gov/j/gcj/us_releases/remarks/2016/264404.htm).

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We meet here, and we work together in New York and in Geneva and in capitals around the world, because the fight to end impunity for the world’s worst crimes must be won, even if doing so takes decades. The United States has shown a deep commitment to that fight ever since Robert Jackson observed at the outset of the International Military Tribunal at Nuremberg that some crimes were “so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”

The United States welcomes this annual opportunity to engage as an Observer State with the International Criminal Court and its states parties in pursuing our shared objective of ensuring accountability for crimes that shock the conscience of humanity. While recognizing that we continue to face challenges in this endeavor, I would like to reflect today on some of the remarkable achievements we have seen in the past year.

First, in March we welcomed the Court’s first conviction for crimes of sexual violence, a verdict that makes more vivid and concrete the principle that so many of us have repeated over and over—that the use of sexual violence as a tactic of war must not be tolerated. This is a scourge that must be condemned to the past. We appreciate the Prosecutor’s continued efforts to bring attention to these crimes, including by ensuring that the trial of Dominic Ongwen will address allegations of sexual violence. For our part, the United States remains committed to efforts to hold accountable those responsible for sexual violence. In that vein, we were pleased to announce in September additional funding to support Guinea’s efforts to bring to trial those responsible for the brutal rape and killing of hundreds of civilians during the 2009 stadium massacre.

Also in September, we saw the Court’s first conviction for crimes related to the destruction of cultural heritage. The statement made by the Prosecutor underscored the importance of these crimes, vividly describing them as an effort to eliminate “the physical manifestations that are at the heart of communities” and “a profound attack on the identity, the memory, and therefore the future of entire populations.” It is with this same recognition in mind that the United States has been dedicated to the protection of cultural heritage across the world and particularly in conflict zones, including through combatting the trafficking of antiquities looted by Da’esh and supporting conservation efforts in Syria and Iraq.

Finally, we welcomed just last month the Court's first conviction for witness tampering. The corrupt influencing of witnesses, and the use of intimidation and violence against them, poses a grave threat to efforts to expose the truth about atrocity crimes and provide justice to victims.

More broadly, the United States is pleased to have played a supporting role in a number of positive developments we have seen this year in the pursuit of justice for atrocities and other serious crimes. We have provided or committed financial or in-kind support to a number of justice initiatives, including the Extraordinary African Chambers' proceedings that led to the conviction of former Chadian President Habré, the newly created Specialist Chambers in Kosovo, and the Special Criminal Court being developed by authorities in the Central African Republic.

Our work with Ugandan and Central African authorities set Dominic Ongwen on the path to a courtroom in The Hague—and the State Department continues to offer rewards for information leading to the apprehension of a number of other individuals charged by international tribunals, through a program launched and more recently expanded by bipartisan majorities of the U.S. Congress.

And the United States, including U.S. law enforcement agencies, is committed to working with our partners here and elsewhere to better ensure that witnesses who have the courage to speak the truth about such crimes are not made victims for doing so, and that witness intimidation does not become a pathway to impunity.

At the same time, in spite of all our common efforts, we must acknowledge important frustrations over the last year. In Darfur, for example, the lack of accountability for past crimes has sustained a climate in which abuses continue—and the recent debates over immunity and withdrawal should not diminish concern for the desperate plight of victims.

And, even as we gather here this week, horrific atrocities in Syria and Iraq continue to shock the conscience. In March, Secretary Kerry spoke boldly and decisively in concluding that Da'esh is responsible for genocide in Iraq against groups in areas under its control, including Yazidis, Christians, and Shia Muslims; and he has also spoken forthrightly about atrocities in Syria, including his recent condemnation of "what can only be described as crimes against humanity taking place on a daily basis," and his call for crimes in Syria to be investigated and for those who commit them to be held accountable. It is incumbent on the international community not to turn a blind eye to these atrocities; we must work tirelessly to identify ways to bring to justice those most responsible.

In other situations, we have seen tentative steps toward reckoning with similarly serious crimes. We continue to support the government of the Central African Republic's efforts to establish a Special Criminal Court, which will work alongside the ICC—which is already investigating at the government's request—as a strong ally to bring to justice those responsible, at all levels, for atrocity crimes. We urge the CAR authorities to complete this process. We also continue to call for the establishment under the auspices of the African Union of the Hybrid Court for South Sudan, which the parties to South Sudan's conflict have agreed must be created as part of a sustainable peace. The African Union has already taken some preliminary steps toward establishing the court, and if these are completed, the court has the potential to be a model of a joint effort between states and the African Union to end impunity and pursue justice for victims.

The ICC of course continues to play an important role in the broader array of efforts to promote justice, alongside regional, domestic, and hybrid institutions—and the recent decisions to withdraw from the Court will not diminish the underlying imperatives for accountability that have fueled these efforts. As we have said, though, the best prospects for ensuring justice lie in the first instance in the strengthening of national institutions and political will, and in the efforts of States to promote capacity and progress at that level, in particular in societies striving to rebuild after years of conflict. At the same time, the United States urges its fellow States and the Court itself to do all they can to support and respect genuine domestic efforts to ensure accountability and promote justice.

It is in the context of the Court’s role in promoting justice for atrocity crimes that I would recall the concerns the United States has consistently raised with respect to the crime of aggression amendments. We continue to believe there remains a dangerous and substantial degree of uncertainty with respect to quite basic issues regarding the amendments, and we continue to believe that it is in the interest of both peace and justice to ensure that any decision to activate the Court’s jurisdiction be preceded by concrete steps to provide greater clarity on these matters.

The United States has played an active and leading role in promoting justice for mass atrocities for more than seventy years. We look forward to our continued partnership in service of these goals.

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**c. Central African Republic**

On March 21, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, issued a statement on the conviction by the ICC of Jean-Pierre Bemba Gombo, which is available at <http://2009-2017-usun.state.gov/remarks/7199>.

The State Department issued a press statement on March 22, 2016 on Gombo’s conviction, which is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254958.htm)

[2017.state.gov/r/pa/prs/ps/2016/03/254958.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254958.htm).

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The United States welcomes yesterday’s verdict at the International Criminal Court (ICC) in the case against Jean-Pierre Bemba Gombo, a former vice president of the Democratic Republic of the Congo and previously a leader of a Congolese rebel group that committed widespread atrocities in the Central African Republic (CAR) from 2002 to 2003. His conviction for rape, murder, and pillaging as war crimes and crimes against humanity while a rebel leader brings an important measure of justice to the victims of these crimes and in particular advances the fight against impunity for sexual violence in conflict.

Those who are responsible for such heinous acts must be held accountable. Yesterday’s verdict, which recognizes Bemba’s command responsibility for atrocities committed by his forces, demonstrates that those responsible for such crimes—even those at the highest levels—cannot expect to escape justice. Secretary Kerry has reinforced this important principle, stating at

the Global Summit to End Sexual Violence in Conflict that “responsibility goes straight to the top, even to the military commanders who knew or should have known about sexual violence and failed to act.”

The United States supports the ICC’s investigations in the Central African Republic, and we commend CAR’s commitment to ensuring accountability for serious crimes, including through its cooperation with the ICC in this matter as well as through domestic efforts to pursue justice. Yesterday’s decision follows other important recent efforts through both national and international judicial processes to begin to change the culture of impunity in the region. Recognizing the importance of this decision to many in Central Africa, we urge all stakeholders to respond in a measured and non-violent manner to this landmark judgment.

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**d. ICC Case on Destruction of Cultural Sites in Mali**

In a September 27, 2016 press statement, the U.S. Department of State welcomed the ICC verdict in a case against Ahmad Al Faqi Al Mahdi of the Islamic extremist group Ansar al-Dine (“AAD”). As discussed in *Digest 2015* at 104-05, Al Faqi was surrendered to the ICC for prosecution in 2015 and faced charges of war crimes relating to intentional attacks against Muslim shrines and mausoleums in Timbuktu. The 2016 press statement welcoming Al Faqi’s sentence is available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262507.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/262507.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262507.htm), and excerpted below.

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The United States welcomes today’s verdict at the International Criminal Court (ICC) in the case against Ahmad Al Faqi Al Mahdi, a member of the violent extremist group Ansar al-Dine. Al Faqi, who surrendered to the ICC in 2015 by Nigerien authorities and pled guilty to one charge of war crimes related to intentionally directing attacks against Muslim shrines and mausoleums in Timbuktu, was sentenced to 9 years of imprisonment.

As we have seen in Mali and other contexts, the destruction of cultural artifacts and monuments has been used as a tool to seek to terrorize, to erase history, and to eradicate the identities of communities. These are assaults not just on a country and its people, but on the common cultural heritage of all humankind, and those responsible for these acts should face justice. Secretary Kerry has underscored that such acts “are a tragedy for all civilized people, and the civilized world must take a stand.” Al Faqi’s conviction is part of broader national and international efforts to protect cultural property, and it sends an important message to those responsible for such crimes that impunity will not prevail.

The United States supports efforts by the ICC and Malian authorities to provide justice for these serious crimes committed in Mali. We commend Mali for its cooperation with the ICC in this matter, and we encourage continued national and international efforts to bring to justice senior extremist leaders who led the campaign to terrorize northern Mali and destroy symbols of its rich history of tolerance and cultural pluralism.

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**e. Sudan**

On June 9, 2016, Ambassador David Pressman, Alternate Representative to the UN for Special Political Affairs, delivered remarks at a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. His remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7323>

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This Council referred the situation in Darfur to the International Criminal Court in 2005. Since then, the instability, insecurity, violence, and suffering in Darfur has continued unabated. ... The United Nations has verified that 68,000 people have been displaced since January of 2016 due to the fighting, raising the total number of internally displaced persons in Darfur to more than 2.7 million with 5.8 million people in need of humanitarian assistance.

Further compounding the problem has been the obstruction of humanitarian assistance, including food and critical medical care. ...

The Secretary-General has reported for months that the vacancy rates in UNAMID's human rights and protection of civilians sections are 50 and 40 percent, respectively. These vacancies in the human rights and protection staff of UNAMID are unacceptable and they are due to the systematic denial of visas by the Government of Sudan. Restrictions and impediments imposed by Khartoum have also precluded UN agencies from ascertaining the scale of civilian casualties and displacement from fighting, and from otherwise comprehensively reporting on the situation on the ground. These provocative acts—acts like kicking out the head of OCHA—have also done little to awaken the Security Council's readiness to respond. That's not how the system was supposed to work. Indeed, the Security Council's inability to agree even on the most basic responses to extraordinary provocations is a collective failure.

As we consider this vicious cycle, and our seeming inability to agree on how to stop it, we at least must remain committed to reaffirming our commitment to justice for the victims of genocide and atrocities in Darfur. Failure to provide accountability for the injustices the victims and survivors have incurred emboldens further abuses in Sudan and outside of Sudan. ...

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...[W]e thank the Prosecutor for her office's continued investigations into abuses in Darfur, and for her long-standing efforts to promote justice for attacks on civilians, including humanitarian workers, and peacekeepers, by government and armed opposition groups. We also continue to support UNAMID and its work, which is crucial to efforts to alleviate the suffering of civilians, and to ensure allegations of atrocities can be investigated, as in the numerous cases of conflict-related sexual violence documented by UNAMID in 2015 and to which the Prosecutor refers in this report. It is critical that the Security Council, for its part, do more to help ensure compliance with Resolution 1593, and press Sudanese authorities to fulfill Sudan's obligation to cooperate fully with the Court and with the Prosecutor. While, as the Security Council noted in a letter to the International Criminal Court, the Decisions of Pre-Trial Chambers on the situation in Darfur have been brought to the attention of members of the

Council; this is far from enough. We also continue to call on all governments not to invite, facilitate, or support travel for individuals subject to arrest warrants in the ICC's Darfur situation, and for Sudan to fully cooperate with the ICC. And we continue to believe that the Court's arrest warrants in the Darfur situation should be carried out.

History has shown that the road to accountability can be long and difficult, but that justice can ultimately triumph against long odds. The developments in the Extraordinary African Chambers in Senegal, including the recent conviction of former President Hissène Habré, are but one testament to the idea that the tenacity of victims of mass atrocities in seeking justice should not be underestimated. And this example shows what is possible when governments, regional bodies, and victims' groups cooperate to ensure that justice is done. I'd like to emphasize this point, because indeed, it is not just institutions and governments that have a role to play—individuals can help too, and they are essential. We are heartened by those in civil society—from South Africa to Uganda—who have continued to show their solidarity with those who have suffered so much.

And while it is easy to be daunted by the obstacles to accountability, the International Criminal Court's investigation in Darfur has brought some measure of hope to victims of atrocities there. There can be both purpose and dignity in coming forward and speaking out about atrocity crimes. We commend the bravery of these victims and look forward to the day when they, like the victims of the Habré regime, see justice delivered in a court of law.

The United States will continue to work with this Security Council and other partners in the international community to promote an end to Sudan's many conflicts and a just and sustainable peace.

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On December 13, 2016, Ambassador Isobel Coleman, U.S. Representative to the UN for UN Management and Reform, delivered remarks at a UN Security Council briefing by the ICC Prosecutor on the situation in Darfur. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7606>.

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It is clear that the need for justice continues. In that regard, it is far too easy to miss the tremendous suffering of victims, especially when the tempo of conflicts in Syria and South Sudan—and elsewhere—has meant that the long-lasting conflict in Darfur can all too often slip off the front pages. But we should be alarmed that there has been far more attention of late paid to criticizing the ICC's efforts in Darfur than to seeking justice for Sudanese victims of mass killings, widespread rapes, and destruction of communities that led this body to refer the situation in Darfur to the ICC Prosecutor.

We also remain deeply concerned that President Bashir—and others facing arrest warrants in the ICC's situation in Darfur—continues to be welcomed by certain Member States. The hundreds of thousands of victims of atrocities in Darfur who saw their loved ones injured and killed, their homes burned, and their communities destroyed, must see us stand with them.

...

[W]e are heartened by the many states that continue to refuse to welcome to their countries the individuals subject to ICC arrest warrants in the Darfur investigation, and we commend those who have spoken out against President Bashir's continued travel.

There is a path forward for a peaceful, stable future in Sudan. A comprehensive peace process that addresses the political, security, and humanitarian issues at the root of Sudan's conflicts is critical. We welcome the recent reduction in fighting in many parts of Darfur and the announcements that the government and three of the four largest armed groups in Sudan have committed to extend their Cessation of Hostilities through the dry season. We call on the Sudan Liberation Army-Abdul Wahid to do the same. And it is critical that UNAMID have access throughout Darfur to ensure that any alleged violations of the Cessation of Hostilities can be investigated.

Ultimately, accountability for atrocities committed in Sudan is essential for building adherence to the rule of law and breaking the cycle of impunity where past crimes beget future crimes. Instead, justice can give us a different path, breaking that cycle of impunity, and restoring dignity to victims and their families through a public acknowledgment of the gravity of the wrongs done to them. Now is a time for all of us to recommit to the pursuit of justice in Sudan.

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**f. Libya**

On May 26, 2016, Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered remarks at a UN Security Council briefing on Libya. Ambassador Sison's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7302>.

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The abuses that the prosecutor has described today, and which have been reported separately to the Security Council and the Human Rights Council, emerge from a broader political and security crisis in Libya. In that context, the United States welcomes the positive political developments that have taken place since the prosecutor last briefed the Security Council on the situation in Libya last year, including the arrival of the Presidency Council led by Prime Minister Sarraj in Tripoli and the decision of the Presidency Council to have the ministers of the Government of National Accord begin work in a caretaker status.

We also echo the unified message of the joint communiqué on Libya issued in Vienna on May 16 on behalf of 21 of Libya's partners, three regional organizations, and the United Nations, expressing our support for the Government of National Accord and for its efforts to restore state authority and the rule of law. Uniting behind the Government of National Accord represents the only path toward the kind of national cohesion that will be needed to defeat Da'esh and other violent extremists.

The need for progress in these areas has never been more urgent, and the human costs of its absence have been high. We continue to see deeply worrying reports of abuses against civilians, and the environment for those who seek to document or seek justice for these actions remains hostile as well. An investigation by the UN's Office of the High Commissioner for Human Rights recently reported disturbing instances of attacks against, and harassment of, judicial actors and court facilities, as well as human rights defenders and journalists. It also describes sexual violence against women in detention committed by one armed faction. The fear of abduction or other abuses has left many women in Da'esh-controlled areas effectively trapped in their homes.

The United States continues to condemn the abuses that Da'esh-affiliated groups have committed in Sirte and other areas under Da'esh control, including killings of civilians and members of the security forces. As we have made clear, the United States will support the application of targeted individual sanctions against those who engage in activity that threatens Libya's peace, security, and stability and those involved in certain serious abuses or violations of human rights. But ultimately, to halt these abuses, it will be critical for the Government of National Accord to restore confidence in the rule of law and reverse the collapse of Libya's domestic judicial system, which must be able to investigate and pass judgments without fear of reprisal, and which must do so in a way that respects the rights of defendants.

This is critical for reengaging Libyans in the political process and restoring trust in democratic institutions. To promote a culture of accountability in Libya, we strongly support efforts to promote a reckoning for the abuses that were committed in the final days of the Qadhafi regime—including the crimes against humanity of murder and persecution for which Saif Qadhafi is alleged to have been responsible in the course of helping carry out a policy to attack civilians who were holding demonstrations against his father's government.

We welcome what the prosecutor has continued to describe as a cooperative relationship between Libya's prosecutorial authorities and her office, and we urge the Government of National Accord to sustain and build upon this relationship, consistent with the Security Council's continuing call for Libya to cooperate with the prosecutor.

We also welcome the acknowledgement by Libyan authorities that Saif Qadhafi is not in their custody, and we urge the Government of National Accord to take appropriate steps to seek Qadhafi's transfer to the International Criminal Court.

Ending impunity is only one of several critical challenges the Government of National Accord faces, although success in that regard will reinforce progress in others.

We appreciate the contribution that Prosecutor Bensouda and her office have made in helping promote accountability in Libya, which reinforces what we continue to say: that the Government and the Libyan people are far from alone as they stand at the beginning of this new chapter in Libya's history, and that the United States and many other partners will stand with them as they seek to build a just and lasting peace.

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On November 9, 2016, Ambassador Sison delivered remarks at a UN Security Council briefing on Libya. Ambassador Sison's remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7540>.

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Libya's ongoing crisis provides a climate of impunity for [atrocities] crimes. More broadly, it has impeded the ability of the Libyan people to see the hope of their country's revolution translated into an enduring foundation for peace, stability, and prosperity. The next step toward a solution is a stable, unified, and inclusive government, so the international community must help Prime Minister al-Sarraj consolidate progress toward implementing the Libyan Political Agreement and strengthen Libya's institutions.

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Violations and abuses continue to be committed against people from a wide range of vulnerable populations, ranging from civilians who are subject to indiscriminate or even deliberate attack, to captured combatants who have been tortured and killed, to migrants who have sought to pass through Libya and have been inhumanely detained, extorted, sexually assaulted, and otherwise exploited by smugglers and traffickers.

UNSMIL has reported that there is "total impunity" for serious abuses committed by armed groups. These violations and abuses are appalling in their own right. Furthermore, they create grievances that sustain the broader political crisis and thus work against our common efforts to achieve a lasting peace. We call on all parties to refrain from unlawfully targeting civilians, and we urge that those responsible for serious crimes be held accountable. Much more must be done to establish a functioning justice system capable of addressing this problem. We are encouraged by the progress of forces aligned with the Government of National Accord in retaking the city of Sirte, and we look forward to seeing this progress further consolidated in the coming days and weeks. Da'esh's presence is a threat to Libya's future and to regional security. Its eventual military defeat must be reinforced with progress toward reconciliation, dialogue, and the rule of law.

In that vein, the atrocities allegedly committed in the last days of the Qadhafi regime may seem far removed from today's conflict, but we believe that promoting accountability for those acts remains a key element of the broader effort to reestablish the rule of law in Libya. The ICC's investigation has helped ensure that the Qadhafi regime's acts in early 2011 were seen as the crimes that they are, and that those responsible for such acts could not count on impunity.

We remain encouraged by the reports of continued cooperation between Libya's judicial authorities and the Office of the Prosecutor. While we recognize that Saif al-Islam al-Qadhafi is not in the Libyan government's custody, we continue to urge the Government of National Accord to take appropriate steps to seek his transfer to the International Criminal Court, consistent with Libya's obligations under Resolution 1970 and the repeated calls of the Security Council for Libya to cooperate fully with the ICC and the Prosecutor.

To the extent that other actors continue to frustrate this process, we encourage this Council to add its voice to the call for Mr. Qadhafi to be transferred to The Hague and face charges there for the crimes against humanity he is alleged to have committed. We appreciate the Prosecutor's efforts to help ensure that the victims of such atrocities do not escape our continued focus.

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

### a. General

On June 8, 2016, Ambassador David Pressman, Alternate U.S. Representative to the UN for Special Political Affairs, delivered remarks at a UN Security Council debate on the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”). Ambassador Pressman’s remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7317>.

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The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, and now, the Mechanism for International Criminal Tribunals have been and are essential components in advancing peace and justice in Rwanda and the former Yugoslavia and the development of international law.

Most recently, in March of this year, Radovan Karadžić—a person that Ambassador Power recently described as “a man who believed he could do what he wanted, when he wanted, consequences to others be damned”—... was found guilty and sentenced to 40 years in prison for genocide, crimes against humanity, and violations of the laws and customs of war. More specifically, the underlying crimes attributed to Karadžić included persecution, extermination, murder, deportation, forcible transfer, terror, unlawful attacks on civilians, amongst others.

While legalisms and legal definitions can never adequately convey the inhumanity of what happened, what was experienced, what was done to human beings, the pursuit of sober justice and the obedience to facts inherent in that process is essential if we are ever to stop these crimes from occurring again. In the 1995 order confirming the Srebrenica indictment against Karadžić, Judge Riad wrote that the events of Srebrenica were “truly scenes from hell, written on the darkest pages of human history.” There were, he wrote, “thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers’ eyes, a grandfather forced to eat the liver of his own grandson.”

The establishment of facts, as part of the process of advancing justice, is critical to counter those who seek to distort facts, revise history, or rewrite reality. That genocide occurred at Srebrenica was firmly established both by the ICTY and the International Court of Justice. There is no fact-based debate. This is our history. These well-established facts render all the more sad and shameful this Council’s failure to be able to adopt a simple resolution commemorating the 20th anniversary of Srebrenica. The facts are well established and, as one speaker said following the veto last year of a draft resolution recognizing these facts, “denial is the final insult to the victims.” Denial is of course dangerous, but the challenge posed by denial also highlights one of the most important contributions of international justice—of the process of meting out facts, of identifying individual responsibility—it is that it helps us understand what happened, how it happened, who was responsible—facts that hopefully allow us to learn how to prevent it from happening again.

Although some leaders, including in other contexts today, understandably fear trials and accountability, justice, and indeed peace requires our zealous pursuit of it. And the Karadžić conviction—and indeed the December arrest by Congolese authorities of Ladislas Ntaganzwa—is an important reminder that although time may pass, this imperative will not subside. And it is to that end, that we must remain persistent in our pursuit of the eight remaining fugitives indicted by the International Criminal Tribunal for Rwanda. The Mechanism needs to reenergize its efforts to apprehend these men, and the Member States of this organization—especially in the Great Lakes region of Africa—must proactively contribute to our shared efforts of holding these men accountable. The United States of America will continue to do our part, and we reiterate our offer of up to \$5 million in rewards for information leading to the arrest of Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Augustin Bizimana, Charles Ryandikayo, Pheneas Munyarugarama, Félicien Kabuga, and Protais Mpiranya.

President Meron, Prosecutor Brammertz, the United States asks that you make tracking and apprehending these remaining fugitives a primary focus of the MICT’s work going forward. It has been too long.

Before concluding, I would like to commend the ICTY under the solid leadership of President Agius for the progress made in completing its work over the past reporting period, and for ensuring that justice is served expeditiously while respecting the rights of the accused. The Tribunal has now completed almost all of its cases, with only two defendants remaining at the trial stage and two appeals ongoing.

We have confidence that the ICTY can meet its commitment of completing its work by the end of 2017. In this regard—and in light of President Aguis’ briefing—the United States would like to reiterate the importance of full cooperation of all concerned states with the ICTY, including with respect to the execution of arrest warrants issued by the ICTY for three individuals in a contempt case.

Mr. President, we should be circumspect of leaders who suggest that justice comes at the expense of reconciliation or unity. Trials may be inconvenient to those who bear responsibility for grave crimes—be they Milošević or Karadžić, Akayesu or Nahimana—but as our experience here has demonstrated it is simply not true that pursuing justice frustrates reconciliation or upsets unity. It does the opposite. The pursuit of justice is vital to understanding the events of dark pasts, to proving facts, and disproving fictions. That some leaders in other contexts may prefer a course other than accountability suggests they are interested in advancing objectives unrelated to our collective pursuit of sustainable peace.

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On November 9, 2016, Valerie Biden Owens, Senior Advisor for the U.S. Mission to the United Nations, delivered remarks on the reports of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and Mechanism for International Criminal Tribunals (“MICT”) at the 71<sup>st</sup> session of the UN General Assembly. Ms. Owens’s statement is excerpted below and available in full at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7543)

[usun.state.gov/remarks/7543](https://2009-2017-usun.state.gov/remarks/7543)

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Regarding the work of the ICTY, the United States continues to support the Tribunal's important work in moving forward thoroughly and expeditiously to render verdicts in cases that serve the broader needs of justice while protecting the rights of the accused. We have confidence that the ICTY can meet its commitment of completing its work by the end of 2017. In this regard, the United States would like to reiterate the importance of full cooperation of all concerned states with the ICTY, including with respect to the execution of arrest warrants issued by the ICTY for three individuals in a contempt case.

Turning to the Mechanism for International Criminal Tribunals, the United States commends the Mechanism's efforts to assist national jurisdictions. The pursuit of justice for victims in Rwanda and the former Yugoslavia must not end with the closure of the ICTY and the International Criminal Tribunal for Rwanda, or ICTR. While both the ICTR and the ICTY have successfully tried many high-level perpetrators, further accountability for the crimes committed now depends on fair and effective trials for mid- and lower-level perpetrators in national courts. The United States recognizes the great depth of expertise and breadth of evidence that Tribunal counsel, judges, and staff can bring to bear in assisting national prosecutions and supports the Mechanism's efforts to assist national justice sectors.

The United States further supports the Mechanism's prioritization of the location and arrest of the remaining fugitives from the ICTR. The international community must not relent in the pursuit of these defendants, whose names and associated heinous allegations, bear repeating: Fulgence Kayishema, accused of orchestrating the massacre of thousands; Charles Sikubwabo, accused of instigating massacres at a church; Aloys Ndimbati, a former mayor, accused of being directly involved in the massacres; Augustin Bizimana, the former Defense Minister of the interim Rwandan government, who is alleged to have controlled the nation's armed forces in preparing and planning for the genocide campaign and preparing lists of people to be killed; Charles Ryandikayo, who is alleged to have participated in the massacre of thousands of men, women and children who congregated in a church, and directed militias and gendarmes to attack the church with guns, grenades, and other weapons; Pheneas Munyarugarama, a former lieutenant colonel in the Rwandan Army, who allegedly helped to direct and take part in the systematic killing of Tutsi refugees fleeing the fighting; Félicien Kabuga, the alleged main financier and backer of the political and militia groups that committed the genocide, he is also accused of transporting the death squads in his company's trucks; and Protais Mpiranya, commander of the Rwandan Presidential Guard, who allegedly directed his soldiers to kill the sitting Rwandan Prime Minister and 10 United Nations peacekeepers guarding her home.

We must continue to recall these names and deeds until each and every one of these men stands to answer for their alleged actions. Recognizing that state cooperation will be essential for their capture, the United States remains unwavering in its commitment to ensuring that these eight fugitives are apprehended and brought to justice. We continue to offer a reward of up to \$5 million for information leading to the arrest or transfer of these fugitives.

The United States would like to express its concern regarding the impact of Judge Akay's detention on the important work of the Mechanism. Judge Akay was arrested during a period of time when he was working on a Mechanism case. In this connection, we recall that the Statute of the Mechanism provides for judges to work remotely except for sittings or as directed by the President. With this in mind, we hope that this matter can be resolved expeditiously and in a transparent manner.

As the Mechanism commences its next phase of operations, we commend President Meron for his judicious leadership in ensuring a seamless transfer of functions from the ICTY and the ICTR to the Mechanism. Although the Mechanism's size and functions will diminish over time, a great deal of work remains to be done, and its importance remains as central as ever. Because of these Tribunals, the victims of horrific atrocities have received a meaningful measure of justice, and the international community has greatly advanced international peace and security via justice and accountability for atrocities during the past twenty years. The successful completion of the work of the Mechanism will serve to prove that justice is not a distraction from work of advancing international peace and security, but the essence of it.

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On December 8, 2016, Ambassador Isobel Coleman, U.S. Representative to the UN for UN Management and Reform delivered remarks at a UN Security Council open debate on the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Ambassador Coleman's remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7591>.

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The United States extends its sincere appreciation to President Agius, President Meron, and Prosecutor Brammertz for your reports today to this Council, as well as for your leadership and contributions to advancing justice for victims of the worst atrocities committed in the former Yugoslavia and Rwanda. Without the diligence and determination of jurists and staff at these tribunals, perpetrators of the worst crimes known to humanity—genocide, war crimes, and crimes against humanity—could continue to live freely, in impunity—an unacceptable outcome.

The persistent efforts of these tribunals resulted in significant milestones this year that serve to warn would-be perpetrators everywhere that there will be no escape from justice. Earlier this year, former Republika Srpska President Radovan Karadžić was found guilty and sentenced to 40 years in prison for genocide, crimes against humanity, and violations of the laws and customs of war—a historic conviction that once seemed impossible. Just this week, the ICTY commenced closing arguments in the case of Bosnian Serb military commander Ratko Mladic, who stands accused of genocide of Bosniaks from Srebrenica, terrorizing the population of Sarajevo, and taking UN peacekeepers hostage.

The United States supports the work of the Mechanism to conclude expeditiously the retrial of the case of Stanisić and Simatović and the appeals proceeding in the cases of Radovan Karadžić and Vojislav Šešelj.

The ICTY establishes facts through judicial process, which is critical to counter those who seek to distort facts, revise history, or rewrite reality. The United States notes with great concern the detrimental impact of increasingly divisive political speech in the region about the pursuit of justice for war crimes committed in the former Yugoslavia. Such inflammatory rhetoric can harm regional cooperation among the states of the former Yugoslavia, which is essential to promoting accountability for war crimes.

The United States would like to reiterate the importance of full cooperation of all concerned states with the ICTY. The United States remains concerned that three arrest warrants for individuals charged with contempt of court in relation to witness intimidation in the case of Šešelj remain unexecuted in Serbia for 22 months. Recognizing that cooperation is an on-going obligation essential to the functioning of the tribunal, the United States calls on Serbia to execute these arrests expeditiously. Failure to fully cooperate with the tribunal in accordance with its statutes and the resolutions of this Council compromises the core functions of the international justice system and must be addressed with appropriate urgency.

The United States commends recent efforts by the prosecutor's office to review its fugitive tracking efforts and implement revised strategies to address key challenges, so that the eight remaining fugitives from the International Criminal Tribunal for Rwanda may be swiftly located, arrested, and brought to justice. The United States is unwavering in its commitment to ensuring that these fugitives are apprehended and brought to justice, and we continue to offer a reward of up to \$5 million for information leading to the arrest or transfer of these eight men.

The United States would also like to express our sincere appreciation for the tribunals' efforts, especially the Office of the Prosecutor, in building capacity among national prosecutors. The pursuit of justice for victims in Rwanda and former Yugoslavia must not end with the closure of these tribunals. While both tribunals have successfully tried many high-level perpetrators, further accountability for crimes committed depends on fair and effective trials for alleged mid- and lower-level perpetrators in national courts.

The United States remains deeply concerned about the Mechanism's casework that is being severely impaired while Judge Akay, who is expected to be working on a case before the Mechanism, remains detained in Turkey. We recall that the UN Security Council designed the Mechanism in a way that provides for judges to work remotely except for sittings or as directed by the President, and we reiterate the importance of judges being able to carry out this important work on behalf of the United Nations. With this in mind, we hope that this matter can be resolved expeditiously.

Thanks to the unrelenting dedication of these tribunals, the victims of horrific atrocities have received a meaningful measure of justice. Promoting justice and accountability is all the more critical in the present moment when leaders' horrific acts against civilians have so far been met with impunity in places like Syria and South Sudan. The successful completion of the work of the Mechanism will serve to prove that justice is not an afterthought in the work of advancing international peace and security, but the core of it.

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**b. International Criminal Tribunal for the Former Yugoslavia**

On March 24, 2016, Ambassador Power issued a statement on the conviction of Radovan Karadzic by the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Ambassador Power's statement is excerpted below and available at

<http://2009-2017-usun.state.gov/remarks/7202>

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I welcome the decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to convict Radovan Karadzic on 10 counts, including genocide, crimes against humanity, and violations of the laws and customs of war. As the war-time political leader of the Bosnian Serbs, Karadzic was behind countless crimes that shock the conscience. This day is long overdue.

From 1993 to 1995, I was a journalist living in the former Yugoslavia. While there, I spent considerable time in Sarajevo, the Bosnian capital, where Karadzic had lived many years before the war, ensconced in the intermingled population of Bosnian Muslims, Croats, Serbs, and Jews.

On the occasions I visited Karadzic's nearby stronghold of Pale during the war, I was always struck by the Bosnian Serb leader's nationalist zeal, as he was a gleeful propagandist for an ethnically pure Serb statelet. But more than this, I was struck by the confidence he exuded and the utter absence of concern he showed for his former friends and neighbors in the town he had once called home. Indeed, he often brought media with him when he visited the Serb forces laying siege—through devastating artillery strikes and vicious sniper attacks—to the same neighborhoods in which he had lived.

When I think back to Karadzic's long, rambling, perennially chipper press conferences, one word comes to mind: impunity. This was a man who believed he could do what he wanted, when he wanted, consequences to others be damned. I doubt that he ever seriously considered the possibility that he might one day be held accountable. Many brutal leaders today—Syrian president Bashar al-Assad, Boko Haram leader Abubakar Shekau, ISIL leader Abu Bakr al-Baghdadi—project that same self-assurance. Today's verdict sends those leaders and others like them a message: your crimes will never be forgotten, and one day you, too, will be held accountable for the horrors you have inflicted on civilians.

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### c. UN Mechanism for International Criminal Tribunals ("MICT")

On March 23, 2016, the Department of State issued a press statement on the transfer of Ladislas Ntaganzwa to Rwanda by the Democratic Republic of the Congo pursuant to an arrest warrant by the UN Mechanism for International Criminal Tribunals ("MICT"). The press statement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/255057.htm)

[2017.state.gov/r/pa/prs/ps/2016/03/255057.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/255057.htm).

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The United States welcomes the transfer of Ladislas Ntaganzwa by the Government of the Democratic Republic of the Congo (DRC) to face trial in Rwanda for several crimes, including genocide and crimes against humanity, pursuant to an arrest warrant by the United Nations Mechanism for International Criminal Tribunals (MICT). This transfer is a positive example of regional judicial cooperation and took place as a result of close coordination and consultation by the DRC government and the MICT, as well as other diplomatic partners. Ntaganzwa is the sixth individual indicted by the International Criminal Tribunal for Rwanda who has been arrested by

the Government of the DRC and transferred for trial.

Ntaganzwa's apprehension is a welcome step toward justice for the victims of the Rwandan genocide. Ntaganzwa is accused of abusing his position of power as a mayor to help plan, prepare, and carry out the massacre of over twenty-thousand Tutsis at Cyahinda parish—many of whom had gathered to take refuge from massacres in the surrounding countryside—as well as thousands of killings elsewhere in Rwanda. As a reminder of the brutal way in which sexual and gender-based violence is often used as a tactic of war, Ntaganzwa is also charged with giving direct orders for women to be brutally, and repeatedly, raped.

We commend the efforts of those involved in Ntaganzwa's transfer and whose actions made it possible for Ntaganzwa to face justice, and we encourage continued efforts to bring to justice those responsible for genocide and other atrocities in Rwanda. Eight individuals charged by the International Criminal Tribunal for Rwanda remain at large, and the United States remains committed to supporting their apprehension—and to showing the survivors of atrocity crimes around the world that the pursuit of justice knows no expiration date. ...

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### 3. Other Tribunals and Bodies

#### Extraordinary African Chambers

As discussed in *Digest 2015* at 116, the United States supported proceedings against former Chadian president Hissène Habré, brought before the Extraordinary African Chambers of Senegal by the Government of Senegal and the African Union. On May 30, 2016, Secretary Kerry issued a press statement welcoming the conviction of Habré for war crimes and crimes against humanity, including murder, torture, rape, and sexual slavery. May 30, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/05/257811.htm>. Excerpts follow from Secretary Kerry's statement.

...This ruling is a landmark in the global fight against impunity for atrocities, including war crimes and crimes against humanity.

Habré's crimes were numerous, calculated, and grave. Beginning in 1982, his eight-year term as the president of Chad was marked by large-scale, systematic violations, including those involving murder of an estimated 40,000 people, widespread sexual violence, mass imprisonment, enforced disappearance, and torture. Without the persistence of his accusers and their demand for justice, Habré might never have faced a court of law. I especially commend the courage of the nearly 100 victims who testified, and I hope the truths uncovered through a fair and impartial trial will bring some measure of peace to his thousands of victims and their families.

As a country committed to the respect for human rights and the pursuit of justice, this is also an opportunity for the United States to reflect on, and learn from, our own connection with past events in Chad. I strongly commend the Senegalese Government, the Chadian Government, and the African Union for

creating the Extraordinary African Chambers that allowed for a fair and balanced trial. Let this be a message to other perpetrators of mass atrocities, even those at the highest levels and including former heads of state, that such actions will not be tolerated and they will be brought to justice.

Ambassador Power also issued a statement on May 30, 2016 on the conviction of Hissène Habré, which is available at <http://2009-2017-usun.state.gov/remarks/7309>.

**Cross References**

*Treaties generally*, **Chapter 4.A.1.**

*Treaty transmittal including extradition and MLATs*, **Chapter 4.A.2.**

*Treaties receiving Senate advice and consent*, **Chapter 4.A.3.**

*Abu Khatallah case*, **Chapter 4.C.1.**

*Litigation regarding U.S.-Colombia extradition treaty*, **Chapter 4.C.2.**

*Meshal v. Higgenbotham*, **Chapter 5.A.1.**

*Trafficking in persons in periodic report on rights of the child*, **Chapter 6.C.1.a.**

*Child Soldiers in TIP report*, **Chapter 6.C.2.b.**

*Protecting human rights while countering terrorism*, **Chapter 6.I.1.**

*ILC's work on crimes against humanity*, **Chapter 7.C.**

*IACHR case on extradition treaty*, **Chapter 7.D.1.d.**

*Hostage taking in FCSC case*, **Chapter 8.E.**

*Relations with Cuba*, **Chapter 9.A.3.**

*JASTA*, **Chapter 10.A.1.**

*Odhiambo v. Kenya (claim regarding government rewards program)*, **Chapter 10.B.2.a.**

*Maritime security and law enforcement*, **Chapter 12.A.5.**

*Wildlife trafficking*, **Chapter 13.C.3.**

*Terrorism sanctions*, **Chapter 16.A.6.**

*Transnational crime sanctions*, **Chapter 16.A.10.**

*Atrocities prevention*, **Chapter 17.C.**

*Use of force issues related to counterterrorism*, **Chapter 18.A.1.**

*Nuclear security treaties*, **Chapter 19.B.4.a.**

*Nuclear terrorism*, **Chapter 19.B.4.b.**

## CHAPTER 4

### Treaty Affairs

#### A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

##### 1. Treaties and International Agreements Generally

On October 15, 2016, State Department Legal Adviser Brian J. Egan spoke at Yale Law School on the future of international agreements. Mr. Egan’s remarks are excerpted below and available at

<http://2009-2017.state.gov/s//releases/remarks/263221.htm>

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...[T]oday, I’d like to focus on one particular part of this topic that should be important to future Administrations, whatever their makeup. And this is the need to preserve the continued importance and vitality of Article II treaties in our system.

There appears to be much talk in academic circles about the “end”—including the end of Article II treaties. I submit that Article II treaties are not dead, although some notable failures to garner Senate advice and consent in recent years warrant further reflection and examination. It is also true that some Article II treaties continue to generate anxiety. I’ll explain why I think that general anxiety over treaties is unwarranted and curtails the United States’ ability to promote U.S. interests and values.

In short, I will use these brief remarks on Article II treaties to suggest some occasions for optimism, some causes for concern, and some proposals for progress.

First, let’s talk about why we should be optimistic.

In spite of the widely publicized recent failures to provide advice and consent to the Disabilities Convention and the Law of the Sea Treaty earlier in the Obama Administration, a host of other treaties have received the required 2/3 vote in the same timeframe. For all the challenges the advice and consent process sometimes poses, it’s clear that—even in the current environment—the executive branch and the Senate can work together effectively on treaties. As recently as the 110th Congress of 2007 to 2008, the Senate provided advice and consent to over 80 treaties across a broad range of subject matters. For example:

- Treaties in the environment area addressing control of anti-fouling systems on ships and land based sources of marine pollution;
- Treaties in the law of armed conflict area addressing explosive remnants of war, use of blinding laser weapons, use of incendiary weapons, and protection of cultural property during armed conflict;
- Intellectual property conventions addressing patents, trademarks, and international regulation of industrial designs;
- Treaties addressing cooperation to combat terrorism and the proliferation of weapons of mass destruction; and
- A range of law enforcement treaties enhancing law enforcement cooperation with the European Union and its member states.

During the most recent Congress, much of the focus in this area has been on two instruments that were not Article II treaties: the Joint Comprehensive Plan of Action with Iran, and the Paris Agreement. Less attention has been paid, however, to recent, enhanced efforts by the Administration and the Senate to work together on pending Article II treaties. Those efforts have resulted in seven treaties being approved by the Senate this year. While seven is significantly fewer than 80, seven is not “zero.”

Two of the treaties approved by the Senate this year are multilateral treaties—one addressing access to plant genetic resources, and the other addressing choice of law rules regarding certain transactions involving securities. Five bilateral law enforcement treaties were also approved. This of course follows on the heels of the successful partnership between the Administration and the Senate in 2010 to ratify the New START treaty with Russia.

A few things are notable about these successes:

First, they each occurred in periods of divided government. During the 2007-2008 period, the Republicans held the White House and the Democrats controlled the Senate. And our recent, albeit more modest, successes occurred with a Democratic President and a Republican-controlled Senate. So this history demonstrates that bipartisan cooperation on treaties is possible, even in polarized times.

Second, a number of the treaties approved during these periods were non-routine multilateral agreements. In approving them, the Senate was not simply deferring to familiar past practice. Rather, these treaties required at least two-thirds of the Senate to make judgments about the merits of a variety of unique treaty regimes, each with diverse groups of stakeholders, and impacting a range of U.S. interests. The Senate’s approval of these treaties confirms the continuing support for the view that multilateral cooperation through treaties can advance U.S. interests.

Third, a number of these treaties were approved by the Senate subject to declarations that they are self-executing—in other words, that they can be enforced by our courts without further legislation. Among these is the recently passed Hague Securities Convention, which addresses transactions that are otherwise governed by state law enactments of the Uniform Commercial Code and thus interfaces significantly with state law. This suggests, even in a time of increased attention to federalism issues, support from a substantial majority of the Senate for having treaties operate directly in U.S. law at least in some categories of cases, including in ways that may displace state law.

Declarations of self-execution are a recent phenomenon in U.S. treaty practice, and they are indicative of the Senate’s increasing sophistication in its use of reservations, understandings and declarations to facilitate entering into treaties that might otherwise raise federalism or other

types of concerns. As most of you already know, reservations, understandings and declarations, or “RUDs,” are tools the Senate has long used to address risks or concerns about particular treaties in a way that would allow the United States to join. Where a treaty’s provisions may be ambiguous on particular points of importance to the United States, we have often publicly stated how we will interpret the provision, and such interpretive understandings are often included in the Senate’s resolution of advice and consent approving ratification of the treaty. Such statements are also used to indicate how a treaty’s provisions relate to U.S. law and how the United States expects to implement them. In some instances, treaties permit reservations, allowing the United States to decline to accept particular obligations that it disagrees with or that would conflict with our law. As some of you have discussed in your writings, there are of course limits to the use of RUDs—sometimes in the text of the treaty itself, and as a matter of customary international law. But in general, I think that RUDs, used appropriately, are an important mechanism for facilitating the treaty approval process.

In recent decades, RUDs adopted in approving treaties have included provisions to address concerns related to the potential impact of the treaties on U.S. states and to ensure that treaties won’t be interpreted to require or authorize actions prohibited by the Constitution. They also include so-called declarations of non-self-execution, which ensure that the treaties won’t create rights enforceable in U.S. courts independent of the laws relied on to implement the treaties. U.S. courts, including the Supreme Court, have routinely given effect to such conditions when considering claims involving these treaties. The use of RUDs has proven to be successful and is an important tool for facilitating continued work on Article II treaties between the political branches of government.

Our track record on finding mechanisms for joining treaties, including complex multilateral treaties, suggests that there are many reasons to see the Article II treaty glass as half full. However, there are other aspects of the Senate’s approach to certain treaties that create cause for concern, and that are worth examining:

As the Senate has recognized in a variety of contexts, RUDs can be highly effective. However, they have not always been sufficient to generate the required support for a given treaty. And some have suggested that doubt exists as to whether these tools can be fully effective even in contexts in which they have been used previously. For example, during the Senate’s consideration of the Convention on the Rights of Persons with Disabilities in 2013, the then ranking member (and now Chairman) of the Senate Foreign Relations Committee Bob Corker announced that he could not support the Convention because U.S. ratification could “undermine the constitutional balance between the state and federal governments and the legitimacy of our democratic processes.” He expressed uncertainty that “even the strongest RUDs” designed to address such concerns “would stand the test of time,” and said that, “any uncertainty on this issue is not acceptable.” To some, this is reminiscent of the controversy surrounding World War II-era human rights treaties that nearly resulted in the adoption of the Bricker Amendment. Among other things, the Bricker Amendment would have required that treaties could become effective as domestic law in the United States only through enactment of legislation that would be valid in the absence of the treaty—meaning both that treaties could never be self-executing and that Congress could not rely on a treaty to enact legislation necessary and proper to its implementation.

Senator Corker’s statement doesn’t indicate any particular instances in which he believes prior human rights treaties approved in this way have harmed our Constitutional system. I would submit that the “test of time” has actually shown the absence of any such problems. In other

words, the Senate and executive branch have managed to enter a variety of multilateral treaties under conditions that appropriately addressed and minimized federalism and related constitutional concerns.

The United States has had a successful experience with joining and implementing such human rights treaties in a manner consistent with our Constitution. Beginning with U.S. ratification of the Genocide Convention in the 1980s, we have established a consistent practice of support for core human rights treaties based on the understanding that such treaties, are consistent with—and help promote—U.S. human rights interests and values, including the ability to exercise political and moral leadership on issues of human rights and human dignity. In joining these treaties, the United States has relied on a variety of reservations, understandings and declarations to ensure that the United States could join in a manner consistent with our Constitution. Similar approaches have been followed in respect to the United States' joining the Convention Against Torture, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Presidents Reagan, George H.W. Bush, and George W. Bush advocated for ratification of these human rights treaties—which address genocide, torture, civil and political rights, and human trafficking and sexual slavery—subject to appropriate reservations, understandings and declarations. None of this would have been possible if past Presidents and Senates had believed that RUDs were ineffective tools in the way Senator Corker appears to suggest.

Given this history of reliance on RUDs, it would be worrying if the Senate came to doubt the effectiveness of RUDs approved by the Senate to address federalism or other potential concerns. In the absence of tools capable of addressing such concerns, the default position for many Senators with such concerns may be to oppose treaties altogether. In my view, this stance would be unnecessary and would come at a great cost to the ability of the United States to exercise political and moral leadership on issues of human rights and human dignity. A fresh look at using these tools in a manner consistent with the Senate's practices over the last several decades could help to provide paths toward approval for more treaties.

These points connect to a larger point about how we approach treaties generally. The United States takes treaty obligations seriously. For that reason, we give treaties careful consideration before joining them. We want to be sure we understand what they mean, how we will implement them, and whether they advance U.S. interests and values. This is all as it should be, and is extremely important. This judicious approach to treaties does not, however, require that every treaty be perfect in every respect in order for joining a treaty to be in our interests. It should not mean that any hypothetical risk associated with joining a treaty, no matter how remote or implausible, should serve as a bar to our joining, particularly when tools are available to address such risks.

President Reagan saw treaties in these terms. In recommending U.S. ratification of the Convention Against Torture, he noted that, "In view of the large number of States concerned, it was not possible to negotiate a treaty that was acceptable to the United States in all respects." This fact, however, did not cause Reagan to oppose the Convention. Rather, he recommended to the Senate that the United States join the Convention subject to certain RUDs to address a series of concerns he had with the Convention. This approach to treaties is consistent with common sense approaches we see in other areas. Legislators in our Congress and in our state legislatures are familiar with the need to compromise in order to enact laws that benefit their constituents,

and that often involves supporting legislation that includes some provisions they personally oppose. Similarly, businesses regularly negotiate contracts that involve compromises but that on balance produce benefits that will help them become more profitable.

Seeing treaties in this vein can lead to a more balanced view of the costs and benefits associated with a treaty. Whatever concerns one might have, for example, about the International Seabed Authority created under the Law of the Sea Convention, are they really so significant as to justify our staying out of a regime that codifies for the world our views about the uses of the oceans and provides enormous benefits to our military and industry?

Does the possibility that a human rights treaty body might make a recommendation regarding the interpretation of the treaty that we disagree with and remain free to disregard really mean that we should stay outside the treaty and forfeit our ability to lead and shape the international community's approaches on matters of human rights and human dignity? In short, taking treaties seriously should not mean that we focus only on the ways in which a treaty might lead to outcomes of concern. Rather it should also mean that we look closely at the ways we can mitigate such risks, using all the tools available to us, and that we consider any such risks in the contexts of the benefits that joining the treaty regime can provide.

Often these benefits are practical and tangible. Our joining the Law of the Sea Convention, for example, would clarify U.S. sovereign rights over maritime areas and would promote the maritime mobility of the U.S. military. Sometimes, the benefits are to ensure continued U.S. leadership on an issue of importance to our country. In the disabilities area, our Americans with Disabilities Act was groundbreaking legislation in establishing standards for prohibiting discrimination and ensuring equal opportunity for persons with disabilities. Our Congress led with this law, and the core principles in the Disabilities Convention can be found in our own ADA.

Another area in which recent efforts on treaties have been less successful is tax treaties. Historically, tax treaties have been among the least controversial treaties, and they have enjoyed broad bipartisan support. The United States has tax treaty relationships with over 60 countries, pursuant to treaties that have received the Senate's advice and consent. Tax treaties help U.S. businesses by providing greater certainty regarding their potential liability for tax in foreign jurisdictions, and by allocating taxing rights between jurisdictions to reduce the risk of double taxation. They also provide important tools to prevent tax evasion, including mechanisms allowing for the exchange of information between tax authorities to assist in the administration and enforcement of tax laws.

However, the Senate has not approved a tax treaty since 2010. The Senate Foreign Relations Committee has favorably reported tax treaties to the full Senate without opposition in each of the last three Congresses, but in each instance a single Senator has objected to their approval. Eight tax treaties are currently on the Senate's executive calendar and sitting in limbo. Given that, under the Constitution, a two-thirds majority of the Senate is sufficient to advise and consent to ratification of a treaty, the opposition of one Senator should not be enough to defeat a treaty. Yet, to date, the Senate has been unwilling to hold a vote on tax treaties to allow the voices of the Senate as a whole to be heard on the matter. Though the practice has been less common in recent years, in the 1980s the Senate frequently held roll call votes on treaties, precluding isolated minority views from preventing the Senate from providing its advice and consent. Voting, of course, requires the Senate to find time on a full calendar to debate an issue and may come at the expense of its ability to spend time on other pressing matters. But the alternative establishes a de facto unanimity requirement for treaties. And in the case of the tax

treaties, this would result in an indefinite halt to forging new cooperative relationships on tax matters, harming the interests of U.S. businesses and our ability to combat tax evasion. So the time has come for the Senate to hold a vote to approve the tax treaties.

Rather than end on a despairing note, let me conclude with some proposals for progress at this important juncture. This is a particularly useful moment to be considering our approach to treaties. We are about to experience a Presidential transition and the beginning of a new session of the Senate. Lessons from this recent experience can usefully inform the next Administration and Senate and help guide cooperation on treaties. With this in mind, I'd like to offer a few thoughts on steps both branches can take to promote productive work on treaties in the period ahead.

First and foremost is dialogue. Successful efforts on treaties require the active engagement of both the executive branch and the Senate. Dialogue between the branches throughout the treaty process is essential, and touches a range of issues. To name a few:

- Treaty negotiation: Executive branch engagement with the Senate early in the treaty negotiating process can play a very important role in maximizing chances for treaty approval. Doing so gives the Senate a chance to learn about the problem to be addressed by a proposed treaty, to provide input on issues in the negotiation, and to become a stakeholder in the outcome.
- Development of a treaty agenda: Dialogue between the executive branch and the Senate on a treaty agenda can help both branches focus efforts on treaties that have the greatest chances of winning support, as well as identifying areas where further work can create additional opportunities.
- Treaty ratification process: Close consultation between the executive branch and the Senate in preparing for hearings on treaties and drafting resolutions of advice and consent is critical to identifying issues that may need to be addressed and developing workable solutions that advance a treaty's chances for approval.

The importance of dialogue isn't limited to the executive branch and the Senate. Successful efforts on treaties also require engagement with treaty stakeholders, including the private sector, civil society, interest groups, scholars and others—including state and local governments. These actors are often among the most effective advocates for (or against) treaties that affect their interests, and mobilizing their support and addressing their concerns is critical. The area of private international law provides one example of the importance of this collaboration. The United States is a relative newcomer to the field. Although Europe began work in earnest on private international law treaties in the 19th century, the United States did not actively participate in negotiations over private international law instruments until the 1960s. Our reluctance was based in significant part on federalism concerns—the idea that commercial law was an area for the U.S. states to regulate. Over time, we have learned how to work with state law officials, the private sector, and academic experts to develop a practical private international law agenda—to prioritize our work on areas that have tangible benefits, in a manner that can be compatible with U.S. state law.

It's also important for the executive branch and Senate to prioritize work on treaties.

- For the executive branch's part, this requires giving early and consistent attention to treaties and how they fit into a broader policy agenda. This can be done in part through of the "treaty priority list" that the State Department usually transmits to the Congress at the beginning of a new Congress. This can also be accomplished by considering whether the negotiation of new treaties would advance important objectives in particular areas, or

whether those objective can be met better through other legal instruments. This work can then inform efforts advance work on treaties both in the Senate and with international partners.

For the Senate's part, prioritizing treaties requires planning for work on them as an integral part of its legislative agenda. The Senate Foreign Relations Committee can develop a treaty work plan, allocating time on the Committee's calendar for hearings on treaties at regular intervals throughout the year. And, while many treaties can proceed without controversy, others—as I noted earlier—may require debate or roll call votes. Allocation of time on the Senate calendar for these steps is important as well.

In addition, it will be important for the next Administration to be able to explain the benefits of treaties and to advocate effectively on their behalf. ... [W]inning support for particular treaties requires explaining the tangible benefits a treaty provides and why it advances U.S. interests. This is an area where we as a government can and should sharpen our efforts. The next Administration should give careful thought about how to make better use of its public messaging and public diplomacy tools to effectively make the case for treaties.

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Deputy National Security Adviser Avril Haines also spoke at Yale Law School on October 15, 2016 on the importance of treaties. Her remarks are excerpted below and available at [https://obamawhitehouse.archives.gov/the-press-](https://obamawhitehouse.archives.gov/the-press-office/2016/10/19/remarks-dnsa-avril-d-haines-yale-law-school-importance-treaties)

[office/2016/10/19/remarks-dnsa-avril-d-haines-yale-law-school-importance-treaties.](https://obamawhitehouse.archives.gov/the-press-office/2016/10/19/remarks-dnsa-avril-d-haines-yale-law-school-importance-treaties)

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As Brian indicated in his remarks, in recent years, we have experienced a backlash against treaties. I am the first to admit that you have to judge the substance of a treaty—not every deal is a good deal—but the criticism has frequently been framed against treaties generally. They are criticized as unnecessary limitations on our sovereignty, tools for the federal government to take power away from the states, and vehicles through which the United States submits itself to international bodies that do not share our values.

I have an entirely different image of treaties that I want to share with you—not as a treaty lawyer but as a policymaker and a national security professional in today's complex world. I see treaties as enablers of U.S. foreign policy and core U.S. interests. From my perspective, treaties—whether advice and consent, or otherwise—are absolutely essential to meeting the challenges we face as a country. We need to change the conversation about treaties.

Brian explained how, as a legal matter, there are tools available to the Senate for addressing risks or concerns about particular treaties, including any federalism issues that are raised. What I thought I would spend my time on is why we need treaties; how we use treaties, international agreements, and even non-legally binding commitments to advance American interests; and then give you a sense of why I believe that if we turn away from treaties as a tool of foreign policy or demand that they only be ratified if no compromises have been made in the context of negotiations, we will be abdicating U.S. leadership in the world when it is sorely needed and to our great advantage as a country.

Let me start on an optimistic note. Thanks in large part to the international system that the United States has played a leading role in building and maintaining, we are living in the most prosperous and progressive era in human history. ...

At the same time, we live in an increasingly complex and fast-paced world—one in which issues that first arise across the globe can reach our shores in record time or impact us from abroad, creating national security challenges for the United States. ...

Naturally, people question whether governments can meet all of these challenges and threats. We see this in polls reflecting the falling trust that people have in their government—not just in the United States but in Europe and elsewhere around the world.

So how do we address the challenges and harness the opportunities? When defining our core interests as a nation, past administrations have typically focused on three: security, prosperity, and values. We added a fourth to our National Security Strategy: promoting international order—or, as the 2015 strategy put it, “a rules-based international order advanced by U.S. leadership that promotes peace, security, and opportunity through stronger cooperation to meet global challenges.”

Why make this change? Why emphasize it as a core national interest? Because it is through a rules-based international order that we are able to promote security, prosperity, and even our values and without it, we are in danger of not achieving these core interests. The United States, as powerful as it is, cannot bear every burden alone—nor should we seek to do so. Establishing multilateral frameworks is how we address challenges that span borders and amplify our ability to prevent and respond to increasingly complex threats that demand coordinated action. A rules-based order promotes prosperity and influences behavior without the need to resort to military force. A rules-based order has served us well in promoting our values, such as equality and human dignity. That’s why—as the United States has recognized from our founding to the creation of the post-war international framework to today—fostering a rules-based international order is not just a nice idea, but a core national interest. Of course, treaties and other international instruments, form the backbone of a rules-based international order.

Let me give you a few examples to illustrate my point. When Ebola swept through West Africa, our response benefitted greatly from the resources of the World Health Organization, which was established by an international agreement. When the globe was gripped by a worldwide financial crisis, the World Bank and IMF, two institutions founded by treaties, allowed us to take measures to respond and mitigate the recession. And when we need a force to maintain fragile peace in South Sudan, Haiti, or Kashmir, the Security Council, an organ of the United Nations established by treaty, is empowered to send in those Blue Helmets. In other words, treaties framing the international order allow us to mobilize unprecedented collective action to address challenges central to global prosperity and stability.

Treaties and other forms of international agreements are likewise important to our economy: free trade agreements, bilateral investment treaties, and the WTO contribute to our economic growth by helping American businesses operate in and export their products to foreign markets and protect the intellectual property of American innovators. Bilateral tax treaties make it so that U.S. companies with overseas presences are not subject to double taxation.

Another example is the Iran nuclear deal, which demonstrates how a rules-based international order can provide sufficient leverage to change another country's behavior in our national security interest without resorting to the use of military force. We imposed unprecedented sanctions on Iran through the Security Council in response to its nuclear program, and then led a hard-fought campaign of multilateral diplomacy that achieved the Joint

Comprehensive Plan of Action. As a result, Iran has dismantled two-thirds of its installed centrifuges and shipped 98 percent of their enriched uranium stockpile out of the country, and we've put a lid on its nuclear program without firing a shot.

Or take the South China Sea. To be sure, we've seen growing tensions between China and Southeast Asian nations over maritime claims. But, recently, we saw the Philippines make a lawful and peaceful effort to resolve their maritime claims with China using the tribunal established under the Law of the Sea Convention. The tribunal's ruling delivered a clear and legally binding decision on maritime claims in the South China Sea as they relate to China and the Philippines—a ruling that we and a number of other countries have made very clear should be respected. Without the Law of the Sea Convention to establish clear rules of the road—or the ocean, as the case may be—the risk of a clash between competing claimants could well be higher.

And through a rules-based order, we are able to lead by example and promote U.S. values. Brian talked about the Genocide Convention and other core human rights treaties that promote U.S. interests in preventing atrocities and promoting universal rights and fundamental freedoms. Of course, this really only works when we can actually demonstrate that the rules and principles underpinning the order we are crafting, apply to the United States as much as to other countries. As a party to the WTO, we've shown that even a nation as powerful as the United States is not above the law if we commit trade violations or other infringements. And, in a number of instances, we've agreed to adopt a uniform set of rules governing particular conduct or transactions, such as intellectual property treaties and certain environmental agreements.

This brings me to the heart of my talk and today's event. Treaties and other forms of international agreements underwrite so many of the institutions, rules, and structures that are critical to the international order—and therefore to U.S. interests. And the same charges made against the international order frequently are leveled against treaties—that they're obsolete in today's world, that they reduce our national power, or that they require us to compromise our sovereignty.

In my view, the very opposite is true. Treaties are at least as essential today as they have ever been. They are a vital tool in helping the United States achieve our national objectives. And they provide a framework in which we can harness the cooperative energy of other countries to address threats that no single nation—no matter how powerful—can address on its own.

I recognize that there are scholars who see international law as an impediment rather than as an enabler. There are those who argue that entering into arms control treaties with Russia limits American military options while Russia ignores its obligations. Or that adhering to the laws of armed conflict places us at a disadvantage when our enemies flout the rules. Or that ratifying the UN Disabilities Treaty would allow an international committee to tell American parents how to raise their children. I won't address each substantive issue—suffice it to say that I believe we should join the UN Disabilities Treaty, remain convinced that following the law of armed conflict is critical, and that arms control treaties, while not perfect, remain among the best mechanisms I know for promoting a safer world. But I would like to make two broader points.

First, I don't think those same critics are necessarily saying that all treaties are bad—just some of them because of concerns about substance or actors, or both. And thus I would ask you, as you write on these issues, that you make the point that treaties or other international instruments are not, in and of themselves, problematic, as I fear that gets lost in the public debate.

I doubt, frankly, that anyone—on a bipartisan basis—would regard most treaties as problematic. But the average person may not realize how often we all rely on legal frameworks established by treaties. When you want to call, email, or send a letter to a friend living abroad, you're able to do so thanks to rules established by treaties. One of the reasons that you can feel reasonably assured of your safety when getting on a commercial flight in countries around the world is that the International Civil Aviation Organization establishes safety standards. Treaties help improve the quality of our air and ensure that food imported from abroad doesn't make us sick. Overall, the United States is a party to over 10,000 treaties—and that's a good thing for enhancing our everyday lives and advancing American interests in the world.

Second, if we are to reap the benefits of negotiated international instruments, while we should insist on a good deal for the United States, we should also be prepared to comply with the rules we are telling everyone else to comply with and to take on some risk with respect to, for example, the possibility that international mechanisms we establish will not always do exactly what we want them to do, so long as we believe that they are worth it in the long run as mechanisms that promote U.S. security, prosperity, and values.

My concern is that this strain of skepticism regarding treaties and other international instruments has stymied what has long been a healthy dynamic between Congress and the White House, regardless of which party has been in power—and the impact has been stark. Since 1960, the U.S. Senate has provided advice and consent to ratification of over 800 treaties, a rate of more than one treaty every month. Between 1995 and 2000, when President Clinton was in office and Jesse Helms chaired the Senate Foreign Relations Committee, the Senate approved over 140 treaties, including the Chemical Weapons Convention, the START Treaty, and treaties dealing with labor rights, law enforcement cooperation, environmental protection and investment protection.

But since 2009 the Senate has provided advice and consent to just 20 treaties, or roughly 2.5 per year—a fraction of the historical average. While we have seen some signs of progress in the past few months of this Congress, the trend line is not encouraging.

That is to our detriment as a nation, and this skeptical attitude toward treaties would have been surprising to our founders, who routinely relied on treaties to build political and economic relationships. The prominent placement of treaties in our Constitution is due to the founders' strong belief that entering into treaties with other nations and carrying out the obligations they provide for were essential tools to allow the country to protect and advance its interests in the world.

The insight central to this view—that our country is stronger when we can work together with other nations and that some problems we face can't be solved by our efforts alone—is truer today than ever before. Treaties are essential to helping us address the increasing number of global challenges that affect us and are important even with respect to domestic challenges, given the mobility of our citizens, the increasing contact that our citizens have with persons and entities outside of the United States, and the impact that the world has on the United States. And as the challenges evolve, so should our legal framework, which means new treaties or other international instruments.

This is my final point. Another charge against treaties is that they are obsolete—we have done what we need to do in treaty form. This is a point generally made with respect to advice and consent treaties because we have all seen the challenges associated with Senate approval, but I simply do not accept that assertion; why would we willingly give up on a type of international agreement, particularly given the potential limits that might provide on what we can negotiate

with other countries? We should not accept this. Some argue that we've established all of the multilateral and bilateral frameworks needed but nothing could be further from the truth. We need every tool and we need to ensure that our legal frameworks evolve in step with the challenges and opportunities we face as a country.

Over the last eight years, at the President's direction, we have worked to advance our core interests in the international order by building on existing legal frameworks—or creating new ones—that allow us to share the burden in meeting the global challenges we face, while simultaneously reducing the chance of conflict and instability. As President Obama told graduates at the Air Force Academy earlier this year, “one of the most effective ways to lead and work with others is through treaties that advance our interests.”

The President rallied the world against the threat of climate change with the historic Paris Agreement, and after a long night in Kigali, Rwanda—we just adopted an amendment to the Montreal Protocol to phase down harmful emissions like hydrofluorocarbons, which is a particularly potent greenhouse gas. We're working to strengthen our economy through TTIP (the Transatlantic Trade and Investment Partnership), as well as TPP (the Trans-Pacific Partnership), an agreement that, if approved by Congress, will advance America's economic and strategic interests by helping us sell more American exports to the Asia Pacific, leveling the playing field for our workers and establishing strong labor and environmental standards. We've bolstered our security through the New START Treaty with Russia to reduce nuclear stockpiles, and by concluding a protocol to allow Montenegro to join NATO, which is now pending in the Senate. Every one of these new instruments represent critical developments that were built on existing instruments, many of which were advice and consent treaties.

Far from tying our hands, treaty regimes serve as mechanisms through which the United States exercises its power and advances its interests and values. When the United States negotiates environmental treaties, for example, that obligate other countries to take measures that we typically already take domestically, we are effectively shaping the world's approach to dealing with environmental problems, raising foreign standards to meet our own, leveling the playing field for our industries, and helping to protect the health of our people. When we negotiated the Law of the Sea Convention, we enshrined rules regarding freedom of navigation and rights of coastal states that benefit the United States more than any other state. Conversely, when we choose to stay outside treaty regimes, we allow others to shape the terms of international cooperation, in ways that maximize their interests and advance their values rather than our own. It means, for example, that our companies will have to operate under others' rules in many of the places they do business around the world—or else, in the absence of international legal frameworks, operate in a less predictable and certain environment.

So treaties and international agreements play a vital role in upholding the international order and advancing our interests. Nevertheless, the institutions and norms built up in the post-war era are being tested—by the forces of globalization, by an unprecedented migration crisis, by growing regional and sectarian violence. We cannot ignore the fact that the benefits of globalization and automation have not been distributed equally. We cannot ignore the inequality within and among nations, or the fact that international institutions are ill-equipped, underfunded, and under-resourced to handle the problems we are handing them. For example, if we do not address the growing inequality in many states, we're likely to see economic retrenchment, further political polarization between the “haves” and “have-nots,” and a return to mercantilist economic policies that would endanger American access to foreign markets and

threaten global economic growth—and a withdrawal from U.S.-led international organizations and agreements.

The key is that we cannot hope to address the impact of these vital trends without engaging the world and ultimately developing and strengthening the international mechanisms discussed, which are established by treaties. And this is true across the board from a foreign policy and national security standpoint. Whether we are trying to strike the right balance in the South China Sea between demonstrating resolve and avoiding inadvertent escalation, or reassuring our allies and reinforcing resilience in Europe in the face of a migrant crisis, or in adapting the U.S. government’s capacity to exploit new opportunities and mitigate risks associated with an emerging technological landscape. International legal mechanisms are among the most important tools we have for addressing these policy issues.

I hope I have convinced you to stand up for treaties. I don’t mean to suggest that you should not criticize the substance of particular treaties—and although I have views on that too, I am not taking that up today. I just ask that you separate out your concern over substance, even if linked to trends in treaty-making, from concerns regarding treaties generally as an instrument in foreign policy, which needs to be preserved, as treaties are the backbone of a rules-based international order that serves the interests of the United States and ultimately promotes U.S. security, prosperity, and values.

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## **2. Treaties Transmitted to the Senate**

The President transmitted eleven treaties to the U.S. Senate for its advice and consent to ratification in 2016. Those transmitted in 2016 are:

1. The United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York on November 23, 2005, and signed that day on behalf of the United States (S. Treaty Doc. 114-5); transmitted to the Senate February 10, 2016.
2. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on June 27, 2013, and signed on behalf of the United States on October 2, 2013 (S. Treaty Doc. 114-6); transmitted to the Senate February 10, 2016.
3. The United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed on behalf of the United States on December 30, 2003 (S. Treaty Doc. 114-7); transmitted to the Senate February 10, 2016.
4. The Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012, and signed on behalf of the United States on June 26, 2012 (S. Treaty Doc.: 114-8); transmitted to the Senate February 10, 2016.
5. United Nations Convention on Independent Guarantees and Stand-By Letters of Credit, done at New York on December 11, 1995, and signed on behalf of the United States on December 11, 1997 (S. Treaty Doc. 114-9); transmitted to the Senate February 10, 2016.

6. Extradition Treaty between the Government of the United States of America and the Government of the Dominican Republic, signed at Santo Domingo on January 12, 2015 (S. Treaty Doc. 114-10); transmitted to the Senate February 10, 2016.
7. Treaty between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 20, 2015 (S. Treaty Doc. 114-11); transmitted to the Senate March 17, 2016.
8. Protocol to the North Atlantic Treaty on the Accession of Montenegro, done at Brussels May 19, 2016, and signed that day on behalf of the United States (S. Treaty Doc. 114-12); transmitted to the Senate June 28, 2016.
9. Treaties on the delimitation of maritime boundaries between the United States of America and the Republic of Kiribati, signed at Majuro September 6, 2013, and between the United States of America and the Federated States of Micronesia, signed at Koror August 1, 2014 (S. Treaty Doc. 114-13); transmitted to the Senate December 9, 2016.
10. The Arms Trade Treaty, done at New York April 2, 2013, and signed on behalf of the United States on September 25, 2013 (S. Treaty Doc. 114-14); transmitted to the Senate December 9, 2016.
11. United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, done at New York December 10, 2014, and signed on behalf of the United States on March 17, 2015 (S. Treaty Doc. 114-15); transmitted to the Senate December 9, 2016.

### 3. Senate Advice and Consent to Ratification of Treaties

The U.S. Senate provided its advice and consent to ratification of seven treaties in 2016. See Chapter 3 for discussion of the U.S. Senate's advice and consent to ratification of extradition and mutual legal assistance treaties in 2016. See Chapter 13 for discussion of the U.S. Senate's approval of the Treaty on Plant Genetic Resources for Food and Agriculture on September 28, 2016. See Chapter 15 for discussion of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, also approved on September 28, 2016.

### 4. ILC Work on the Law of Treaties

On October 24, 2016, Department of State Legal Adviser Brian J. Egan, delivered remarks at the 71st Session of the UN General Assembly Sixth Committee on the work of the International Law Commission ("ILC"). His remarks on the topic of subsequent agreements and subsequent practice in relation to interpretation of treaties are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7560>.

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Mr. Chairman, turning to the topic of “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, the United States would like to thank the Special Rapporteur, Professor Georg Nolte, and the Commission for their extensive and impressive work on this important topic. We have begun our review of the draft conclusions and lengthy commentary and look forward to commenting next year.

In the meantime, we would like to note certain of our concerns with the draft conclusions as adopted by the Commission on first reading.

We are particularly focused on paragraph 3 of Draft Conclusion 12, which states that the “practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.”

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization “as such” in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the States party to the international organization, but to the conduct of the international organization itself. In citing VCLT articles 31(1) and 32, the Commission recognized that the practice of that international organization is not “subsequent practice” for the purposes of the rule reflected in Vienna Convention, Article 31(3)(b), which we believe is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, in light of the inapplicability of Article 31(3)(b), the draft conclusion states instead that consideration of the international organization’s practice is appropriate under paragraph 1 of Article 31 as well as Article 32 of the Vienna Convention.

The United States believes that paragraph 1 of Article 31 is not relevant in this context. Paragraph 1 reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” The factors to be considered pursuant to Article 31(1)—“ordinary meaning,” “context” and “object and purpose”—do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how Article 31(1) can properly be interpreted—consistent with the Vienna Convention itself—in this way. Indeed, it provides no support for this proposition, such as in relevant international or national case law.

Article 32 of the Vienna Convention may potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. We believe that circumstances in which the practice of the international organization may fall within Article 32, however, would need to be explained in the commentary. The current draft does not do so.

Before concluding on this topic, we would also like to note our comments regarding Draft Conclusions 5 and 11. With respect to Draft Conclusion 5, we question the language of paragraph 1, which states that subsequent practice “may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.” In our view, there are many acts that are attributed to a State for purposes of holding a State responsible that are not properly viewed as the practice of the State for purposes of the interpretation of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions.

It is also our view that the inclusion in this ILC product of Draft Conclusion 11, on decisions adopted within the framework of a Conference of States Parties, may suggest that the work of such conferences frequently involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. We believe that these results are by far the exception, not the rule, and we are studying the commentary, including the examples included in it, from this perspective.

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On November 2, 2016, Stephen Townley, Deputy Legal Adviser for the U.S. Mission to the UN, delivered the U.S. statement at the Sixth Committee on the Report on the Work of the ILC at its 68<sup>th</sup> session. Mr. Townley's remarks on the provisional application of treaties are excerpted below and available at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7536)

[usun.state.gov/remarks/7536](https://2009-2017-usun.state.gov/remarks/7536)

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Mr. Chairman, turning to the topic of "Provisional application of treaties," the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his fourth report. We also thank the Drafting Committee for its contributions in the Draft Guidelines it has provisionally adopted.

As the United States has stated, we believe the meaning of "provisional application" in the context of treaty law is well-settled—"provisional application" means that a State agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State. Provisional application gives rise to a legally binding obligation to apply the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself may be once it has entered into force. We approach all of the ILC's work on this topic from that perspective. With that in mind, we are generally in agreement with the text of most of the Draft Guidelines as provisionally adopted by the Drafting Committee.

One exception is Draft Guideline 4, entitled "Form." As we have noted previously, we are concerned that Draft Guideline 4 as provisionally adopted may suggest that a State's legal obligations under provisional application may be incurred through some method other than the consent of all the States concerned, contrary to Article 25 of the Vienna Convention on the Law of Treaties. We believe that it is important that that Guideline be reworked to avoid that interpretation, perhaps rephrasing subparagraph (b) to read: "any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, that reflect the consent of all the States concerned."

We also hope to see Draft Guideline 3 as provisionally adopted and Draft Guideline 10 as proposed by the Special Rapporteur clarified to make clear that a State may provisionally apply a treaty pending its entry into force for that State, even if it has entered into force for other States, and that a State may agree to provisionally apply a treaty only to the extent it is consistent with its national law.

In addition, we are continuing to consider Draft Guideline 7, which provides that the provisional application of a treaty or part of a treaty “produces the same legal effects as if the treaty were in force” unless otherwise agreed. While we believe that is largely correct, one way in which this is not precisely true is that, as we have noted, provisional application can be more easily terminated. Moreover, we are studying whether—as suggested in the Special Rapporteur’s report and by some members of the Commission—Draft Guideline 7 means that that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. This is a fascinating and complicated issue to which we will be giving additional thought as the Commission’s work on this topic progresses.

With regard to future work of the Special Rapporteur and the ILC on this topic, we continue to support the suggestion that the ILC develop model clauses as a part of this exercise, as those clauses may assist practitioners in considering the many options that are available. However, we are not convinced of the merits of specifically studying the provisional application of treaties that address the rights of individuals, as we do not believe that the rules regarding provisional application of treaties differ based on the subject matter of the instrument.

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## B. TREATY AMENDMENT

### *South Pacific Tuna Treaty*

On June 29, 2016, the State Department announced that the renegotiation of the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (“South Pacific Tuna Treaty”) had concluded successfully on June 25. See June 29, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259201.htm> excerpted below.

The revised Treaty would set the operational terms and conditions for the U.S. tuna purse seine fleet to fish in waters under the jurisdiction of the Pacific Island Parties, which cover a wide swath of the Western and Central Pacific Ocean. The Western and Central Pacific Ocean contains the largest and most valuable tuna fisheries in the world. Many Pacific Island parties depend on fisheries as one of their most important natural resources, and the United States has for decades sought to be a valued partner in developing regional fisheries. The U.S. purse seine fleet operates according to the highest commercial standards and is subject to strict enforcement by U.S. authorities. The Treaty has supported U.S. contributions to sound sustainable fishery management and efforts to combat illegal, unreported, and unregulated fishing. It has been a cornerstone for cooperation between the Pacific Islands and the United States, and has helped establish best practices for fisheries management in the region.

The United States sought amendment of the 27-year-old treaty to allow greater flexibility in commercial cooperation between U.S. industry and Pacific Island parties. On

December 3, 2016, the United States and 16 Pacific Island governments initialed and adopted amendments to the South Pacific Tuna Treaty at a ceremony in Fiji. See State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/264807.htm)

[2017.state.gov/r/pa/prs/ps/2016/12/264807.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/264807.htm). The media note is excerpted below.

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The revisions to the Treaty will generate higher economic returns from fisheries for Pacific Island countries, while supporting the continued viable operation of the U.S. fishing fleet in the region. The positive outcome reflects strong commitments to the Treaty by the parties and relevant stakeholders, including the Pacific Islands Forum Fisheries Agency (FFA) and the U.S. fishing industry, and a further enhancement of political and economic ties between the United States and the Pacific Island region.

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The parties have been negotiating amendments to modernize the Treaty and extend its terms of access since 2009. Based on the progress demonstrated by these Treaty amendments, the United States rescinded its decision to withdraw from the Treaty, which would otherwise have taken effect in January 2017.

The revisions to the Treaty include the general terms of fishing access for the U.S. purse seine fishing vessels to waters under the jurisdiction of Pacific Island parties through 2022. Greater flexibility in the fishing arrangements, as well as opportunities for new forms of commercial cooperation, will benefit both U.S. industry and the Pacific Island parties. The U.S. government intends to continue providing \$21 million annually pursuant to a related agreement to support economic development in the Pacific Island region.

The amended Treaty also reinforces U.S. marine conservation interests in the Western and Central Pacific Ocean, where over half of the world's tuna are caught. The continued operation of the U.S. fishing industry also provides important economic benefits to the territory of American Samoa, which played an active role on the U.S. delegation in recent years.

The continued presence of the U.S. purse seine fleet is important to the development of sustainable, well-managed fisheries in the region. U.S. fishing vessels operate according to the highest commercial standards, and are subject to strict enforcement by U.S. authorities of U.S. laws and regulations as well as regional conservation measures. The Treaty framework also supports efforts to combat illegal, unreported, and unregulated fishing, including through cooperation on maritime monitoring, control, and surveillance.

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Prior to renegotiation, the Secretary of State sent a diplomatic note communicating U.S. withdrawal from the South Pacific Tuna Treaty to the depositary (Papua New Guinea) on January 29, 2016. According to the terms of the Treaty, it would cease to have effect one year following the depositary's receipt of the U.S. notice of withdrawal. The Department of Foreign Affairs of Papua New Guinea received the letter

from Secretary Kerry rescinding its instrument of withdrawal from the Treaty on December 7, 2016 and thereafter provided formal notification to all other Parties. Because the U.S. withdrawal was rescinded less than a year after it was noticed to the depositary, the Treaty never ceased to have effect during the time period between U.S. issuance and rescission of its notice of withdrawal.

## C. LITIGATION INVOLVING TREATY LAW ISSUES

### 1. *Abu Khatallah*

As discussed in *Digest 2015* at 131-35, the United States filed a brief refuting assertions by defendant Ahmed Salim Faraj Abu Khatallah that criminal charges against him should be dismissed because his apprehension in Libya violated international treaties. Abu Khatallah was charged with participating in the September 11-12, 2012 terrorist attack in Benghazi, Libya. On February 2, 2016, the U.S. District Court for the District of Columbia issued its decision denying the motion to dismiss that was based on alleged violations of international treaties. *United States v. Khatallah*, 160 F.Supp.3d 144 (D.D.C. 2016). Excerpts below (with footnotes and record citations omitted) include the court's consideration of the international treaty law issues.

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Abu Khatallah further accuses the government of “knowingly and intentionally violat[ing] international law.” Specifically, he contends that the government violated Article 2 of the United Nations Charter, which provides, in relevant part:

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4. 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, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. Charter art. 2. Abu Khatallah also contends that the government violated the Hague Convention, 2 which he describes as “provid[ing] that belligerents may not violate the sovereignty of neutral nations[ ] not participating in a conflict.” see also Hague Convention art. 1 (“The territory of neutral Powers is inviolable.”). In Abu Khatallah’s view, “sending the military into Libya, without authorization from or notice to the Libyan government, ... violated these treaties and Libya’s sovereignty.”

The government's response is two-fold: It contends that none of the cited provisions of the U.N. Charter or of the Hague Convention is self-executing and that none creates privately enforceable rights. If the government is correct on either point, Khatallah may not seek to enforce either agreement in this Court.

1. Whether the U.N. Charter or the Hague Convention Is Self-Executing  
 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.” *Medellín v. Texas*, 552 U.S. 491, 504, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). The Court explained the distinction: [A] treaty is equivalent to an act of the legislature, and hence self-executing, when it operates of itself without the aid of any legislative provision. When, in contrast, [treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect. In sum, while treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.

*Id.* at 505, 128 S.Ct. 1346 (internal citations and quotation marks omitted). Unless the provisions of the U.N. Charter or the Hague Convention that Abu Khatallah cites are self-executing—or otherwise backed by implementing statutes—they may not be enforced in a U.S. court. He does not claim that Article 2 of the U.N. Charter or the Hague Convention is supported by implementing legislation, nor does he contend that they are self-executing.

This concession is notable, yet unsurprising. Under the test the Supreme Court laid out in *Medellín*, a self-executing treaty is one whose terms “reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.” ... A treaty is non-self-executing when it “reads like a compact between independent nations that depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Al-Bihani v. Obama*, 619 F.3d 1, 20 (D.C. Cir. 2010) (quoting *Medellín*, 552 U.S. at 521, 128 S.Ct. 1346). Nothing in the Charter or the Convention demonstrates a determination by the President and the Senate that those agreements should have domestic legal effect. Abu Khatallah’s citations to the Charter do not show otherwise. Discussing the text of the Charter, for example, he appears to rely on ... U.N. Charter art. 2(4). The Charter, however, explicitly labels this statement a general “[p]rinciple[.]” *Id.* art. 2. It is clearly “not a directive to domestic courts,” *Medellín*, 552 U.S. at 508, 128 S.Ct. 1346, but rather a commitment—in the form of a compact between independent nations—to conduct their international relations in a manner “[ ]consistent with the Purposes of the United Nations,” U.N. Charter art. 2(4). Moreover, the language of the “[p]rinciples” that Abu Khatallah cites is so broad that it is difficult to imagine how a court could enforce them absent some additional implementing legislation—which he does not contend exists.

Similarly, the Hague Convention provides no directive to U.S. courts, and Abu Khatallah cites no authority to support the notion that the President and Senate intended it to be judicially enforceable. He claims that it “provides that belligerents may not violate the sovereignty of neutral nations [ ] not participating in a conflict,” likely referring to the provision that states, “The territory of neutral Powers is inviolable.” This general statement of principle, however, is at least as broad as the language Abu Khatallah cites in the U.N. Charter. And there is no indication—in the text or otherwise—that this provision was intended to have “immediate legal effect in domestic courts.” *Medellín*, 552 U.S. at 508, 128 S.Ct. 1346.

At least one court has followed this line of reasoning and rejected the exact argument that Abu Khatallah advances here. See *al Liby*, 23 F.Supp.3d at 201–03. In *al Liby*, the defendant—who was himself seized in Libya by members of the U.S. army—complained that his apprehension violated the same provisions of the U.N. Charter and the Hague Convention cited

by Abu Khatallah. The court held that none of these treaty provisions was self-executing, reasoning that “[t]he United Nations Charter has been ratified by the United States, but nothing suggests that it was intended to be enforceable in federal courts” and that “the provisions on which al Liby relies in Article 2 of the Charter ... are only general principles. None of those principles ... can reasonably have been intended to be enforceable in U.S. courts.” *Id.* at 201–02. The court held the Hague Convention to be “similarly ... not self-executing. It attempts to impose standards of conduct for belligerent nations, but the Convention itself indicates that it was not intended to create judicially enforceable rights.” *Id.* at 202.

Other courts have consistently agreed that similar provisions of the U.N. Charter and Hague Convention are not self-executing. ... Here, too, the Court finds that none of the treaty provisions on which Abu Khatallah relies is self-executing. ———

## 2. Whether the U.N. Charter or the Hague Convention Creates Privately Enforceable Rights

As the Supreme Court has explained, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’ ” *Medellín*, 552 U.S. at 506 n. 3, 128 S.Ct. 1346 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit “presume[s] that treaties do not create privately enforceable rights in the absence of express language to the contrary.” *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C.Cir.1980)). Therefore, even if the provisions of the U.N. Charter and the Hague Convention that Abu Khatallah cites were self-executing—and thus “ha[d] the force and effect of a legislative enactment,” *id.* at 506, 128 S.Ct. 1346 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888))—he could not seek relief pursuant to them in court unless the treaty provided him a cause of action to enforce some individual right.

As in *al Liby*, Abu Khatallah “has not identified any provision of the United Nations Charter or the Hague Convention that created judicially enforceable private rights.” 23 F.Supp. 3d at 202–03. Nor has he pointed to anything in the drafting or negotiating history to support the existence of a private right of action under either treaty. Abu Khatallah’s failure to do so is understandable. After all, the provisions on which he relies are not intended to directly benefit private persons. They “do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C.Cir.1984) (Bork, J., concurring). Rather than respond to the government’s argument that the treaty provisions at issue “are not self-executing and do not provide for individual rights,” Abu Khatallah contends that “regardless of the ordinary enforceability of treaty provisions and international law,” the Court has the authority to enforce them here “because this is an extraordinary case involving outrageous government misconduct.” This statement essentially operates as a concession that these treaty provisions do not confer rights on private individuals or allow those individuals to enforce these provisions in court. Therefore, especially in the absence of “express language to the contrary,” *Medellín*, 552 U.S. at 506 n. 3, 128 S.Ct. 1346, this Court finds that no private right of action exists to enforce the provisions of the U.N. Charter or Hague Convention on which Abu Khatallah relies.

3. The Appropriate Remedy for a Violation of the U.N. Charter or the Hague Convention

[D]ivestiture of personal jurisdiction is an inappropriate remedy for a violation of the treaty provisions at issue here. It is true that “where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law.” *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 346–47, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006). Yet “[w]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one ... through lawmaking of their own” under the guise of exercising their supervisory powers. *Id.* at 347, 126 S.Ct. 2669. Therefore, unless the U.N. Charter or the Hague Convention makes available to Abu Khatallah the remedy he seeks, the Court is powerless to grant him such relief even if his apprehension violated those agreements.

The closest parallel is again *al Liby*, where the court held that it would still have had jurisdiction over the defendant “even assuming that the international treaties were self-executing and created judicially enforceable private rights.” 23 F.Supp. 3d at 203. As a result, “dismissal of the indictment would not [have] be[en] appropriate” because “[t]he treaties do not provide for such relief, and the Court will ‘infer neither an entitlement to suppression nor an entitlement to dismissal absent express, or undeniably implied, provision for such remedies in a treaty’s text.’” *Id.* (quoting *United States v. Li*, 206 F.3d 56, 62 (1st Cir.2000)). And again, that Abu Khatallah asks the Court to divest itself of jurisdiction over him, rather than to dismiss the indictment outright, does not substantively change the analysis. Indeed, if a court would be unjustified in suppressing evidence after finding a treaty violation, without some authority in the treaty for granting that form of relief, see *Sanchez–Llamas*, 548 U.S. at 346, 126 S.Ct. 2669, it is difficult to fathom how this Court could properly divest itself of jurisdiction over Abu Khatallah without some clear indication to that effect from the treaty provisions themselves. He has identified none, and the Court accordingly finds that his requested relief is unavailable, even if the treaty provisions were self- executing and provided for privately enforceable rights.

\* \* \* \*

2. **Litigation Regarding U.S.-Colombia Extradition Treaty**

On October 26, 2016, Assistant Legal Adviser for Law Enforcement and Intelligence Tom Heinemann provided a supplemental declaration in an extradition case in which the individual sought for extradition (Andres Felipe Arias Leiva) claimed that the extradition treaty between the United States and Colombia was not in force. Excerpts follow from Mr. Heinemann’s October 26 declaration.

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\* \* \* \*

1. On April 20, 2016, in my capacity as the Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser, Department of State, Washington, D.C., the office responsible for extradition requests, I executed a declaration based upon my personal knowledge and upon information made available to me in the performance of my official duties, affirming that the relevant and applicable provisions of the extradition treaty between the United

States of America and the Republic of Colombia are in full force and effect. This declaration is intended to supplement the declaration previously submitted by me in order to provide additional information related to the validity of an extradition treaty between the United States of America and Colombia.

2. As stated in paragraph 3 of my declaration of April 20, 2016, the Extradition Treaty between the United States of America and the Republic of Colombia (the “Treaty”) is the relevant and applicable treaty in relation to the extradition case of Andres Felipe Arias Leiva.

3. Colombia ratified the Treaty on November 3, 1980. The United States Senate gave advice and consent to ratification on December 2, 1981, and the President of the United States ratified the Treaty on January 4, 1982. The Treaty entered into force March 4, 1982, when the parties exchanged instruments of ratification. It was proclaimed by the President of the United States on March 25, 1982.

4. Article 21 of the Treaty governs its ratification, entry into force, and termination. Pursuant to this article, the Treaty “shall enter into force on the date of the exchange of instruments of ratification.” Either Party may terminate the Treaty “by giving notice to the other Party, and the termination shall be effective six months after the date of receipt of such notice.”

5. Since the Treaty’s entry into force, neither the United States nor Colombia has given the notice of termination specified in Article 21. Therefore, the Treaty remains in force between the United States and Colombia.

6. The decisions of the Colombian Supreme Court of December 12, 1986 and June 25, 1987 did not terminate or suspend the operation of the Treaty. The two court decisions ruled invalid the relevant Colombian legislation approving and giving domestic effect to the Treaty. Whatever the effect of those decisions may have been under the internal law of Colombia, the United States has never considered that the Colombian court’s decisions had the effect of terminating or suspending the operation of the Treaty, either as a matter of international law generally or under the express terms of Article 21.

7. Under international treaty law and Practice, a treaty that has entered into force remains in force, unless it is set aside on one of the grounds and under the conditions provided for in international law.<sup>11</sup> The United States considers that the Vienna Convention on the Law of Treaties, to which Colombia but not the United States is a party, provides an authoritative guide to international treaty law and practice on the validity and termination of treaties.<sup>12</sup> Article 46 of the Vienna Convention provides that a State may not invoke a violation of its internal law as invalidating its consent to be bound “unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”<sup>13</sup> A violation would be “manifest” only “if it would be objectively evident” to any State acting “in accordance with normal practice and in good faith.” The circumstances relied upon in the Colombian Supreme Court’s decisions do not meet this threshold. Moreover, Articles 65 and 67 of the Convention provide that a State wishing to invalidate, terminate or suspend a treaty on one of the grounds specified in the Convention must

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<sup>11</sup> See Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984) 162-63, quoting from Yearbook of the International Law Commission (1966/41) 236. See also Aust, *Modern Treaty Law and Practice* (3d ed. 2013) 273-74.

<sup>12</sup> See, Restatement (Third) of the Foreign Relations Law of the United States, Part III, International Agreements, 145-146.

<sup>13</sup> *Accord* Restatement (Third) of the Foreign Relations Law of the United States § 311, paragraph 3.

provide a written notification to the other Party.<sup>14</sup> Colombia has not provided such a notification to the United States.

8. In conclusion, notwithstanding the Colombian court's decisions, Colombia has not provided the United States either a notice of termination under Article 21 of the Treaty, or a notice of invalidity or termination under the principles set forth in the Vienna Convention. In the view of the United States, the obligations of the Treaty remain legally binding upon both Parties. This has been the consistent view of the United States since the Supreme Court rulings, and the United States—both at the executive and judicial level—has relied on the Treaty numerous times since 1987 as the authority for approving extraditions to Colombia.

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On December 16, 2016, Assistant Legal Adviser Heinemann provided a second supplemental declaration in the Arias Leiva case. Excerpts follow from Mr. Heinemann's December 16 declaration. The declaration and its attachments are available at

<https://www.state.gov/s/l/c8183.htm>

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\* \* \* \*

2. On December 2, 2016, the Embassy of Colombia presented my office with Diplomatic Note S-EUSWHT-16-1982, which forwarded a copy of Diplomatic Note S-DM-16-109804, dated December 2, 2016, from the Director of the Office of International Judicial Affairs of the Ministry of Foreign Affairs of Colombia, as well as a courtesy translation. Copies of these documents are attached to this declaration.

3. Diplomatic Note S-DM-16-109804 confirms that the Government of Colombia shares the same position as the United States (as stated in my declaration of October 26) with regard to the status of the Extradition Treaty between the United States of America and the Republic of Colombia (the "Treaty"). Specifically, the Government of Colombia has confirmed that it agrees that the treaty remains in force "in accordance with the [sic] international law, and as provided by the Article 21(4) of the same Treaty and of the Article 54 of The Vienna Convention on the Law of Treaties, as neither the Republic of Colombia nor the United States of America have notified themselves their intention of terminating it." Furthermore, the Government of Colombia has confirmed that it made its request for the extradition of Mr. Andres Felipe Arias Leiva to the United States of America under the Treaty and that it expects that the United States would process the request based on the Treaty. Because these views come from the Ministry of Foreign Affairs of Colombia and were formally transmitted via diplomatic note, the Department of State considers them to be the official views of the Government of Colombia.

4. It is also important to note that the fact that Colombia's domestic law implementing the Treaty was struck down by the Colombian Supreme Court does not mean that the Government of Colombia is failing to fulfill its international legal obligation to extradite under the Treaty.

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<sup>14</sup> *Accord* Restatement (Third) of the Foreign Relations Law of the United States § 337, paragraph 1 and comment (b).

Colombia routinely acts on U.S. extradition requests and, in fact, consistently extradites more fugitives annually to the United States than any other country.

\* \* \* \*

**Cross References**

*Extradition treaties*, **Chapter 3.A.1.**

*Mutual Legal Assistance Treaties (MLATs)*, **Chapter 3.A.2.**

*National practice in treaty implementation*, **Chapter 7.A.7.**

*Russian ratification of “treaty” with Abkhazia*, **Chapter 9.B.2.**

*Warfaa v. Ali*, **Chapter 10.C.2.**

*Dogan v. Barak*, **Chapter 10.C.3.**

*Air transport agreements*, **Chapter 11.A.**

*Interpretation of NAFTA*, **Chapter 11.B.**

*Transmittal of IP-related treaties*, **Chapter 11.H.1.**

*Transmittal of maritime boundary treaties*, **Chapter 12.A.4.a.**

*UN Framework Convention on Climate Change*, **Chapter 13.A.1.a**

*Port State Measures Agreement*, **Chapter 13.B.1.b.**

*Treaty on Plant Genetic Resources*, **Chapter 13.C.1.**

*CITES—rules of procedure for regional economic integration organizations*, **Chapter 13.C.2.**

*Cultural Property MOUs*, **Chapter 14.A.**

*Private international law conventions transmitted to Senate*, **Chapter 15.A.3.**

*Hague Securities Convention*, **Chapter 15.A.4.**

*Ratification of Child Support Convention*, **Chapter 15.B.**

*Entry into force of amendment to CPPNM*, **Chapter 19.B.4.a.**

## CHAPTER 5

### Foreign Relations

#### A. LITIGATION INVOLVING NATIONAL SECURITY AND FOREIGN POLICY ISSUES

##### 1. *Meshal v. Higgenbotham*

As discussed in *Digest 2015* at 142-44, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of a *Bivens* action against FBI agents relating to detention and interrogation in foreign countries in the context of counterterrorism investigations. *Meshal v. Higgenbotham*, 804 F.3d. 417 (D.C. Cir. 2015). On February 2, 2016, the Court denied rehearing en banc. On May 31, 2016, Meshal filed a petition for certiorari in the U.S. Supreme Court. On September 20, 2016, the United States filed its brief in opposition to certiorari, arguing that the court of appeals correctly held that consideration of factors including extraterritoriality, national security, and foreign policy makes unavailable a *Bivens* remedy and that further review by the Supreme Court is not warranted. Excerpts follow from the U.S. brief.

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\* \* \* \*

A two-step analysis governs the decision whether to extend *Bivens* to a new context. First, a court should consider “whether any alternative, existing process for protecting the [plaintiff’s] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Second, “even in the absence of [such] an alternative” remedial mechanism, the court must make an assessment “appropriate for a common-law tribunal” about whether judicially created relief is warranted, “paying particular heed \* \* \* to any special factors counselling hesitation before authorizing a new kind of federal litigation.” *Ibid.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). That inquiry involves a “case-by-case,” rather than categorical, “approach in determining whether to recognize a *Bivens* cause of action.” Pet. App. 13a.

b. The court of appeals correctly applied that framework in declining to extend the

judicially inferred damages remedy to “alleged actions occurring in a terrorism investigation conducted overseas by federal law enforcement officers.” Pet. App. 17a. Courts are “reluctant to intrude upon the authority of the Executive in military and national security affairs,” “unless Congress specifically has provided otherwise.” *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). Such reluctance is appropriate because “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Haig v. Agee*, 453 U.S. 280, 292 (1981). Thus, even in the habeas context (where the judiciary need not infer the existence of a remedy), courts should not “second-guess” determinations about “sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally,” because those are determinations that “the political branches are well situated to consider.” *Munaf v. Geren*, 553 U.S. 674, 702 (2008).

Petitioner’s claims squarely implicate national-security and foreign-policy sensitivities. Petitioner seeks to hold liable in damages U.S. officials who were conducting a terrorism investigation in cooperation with foreign governments. “One of the questions raised by [petitioner’s] suit is the extent to which [respondents] orchestrated his detention in foreign countries.” Pet. App. 22a. Litigating about such questions could have serious “diplomatic consequences” and could “affect the enthusiasm of foreign states to cooperate in joint actions or the government’s ability to keep foreign policy commitments or protect intelligence.” *Id.* at 22a-23a.

This case, moreover, involves “U.S. officials” who “were attempting to seize and interrogate suspected al Qaeda terrorists in a foreign country.” Pet. App. 32a (Kavanaugh, J., concurring). As the district court correctly found, *id.* at 95a, petitioner’s suit, which turns in part on whether the conduct of U.S. officials was unreasonable, would require inquiry into other sensitive issues, including national-security threats in the unstable Horn of Africa region (and petitioner’s own potential contribution to those threats); the substance and sources of intelligence information; the government’s policies for conducting counterterrorism investigations, see C.A. App. 24-25, 32, 57; the consistency of petitioner’s detention and treatment with Kenyan, Somali, and Ethiopian law and policy and the supposed cooperation of foreign governments and their officials with U.S. investigative efforts, see *id.* at 25, 45; and evidence concerning the conditions of detention in Ethiopia, Somalia, and Kenya. Answering such questions could require discovery of national-security information from foreign counterterrorism officials and from U.S. officials up and down the chain of command. See, e.g., *id.* at 57 (petitioner’s allegation that his treatment was conducted with full awareness of other U.S. officials “including officials designated by the Attorney General and the Director of Central Intelligence”). The sensitivities associated with litigating this case are not, as petitioner suggests (Pet. 17), merely “conjectural.”

c. The fact that petitioner’s claims arise from respondents’ *extraterritorial* conduct provides a particularly compelling reason to reject extension of the *Bivens* remedy. This Court “has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.” *Vance v. Rumsfeld*, 701 F.3d 193, 198-199 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013). The decision below correctly recognized that the extraterritorial nature of the conduct petitioner challenges is “critical.” Pet. App. 18a.

This Court presumes that judge-elaborated causes of action do not apply to conduct occurring abroad even where a statute has already authorized the courts to recognize new causes of action. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013). The Court has applied that presumption when, as here, the question is whether Congress has

implicitly delegated the authority to recognize a cause of action. See *ibid.* “If Congress had enacted a general tort cause of action applicable to Fourth Amendment violations committed by federal officers (a statutory *Bivens*, so to speak), that cause of action would not apply to torts committed” outside the United States unless Congress had sufficiently indicated its intention to overcome the presumption against extraterritorial application. Pet. App. 18a. “There is no persuasive reason to adopt a laxer extraterritoriality rule in *Bivens* cases.” *Id.* at 31a (Kavanaugh, J., concurring). In fact, it would be “grossly anomalous \* \* \* to apply *Bivens* extraterritorially when [the Court] would not apply an identical statutory cause of action for constitutional torts extraterritorially.” *Ibid.*

\* \* \* \*

d. Contrary to petitioner’s characterizations (Pet. 14-17, 31-34), the decision below does not establish a categorical rule granting absolute immunity to counterterrorism agents acting abroad. Whether a federal court should extend *Bivens* to a new, sensitive context “is analytically distinct from the question of official immunity from *Bivens* liability.” *United States v. Stanley*, 483 U.S. 669, 684 (1987). The relevant question therefore is not whether respondents are immune from suit, but whether the creation of any remedy is best left to Congress rather than the courts. Pet. App. 20a- 23a; see *id.* at 30a-31a (Kavanaugh, J., concurring).

Rather than issue a “categorical” (Pet. 14, 31) ruling, moreover, the court of appeals followed this Court’s “case-by-case” approach and was careful to make its holding “context specific.” Pet. App. 13a-14a (citing *Wilkie*, 551 U.S. at 550, 554). It therefore refused to decide “whether a *Bivens* action can lie against federal law enforcement officials conducting non-terrorism criminal investigations against American citizens abroad.” *Id.* at 13a. And it refused to decide “whether a *Bivens* action is available for plaintiffs claiming wrongdoing committed by federal law enforcement officers during a terrorism investigation occurring within the United States.” *Ibid.* Instead, it appropriately based its holding on the confluence of multiple factors, including the terrorism-related nature of respondents’ investigation, the extraterritorial locus of the allegedly wrongful conduct, and the alleged involvement of foreign governments and officials in petitioner’s detention. *Id.* at 22a-23a.

e. Finally, petitioner emphasizes (Pet. 20) that he has no alternative mechanism to obtain damages for his asserted claims. As the court of appeals explained, however, this Court “has repeatedly held that ‘even in the absence of an alternative’ remedy, courts should not afford *Bivens* remedies if ‘any special factors counsel[] hesitation.’ ” Pet. App. 19a (quoting *Wilkie*, 551 U.S. at 550, and citing *Schweiker*, 487 U.S. at 421- 422).

If Congress chooses to create a civil money-damages remedy for claims like petitioner’s, which relate to detention and interrogation that occurred in the course of counterterrorism operations undertaken abroad in alleged cooperation with foreign governments, Congress in crafting such legislation can take steps to reduce the potentially harmful effects of private suits on national security and foreign policy. In such contexts, “Congress is in a far better position than a court to evaluate the impact of a new species of litigation” and may “tailor any remedy to the problem perceived.” *Wilkie*, 551 U.S. at 562 (citation omitted). “[W]hen Congress deems it necessary for the courts to become involved in sensitive matters, \* \* \* it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns.” *Lebron*, 670 F.3d at 555. Thus, Congress has “created the special Foreign Intelligence Surveillance Court to consider wiretap requests in the highly sensitive area of” foreign-

intelligence investigations. *Ibid.* Congress enacted the Classified Information Procedures Act, 18 U.S.C. App. at 860, to regulate the use and disclosure of sensitive information in criminal cases. See generally *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In the absence of such statutory safeguards, however, the court of appeals correctly declined to recognize an extrastatutory, and extraterritorial, damages action in the sensitive context presented by petitioner’s claims.

3. Petitioner contends (Pet. 9-14) that the Court should grant review in this case to address confusion in the courts of appeals about “the status of national security as a bar to *Bivens* relief.” Pet. 13. The decision below, however, comports with the great weight of authority in the courts of appeals, which have repeatedly held that “special factors counseling hesitation \* \* \* foreclosed *Bivens* remedies in cases ‘involving the military, national security, or intelligence.’” Pet. App. 20a (quoting *Doe*, 683 F.3d at 394); see also *id.* at 11a-12a (citing *Vance*, 701 F.3d at 198-199; *Lebron*, 670 F.3d at 548-549; *Arar*, 585 F.3d at 571; *Wilson v. Libby*, 535 F.3d 697, 705-708 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009)). Most closely on point, the Fourth, Seventh, and D.C. Circuits have all rejected *Bivens* actions challenging the conditions under which federal officials have detained persons, including U.S. citizens, suspected of having ties to terrorism. See *Vance*, 701 F.3d at 197-203; *Doe*, 683 F.3d at 395-396; *Lebron*, 670 F.3d at 547-556; *Ali v. Rumsfeld*, 649 F.3d 762, 765-768 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir.), cert. denied, 558 U.S. 1091 (2009). Petitioner suggests (Pet. 11) that those cases are distinguishable from this one because they involved “suits against military officials” about “the conduct of war.” That potential distinction, however, is still consistent with the conclusion of the court below that national-security considerations—when taken *in conjunction with other factors*—may justify a refusal to extend the *Bivens* remedy.

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...The decision below, however, is in harmony with all of the most analogous court of appeals decisions, which have uniformly declined to recognize a *Bivens* remedy in suits that challenge overseas conduct implicating national security. The D.C. Circuit’s ruling therefore does not warrant further review.

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## 2. *Sokolow*

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority (“PA”) and the Palestinian Liberation Organization (“PLO”) urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the PA and PLO were not subject to general personal jurisdiction or specific personal jurisdiction in the United States and vacated and remanded the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016).\*

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\* Editor’s note: The plaintiffs filed a petition for certiorari on March 3, 2017.

## **B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT**

### **1. Overview**

The Alien Tort Statute (“ATS”), sometimes referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court held that the ATS is “in terms only jurisdictional” but that, in enacting the ATS in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2016 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

### **2. ATS and TVPA Cases Post-*Kiobel***

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”

#### **a. Warfaa v. Ali**

On February 1, 2016, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *Warfaa v. Ali*, 811 F.3d. 653 (2016), affirming the 2014 judgment of the district court dismissing Warfaa’s ATS claims after applying the presumption against extraterritorial application of the ATS set forth in *Kiobel*. *Warfaa v. Ali*, 33 F.Supp.3d 653 (E.D.Va. 2014). The Fourth Circuit also affirmed the district court’s determination that the TVPA claims could proceed because Ali was not entitled to immunity under binding Fourth Circuit precedent. The United States did not express a view on defendant’s entitlement to immunity in the district court or the Fourth Circuit in this case. In the Fourth Circuit, plaintiff cited the U.S. statement of interest filed in *Yousuf v. Samantar*, another case in

the Eastern District of Virginia against a former Somali official. See *Digest 2011* at 338-40 for discussion of the U.S. statement of interest in *Yousuf v. Samantar*. On May 2, 2016, Ali filed a petition for certiorari in the U.S. Supreme Court on the immunity issue. Warfaa conditionally cross-petitioned for certiorari on the ATS issue. On October 3, 2016, the Supreme Court invited the Acting Solicitor General to file a brief in the case expressing the views of the United States on both petitions.

**b. Doğan v. Barak**

On June 10, 2016, the United States filed a suggestion of immunity in U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. The Department of State determined that Ehud Barak, former defense minister of Israel, was immune from the claims in this suit. Plaintiffs sued after their son was killed by Israeli Defense Forces (“IDF”), alleging that Barak knew about and failed to prevent human rights abuses in the operations that led to their son’s death. On October 13, 2016, the district court issued its decision, granting Barak’s motion to dismiss the case on immunity grounds. The discussion of the TVPA’s effect on common law immunity in the U.S. brief follows (with footnotes omitted). The suggestion of immunity is discussed and excerpted further in Chapter 10 and available in full at

<http://www.state.gov/s/l/c8183.htm>.

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Plaintiffs also err in suggesting that Congress abrogated immunity under the common law for foreign officials accused of torture or extrajudicial killing. Opp’n at 9. Indeed, they argue that the TVPA does so “unambiguous[ly].” Opp’n at 10. This is plainly incorrect, as the TVPA is entirely silent as to whether it limits the immunities of foreign officials. Indeed, Plaintiffs can cite no portion of the TVPA that references or mentions common law immunity. As the Supreme Court has noted, “[i]n order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); see also *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812) (noting that courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches “in a manner not to be misunderstood”). The TVPA lacks any such clear statement abrogating immunity.

Indeed, the Court of Appeals for the D.C. Circuit rejected on this basis the proposition that the TVPA supersedes common law head-of-state immunity. See *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (per curiam). The D.C. Circuit relied on “[t]he canon of construction that statutes should be interpreted consistently with the common law[, which] helps us interpret a statute that, as here, ‘clearly covers a field formerly governed by the common law.’” *Id.* at 179 (quoting *Samantar*, 560 U.S. at 320). Finding no “language [in] the TVPA . . . [that] supersedes the common law,” the D.C. Circuit “conclude[d] that the common law of head of state immunity survived enactment of the TVPA.” *Id.* at 180. The same is true of the common law of foreign official immunity more generally.

The legislative history of the TVPA further confirms that the TVPA does not abrogate common law foreign official immunity. The Senate Judiciary Committee Report (“Senate Report”) specifically states that the “TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.” S. Rep. No. 102-249, at \*7 (1991) (footnote omitted). Additionally, the Senate Report emphasizes that the TVPA was not intended to override diplomatic and head-of-state immunities. *Id.* at \*7–\*8; see also H.R. Rep. No. 102-367, at \*5 (1991) (“[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity.”). With respect to conduct-based immunity, the legislative history indicates that Congress believed that foreign states rarely would request immunity on behalf of an official in cases where torture or extrajudicial killing occurred—since states would rarely “admit some knowledge or authorization of relevant acts.” Senate Report at \*8 (internal quotation marks omitted). But the converse implication is that where, as here, the foreign state has asserted that the acts alleged were taken in an official capacity, the Senate Judiciary Committee understood that the TVPA would not override foreign official immunity.

Contrary to Plaintiffs’ assertion, reading the TVPA in harmony with the immunities of foreign officials does not render the TVPA a “[v]irtual [n]ullity.” Opp’n at 12. For example, foreign officials may be liable under the TVPA, even for official acts, where the parent state waives their immunity. See *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472 (noting the “Philippine government’s agreement that the suit against Marcos proceed”). And a foreign official will be subject to liability under the TVPA in any case where the Executive Branch informs the court that it has decided not to recognize the foreign official’s claim of immunity from suit, as was the case in *Samantar*. Here, however, the Executive Branch has determined that Barak is immune from suit under the TVPA.

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## C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*

### 1. Political Question: Lawsuits Seeking Evacuation From Yemen

As discussed in *Digest 2015* at 149, groups of U.S. citizens sued the Departments of State and Defense in Michigan and Washington, D.C. in 2015 seeking a formal U.S. government evacuation of private U.S. citizens from Yemen. One such case was dismissed in 2015. *Sadi v. Obama*, No. 15-11314 (E.D. Mich. 2015). The second case, *Mobaraz v. Obama*, was dismissed in 2016 on a similar basis, that resolving the complaint would involve a nonjusticiable political question. Excerpts follow (with footnotes omitted) from the May 17, 2016 memorandum opinion of the U.S. District Court for the District of Columbia.

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Plaintiffs have asked this Court, in no uncertain terms, to issue an order that compels the Executive Branch to conduct an evacuation of American citizens in Yemen. Not surprisingly, Defendants insist that any such order would impermissibly encroach upon the discretion that the Constitution affords to the political branches to conduct foreign affairs; therefore, prior to considering Defendants' contention that Plaintiffs' complaint fails to state a claim under the APA, this Court must first determine whether or not it has the authority to traverse the thicket of thorny foreign-policy issues that encompasses Plaintiffs' allegations. Precedent in this area makes it crystal clear that federal courts cannot answer "political questions" that are presented to them in the guise of legal issues, *see infra* Part III.A., but identifying *which* claims qualify as nonjusticiable political questions—and which do not—can sometimes be a substantially less lucid endeavor. Not so here: as explained below, after considering the parties' arguments and the applicable law regarding the boundaries of the political-question doctrine, this Court is confident that Plaintiffs' claims fit well within the scope of the nonjusticiability principles that the Supreme Court and D.C. Circuit have long articulated. Accordingly, in its Order of March 31, 2016, the Court granted Defendants' motion and dismissed Plaintiffs' case.

#### A. The Political-Question Doctrine

The political-question doctrine is, in essence, "a function of the separation of powers," insofar as it recognizes that "some [q]uestions, in their nature political, are beyond the power of the courts to resolve[.]" *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (first alteration in original) (internal quotation marks and citations omitted). The Supreme Court has said that the doctrine aims "to restrain the Judiciary from inappropriate interference in the business of the other branches of Government[.]" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). As such, it "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch[.]" *El-Shifa*, 607 F.3d at 840 (internal quotation marks and citations omitted).

That said, it is important to note that the political-question doctrine is "a narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it," *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted); moreover, the doctrine is also "notorious for its imprecision," *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). This means that courts have often struggled to ascertain whether, and under what circumstances, claims in a plaintiff's complaint raise nonjusticiable political issues.

Fortunately, some guideposts do exist. The D.C. Circuit has announced that a court identifies a nonjusticiable political question by "[c]onducting [a] discriminating analysis of the particular question posed by the claims the plaintiffs press[.]" *El Shifa*, 607 F.3d at 844 (internal quotation marks and citation omitted); *see also id.* at 842 ("[T]he presence of a political question in these cases turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action." (citation omitted)). This probing analysis of a plaintiff's claims historically has centered on ascertaining whether any one of the several factors that the Supreme Court first laid out in *Baker v. Carr*, 369 U.S. 186 (1962), are present. *See El Shifa*, 607 F.3d at 841. Under settled Supreme Court precedent,

a claim presents a political question if it involves: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent

resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* (internal quotation marks omitted) (quoting *Baker*, 369 U.S. at 217); *see also Simon v. Republic of Hungary*, 812 F.3d 127, 149–50 (D.C. Cir. 2016). Notably, these factors are disjunctive, and when any one of them is “[p]rominent on the surface” of a case, the case involves a nonjusticiable political question and the court cannot proceed. *Baker*, 369 U.S. at 217.

Given these touchstones, it is easy to see why “[d]isputes involving foreign relations” often raise nonjusticiable political questions. *El-Shifa*, 607 F.3d at 841 (noting that claims regarding foreign-policy matters “raise issues that frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature” (internal quotation marks and citation omitted)). Indeed, the President has “‘plenary and exclusive power’ in the international arena” and acts “‘as the sole organ of the federal government in the field of international relations[,]’” *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); consequently, courts have found that controversies that are “intimately related to foreign policy” are “rarely proper subjects for judicial intervention,” *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted).

But there is no per se ‘foreign policy’ rule—*i.e.*, a claim is not nonjusticiable simply and solely because it “implicates foreign relations.” *Id.* (citation omitted). And drawing the line between nonjusticiable and justiciable claims, at least in foreign-relations cases, involves identifying those claims that require the court to opine on the “wisdom of discretionary decisions made by the political branches in the realm of foreign policy[,]” as distinguished from claims that “[p]resent[] purely legal issues such as whether the government had legal authority to act.” *Id.* at 842 (second alteration in original) (internal quotation marks and citation omitted). That is, if “[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination” and, instead, are merely tasked with the “familiar judicial exercise” of determining how a statute should be interpreted or whether it is constitutional, the claim does not involve answering a political question and is justiciable. *Zivotofsky*, 132 S. Ct. at 1427; *see also Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229–30 (1986) (explaining that not “every case or controversy which touches foreign relations lies beyond judicial cognizance[,]” and emphasizing that courts “have the authority to construe treaties[,] . . . executive agreements, and . . . congressional legislation” and to address other “purely legal question[s] of statutory interpretation” in the foreign-policy realm (internal quotation marks and citation omitted)). However, if the court is being called upon to serve as “a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security[,]” then the political-question doctrine is implicated, and the court cannot proceed. *El-Shifa*, 607 F.3d at 842.

In this regard, then, *El-Shifa*’s dichotomy between claims presenting purely legal questions, on the one hand, and claims requiring the reconsideration of discretionary foreign-policy decisions, on the other, helpfully directs a court’s attention to its own role in determining the issue presented when deciding a case with foreign-policy implications. When deciding the claim merely requires the court to engage in garden-variety statutory analysis and constitutional reasoning, it has authority to do so (*i.e.*, the claim is justiciable), but a claim that goes beyond those classically judicial functions to request that a court override discretionary foreign-policy

decisions that the political branches have made—however framed—falls within the heartland of the political-question doctrine. *See Ali Jaber v. United States*, No. 15-0840, 2016 WL 706183, at \*4 (D.D.C. Feb. 22, 2016) (“If plaintiffs’ claims, ‘*regardless of how they are styled*, call into question the prudence of the political branches in matters of foreign policy or national security,’ then they must be dismissed.” (emphasis in original) (quoting *El-Shifa*, 607 F.3d at 841)). In other words, the political-question doctrine demands that a court assiduously avoid “assess[ing] the merits of the President’s [discretionary] decision[s]” regarding foreign-policy matters, *El Shifa*, 607 F.3d at 844, by “declin[ing] to adjudicate claims seeking only a ‘determination[ ] whether the alleged conduct *should* have occurred[.]’” *id.* at 842 (second alteration in original) (emphasis in original) (quoting *Harbury*, 522 F.3d at 420).

**B. Plaintiffs’ Claims Require This Court To Determine Whether The Executive Branch Should Have Decided To Conduct Complex Overseas Operations, Which Is A Quintessential Political Question**

Plaintiffs’ APA claims—as elucidated in the complaint—rest fundamentally on the contention that the failure of State and DOD to provide “a swift, accommodating, and reasonable evacuation from Yemen” (Compl. ¶ 82) constitutes agency action that is “arbitrary[.] capricious[.] an abuse of discretion[, or otherwise] not in accordance with law[.]” in violation of the APA. (*Id.* ¶ 81 (citing 5 U.S.C. § 706); *see also id.* ¶¶ 82-92.) It is clear to this Court that this claim fits squarely within the recognized standards for identifying nonjusticiable political questions described above, for several reasons.

First of all, Plaintiffs’ APA claim involves “a textually demonstrable constitutional commitment of the issue to a coordinate political department[.]” *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted)—which is the first *Baker* factor, and a hallmark of political questions. It cannot be seriously disputed that “decision-making in the fields of foreign policy and national security is textually committed to the political branches of government.” *Schneider*, 412 F.3d at 194; *see also id.* at 194–95 (collecting the various explicit “[d]irect allocation[s]” in the Constitution of those responsibilities to the legislative and executive branches). And, indeed, Plaintiffs seek to have this Court question the Executive Branch’s discretionary decision to refrain from using military force to implement an evacuation under the circumstances described in the complaint, despite the fact that, per the Constitution, it is the President who, as head of the Executive Branch and “Commander in Chief[.]” U.S. Const. Art. II, § 2, decides whether and when to deploy military forces, not this Court. *See El-Shifa*, 607 F.3d at 842 (explaining that a claim “requiring [the court] to decide whether taking military action was wise” is a nonjusticiable “policy choice[ ] and value determination[ ]” (second and third alterations in original) (internal quotation marks and citation omitted)).

Plaintiffs’ suggestion that the court-ordered remedy they seek could very well stop short of a direct mandate for military intervention ... makes no difference, as far as the political-question doctrine is concerned. Regardless, the clear basis for the complaint’s assertion that Plaintiffs are entitled to any relief at all is the contention that the Executive Branch has abused its discretion—in APA terms—in refusing to evacuate U.S. citizens from Yemen thus far (*see, e.g.*, Compl. ¶ 81), and the Court’s evaluation of *that* contention would necessarily involve second-guessing the “wisdom” of these agencies’ discretionary determinations. *El-Shifa*, 607 F.3d at 842; *see also Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that, per the reasoned-decisionmaking requirement embedded in the APA’s “arbitrary and capricious” standard, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and

the choice made[.]” and the court must “review[] that explanation” and “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment” (internal quotation marks and citations omitted). This means that it is effectively impossible to decide what Plaintiffs’ complaint asks this Court to decide—whether or not State and DOD acted arbitrarily and capriciously in violation of the APA in evaluating the facts and deciding not to extract private American citizens from Yemen—without invading “a textually demonstrable constitutional commitment” to another branch (the first *Baker* factor). *El-Shifa*, 607 F.3d at 841 (internal quotation marks and citation omitted). Nor could this Court respond to the complaint’s clarion call without making its own determination about the facts alleged in the complaint regarding the dangerous conditions in Yemen, and specifically, whether these facts, if true, warrant evacuation of the American citizens in that country—*i.e.*, “an initial policy determination of a kind [that is] clearly for nonjudicial discretion” (the third *Baker* factor). *Id.* (internal quotation marks and citation omitted).

...[T]he complaint’s allegations make plain that Plaintiffs are seeking judicial review and intervention with respect to Defendants’ decision not to evacuate American citizens from Yemen, and in so requesting, Plaintiffs are effectively asking this Court to decide whether the Executive Branch *should* have exercised its discretion to undertake a complex military operation in order to effect an evacuation in a foreign, war-torn country. Evaluating Plaintiffs’ claims would involve “call[ing] into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion[.]” *El-Shifa*, 607 F.3d at 842, and also could not be accomplished without this Court making and imposing policy judgments of its own about the wisdom and/or reasonableness of the agencies’ determination that the requested evacuation should not proceed. Therefore, on its face, Plaintiffs’ complaint plainly raises a nonjusticiable political question.

**C. Plaintiffs’ Argument That Their Claims Are Justiciable Because State And DOD Have A Non-Discretionary Duty To Evacuate Endangered American Citizens Is Unavailing**

The foregoing analysis of the facial nonjusticiability of the complaint’s arbitrary-and-capricious claims under the political-question doctrine would ordinarily be the end of this matter. But Plaintiffs make a substantially different core contention about their APA claims in opposition to Defendants’ motion to dismiss, and in order to explain the Court’s application of the political-question doctrine fully, Plaintiffs’ alternative characterization needs to be addressed. ...Plaintiffs insist that the agency conduct they seek is not a *discretionary* determination at all, but a mandatory, non-discretionary duty of the Executive Branch that is enshrined in a statute, an executive order, and an internal inter-departmental memorandum. Plaintiffs say these three sources require State and DOD to conduct evacuations when American lives are “endangered” overseas (Pls.’ Opp’n at 7), and therefore, “Defendants’ inaction regarding Plaintiffs stranded in Yemen [is] actionable” under the APA. (*Id.* at 4).

The statute that Plaintiffs point to as a basis for their contention that State and DOD have no choice but to evacuate them (*see* Pl. Opp’n at 5) is subtitled “[o]verseas evacuations” and states:

The Secretary of State shall develop and implement policies and programs to provide for the safe and efficient evacuation of United States Government personnel, dependents, and private United States citizens when their lives are endangered. Such policies shall include measures to identify high risk areas where evacuation may be necessary and, where appropriate, providing staff to United States Government missions abroad to assist in those evacuations.

22 U.S.C. § 4802(b). Plaintiffs also rely on an executive order (*see* Pls.’ Opp’n at 5) that directs the Secretary of State to “carry out Department of State responsibilities in the conduct of the foreign relations of the United States during national security emergencies, under the direction of the President . . . , including, but not limited to . . . [p]rotection or evacuation of United States citizens and nationals abroad[.]” Exec. Order No. 12656, 53 Fed. Reg. 47491, 47503–04 (Nov. 18, 1988), and directs further that the Secretary of Defense shall “[a]dvise and assist the Secretary of State . . . as appropriate, in planning for the protection, evacuation, and repatriation of United States citizens in threatened areas overseas[.]” *Id.* at 47498. Additionally, Plaintiffs seize upon an internal memorandum of agreement between State and DOD (*see* Pls.’ Opp’n at 6), which states in relevant part that

it is the policy of the United States Government . . . to: 1. Protect U.S. citizens and nationals and designated other persons, to include, when necessary and feasible, their evacuation to and welfare in relatively safe areas[;] 2. Reduce to a minimum the number of U.S. citizens and nationals and designated other persons subject to the risk of death and/or seizure as hostages[; and] 3. Reduce to a minimum the number of U.S. citizens and nationals and designated other persons in probable or actual combat areas so that combat effectiveness of U.S. and allied forces is not impaired.

(Mem. of Agreement, Ex. 3 to Defs.’ Mot., ECF No. 8-4, at 2.) Significantly for present purposes, Plaintiffs’ belated insistence that the Executive Branch has a non-discretionary duty to evacuate American citizens from Yemen by virtue of these legal provisions is an obvious attempt to establish that their APA claim presents a “purely legal issue[.]” that a federal court is competent to decide, *El Shifa*, 607 F.3d at 842 (internal quotation marks and citation omitted), because showing the existence of such a duty under law would make it plain that evacuation is “a *discrete* agency action that [Defendants are] *required to take*[.]” *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (emphasis in original) (internal quotation marks and citation omitted) (examining 5 U.S.C. § 706(1)). After all, no less an authority than the Supreme Court has explained that Congress can create judicially administrable standards that purport to direct the Executive’s actions in the foreign-policy realm; and, indeed, when Congress does so, the classic judicial role of deciding what those standards mean and whether they are constitutionally permissible—an exercise that is not susceptible to the political-question bar—is brought to the fore. *See Zivotofsky*, 132 S. Ct. at 1427 (explaining that “[t]he existence of a statutory right . . . is certainly relevant to the Judiciary’s power to decide” a claim requesting judicial enforcement of that right, even when the statute relates to matters of foreign policy).

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In the instant case, Plaintiffs argue that the statute, executive order, and memorandum of agreement they rely on collectively establish a non-discretionary duty on the part of the Executive to evacuate American citizens abroad when they “are at immediate risk of death or seizure as hostages in a combat zone” (Pls.’ Opp’n at 8 (citation omitted)), and, similar to the arguments about the significance of the statutory right in *Zivotofsky*, Plaintiffs here maintain that these evacuation-related provisions render their APA claims judicially enforceable. (*See id.* at 7 (“Once an evacuation is necessary or appropriate, . . . the Secretary of State does not have discretion to not implement [an] evacuation[.]”); *see also id.* (“[The provisions] contain clear and unambiguous language that the Secretary of State ‘*shall*’ provide for the safe and efficient evacuation of U.S. Citizens when their lives are endangered[.]” (emphasis in original).) This line

of argument fails for several reasons—only one of which warrants substantial discussion here. That is, even assuming *arguendo* that the provisions to which Plaintiffs point mandate the implementation of evacuation procedures under the circumstances prescribed, it is clear to this Court that none of these provisions solves Plaintiffs’ political-question problem, because none sets forth the kind of stark, obligatory action—*entirely* devoid of discretion—that was the subject of the *Zivotofsky* case, and Plaintiffs’ breach-of-duty claim goes beyond requesting this Court’s resolution of a debate about the meaning or constitutionality of the provisions at issue; rather, Plaintiffs seek judicial review of the agencies’ conclusion that the prerequisites for evacuation that are allegedly prescribed by law have not been met.

To be specific, a careful examination of the provisions that Plaintiffs say create a non-discretionary duty to evacuate U.S. citizens reveals that these provisions are replete with *conditional* language, such as: evacuation “when necessary and feasible” (Mem. of Agreement at 2); “safe and efficient evacuation” when “lives are endangered[.]” 22 U.S.C. § 4802(b); and “evacuation . . . in threatened areas[.]” 53 Fed. Reg. at 47498. Thus, the duty Plaintiffs identify is clearly contingent upon the relevant agencies first exercising their discretion to make a determination regarding whether these prerequisites are satisfied, which means that the alleged duty is plainly *not* non-discretionary. Furthermore, if Plaintiffs’ claims involved mere issues of interpretation and/or constitutionality with respect to these conditional provisions, then one might reasonably conclude that only mine-run, garden-variety, justiciable questions of law are being presented. But the question that Plaintiffs’ APA claim poses is not just what these provisions *mean*; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is *that* aspect of the court’s inquiry that would necessarily require the court to answer a non-justiciable political question.

To understand why this is so, consider the statute’s purported pronouncement that the U.S. government should arrange for the evacuation of American citizens from “high risk areas where evacuation may be necessary” and should provide “safe and efficient evacuation” of U.S. citizens overseas “when their lives are endangered.” 22 U.S.C. § 4802(b). This requirement is substantially similar to the Executive Order’s statement that evacuations may be executed when Americans are in “threatened areas overseas[.]” 53 Fed. Reg. at 47498, and also the Memorandum of Agreement’s assertion that it is the policy of the United States to evacuate American citizens from foreign lands for their protection “when necessary and feasible” (Mem. of Agreement at 2). Determining whether or not State or DOD has breached its alleged evacuation duties—as Plaintiffs’ claims would require this Court to do—would necessarily involve sifting facts to determine (a) whether an overseas situation actually endangers American lives, (b) whether the complex military operations that might be required to accomplish an evacuation are necessary or appropriate, and (c) whether an evacuation can be executed safely and efficiently under the circumstances presented. Each of these decisions (and likely others not known to this Court) is a determination that is squarely within the political branches’ bailiwick, because each would require the application of judgment and expertise to the facts on the ground as the Executive Branch understands them. *See Schneider*, 412 F.3d at 194 (“[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government.”). Put another way, even if this Court accepts Plaintiffs’ argument that these alleged sources of law create a duty to evacuate when evacuation is “necessary” and “appropriate” (*see* Pls.’ Opp’n at 7), to address Plaintiffs claim, this Court would have to venture far beyond the familiar judicial task of interpreting the law and, instead, would have to make its own assessment of the applicability of the “necessary” and “appropriate” conditions to the

Yemeni situation, despite what State and DOD have already decided in this regard. It is clear beyond cavil that this kind of second-guessing of the policy decisions of the political branches is precisely what the political-question doctrine forbids. *See El-Shifa*, 607 F.3d at 844 (“[C]ourts cannot reconsider the wisdom of discretionary foreign policy decisions.” (citation omitted)); *see also Ali Jaber*, 2016 WL 706183, at \*4–6 (holding that a claim that asked the court to declare that a “drone strike violated domestic and international law” was nonjusticiable because, to decide it, the court would have to determine the “imminence” of the threat addressed with the drone strike, “the feasibility of capture,” and the “proportionality” of the strike (internal quotation marks and citations omitted)).

It is also quite clear—for many of the same reasons—that there are no judicially discoverable or manageable standards for this Court to apply when considering the extent to which the agencies have breached the duty of evacuation that the statute, executive order, and memorandum purportedly establish. *See El-Shifa*, 607 F.3d at 841 (stating *Baker* factor two); *see also Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (noting the partial conceptual overlap of *Baker* factors one and two). That is, in order to determine whether State and DOD have violated the non-discretionary duty that Plaintiffs say exists pursuant to these provisions, the Court would need a means of measuring the existence of the factual predicates that trigger the duty; yet, Plaintiffs offer no standards for making that call, and this Court has found none. For example, what makes an evacuation “necessary,” as opposed to merely preferable or appropriate, such that Defendants can be deemed to have violated the law in failing to evacuate Americans in Yemen “when necessary”? And what standard would the Court apply to assess the feasibility of an evacuation operation for the purpose of determining whether State and DOD have breached their duty to evacuate Americans in Yemen “if feasible”? Plaintiffs suggest that the terms “shall” and “will” in the statute, executive order, and memorandum provide sufficient guidance (*see* Pls.’ Opp’n at 14), but that is not so, because those terms do not establish *how* a court is to determine whether requirements such as “necessary” and “feasible” have been satisfied. “[C]ourts are fundamentally underequipped to . . . develop standards for matters not legal in nature[.]” *El-Shifa*, 607 F.3d at 844 (internal quotation marks and citation omitted), and, indeed, this Court is not alone in its belief that the voyage upon which Plaintiffs have asked it to embark is essentially rudderless: as Defendants point out, another district court has reached this same conclusion in an indistinguishable case regarding these same provisions. *See Sadi v. Obama*, No. 15-11314, 2015 WL 3605106, at \*5–\*7 (E.D. Mich. June 8, 2015).

In the final analysis, then, this Court concludes that Plaintiffs’ claims would necessarily require the Court to “supplant a foreign policy decision of the political branches with [this Court’s] own unmoored determination” of whether the situation calls for evacuation in a manner that renders Plaintiffs’ claims nonjusticiable under the political question doctrine. *Zivotofsky*, 132 S. Ct. at 1427. This conclusion is strikingly obvious, all things considered, and if any doubts remain, the D.C. Circuit’s consistent construction of 8 U.S.C. § 1189(a) should remove them. That statute authorizes the Secretary of State to designate an organization as a “foreign terrorist organization” if (1) the organization is foreign, (2) the organization engages in terrorist activity or terrorism (as statutorily defined) and (3) “the terrorist activity of the organization threatens national security or U.S. nationals.” *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014); *see also El-Shifa*, 607 F.3d at 843 (same example). The D.C. Circuit has held that the first two prongs of this statute are justiciable, but not the third, because whether or not an organization actually threatens the security of American nationals or the country as a whole rests on a “political judgment[.]” for which the “Judiciary has neither aptitude, facilities

nor responsibility[.]” *People’s Mojahedin Org. v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (internal quotation marks and citation omitted); *see also Ralls Corp.*, 758 F.3d at 313 (noting that this example amply “illustrate[s] . . . the distinction between a justiciable legal challenge and a non-justiciable political question”).

So it is here. Even if the statute, executive order, and memorandum require “safe and efficient” evacuation when “necessary or appropriate” or when American lives are “endangered” (Pls.’ Opp’n at 7), the existence of any or all of these factual predicates is a foreign-policy judgment that is constitutionally committed to the political branches, not the judiciary. And with respect to the facts on the ground in Yemen, State and DOD apparently have determined that the evacuation of American citizens is not, in fact, necessary, feasible, or safe. Under the political-question doctrine, this Court lacks the power, and the tools, to say otherwise.

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## 2. Political Question: *Center for Biological Diversity et al. v. Hagel*

As discussed in *Digest 2015* at 158-63, the U.S. District Court for the Northern District of California granted the U.S. government’s motion to dismiss challenges brought by Japanese individuals and four environmental groups to a decision by the U.S. government and the Government of Japan to build a new military base on Okinawa (the Futenma Replacement Facility or “FRF”). *Center for Biological Diversity (“CBD”), et al. v. Hagel, et al.*, 80 F. Supp. 3d 991 (N.D. Cal. 2015). Plaintiffs asserted that construction of the new base would destroy critical habitat for the Okinawa dugong, a marine mammal similar to the manatee, which is critically endangered. The U.S. government considered effects on the dugong in accordance with a previous decision by the district court relying on the National Historic Preservation Act (“NHPA”). *Okinawa Dugong, et al. v. Gates, et al.*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). The U.S. government completed its report pursuant to Section 402 of the NHPA in 2014 and took steps to begin construction of the base, prompting plaintiffs to move to reopen the case, claiming violations of the Administrative Procedure Act (“APA”). Excerpts follow (with footnotes omitted) from the U.S. brief, filed February 19, 2016, on appeal to the U.S. Court of Appeals for the Ninth Circuit. The brief is available in full at <https://www.state.gov/s/l/c8183.htm>

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### I. CBD’s claims . . . are barred by the political question doctrine.

The political question doctrine originated in Chief Justice Marshall’s observation that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803). The doctrine is “primarily a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). And it is jurisdictional: “if a case presents a political question, [courts] lack subject matter jurisdiction to decide that question.” *Corrie*, 503 F.3d at 980-82.

Political questions are not justiciable even where a statute, such as the APA, would otherwise provide for judicial review. “[A] statute providing for judicial review does not override Article III’s requirement that federal courts refrain from deciding political questions.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc). *See also Sierra Club v. Morton*, 405 U.S. 727, 732 n. 3 (1972) (“Congress may not confer jurisdiction on Art. III federal courts . . . to resolve ‘political questions,’ because suits of this character are inconsistent with the judicial function under Art. III”) (internal citations omitted); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (no presumption of reviewability applies “[w]hen it comes to matters touching on national security or foreign affairs”).

...As this Court has noted, the *Baker* tests “are more discrete in theory than in practice, with the analyses often collapsing into one another.” *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). The first two tests—a textual commitment to another branch of government and a lack of judicially manageable standards—are “the most important,” *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), but in order for a case to be nonjusticiable, the court “need only conclude that one factor is present, not all.” *Schneider*, 412 F.3d at 194.

To be sure, not every case or controversy that touches on political matters lies beyond judicial cognizance. *Baker*, 369 U.S. at 211. The political question doctrine applies to “‘political questions,’ not . . . ‘political cases,’” *id.* at 217, and must be applied narrowly based on careful case-by-case analysis of the claims at issue. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (“*Zivotofsky I*”); *Corrie*, 503 F.3d at 982.

Here, CBD’s Supplemental Complaint seeks declaratory and injunctive relief, including an order setting aside the Secretary’s Findings and “[a]n order that DoD not undertake any activities in furtherance of the FRF project.... As we demonstrate below, application of the *Baker* tests demonstrates that these claims for relief are non-justiciable.

A. The relief CBD seeks raises political questions under the first *Baker* test—a constitutional commitment of the issue to the political branches.

No areas of federal activity are more firmly committed to the political branches than foreign policy and national defense. *Schneider*, 412 F.3d at 194-95 (discussing U.S. Const. art. I, § 8 and art. II, §§ 2, 3). Indeed, the political question doctrine is universally recognized to apply with unique force where matters of foreign policy and national security are at play. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (“the nuances of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court”) (citations omitted); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“*Waterman*”) (“the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative”); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision”); *see also Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999).

The relief sought by CBD runs afoul of the first *Baker* test. This is particularly apparent with respect to CBD’s request for an injunction prohibiting the Secretary from undertaking “any activities in furtherance of the FRF project” until the Secretary complies with Section 402 in the

manner CBD contends is required. ER 59. This injunction would effectively require the United States to violate its bilateral commitments with the Government of Japan regarding the FRF—commitments negotiated at the highest levels of the two governments under the Security Treaty and the Status of Forces Agreement. Not only would the injunction block the Secretary’s implementation of the FRF project, it would also *require the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory*. Thus, as the district court found (ER 7, 32-36), the injunction CBD seeks would directly implicate foreign policy and national defense issues that are constitutionally committed to the political branches of government.

CBD’s argument to the contrary (Br. 41-54) is not persuasive. CBD acknowledges that “political [and] national security decisions . . . are properly the domain of the executive or legislative branches,” but contends that its claim “does not require the court to second-guess or supplant such decisions.” Br. 41. CBD maintains that it does not seek review of “DoD’s ultimate policy decisions concerning the location, design, construction, or operation of a military base,” but only seeks review of the Secretary’s “consultation, information-gathering, and evaluation process pursuant to the National Historic Preservation Act’s ‘take into account’ requirement[.]” Br. 43-44; *see also* Br. 52 (“Plaintiffs’ claims and the relief they request do not ask the court to opine on the decision to build the FRF.”). But these characterizations of the case are not credible. CBD’s challenge to the Secretary’s NHPA procedures and Findings may not be a direct challenge to the Secretary’s “ultimate policy decisions” concerning the FRF, but the *relief* CBD seeks strikes at the heart of those policy decisions. An injunction blocking the Secretary’s implementation of the FRF project and requiring the Secretary to bar the Government of Japan and its contractors from accessing sovereign Japanese territory would be a gross intrusion into issues of foreign relations and national defense—issues committed to the political branches. *See Corrie*, 503 F.3d at 984 (“Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interests and judgment of the United States government itself.”).

\* \* \* \*

Likewise, the first *Baker* test also bars CBD’s claims for declaratory relief. The declaratory relief that CBD seeks—a declaration that the Secretary’s take-into-account process was unlawful and an order setting aside the Secretary’s Section 402 Findings—would, at a minimum, call into question the United States’ ability to fulfill its commitments to the Government of Japan regarding the FRF. The issues raised by CBD’s requested declaratory relief are thus inextricably intertwined with the implementation of the Security Treaty, the Status of Forces Agreement, the 2006 Roadmap, and other bilateral commitments—matters of foreign policy and national security that are the province of the political branches, not the courts. Thus, like the injunctive relief, the declaratory relief that CBD seeks is non-justiciable.

\* \* \* \*

CBD’s reliance (Br. 48-49) on *Zivotofsky I* is misplaced as well. *Zivotofsky I* involved a statute providing that Americans born in Jerusalem may elect to have “Israel” listed as their place of birth on their passports. The State Department declined to follow the law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by the parents of a child born in Jerusalem who invoked the statute, the Secretary of State argued

that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals agreed, but the Supreme Court reversed. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *vacated by Zivotofsky I*, 132 S. Ct. 1421. The Court held that the question presented was not whether Jerusalem should be recognized as part of Israel (as the lower courts had reasoned), but whether the statute was constitutional—which, of course, is a decision for the courts. *Zivotofsky I* at 1428.

Discussing *Zivotofsky I*, CBD asserts that “[d]espite the Secretary’s assertions of the foreign policy and national security effects of an order requiring the agency to implement the statute, the Court *did not find that the interpretation and application of the statute was barred by the political question doctrine.*” Br. 49 (emphasis added). This is true but beside the point. There was no dispute in *Zivotofsky I* regarding the interpretation of the statute. 132 S. Ct. at 1427 (“Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional.”) Moreover, in a subsequent decision, the Supreme Court held the statute unconstitutional because it infringed on the President’s exclusive power to recognize foreign sovereigns. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). Ultimately, *Zivotofsky I*’s holding—that determining whether the passport statute was constitutional was a question for the courts—has no bearing on the question presented in this case: whether the injunctive and declaratory relief that CBD seeks against the Secretary’s implementation of the FRF project raises a political question.

**B. CBD’s claims for relief are political questions under the second *Baker* test—lack of manageable standards.**

CBD’s requested relief also implicates the second *Baker* test: a lack of judicially discoverable and manageable standards. To obtain an injunction, CBD would have to prevail on the merits and show that (1) it suffered an irreparable injury; (2) its remedies at law are inadequate; (3) the balance of hardships tips in its favor; and (4) the public interest would not be disserved by the injunction. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011). Yet as the district court explained (ER 32), “there are no judicially administrable standards” by which a court could decide whether CBD satisfied the third and fourth elements of the injunction test. To evaluate the balance of hardships and the public interest, the court would have to weigh the harms asserted by CBD against the United States’ foreign policy and national security interests. As the D.C. Circuit has explained, there are “no standards by which [a court] can measure and balance” such foreign policy considerations. *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006). *See also Schneider*, 412 F.3d at 196; *See also El-Shifa Pharma. Indus.*, 607 F.3d at 845 (“We could not decide this question [whether U.S. attack on Sudanese pharmaceutical plant was mistaken] without first fashioning out of whole cloth some standard for when military action is justified. The judiciary lacks the capacity for such a task.”).

In response to the district court’s well-founded concern about the lack of judicially administrable standards, CBD blithely asserts (Br. 51-52) that “the district court is fully capable” of weighing the balance of harms and the public interest, and that the court can do so *after* it decides the merits of CBD’s NHPA claim. But that approach is backwards. The political question doctrine is jurisdictional, *Corrie*, 503 F.3d at 982, and “[w]ithout jurisdiction the court cannot proceed at all in any cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). And while CBD notes (Br. 51) the “inherent flexibility of the courts’ equitable jurisdiction,” CBD does not even attempt to proffer a substantive standard that the district could use to decide whether the balance of harms

and the public interest require that the Secretary be enjoined from carrying out “any activities in furtherance of” the bilateral FRF project.

This lack of manageable standards also extends to CBD’s claims for declaratory relief. As noted, CBD seeks (1) a declaration that the Secretary’s take-into-account process was unlawful, (2) an order setting aside the Findings that were the product of that process, and (3) a remand to the agency for further proceedings. Ordinarily, interpreting legislation and reviewing agency action are “familiar judicial exercise[s].” ER 22 (district court decision, quoting *Zivotofsky I*, 132 S. Ct. at 1427). But here, NHPA § 402 provides no substantive standard by which to review either the procedures the Secretary used to consider the impacts of the FRF or the substance of his conclusion. Section 402 merely provides that the head of an agency “shall take into account the effect” of its overseas undertakings on certain types of historic property “for purposes of avoiding or mitigating any adverse effects.” 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2). Neither Section 402 nor any other provision of the NHPA defines the requirements of that take-into-account process for foreign undertakings. Indeed, unlike Section 106, Section 402 does not even require the federal agency to afford the Advisory Council on Historic Preservation an opportunity to comment on the undertaking. *Compare* 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f) *with* 54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2).

Moreover—and contrary to the reasoning of the district court’s superseded 2008 decision—the regulations implementing the take-into-account process for *domestic* undertakings under NHPA § 106 are inapposite to foreign undertakings under Section 402. For example, the Section 106 regulations contemplate a consultation process that includes (in addition to the Advisory Council) the relevant (1) State Historic Preservation Officer, (2) Indian tribes and Native Hawaiian organizations, (3) representatives of local governments, and (4) “the public.” 36 C.F.R. § 800.2. The first two are, by definition, domestic organizations, *see* 36 C.F.R. §§ 800.16(m), (s), (s), (w), and thus generally have no role to play in foreign undertakings. They are certainly irrelevant in this case. And the requirements to consult with representatives of local governments and “the public” are highly problematic in the context of foreign undertakings. Action of the United States in a foreign jurisdiction is subject to diplomatic constraints and the requirements of foreign law. Traditionally, the Executive Branch determines the activities of Executive Branch officials overseas, in consultation with foreign governments as appropriate.

As the district court observed, the second *Baker* test asks whether the court “has the legal tools to reach a ruling that is principled, rational and based upon reasoned distinctions.” ER 23 (quoting *Alperin*, 410 F.3d at 552). And though the district court concluded otherwise with respect to CBD’s claims for declaratory relief (ER 23-24), those legal tools are lacking here, because there are no applicable statutory or regulatory standards by which a court can review the Secretary’s implementation of Section 402 in this case. Moreover, the process the Secretary used to take into account the effects of the FRF on the dugong is inextricably linked to the implementation of the bilateral arrangements with the Government of Japan to carry out the FRF project. CBD’s request for declaratory relief would require the court to supplant the Secretary’s national security and foreign policy judgments with “the court’s own unmoored determination” of how the Secretary should conduct a take-into-account process where the relevant undertaking is a bilateral project on foreign territory and involves sensitive matters of national defense and foreign policy. *See Zivotofsky I*, 132 S. Ct. at 1427; *cf. Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence” than “[t]he complex, subtle, and professional decisions as to the composition,

training, equipping, and control of a military force”). Accordingly, CBD’s claims for declaratory relief are non-justiciable political questions under the second *Baker* test. *See Schneider*, 412 F.3d at 197.

C. The relief sought by CBD is barred under the fourth, fifth, and sixth *Baker* tests.

CBD’s claims for relief implicate the final three *Baker* tests as well. Those tests address “[4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217. On the facts here, these three tests overlap with one another and confirm the problematic nature of CBD’s claims under the first *Baker* test. *See Alperin*, 410 F.3d at 544 (*Baker*’s tests “are more discrete in theory than in practice, with the analyses often collapsing into one another”).

Both the injunction and the declaratory relief sought by CBD would express a lack of respect for the Secretary’s decision to enter into the bilateral arrangement with the Government of Japan to implement the FRF project—a decision made in the exercise of the Executive’s broad foreign policy and national security powers. The decision to build the FRF is also a “political decision already made” on an issue of foreign policy—an area where it is imperative that the government speak consistently and with one voice. *See Baker*, 369 U.S. at 211 (many question touching on foreign relations “uniquely demand single-voiced statement of the Government’s views”). And there is an “unusual need” to defer to the Executive Branch here. *See Powell v. McCormack*, 395 F.2d 577, 594 (D.C. Cir. 1968) (the “unusual need” test will typically involve “a specific foreign policy determination within the scope of Executive power”) (citations omitted), *aff’d in part, rev’d in part*, 395 U.S. 486 (1969). The understanding reached by the two governments on the location and layout of the FRF was exceptionally difficult to achieve, has been decades in the making, and has absorbed the energies of several Presidents and their Secretaries (State and Defense) and their counterparts in Japan. SER 10-12; *Dugong*, 2005 WL 522106 at \*1-2. The United States has made commitments to facilitate Japan’s construction of the FRF, and any failure to live up to those commitments “would be called into question by the [Government of Japan] as a significant failure of the alliance and a departure from the established norms of the relationship of the two Governments.” SER 6. An injunction or declaratory relief setting aside the Secretary’s decision could “seriously damag[e]” the U.S.-Japan relationship and harm the United States’ broader foreign policy interests.” SER 14.

This Court addressed similar concerns in *Corrie*, which involved a suit by Palestinians for injuries sustained when Israel used bulldozers, built and sold by defendant Caterpillar, to demolish homes in the occupied territories. The bulldozers were paid for by the United States. Even though the United States was not a defendant and plaintiffs were not seeking relief against the United States, this Court held that the suit raised a political question beyond the courts’ jurisdiction:

Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches’ decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States’ decision to pay for the bulldozers which allegedly killed the plaintiffs’ family members.

*Corrie*, 503 F.3d at 980-82; *see also id.* at 983 (“Plaintiffs’ action also runs head-on into the fourth, fifth, and sixth *Baker* tests because whether to support Israel with military aid is not only a decision committed to the political branches, but a decision those branches have already made.” (citation omitted)).

Here, as in *Corrie*, allowing CBD’s suit to proceed would “necessarily require the judicial branch . . . to question the political branches’ decision” to go forward with the bilateral FRF project. *See also Bancoult*, 445 F.3d at 436 (“the policy and its implementation constitute a sort of Mobius strip that we cannot sever without impermissibly impugning past policy and promising future remedies that will remain beyond our ken”); *Schneider*, 412 F.3d at 198.

II. CBD lacks standing to assert its claims for declaratory relief.

A party seeking to invoke the jurisdiction of a federal court bears the burden of establishing that it has Article III standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). To demonstrate standing, a plaintiff must establish that it has suffered “injury in fact”—that is, the “invasion of a legally protected interest which is . . . concrete and particularized” and “actual or imminent, not conjectural” or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The injury must be fairly traceable to defendant’s challenged action, and not the result of “the independent action of some third party not before the court.” *Id.* at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). And it must be likely (as opposed to merely speculative) that a favorable judicial decision will prevent or redress the injury. *Id.* These elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case.” *Id.*

Furthermore, “[a] plaintiff must demonstrate standing separately for each form of relief sought.” *Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 655 (9th Cir 2011) (citation omitted). “[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984), *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976), and *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

In cases where the plaintiff alleges procedural injury, the standard for establishing causation and redressability is somewhat relaxed. “The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Defenders of Wildlife*, 504 U.S. at 572 n. 7. Plaintiff must show “only that the relief requested—that the agency follow the correct procedures—*may* influence the agency’s ultimate decision of whether to take or refrain from taking a certain action” that impacts their concrete interests. *Salmon Spawning*, 545 F.3d at 1226-27 (emphasis added). Nevertheless, “the redressability requirement is not toothless in procedural injury cases.” *Id.* at 1227. Parties do not have standing to insist that procedural rules be followed simply for the sake of enforcing conformity with legal requirements. *Id.* “Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.” *Steel Co.*, 523 U.S. at 107.

As the district court recognized (ER 38-39), this case closely parallels *Salmon Spawning*. There, plaintiffs challenged actions of the National Marine Fisheries Service and the Secretary of State in connection with the United States’ decisions to enter into, and remain a party to, a fisheries treaty with Canada. Plaintiffs’ first claim, a procedural claim, alleged that the Fisheries Service violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, (“ESA”) when it

conducted a consultation with the State Department and issued a biological opinion finding that entry into the treaty would not jeopardize listed species. 545 F.3d at 1225-27. This Court held that that claim was not redressable, explaining that while a court could, in theory, set aside the allegedly flawed ESA consultation and biological opinion,

a court could not set aside the next, and more significant, link in the chain—the United States’ entrance into the Treaty. While the United States and Canada can decide to withdraw from the Treaty, that is a decision committed to the Executive Branch, and we may not order the State Department to withdraw from it. . . . So, while the groups correctly allege that they have a right to a procedurally sound consultation, they cannot demonstrate that “that right, if exercised, *could* protect their concrete interests.”

*Id.* at 1226 (quoting *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 957 (9th Cir. 2005)) (emphasis in *Defenders*).

Plaintiffs second claim in *Salmon Spawning* was substantive: that the agencies’ continued participation in the implementation of the treaty jeopardized listed salmon in violation of ESA § 7(a)(2) and the APA. Plaintiffs argued that a court order declaring that the agencies violated the ESA and APA would require the agencies to exercise their authority to reduce take by U.S. fisheries. *Id.* at 1228. After noting the higher showing required to establish redressability for claims for substantive rather than procedural injury, this Court held that this claim, too, was unredressable. “[T]his claim hinges on agency action vis-à-vis the Treaty. The court cannot order renegotiation of the Treaty, and discretionary efforts by the agencies are too uncertain to establish redressability.” *Id.* at 1228.

The plaintiffs’ third claim was procedural: that the State Department and the Fisheries Service were required by ESA § 7 to reinitiate consultation on the biological opinion due to new information. The Court held that plaintiffs had standing to raise this claim in part because “a court order requiring the agencies to reinitiate consultation would remedy the harm asserted. *Unlike the other claims, this claim is a forward-looking allegation whose remedy rests in the hands of federal officials and does not hinge on upsetting the Treaty.*” *Id.* at 1229 (emphasis added).

CBD’s claims in this case are indistinguishable from the first claim in *Salmon Spawning*. As the district court explained (ER 42), while a court could in theory set aside the Secretary’s allegedly flawed Findings and take-into-account process, a court cannot set aside the Secretary’s decision to commit to the 2006 Roadmap, or order the Secretary to withdraw from the Roadmap, or order the Secretary to negotiate a different understanding with the Government of Japan. Nor, of course, could a court order the Government of Japan to halt its implementation of the FRF. The location and design of the FRF have been established through the bilateral commitments of the two governments. The Government of Japan has completed its environmental analysis and finalized its stormwater management design, and is in the process of constructing the FRF. As a result, even assuming that CBD has a cognizable right under Section 402 to a procedurally sound take-into-account process, CBD cannot demonstrate that that procedural right, if exercised, could protect its concrete interest in protecting the dugong from the alleged impacts of the FRF. *See Salmon Spawning*, 545 F.3d at 1226-27; ER 42.

CBD argues that the district court erred by “limiting the possible results of the NHPA process to ‘the extremes’ of either the status quo (the FRF continuing under existing plans) or a total halt to the project” and failing to recognize the possibility that “DoD could make alterations to the project or its operational plans.” Br. 32, citing *Tyler v. Cuomo*, 236 F.3d 1124, 134 (9th Cir. 2000), and *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991).

The district court made no such error. To the contrary, the court recognized the theoretical possibility that the Secretary might seek modification of the FRF as a result of additional NHPA procedures. But the court correctly concluded that that outcome was “highly unlikely”:

As in *Salmon Spawning*, the “ultimate agency decision” to agree to the Roadmap and build the FRF at Camp Schwab has already been made, and it is highly unlikely that an order requiring the DoD to *revise or reconsider* its NHPA Findings will change that decision. . . . And for the reasons stated above, this Court cannot issue an injunction ordering the Government to pull out of the Roadmap *or otherwise alter its plans for the FRF*.

ER 42 (emphasis added). Nor is there merit to CBD’s assertion (Br. 33) that the court erred in finding it “highly unlikely” that a new NHPA process would lead to a change in the Secretary’s decision to commit to the Roadmap with the Government of Japan. To the contrary, the district court’s decision is consistent with *Salmon Spawning*. The district court correctly recognized that, like the decision to enter into the fisheries treaty in *Salmon Spawning*, the decision to undertake the FRF project is a bilateral decision that has already been made and cannot be undone by court order, and thus is highly unlikely to be altered by further NHPA procedures. ER 42; *see Salmon Spawning*, 545 F.3d at 1226-27.

The record supports the court’s finding. The Government of Japan and the United States have been working towards a solution to the Futenma issue “[f]or almost 20 years.” SER 12. In December 2013 the most significant roadblock to the FRF was lifted through the “historic” step of the Okinawa Governor’s approval of the landfill permit. SER 11. Work by the Government of Japan is finally underway. SER 11-12. “If, after all these efforts, the United States is prevented from fulfilling its end of the bargain—even temporarily—as a result of a court order preventing DoD from moving forward, [the United States’] relationship with Japan will be seriously damaged.” SER 12-13; *see also* SER 6, 14.12

CBD argues that on remand the Navy could “make adjustments to its role in the design and operation of the FRF that would mitigate harms to the dugong,” Br. 29, 54, by “making changes to aircraft flight paths, protocols for controlling run-off and other discharge into Henoko Bay, or levels of night-time illumination.” Br. 32. But flight paths are largely dictated by the location and design of the FRF—factors that are controlled by the 2006 Roadmap. SER 36, 38. Any adjustment of air traffic patterns outside U.S. facilities would have to be negotiated with the Government of Japan. ER 67. Likewise, stormwater management and night-time illumination are part of the Government of Japan’s design, and were analyzed by Japan in its EIA after consideration of the mitigation measures the Navy submitted to Japan during the Navy’s Section 402 consultation process. As a result, it is extremely unlikely that a remand for “reconsideration” of these issues would redress CBD’s alleged injury.

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### 3. Political Question and Standing: *Lin v. United States*

As discussed in *Digest 2015* at 154-57, the United States sought dismissal in the district court of a complaint brought by residents of Taiwan alleging they were unlawfully denied their Japanese nationality at the conclusion of World War II when the Republic of China issued nationality decrees while allegedly “acting as an agent of the United States.” *Lin v. United States*, No. 1:15- CV-295-CKK (D.D.C.). On March 31, 2016, the

district court granted the motions to dismiss, finding plaintiffs lacked standing due to defects in their allegations that the United States caused their loss of nationality, and a lack of redressability by the court. The court also found that the case involves a non-justiciable political question, namely, the nationality of residents of Taiwan.

On May 20, 2016, plaintiffs appealed. The United States filed its brief on appeal in the U.S. Court of Appeals for the D.C. Circuit on November 4, 2016. The U.S. brief, arguing that both the political question doctrine and the lack of standing warrant dismissal, is excerpted below (with footnotes omitted) and available in full at

<https://www.state.gov/s/l/c8183.htm>

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### **I. Plaintiffs' Claims Are Nonjusticiable Under The Political Question Doctrine.**

A. 1. "The political question doctrine is one aspect of 'the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the "case or controversy" requirement' of Article III of the Constitution." *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974)). The "doctrine is essentially a function of the separation of powers." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted). It "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *El-Shifa*, 607 F.3d at 840 (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

While the parameters of the political question doctrine have not been susceptible to a precise formula, the Supreme Court has identified several considerations that may render a case nonjusticiable under the political question doctrine... *Baker*, 369 U.S. at 217. Even the presence of one *Baker* factor can trigger the political question doctrine. *See Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

"Disputes involving foreign relations ... are 'quintessential sources of political questions.'" *El-Shifa*, 607 F.3d at 841 (quoting *Bancoult*, 445 F.3d at 433). "[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Lin I*, 561 F.3d at 505 (quoting *Schneider*, 412 F.3d at 194). "Not only does resolution of" foreign relations issues "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211.

These considerations are especially relevant when deciding a case would require a court to determine sovereignty over a territory. "Who is the sovereign ... of a territory, is not a judicial, but a political, question." *Jones v. United States*, 137 U.S. 202, 212 (1890) (collecting cases); *see also Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called a republic of whose existence we know nothing . . .") (quotation marks omitted); *cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (concluding that a question was justiciable where it did not

require “courts to decide the political status of Jerusalem,” but rather whether a plaintiff could vindicate a statutory right regarding his passport’s listing of place of birth) (quotation marks omitted).

Applying these principles, this Court concluded in 2009 that a request to declare Taiwan’s residents U.S. nationals presented a nonjusticiable political question. *See Lin I*, 561 F.3d at 503-08. “Because deciding sovereignty is a political task, Appellants’ case is nonjusticiable.” *Id.* at 505. This Court explained that “[d]etermining Appellants’ nationality would require us to trespass into a controversial area of U.S. foreign policy in order to resolve a question the Executive Branch intentionally left unanswered for over sixty years: who exercises sovereignty over Taiwan. This we cannot do.” *Id.* at 503-04. This Court declined to “jettison the United States’ long-standing foreign policy regarding Taiwan in favor of declaring a sovereign,” observing that the courts “do not dictate to the Executive what governments serve as the supreme political authorities of foreign lands.” *Id.* at 506-07.

2. This Court’s *Lin I* analysis applies equally here. ... Once again, plaintiffs ask this Court to opine on sovereignty over Taiwan. Instead of seeking a declaration that the United States has sovereignty over Taiwan, plaintiffs seek a declaration that no state has sovereignty over Taiwan, such that Taiwan’s residents are “stateless.” *See* JA34. The underlying inquiry is the same; only plaintiffs’ proposed answer is different. A court cannot adjudicate this case without impermissibly interfering with the Executive Branch’s power to speak with one voice about “what governments,” if any, “serve as the supreme political authorities of foreign lands.” *Lin I*, 561 F.3d at 507 (citing *Jones*, 137 U.S. at 212).

B. Plaintiffs claim that their request to have this Court “review the legality” of the Republic of China’s decrees from 1946 is distinguishable from the claim in *Lin I*, asserting that their present complaint does not implicate “the question of Taiwan’s sovereignty.” Appellants’ Br. 47. Rather, plaintiffs argue, they want a declaration about their “nationality,” which they contend was not addressed in *Lin I*. *Id.* But plaintiffs’ claims in *Lin I* equally involved a claim about nationality. *See Lin I*, 561 F.3d at 503 (observing that plaintiffs “want to be U.S. nationals” and declining to determine their “nationality”); *id.* at 505 (describing the declarations plaintiffs sought regarding their asserted status as “U.S. nationals”). As this Court held, determining sovereignty over Taiwan was an “antecedent question to Appellants’ claims” regarding their nationality. *Id.* at 505-06 (noting that “[o]nce the Executive determines Taiwan’s sovereign, we can decide Appellants’ resulting status and concomitant rights”). The same is true here. That plaintiffs’ claim here would require opining on sovereignty over Taiwan is clear from plaintiffs’ own filings. ... And plaintiffs assert that “[t]he nationality status of Taiwan residents has remained unsettled ... because the [San Francisco Peace Treaty] did not transfer Taiwan to any sovereign” and that their resultant “lack of a recognized nationality constitutes statelessness.” Appellants’ Br. 12, 13; *see also id.* at 21-22 (“[I]n this case, complete sovereignty over Taiwan was not transferred to any other sovereign by treaty, including the [Republic of China], an ambiguity that persists to this day.”).

Indeed, plaintiffs’ arguments are nearly identical to those made unsuccessfully in *Lin I*, in which plaintiffs claimed that they did “not seek to contradict any political decisions relating to Taiwan” nor to “determine ultimate sovereignty over Taiwan.” Appellants’ Br. 26, 29, *Lin I*, No. 08-5078 (Nov. 3, 2008) (2008 WL 5416437). They argued “that the political question doctrine d[id] not prohibit the District Court from interpreting the [San Francisco Peace Treaty] in order to declare” them United States nationals. Appellants’ Reply Br. 11, *Lin I*, No. 08-5078 (Dec. 16, 2008) (2008 WL 5416438). This Court rejected such arguments, explaining that although it

“could resolve th[e] case through treaty analysis and statutory construction,” “the political question doctrine forb[ade] [it] from commencing that analysis.” *Lin I*, 561 F.3d at 506-07. Here, as in *Lin I*, adjudicating plaintiffs’ complaint would involve a determination regarding Taiwan’s political status and therefore “jettison the United States’ long-standing foreign policy regarding Taiwan.” *Id.* at 506. The political question doctrine precludes this Court from taking such an action. *See El-Shifa*, 607 F.3d at 842-43 (explaining that the “courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy”).

## II. Plaintiffs Lack Standing Because They Cannot Establish Causation Or Redressability.

In the alternative, the Court could affirm the dismissal of plaintiffs’ complaint for lack of standing. To establish standing, a plaintiff must show that: (1) it has suffered an injury in fact; (2) its injury was caused by the defendant’s conduct; and (3) the relief sought is likely to redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court correctly concluded that plaintiffs’ pleadings did not establish causation or redressability. *See* JA62-72.

### A. Plaintiffs Cannot Establish Causation.

For a plaintiff to have standing, “there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant,” not the result of “the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). “When ‘[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,’ it becomes ‘substantially more difficult to establish’ standing.” *American Freedom Law Ctr. v. Obama*, 821 F.3d 44, 48-49 (D.C. Cir. 2016) (quoting *Lujan*, 504 U.S. at 562 (internal quotation marks omitted)).

Plaintiffs allege that they are stateless because the decrees deprived them of an internationally recognized nationality. The Republic of China, not the United States, issued the decrees; plaintiffs’ theory of liability turns on its assertion that the Republic of China acted as the United States’ agent. ... Before the district court, plaintiffs argued that the United States was liable because it was aware of the Republic of China’s actions. *See* JA68; *see also* Dkt. No. 25, at 8, 28, 36-37. On appeal, plaintiffs recharacterize their assertions to argue that the United States is liable for failing to supervise the Republic of China and for ratifying its actions. Appellants’ Br. 20-29.

The district court correctly observed that “[p]laintiffs have not put forward any evidence demonstrating that [their] current situation is a result of the events in 1946 and not a consequence of the ‘years and years of diplomatic negotiations and delicate agreements’ that have occurred during the intervening years.” JA69 (quoting *Lin v. United States*, 539 F. Supp. 2d 173, 181 (D.D.C. 2008)). Plaintiffs do not account for intervening developments regarding Taiwan’s status such as the United States’ decision to recognize the People’s Republic of China as the government of China, rather than the Republic of China, or the United Nations General Assembly vote to recognize the People’s Republic of China as the representative of China before the United Nations. *See* JA54; G.A. Res. 2758 (XXVI) (Oct. 25, 1971). And, as the district court stressed, the causation inquiry would require it to “address[] the complex and delicate contours of certain non-justiciable political questions, including whether the United States exhibited sovereign control over Taiwan during the time period at issue.” JA67-68. As discussed above, this the Court cannot do. *See supra* § I.

## B. Plaintiffs Cannot Establish Redressability.

1. For a plaintiff to have standing, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561 (quotation marks omitted). . . . A case where redress depends on the actions of “an international organization that is not regulated by [the United States] government and therefore not bound by [United States] [c]ourt[s]” “is even one step further removed from the typical case in which redress depends on the independent action of a third party.” *Spectrum Five LLC v. FCC*, 758 F.3d 254, 261 (D.C. Cir. 2014).

Plaintiffs’ theory of redressability depends entirely on discretionary actions by the international community. They concede that they “do not—and could not—ask the District Court to end [their] statelessness.” Appellants’ Br. 7. Instead, they assert that the declaration they seek “would significantly motivate the U.N. (and nations bound to comply with international laws prohibiting statelessness)” to provide them with an internationally recognized nationality. *Id.* at 38. They suggest that the requested declaration could prompt the U.N. High Commissioner for Refugees to provide assistance to them. *Id.* at 40, 42.

These assertions, as the district court correctly concluded, do not suffice to establish redressability. “Plaintiffs allege no facts plausibly demonstrating how the sought declaration . . . would be used ‘within international bodies such as the United Nations [] to end their statelessness.’” JA72 (quoting Pls.’ Opp’n to U.S.’s Mot. to Dismiss, Dkt. No. 25, at 39). “[R]esolution of Plaintiffs’ alleged injury necessarily involves “independent actors not before the court and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.”” JA72 (quoting *Lujan*, 504 U.S. at 562). This Court has upheld dismissals of plaintiffs’ cases in which redressability required the independent action of just one non-party state, *see US Ecology*, 231 F.3d at 24-25, two non-party state regulators, *see Klamath Water Users Ass’n v. FERC*, 534 F.3d 735, 739-40 (D.C. Cir. 2008), or a non-party “specialized agency of the United Nations,” *see Spectrum Five LLC*, 758 F.3d at 256, 260-64. Plaintiffs’ generalized plan to use a U.S. court’s declaration to enlist the United Nations’ support for their cause thus cannot demonstrate the requisite redressability to sustain Article III standing. *See Spectrum Five LLC*, 758 F.3d at 264 (dismissing petition for lack of standing where theory of redress would have required an international third party to reconsider an earlier decision where petitioner had “not adduce[d] facts demonstrating how the . . . reconsideration process work[ed], much less demonstrating that the [third party] would likely reach a different conclusion upon reconsideration”) (quotation marks omitted).

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## 4. Political Question: *He Nam You v. Japan*

On February 11, 2016, the United States filed a suggestion of immunity in *He Nam You v. Japan*, No. 15-03257 (N.D. Cal.). The U.S. submission discusses the political question doctrine as applied in an earlier case in the D.C. Circuit. On February 26, 2016, the court dismissed the claims against Japan, the Emperor, and the Prime Minister. Excerpts follow (with footnotes omitted) from the U.S. submission, which is available in full at <http://www.state.gov/s/l/c8183.htm>. The portion of the U.S. submission suggesting immunity on behalf of Emperor Akihito and Prime Minister Abe of Japan is excerpted in Chapter 10.

\* \* \* \*

The United States has an interest in ensuring that foreign states are served in accordance with the FSIA, which mandates service in a manner that complies with customary international law. . . . The FSIA . . . sets forth the exclusive methods for service of process on foreign states. 28 U.S.C. § 1608(a). The procedures for service in Section 1608(a) are “hierarchical”; “a plaintiff must attempt the methods of service in the order they are laid out in the statute.” *Magness v. Russian Federation*, 247 F.3d 609, 613 (5th Cir. 2001). The United States has an important interest in ensuring that foreign states are properly served in accordance with the FSIA’s statutory requirements, as this issue has implications for the treatment of the United States in foreign courts. It is thus critical that foreign states have proper notice of a suit before the foreign state is required to appear in U.S. courts, and prior to a U.S. court taking steps that could adversely affect a foreign state’s rights. It appears from the docket that Japan has not yet been served in this case. Prior to proper service upon Japan, it would be inappropriate for the Court to rule in favor of Plaintiffs in connection with the issues raised in their January 13, 2016 filing, including their assertion that Japan does not enjoy immunity from this action under the FSIA and that the suit does not merit dismissal under the political question doctrine. Nor does the United States believe it would be appropriate for this filing to address the Plaintiffs’ specific arguments in any detail at this stage.

However, should the Court decide to reach the political question issue and conclude that the D.C. Circuit’s decision in *Hwang Geum Joo* provides a sufficient basis for dismissing the claims against Japan in this case at this stage, the United States’ view remains that dismissal of these types of claims on political question grounds would also be warranted. As noted earlier, with respect to World War II-era claims against Japan by former “comfort women” from South Korea, China, Taiwan, and the Philippines, both the D.C. Circuit and this Court in this very action have applied the political question doctrine, “defer[ring] to the judgment of the Executive Branch of the United States Government . . . that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States.” *Hwang Geum Joo v. Japan*, 413 F.3d at 48, 52-53 (holding that the case “presents a nonjusticiable political question, namely, whether the governments of the appellants’ countries resolved their claims in negotiating peace treaties with Japan”); *see He Nam You v. Japan*, No. C 15-03257, 2015 WL 8648569, at \*3 (N.D.Cal. Dec. 14, 2015) (“Although *Joo* is not binding in our circuit, it remains the only appellate authority on point . . . and [the court] adopts its thorough reasoning, which was informed by the position of the United States.”). The United States’ foreign policy determination, set forth in a Statement of Interest and two amicus briefs in the proceedings in *Joo*, that all wartime claims against Japan should be resolved exclusively through diplomacy, has not changed. It remains in the United States’ foreign policy interest, as reflected in the 1951 San Francisco Peace Treaty, for such claims against Japan to be resolved exclusively through government-to-government negotiations, and thus, if the Court decides to reach the issue at this stage, dismissal of the claims against Japan in this lawsuit would also be warranted on political question grounds.

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## 5. Comity, *Forum Non Conveniens*, and Political Question: *Cooper v. TEPCO*

On December 19, 2016, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit in *Cooper v. TEPCO*, No. 15-56424, a case brought by U.S. service members who allege that they were exposed to radiation during the humanitarian operation in response to the earthquake, tsunami, and ensuing meltdown at the Fukushima-Daiichi nuclear power plant in Japan, operated by TEPCO. The U.S. brief, excerpted below, argues that the district court did not abuse its discretion in denying TEPCO's motion to dismiss on the grounds of international comity and *forum non conveniens*, and that it would be premature to consider application of the political question doctrine before conducting a choice of law analysis.

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I. The district court did not abuse its discretion in declining to dismiss this case on the basis of international comity.

A. Comity is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). One strand of comity is “adjudicatory comity,” pursuant to which a U.S. court “as a discretionary act of deference” declines to exercise jurisdiction over a case on the basis that it is more properly decided in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied 136 S. Ct. 690 (2015) (quoting *In re Maxwell Commc’n Corp. ex rel. Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

Under governing Ninth Circuit law, a court addressing adjudicatory comity weighs “several factors, including [1] the strength of the United States’ interest in using a foreign forum, [2] the strength of the foreign governments’ interests, and [3] the adequacy of the alternative forum.” *Mujica*, 771 F.3d at 603 (brackets in original). This Court has set out the following nonexclusive list of factors relevant to ascertaining U.S. and foreign interests: “(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests.” *Id.* at 604; see also *id.* at 607 (indicating that “[t]he proper analysis of foreign interests essentially mirrors the consideration of U.S. interests”). The Executive Branch’s view of its interests is also entitled to “serious weight” and due deference. *Id.* at 610. This Court reviews the district court’s decision for abuse of discretion. *Id.* at 589.

In the view of the United States, the district court did not abuse its discretion in declining to dismiss this case under this test. The district court accurately identified *Mujica* as a recent statement of the governing law in this circuit and applied the relevant factors to the facts of this case. As the district court acknowledged, TEPCO is a Japanese corporation and its actions took place in Japan. Japan therefore has an interest in this litigation. Plaintiffs are U.S. citizens, however, who have chosen to litigate this case in a U.S. forum. This factor weighs against dismissal.

B. The foreign policy and public policy interests here do not require a holding that the district court abused its discretion. As described above, Japan is an important ally and a valuable partner. In addition, the United States applauds Japan's efforts to provide adequate and timely compensation for claims following Fukushima, as detailed in Japan's amicus brief filed with this Court. Japan Br. 2-3. Japan has informed the Court that 2.4 million claims have been resolved under its scheme and that it has paid approximately \$58 billion in compensation. Japan Br. 2. These factors, however, are not a sufficient basis to conclude that the district court abused its discretion here.

Japan's remedial scheme differs in critical ways from remedial schemes as to which U.S. courts have applied principles of adjudicatory comity. Most significantly, while the United States acknowledges Japan's concerns that adjudication of claims outside its compensation scheme might undermine that scheme, Japan does not assert that the scheme is exclusive on its own terms. There is no provision of Japanese law foreclosing lawsuits arising out of the Fukushima disaster to which a U.S. court is asked to give force and effect. Cf. *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (dismissing suit brought by Indian mass tort victims for lack of standing where Indian law gave the Indian government the exclusive right to represent victims of the disaster and the Indian government had agreed to a global settlement). Additionally, the United States was not involved in the creation of Japan's compensation system and is not party to any bilateral or multilateral agreement recognizing or seeking recognition for Japan's compensation system as an exclusive remedy. Cf. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231, 1239 (11th Cir. 2004) (dismissing on comity grounds where "the United States agreed to encourage its courts and state governments to respect the Foundation as the exclusive forum for claims from the National Socialist era" and "consistently supported the Foundation as the exclusive forum").

The United States has no clear independent interest in Japan's compensation scheme beyond our general support for Japan's efforts to address the aftermath of Fukushima. Under these circumstances, the district court could have reasonably determined that the interest in providing U.S. service members a U.S. forum for their claims was not outweighed by the interest in having the Japanese system address all claims arising out of the Fukushima nuclear accident.

C. The Convention on Supplementary Compensation for Nuclear Damage does not evince a public policy of the United States or Japan that would render the district court's comity ruling an abuse of discretion. On the contrary, the district court's decision in this case is consistent with U.S. interests in promoting the Convention.

The Convention entered into force after the Fukushima nuclear accident, so it does not apply to this case on its own terms. As a general rule, "[u]nless 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." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 339, art. 28 (May 23, 1969); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004) ("Ordinarily, a particular treaty does not govern conduct that took place before the treaty entered into force."). Some commentators have suggested that jurisdictional provisions may sometimes be interpreted as applying to disputes that arose before the entry into force of the treaty on the theory that, "by using the word 'disputes' without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement." Draft Articles on the Law of Treaties, with commentaries, Yearbook of the Int'l Law Comm'n, 1966, Vol. II, at 212. However, under this theory, "when a jurisdictional

clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause.” *Id.*

Rather than using the general term “disputes,” the Convention’s jurisdictional channeling is limited to “actions concerning nuclear damage from a nuclear incident” and provides that jurisdiction “shall lie only with the courts of the Contracting Party within which the nuclear incident occurs.” Convention art. XIII(1). So even under this theory, the Convention’s jurisdictional provisions would not be interpreted to apply retroactively. Both “nuclear damage” and “nuclear incident” are defined terms under the Convention, brought into existence only upon the Convention’s entry into force. Additionally, the verb “occurs” is in the present tense, not the past tense as would be expected if the treaty applied retroactively. *Id.*

Moreover, retroactive application would significantly undermine the liability regime established by the Convention. For U.S. interests in the Convention to be fulfilled, it is essential that the treaty regime be widely adhered to internationally. The Convention creates a compensation regime whereby, if an incident occurs for which the baseline compensation is not sufficient, States Parties must pay into a supplementary compensation fund. See Convention art. III, IV. If a State were allowed to receive the benefit of the exclusive jurisdiction provisions and perhaps even access to the supplementary compensation fund by becoming a party to the treaty after a nuclear incident has taken place in its territory, there would be no need for any State to join the Convention prior to such an incident occurring. States would likely wait to join the Convention to avoid having to pay into the fund for an incident in the territory of another State Party. Additionally, if States Parties to the treaty were required to contribute to a supplementary compensation fund for incidents that predate the Convention’s entry into force, the cost would be a significant disincentive to nations considering ratification.

As indicated above, the policies underlying the Convention do not require dismissal in a case to which the Convention does not apply. The Convention regime promotes U.S. interests both in providing prompt and adequate compensation to victims of nuclear incidents and in simultaneously protecting U.S. nuclear suppliers from potentially unlimited liability arising from their activities in foreign markets. See S. Exec. Rep. No. 109-15, at 2, 8. The treaty provisions work together to create an interlocking “system.” Convention art. II(2). The regime must be viewed in its entirety, with the exclusive jurisdiction provision forming part of a bargain in exchange for robust and more likely compensation for victims of a potential incident. Holding that international comity requires dismissal of suits brought in the United States by U.S. citizens for injuries from nuclear incidents abroad would effectively provide for exclusive jurisdiction without the other components of the treaty. United States policy does not call for advancing one element of this system in isolation of the other.

In arguing that U.S. policy requires dismissal, TEPCO mistakenly relies on testimony by the State Department’s then-Senior Coordinator for Nuclear Safety, Warren Stern, during 2005 Senate hearings on the Convention. In response to a question from the Chairman of the Senate Foreign Relations Committee regarding whether joining the Convention would “in effect limit the right of U.S. persons to bring suit against entities or companies in the United States courts or against U.S. companies for accidents overseas,” Mr. Stern responded in the affirmative, but also noted: “As a practical matter, in today’s legal framework, where there is no [Convention], we would expect that if a nuclear incident occurs overseas U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred.” 2005 Hearing at 27. This was a factual, predictive statement (“as a

practical matter”), not an expression of U.S. policy. Certainly, a district court could choose to dismiss a case based on international comity for a claim arising overseas. But it is not required to do so, and, as explained above, limiting this existing flexibility to hear claims outside the courts of the country where the accident occurred was one of the functions of the treaty. Mr. Stern made this clear in his testimony, explaining that “[o]nce the United States and the state whose nationals are involved are both Parties to the [Convention], liability exposure will be channeled to the operator in the ‘installation state,’ thus substantially limiting the nuclear liability risk of United States suppliers.” *Id.* at 19.

11. The district court did not abuse its discretion in declining to dismiss this case on the basis of *forum non conveniens*.

Under the doctrine of *forum non conveniens*, a “district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties.” *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). Courts consider the following private interest factors:

- (1) the residence of the parties and the witnesses;
- (2) the forum’s convenience to the litigants;
- (3) access to physical evidence and other sources of proof;
- (4) whether unwilling witnesses can be compelled to testify;
- (5) the cost of bringing witnesses to trial;
- (6) the enforceability of the judgment; and
- (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Id.* at 1145. The relevant public interest factors are “(1) local interest of lawsuit; (2) the court’s familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum.” *Id.* at 1147. This Court has explained that “[w]hen a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227 (9th Cir. 2011).

The party moving for dismissal has the burden of demonstrating that dismissal is warranted. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The district court’s decision is reviewed for abuse of discretion. *Lueck*, 236 F.3d at 1143.

Although “[t]he presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*,” “a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown.” *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990). This Court has upheld district court decisions dismissing cases on the basis of *forum non conveniens* that were brought by U.S. citizens against foreign defendants regarding conduct that occurred abroad. See, e.g., *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 665–66 (9th Cir. 2009); *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028, 1032 (9th Cir. 2011). However, a defendant seeking to reverse the denial of a motion to dismiss on this basis faces a “doubly difficult task,” given the standard of review on appeal. See *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 (9th Cir. 2006).

The district court did not abuse its discretion here. As the district court explained, relevant evidence is likely present in both countries, and both parties would incur additional costs and be inconvenienced by litigating in the other country. ER 35-40. The district court recognized Japan’s interest in adjudicating the lawsuit, ER 41, and the United States sees no basis for concluding that the district court abused its discretion in determining that the balance of factors nevertheless weighed against dismissal.

TEPCO asserts that a plaintiff's choice of its home forum is irrelevant where a plaintiff would not be required to travel in person to litigate the case abroad. Reply Br. 16. This is incorrect. Plaintiffs may prefer to testify in person, even if this is not legally required, and may wish to do so in front of a tribunal that will hear their testimony in untranslated form. In any event, litigating in plaintiffs' home forum may be more convenient for many reasons, of which travel is only one. The many costs and hurdles inherent in litigating in a foreign legal system are relevant to the *forum non conveniens* analysis. See *Lueck*, 236 F.3d at 1145 (instructing courts to consider "practical problems that make trial of a case easy, expeditious and inexpensive"). TEPCO erroneously relies on cases addressing whether use of an alternative forum is unreasonable or inadequate, not merely inconvenient. See, e.g., *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (addressing enforceability of forum selection clauses in contracts, which are presumed to be valid unless unreasonable under the circumstances); *Mujica*, 771 F.3d at 614 (holding that noncitizen plaintiffs had not made the required "powerful showing" that the alternative forum is "clearly unsatisfactory" for purposes of comity).

As the United States discusses in greater detail below, the district court did err in simply assuming that U.S. law would apply to this suit, without conducting a choice-of-law analysis. ER 42. However, this error does not require reversal of the *forum non conveniens* ruling. While this Court has stated that a choice-of-law analysis must precede a decision on *forum non conveniens*, it did so in the context of cases in which a potentially applicable rule of law mandated venue in U.S. courts. See *Creative Tech.*, 61 F.3d at 700. The United States is not aware of any such statute that could apply in this case. Where no such venue provision is at issue, "the applicability of United States law to the various causes of action 'should ordinarily not be given conclusive or even substantive weight.'" *Lueck*, 236 F.3d at 1148 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981)).

III. This Court should refrain from addressing the political question doctrine at this preliminary stage without the benefit of a choice-of-law analysis.

The Court also invited the United States to express its views on the application of the political question doctrine to the claims in this case. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing the risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Decisions regarding where to locate troops in dangerous and unfolding situations, involving a weighing of the risk to troops against mission objectives, are exactly the type of "complex, subtle, and professional decisions within the military's professional judgment and beyond courts' competence." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 478 (3d Cir. 2013); see also *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180-81 (4th Cir. 2015); *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843-44 (D.C. Cir. 2010) (en banc); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

At this early stage of the litigation, however, it is premature to decide whether the political question doctrine applies prior to conducting a choice-of-law analysis. The United States accordingly takes no position now on the doctrine's application to the claims in this case.

This Court has explained that, “[a]lthough the political question doctrine often lurks in the shadows of cases involving foreign relations,” such cases are often resolved on other legal grounds. *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005). “[I]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

Although this Court treats the political question doctrine as a jurisdictional bar, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007), it can wait for the issues in the litigation to be developed prior to dismissing on that basis, *New York v. United States*, 505 U.S. 144, 185 (1992); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir. 1993).

In order to assess the political question argument in this case, the Court must understand the elements of the cause of action and relevant defenses under the applicable law. TEPCO asserts that it has a defense based on the U.S. military’s supposed recklessness in exposing its troops to radiation, which TEPCO argues is a superseding cause absolving it of liability. TEPCO makes this argument under California law. However, the parties have not yet briefed choice of law and the district court did not address it. Given that the relevant conduct that gave rise to plaintiffs’ claims occurred in Japan, there is at least a possibility that Japanese law will apply to this case. See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001) (explaining standard for choice of law determinations for cases filed in California). At a minimum, the district court would have to consider the potential bodies of law that apply, whether California’s or Japan’s; to determine whether there is a true conflict between those two bodies of law; to resolve any conflict by considering each state’s interests in having its law applied; and, finally, to “apply the law of the state whose interest would be more impaired if its law were not applied.” *Id.*

Without knowing whether California law will apply or whether a superseding-cause defense exists under Japanese law, it is premature to decide whether this case is nonjusticiable under the political question doctrine. Even if the superseding-cause defense were applicable, as the district court explained, at this early stage of the litigation it is far from clear whether the court would actually be called upon to evaluate the wisdom of military decision making. It is also unclear at this stage whether a need to review military decisions to adjudicate any superseding-cause defense would require dismissal, or whether the military’s decisions simply could not qualify as a superseding cause. See *Harris*, 724 F.3d at 469 n.9. To the extent that the superseding-cause defense under governing law requires that the intervening actions be unforeseeable, the court may determine that it was foreseeable that rescue workers, including the U.S. military, would respond to this disaster even if some risk were involved. See, e.g., *USAir Inc. v. U.S. Dep’t of Navy*, 14 F.3d 1410, 1413 (9th Cir. 1994) (“A superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant’s negligent conduct.”) (applying California tort law).

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**D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION****1. *Hernandez***

As discussed in *Digest 2015* at 163-66, the U.S. Court of Appeals for the Fifth Circuit, en banc, affirmed the dismissal of all claims in *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015). *Hernandez* is a damages action against a U.S. Border Protection officer and the United States for the death a Mexican national in a shooting across the U.S. border with Mexico. On October 11, 2016, the U.S. Supreme Court granted the petition for certiorari in the case. The U.S. brief in the Supreme Court was filed in January 2017 and will be discussed in *Digest 2017*.

**2. *Rodriguez***

On October 12, 2016, the United State notified the U.S. Court of Appeals for the Ninth Circuit, which was considering a case involving the same issues as *Hernandez*, discussed *supra*, that the Supreme Court had granted certiorari to review the Fifth Circuit's en banc judgment in *Hernandez*. The Court of Appeals in *Rodriguez v. Swartz*, No. 15-16410, had previously denied a motion to hold its consideration in abeyance pending consideration of the petition for certiorari in *Hernandez*. The Ninth Circuit, sitting en banc, heard arguments in *Rodriguez* on October 21, 2016. However, it deferred deciding the appeal until the Supreme Court decides *Hernandez*.

**Cross References**

*Skalka case discussing political question*, **Chapter 2.B.1.d.**

*Universal jurisdiction*, **Chapter 3.A.5**

*He Nam You v. Japan*, **Chapter 10.D.3.**

## CHAPTER 6

### Human Rights

#### A. GENERAL

##### 1. Country Reports on Human Rights Practices

On April 13, 2016, the Department of State released the 2015 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (“FAA”), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practices in other countries. The reports are available at [State.gov/humanrightsreports](http://State.gov/humanrightsreports) and

[HumanRights.gov/reports](http://HumanRights.gov/reports). Secretary of State John Kerry’s remarks on the release of the

reports are available at [\[2017.state.gov/secretary/remarks/2016/04/255799.htm\]\(http://2009-2017.state.gov/secretary/remarks/2016/04/255799.htm\).](http://2009-</a></p></div><div data-bbox=)

Tom Malinowski, Assistant Secretary of State for Democracy, Human Rights, and Labor

provided a briefing on the country reports, available at [\[2017.state.gov/r/pa/prs/ps/2016/04/255802.htm\]\(http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255802.htm\). A media note on the reports is](http://2009-</a></p></div><div data-bbox=)

available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255793.htm>.

##### 2. UPR Working Groups

As discussed in *Digest 2015* at 175-78, the United States submitted its second Universal Periodic Review (“UPR”) report and made its presentation in Geneva on that report in 2015. The United States received 343 recommendations from other UN Member States during its UPR cycle. The United States accepted, in whole or in part, 260 of those recommendations, or approximately 75 percent. To follow-up on the accepted UPR recommendations, the U.S. government organized six interagency UPR Working Groups, each of which conducted civil society consultations during 2016: 1) Civil Rights and Non-

Discrimination; 2) Criminal Justice; 3) Economic, Social, and Cultural Rights, Indigenous Issues, and the Environment; 4) National Security; 5) Immigration, Labor, Trafficking, Migrants, and Children; and 6) Domestic Implementation and International Treaties and Mechanisms. See *2016 Year-End Summary of the U.S. UPR Working Groups*, available at

<https://www.humanrights.gov/dyn/2017/01/2016-year-end-summary-of-the-u.s.-universal-periodic-review-working-groups>

### 3. Human Rights Council

#### a. Overview

The United States was not a voting member of the UN Human Rights Council in 2016 because of a mandatory one-year hiatus after completing two three-year terms on the Council. However, the United States attended and remained engaged at the Council's three regular sessions in 2016. The key outcomes of each session for the United States are summarized in fact sheets issued by the State Department. The key outcomes at the 31st session are described in a March 25, 2016 fact sheet, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/255182.htm>.

They include: resolutions on the human rights situations in South Sudan, Burma, Iran, North Korea and Syria; resolutions on human rights defenders and peaceful protests; a joint statement on freedom of expression; and resolutions on combatting religious intolerance and promoting freedom of religion or belief; and a joint statement on China's crackdown on lawyers, activists, journalists, and critics. Ambassador Keith Harper, U.S. Representative to the HRC, delivered an end of session statement and explanation for all HRC-31 resolutions on March 24, 2016. Ambassador Harper's statement, available at

<https://geneva.usmission.gov/2016/03/30/ambassador-harper-end-of-session-statement-and-explanation-for-all-hrc31-resolutions/> includes the following:

The United States remains deeply troubled with this Council's stand-alone agenda item directed at Israel and the slate of one-sided resolutions. ...

We note that Council resolutions do not change the current state of conventional or customary international law nor create new legal obligations.

The key outcomes at the 32<sup>nd</sup> session are described in a July 6, 2016 fact sheet, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/259403.htm>. They include: creating an independent expert on violence and discrimination based on sexual orientation and gender identity; a resolution to renew the mandate of the Special Rapporteur on freedoms of peaceful assembly and association; a resolution on women's equal nationality rights in law and in practice; resolutions relating to human rights situations in Belarus, Ukraine, Syria, and Eritrea; a resolution endorsing internet freedom; resolutions on eliminating discrimination and violence against women; the right of girls to education; trafficking in persons, with an emphasis on women and

children; and on the elimination of female genital mutilation; and a resolution on protecting civil society space.

The key outcomes at the 33<sup>rd</sup> session are described in an October 4, 2016 fact sheet, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262782.htm>. They include: a resolution establishing a commission of inquiry on Burundi; resolutions renewing the mandates of independent experts on Sudan, Somalia, and the Central African Republic; resolutions on Syria and Yemen and joint statements on Cambodia and Venezuela; resolutions on political participation and safety of journalists; resolutions on the rights of indigenous peoples; and the appointment of the first UN independent expert on sexual orientation and gender identity. Ambassador Harper delivered the closing statement for the United States at HRC 33 on September 30, 2016. His remarks are excerpted below and available at

<https://geneva.usmission.gov/2016/09/30/ambassador-harper-closing-statement-at-the-33rd-session-of-the-human-rights-council/>

\* \* \* \*

The United States strongly supports the resolution establishing a Commission of Inquiry to investigate and report on deeply troubling human rights violations and abuses in Burundi. We are pleased that the Council adopted a consensus resolution on Yemen, reaffirming the critically important role of OHCHR in helping establish the facts and circumstances of human rights violations and abuses and in advising on appropriate accountability measures. We welcome the resolution strongly condemning continued serious violations and abuses in Syria and calling for the cessation of violence and a political solution to the conflict there. The renewed mandates on Sudan, Somalia, and the Central African Republic represent other valuable tools the council has maintained. We were also pleased to join two joint statements on the human rights situations in Cambodia and Venezuela.

The United States remains steadfast in our support for civil society. We are greatly disappointed by the efforts by several member states to weaken resolutions on critically important themes such as political participation. We welcome the Council's recognition of the critical role of journalists, as well as of the need for all countries to work toward creating a safe and enabling environment for journalists, free of harassment, intimidation, and violence.

The Council took an important step in promoting respect for the human rights of indigenous peoples and with its resolution empowering the Expert Mechanism on the Rights of Indigenous Peoples to help member states better achieve the goals of the UN Declaration on the Rights of Indigenous Peoples.

We note that Council resolutions neither change the current state of convention-based or customary international law nor create new legal obligations. The United States understands that any reaffirmation of prior documents in these resolutions applies only to those states that affirmed them initially. We reiterate our concerns regarding the "right to development," which are longstanding and well known. At the same time, we look forward to continuing to work with our many partners to ensure that our development efforts respect and promote human rights and that development and human rights are, in the words of the Vienna Declaration, mutually reinforcing.

The United States congratulates the Council for the groundbreaking appointment of the independent expert on violence and discrimination based on sexual orientation and gender identity.

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The United States was reelected to a new term on the Human Rights Council in October 2016. See Secretary Kerry's October 28, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/10/263798.htm>. Secretary Kerry observed:

U.S. engagement has helped transform the Council into a more balanced and credible organization and has helped focus the global spotlight on grave violations and abuses of human rights around the world. Since we joined the Council in 2009, it has created Commissions of Inquiry for Syria, North Korea, and Burundi; adopted country-specific resolutions on Sri Lanka, Iran, and Burma; passed groundbreaking resolutions promoting and protecting the rights of freedom of assembly and association; and created an independent expert on violence and discrimination based on sexual orientation and gender identity.

**b. *Actions regarding Eritrea***

On June 10, 2016, the U.S. Department of State issued a statement, taking note of the report issued by the UN Commission of Inquiry on Eritrea. The June 10, 2016 press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258382.htm> includes the following:

The United States takes note of the recently issued report by the UN Commission of Inquiry (COI) on Eritrea, in particular its conclusion that there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea. We have repeatedly expressed grave concern about the human rights situation in Eritrea, and that concern has been reinforced by the COI's findings.

We strongly encourage the Government of Eritrea to engage fully with the international community and UN bodies to address the human rights situation. The Government's willingness to work on several Universal Periodic Review recommendations is a step in the right direction. We also urge Eritrea to implement its constitution, hold national elections, honor its commitment to limit the duration of national service to 18 months, develop an independent and transparent judiciary, and release persons arbitrarily detained including political prisoners, journalists, and members of religious groups.

We continue to support international efforts to improve the protection of human rights and fundamental freedoms in Eritrea and will work to promote these efforts within the context of the upcoming Human Rights Council session.

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**c. Actions regarding Syria**

On September 19, 2016, Ambassador Harper delivered a statement at the Interactive Dialogue with the Commission of Inquiry on Syria. The statement is excerpted below and available at <https://geneva.usmission.gov/2016/09/19/ambassador-harper-statement-at-the-interactive-dialogue-with-the-commission-of-inquiry-on-syria/>.

\* \* \* \*

...The United States welcomes the on-going critical work of the Commission of Inquiry. The Commission once again describes appalling atrocities against men, women and children, including: the regime's systematic and deliberate targeting of civilians, medical facilities, health care providers, first responders; restrictions of humanitarian assistance; torture; and the detention and disappearance of civilians. According to the COI, the majority of the attacks against medical facilities have been carried out by pro-Government forces. In Aleppo alone, 20 hospitals and clinics were destroyed since January with a devastating impact on civilians.

The COI has repeatedly documented the massive, synchronized nature of deaths in State-controlled detention facilities and concluded they amount to crimes against humanity and war crimes. The Syrian regime continues to imprison tens of thousands of Syrians, subjecting many—including children—to torture and sexual violence. We reiterate the many calls from UN bodies for the Syrian government to cease its egregious abuses against prisoners, and allow for immediate, unfettered access to and medical services for all detainees. We also echo the COI's concerns about the tens of thousands of missing persons, and welcome its views on how this issue can be addressed.

We applaud the courageous Syrian human rights defenders who, despite grave risks, continue to document atrocities. In addition to the COI's excellent reporting, the international community must hear directly from Syrians, which is why the cosponsors of the resolution on Syria are calling for a high-level panel to allow for Syrian civil society to address the Council directly.

United with the Syrian and international community, we reiterate our call for an immediate end to all violations and abuses, as well as accountability for perpetrators of them, especially the egregious, widespread, and continued violations committed by the Asad regime. It is the Asad regime's brutal suppression of democratic opposition forces and atrocities against civilians that allow terrorist groups like Da'esh to flourish. ...

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**d. Actions regarding South Sudan**

On March 23, 2016, Ambassador Harper delivered the U.S. statement introducing a resolution on human rights in South Sudan at the 31<sup>st</sup> session of the Human Rights

Council. His statement is excerpted below and available at

<https://geneva.usmission.gov/2016/03/24/u-s-statement-introducing-resolution-on-human-rights-in-south-sudan/>

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As demonstrated by the OHCHR report issued early this month, the human rights situation in South Sudan is one of the gravest situations we face at the Human Rights Council. Since fighting began in December 2013, many serious human rights violations and abuses have been committed.

As the resolution being introduced today makes clear, there is broad concern at the prevailing violence, widespread sexual and gender based violence, indiscriminate targeting of civilians, attacks on United Nations sites and humanitarian convoys, and heightened restrictions on the exercise of fundamental freedoms.

The Human Rights Council must act in the face of such serious concerns. To this end, this resolution establishes a Commission for Human Rights in South Sudan. As a special procedure dedicated to the situation of human rights in South Sudan, the Commission will monitor and report on human rights. The Commission will provide guidance on transitional justice, accountability and reconciliation issues, as appropriate. The Commission will also engage with other international and regional mechanisms, including the African Union and United Nations Missions in South Sudan, with a view to providing support to efforts to promote accountability for human rights violations and abuses. We appreciate South Sudan's express agreement to cooperate with this mechanism.

The text in front of you represents the oral revisions that have been circulated on the extranet. These revisions clarify that the mandate will be a Commission, created as a special procedure and appointed by the President of the Human Rights Council after consultation with the Consultative Group. We ask that the process be completed by the June session so that the mandate can be operationalized as soon as possible.

The U.S. would like to thank the African Group for its constructive approach throughout discussions of this resolution and in particular the leadership of the Ad Group chair, South Africa. We hope this resolution will be adopted by consensus. We encourage all states to support this resolution.

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**e. *Actions regarding Burundi***

On September 27, 2016, at the 33<sup>rd</sup> Session of the HRC, Ambassador Harper delivered a statement at the presentation of the Independent Experts' Report on Burundi.

Ambassador Harper's statement is excerpted below and available at

<https://geneva.usmission.gov/2016/09/27/burundi/>

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Since April 2015, Burundi has descended into a political and security crisis, triggered by the Burundian government’s disregard for term limits and violation of the Arusha Agreement. The UN Independent Investigation on Burundi report issued on September 20, 2016, highlights this increasingly dire situation in Burundi. Burundi’s current trend seems to be towards increased violence and humanitarian catastrophe.

Reported extrajudicial killings, arbitrary detentions, disappearances, sexual violence, torture, unacknowledged places of detention—including in residences of senior government officials—and retaliatory attacks against opposition party members, journalists, civil society members, victims, witnesses, and government officials have continued with impunity. The UN Experts’ Report assessed that, “To the extent that there is a reduction in violence... it is a result of increased oppression.” Burundi’s gains following the end of its civil war in 2006 are receding. Doctors, teachers, and members of civil society and the media have fled the country. We call on all sides to put an end to human rights violations and abuses. We will continue to support efforts to promote accountability for perpetrators of unlawful violence and abuses.

We firmly believe that this crisis can and must be resolved, or Burundi risks descending into further conflict, including the possibility of mass atrocities. The dialogue currently led by the East African Community (EAC) and mediated by former Tanzanian President Mkapa represents the best avenue for reaching a peaceful resolution to the crisis and restoring stability in Burundi.

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## **B. DISCRIMINATION**

### **1. Race**

#### ***Human Rights Council***

At the 33<sup>rd</sup> Session of the Human Rights Council, on September 26, 2016, Ambassador Harper delivered the statement for the United States at the interactive dialogue with the Working Group of Experts on People of African Descent. Ambassador Harper’s statement is excerpted below and available at

<https://geneva.usmission.gov/2016/09/26/dialogue-with-working-group-of-experts-on-people-of-african-descent/>

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The United States was pleased to invite, and to facilitate the visit of, the Working Group of Experts on People of African Descent for a country visit from January 19-29, 2016. We

welcome the chair of the Working Group, Ricardo Sunga III, here today.

The Working Group met with federal, state, and local government officials, judges and lawyers, members of Congress, police officers, academics, members of civil society, and hundreds of African Americans, in Washington, D.C.; Baltimore, Maryland; Jackson, Mississippi; Chicago, Illinois; and New York City.

The Working Group's visit addressed a comprehensive range of issues impacting African-Americans, and members of other minorities, within the United States, including issues related to the criminal justice system, barriers to political participation, disparities in access to education, health, housing and employment, and multiple and intersecting forms of discrimination.

We were happy to arrange this visit and take note of the Working Group's conclusions and recommendations, which we will distribute to relevant stakeholders, including the state and local government officials who met with the Working Group, for appropriate consideration.

We would like to highlight some of the steps, among many, that the United States has been taking to address issues addressed by the Working Group in its report.

On Saturday, September 24, the United States was proud to open its newest addition to the Smithsonian Institution, The National Museum of African American History and Culture, in Washington, D.C. It is the only national museum devoted exclusively to the documentation of African American life, history, and culture. And further to the recommendation of the Working Group that "monuments, memorials and markers [...] be erected to facilitate public dialogue" we note that new projects are emerging around the country, such as a planned memorial to the victims of lynching to be built by the Equal Justice Initiative in Montgomery, Alabama, in 2017.

We appreciate the Working Group's recognition of the "My Brother's Keeper" (MBK) Task Force, a coordinated Federal effort to address persistent opportunity gaps faced by boys and young men of color and ensure that all young people can reach their full potential. In response to the President's call to action, nearly 250 communities in all 50 states have accepted the President's My Brother's Keeper Community Challenge; more than \$600 million in private sector and philanthropic grants and in-kind resources and \$1 billion in low-interest financing have been committed in alignment with MBK; and new federal policy initiatives, grant programs, and guidance are being implemented to ensure that every child has a clear pathway to success from cradle to college and career.

Earlier this year, in response to recommendations from the MBK initiative, the Department of Education released a new resource guide, "Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals," urging colleges and universities to remove barriers that can prevent citizens with criminal records from pursuing higher education. And just a few weeks ago, the Departments of Education and Justice put out new tools on the appropriate use of school resource officers and law enforcement to improve school climates, help ensure safety, and support student achievement in our nation's schools.

We would encourage the Working Group to devote more attention to issues surrounding racism that are more prominent in public discourse, particularly police brutality and racial profiling, and in this regard we would highlight the work of the President's Task Force on 21st Century Policing. In May 2015, the Task Force submitted to the President a final report of best practices and recommendations, based on expertise from stakeholders and input from the public. The task force recommendations provide meaningful solutions to help law enforcement agencies and communities strengthen trust and collaboration, while ushering the nation into the

next phase of community-focused policing. The report was followed by an Implementation Guide, which outlines strategies to assist stakeholders with implementation. Thousands of agencies, associations, and related organizations across the country are now implementing various task force recommendations.

Furthermore, DOJ has opened numerous civil rights investigations into police departments that may have engaged in a pattern or practice of conduct that deprives persons of their rights. In addition, DOJ has obtained more than 250 criminal convictions against police officers in the past five years.

On issues of prison conditions, we would highlight that in January of this year, President Obama announced the adoption of recommendations by DOJ on the use of solitary confinement in the federal prison system, including the ending of solitary confinement for juveniles.

Finally, we reaffirm our commitment to promote racial and ethnic equality to mark the International Decade for People of African Descent. In doing so, we recognize the common challenges faced by persons of African descent in the United States and all over the world. The Decade is an opportunity for the United States to encourage positive domestic discourse on human rights at home, highlight over 50 years of progress under the U.S. Civil Rights Act, and work with international partners to promote nondiscrimination and equality.

The United States has made great progress toward countering racial discrimination, xenophobia, and related forms of intolerance, but we acknowledge much remains to be done. Although we may not agree with all of its factual or legal conclusions, we thank the Working Group for its findings from its constructive visit.

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## **2. Gender**

### **a. General Assembly**

On March 28, 2016, the United States provided an explanation of position on the Agreed Conclusions at the UN Commission on the Status of Women. The U.S. EOP follows. Ambassador Sarah Mendelson, U.S. Representative to the UN for Economic and Social Affairs, delivered remarks at the opening of the annual session of the UN Commission on the Status of Women on March 18, 2016. Ambassador Mendelson's March 18 remarks are not excerpted herein but can be found at <http://2009-2017-usun.state.gov/remarks/7194>

[usun.state.gov/remarks/7194](http://2009-2017-usun.state.gov/remarks/7194)

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\* \* \* \*

Thank you, Mr. Chairman. I first wish to commend you for your tireless and skillful leadership in facilitating our discussions on the Agreed Conclusions for the Commission on the Status of Women's session this year. I also would like to express my delegation's deep gratitude to the Executive Director and the entire team from UN Women for their careful preparation and effective work throughout this session.

### Agreed Conclusions (general)

The United States is pleased the Commission on the Status of Women (CSW) has reached strong Agreed Conclusions. The CSW has focused intensively over the past two weeks on women's empowerment and its link to sustainable development, and we are grateful for the hard work and commitment members of this body have shown to arrive at today's Agreed Conclusions. We have welcomed this body's work to promote gender equality and the empowerment of all women and girls through the 2030 Agenda for Sustainable Development and to recognize that women play a vital role as agents of development. We have all acknowledged that realizing gender equality and the empowerment of all women and girls is crucial to progress across all Sustainable Development Goals and targets. We agree that sustainable development is not possible if women and girls continue to be denied the full realization of their human rights and opportunities. The Agreed Conclusions we have adopted today represent our common commitment to these ends and will provide a roadmap for countries around the world to take additional steps to achieve the full human potential. We have addressed complex issues of education, economic empowerment, and health, and we have once again emphasized the importance of ending the global scourge of violence against women and girls. Today the Commission has fulfilled its role in that global effort.

There are still areas, however, where the Commission could have done better, and we are disappointed that certain issues were inadequately addressed.

### SOGI

Overwhelming evidence demonstrates the clear link between violence against women and girls and discrimination based on sexual orientation and gender identity. We are deeply disappointed that the Conclusions failed to reflect this. The absence of any language to address this does nothing to change what is a meticulously documented truth.

### Unilateral Economic Measures

Unilateral and multilateral sanctions are a legitimate means to achieve foreign policy, security, and other legitimate national and international objectives, and the United States is not alone in that view or practice. We reject the notion that sanctions have any substantial or demonstrated connection to women's empowerment and its important links to sustainable development. The language in the agreed conclusions referencing unilateral economic measures is an attempt to undermine the international community's ability to respond to acts that are contrary to international norms, violations of international law, and undermine the national security of other states.

### Family

We regret that this resolution did not go far enough in recognizing the diversity of family or the various forms of the family all of which make an important contribution to sustainable development. We must realize the human rights of all family members and strengthen family policy development. Only in this way may we achieve our internationally agreed development goals, including on gender equality and empowerment of women and girls, and fulfill our commitment to the future.

### CSE

The U.S. firmly supports sexual and reproductive health and rights and their link to sustainable development. However, we believe the Agreed Conclusions could have gone further toward recognizing the importance of comprehensive sexuality education, including evidence-based education on human sexuality, based on full and accurate information, to enable adolescents and youth to develop life skills in a manner consistent with their evolving capacities.

The United States will continue to work to ensure that these issues are included in future agreements related to health and sustainable development.

Right to Development

While sustainable development is a goal we all aim to achieve, and we welcome the theme of this year’s CSW linking sustainable development to women’s empowerment, the concerns of the United States about the existence of a “right to development” are long-standing and well known, and the “right to development” does not have an agreed international understanding. Work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals—and which every individual may demand from his or her own government.

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**b. U.S. Actions on Women, Peace, and Security**

Ambassador Michele J. Sison, U.S. Deputy Representative to the United Nations, delivered remarks at a UN Security Council open debate on women, peace, and security on June 2, 2016. Her remarks are excerpted below and available at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7313)

[usun.state.gov/remarks/7313](https://2009-2017-usun.state.gov/remarks/7313)

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This Council has long recognized that sexual and gender-based violence not only abuses and violates the human rights of its victims, but also undermines the security, livelihood, and health of nations by suppressing survivors’ participation in civic, social, political, and economic life.

We have put in place many tools for countering conflict-related sexual violence inflicted by state and non-state armed groups, for improving accountability and bringing perpetrators to justice, and for documenting violations against marginalized groups of victims—including women and girls, men and boys, ethnic and religious minorities, and LGBTI individuals. But we must do a better job making use of these tools.

We commend Special Representative Bangura for her energetic efforts to translate the Council’s resolutions into real, on-the-ground action. Her work with the national militaries of the Democratic Republic of Congo and with armed groups on both sides of the conflict in South Sudan to help develop structures to hold perpetrators accountable for their actions has been particularly noteworthy. We also applaud her efforts to support the investigation of the 2009 Stadium Massacre in Guinea.

In addition to the Special Representative’s efforts, we value the work done by the Team of Experts on Rule of Law and Sexual Violence in Conflict, which has assisted countries in the areas of investigations and prosecution, in strengthening legal frameworks, and in ensuring protection of victims and witnesses.

However, significant challenges remain in countering sexual violence in conflict—especially when it comes to holding non-state armed groups and their partners and associates accountable for their crimes.

In resolution 2242, the Council recognized the nexus between sexual violence, terrorism, violent extremism—which can be conducive to terrorism. We have seen steady growth in the use of sexual violence against women and men, girls and boys, by terrorists not only in Iraq and Syria, but also in Somalia, Nigeria, and Mali. Non-state armed groups like ISIL use sexual violence in a pre-meditated and systemic way to recruit fighters, raise money, and intimidate and demoralize communities in order to consolidate their hold over territory.

Resolutions 2199 and 2253 not only strongly condemn such acts by ISIL, al-Qaida, and their associates, but also work to strengthen accountability by encouraging all state and non-state actors with evidence to bring it to the attention of the Council.

The 1267 Committee represents a vital tool for us to punish perpetrators, since any individual who makes funds or other financial and economic resources available to ISIL and other terrorist groups in connection with sexual violence is eligible for designation in the 1267 sanctions regime.

We must make full use of these tools, as noted by Special Rapporteur Giammarinaro, we also need to do more to protect displaced women and girls whose heightened vulnerability puts them at increased risk of sexual violence and trafficking.

Over the past year, we've seen the continuation of mass migration from Syria, Iraq, and the Horn of Africa. Reports of smugglers demanding sex as “payment of passage” are rampant, and part of a global surge in human trafficking. And with reference to Ms. Davis' intervention, that's why last month at the World Humanitarian Summit in Istanbul, the United States announced an additional \$10 million dollar contribution to the “Safe from Start” Initiative to prevent and respond to gender-based violence in emergency situations.

The United States urges all Member States to condemn these crimes and those who commit them; to properly document the horrors, so that one day those responsible can be held accountable; to commit to ending the conflicts that provide an ideal climate for human traffickers; and to commit to eradicating the groups that use human trafficking and conflict-related sexual violence as a weapon of war. Member States must also work to ensure that labor practices—such as charging workers recruitment fees that can lead to debt bondage—do not contribute to human trafficking. We must teach people how to actually see the victims of trafficking. We must also make our resources for victims more victim- and survivor-centered, incorporating victims and survivors into the policy-making process to yield better solutions.

A further challenge, of course, is the lack of global documentation of the phenomenon of sexual and gender-based violence against all vulnerable communities, including those which are too often forgotten in this discourse: LGBTI individuals, as well as men and boys. These individuals are not only at a heightened risk of facing harassment, abuse, sexual violence by armed groups due to discriminatory social norms and attitudes, but they also face a strong stigma against reporting abuses.

We commend the Secretary-General for highlighting the victimization of men and boys; the UN and Member States must more fully embrace a gender-inclusive approach in sexual violence and gender-based violence programming. There is scant documentation with little understanding of the patterns, prevalence, and severity of conflict-related sexual and gender-based violence against males as compared to sexual and gender-based violence against girls and women.

In addition, the absence of targeted services for male victims not only fails to address the needs of boys and men, but could also contribute to the problem of underreporting. Now bilateral efforts to counter conflict-related sexual violence and to improve accountability and documentation, of course, are also crucial.

In 2014, the United States launched the “Accountability Initiative” to support the development of specialized justice sector mechanisms to improve access to justice for survivors of sexual and gender-based violence. We remain committed to strengthening efforts to protect all people from harm, exploitation, discrimination, abuse, gender-based violence, and trafficking, and we must hold perpetrators accountable—especially in conflict-affected environments as all of the speakers have noted to us.

The United States has also committed nearly \$40 million for support to victims of sexual violence in conflict, including in Nigeria, where the United States supports UN agencies, community groups, and local non-governmental organizations that provide health care services, including appropriate psychosocial counseling for women and children who have survived Boko Haram’s horrific campaign.

However, we recognize that support programs are not enough. To combat sexual violence in conflict, women must have a seat at the table in resolving conflicts. Empowered women provide powerful antidotes to violent extremism and have critical contributions to make at every level of our struggle against sexual violence in conflict. We also need women in uniform to rebuild trust between law enforcement and communities; female corrections officers and female counselors to reach out to female inmates who are on the path to radicalization; and women legislators to support more inclusive public policies that address the unique grievances that drive individuals to terrorism.

As Secretary of State Kerry has said, fighting the scourge of sexual violence requires all of these tools, including UN Security Council resolutions, better reporting, and support to survivors. It especially requires holding criminals accountable, and ending impunity. Instead of shaming the survivors, we must punish the perpetrators, and we must be ready to support and empower the survivors as they work to rebuild their lives.

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On October 25, 2016, Ambassador Power delivered remarks at a UN Security Council open debate on women, peace, and security. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7505>.

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...[T]here has been, of course, genuine progress since Resolution 1325 was adopted 16 long years ago. And some of that progress shows up on paper. In 2015, 70 percent of peace agreements signed had gender-specific provisions, compared to just 22 percent of agreements in 2010. That’s a big leap in a short period of time. Over the past year alone, 11 new countries completed national action plans explaining how they’re going to empower women to resolve conflict and promote development; that brings the total number, as we’ve heard, to 64. Some of

the progress has been on representation, if not on this UN Security Council. There was at least one woman present in the delegations for nine of 11 active negotiation processes in 2015, compared to four out of 14 in 2011, so that's not nothing. The United States continues to support this progress. President Obama released our second national action plan in June. And in addition to contributing \$31 million to new initiatives launched over the past year, we're also looking at ... how to address new challenges, including how women can more effectively contribute to strategies on countering violent extremism.

Unfortunately, what the statistics miss is the persistent gap between how men and women actually contribute to peace processes. Even if women are present at the table, which is still too rare, men are the ones who almost always decide when and how to make peace. So today I want to talk briefly about why we need to do more to promote not mere participation, but meaningful, effective participation, with a stress on the word effective.

Let me start by describing the benefits of women's participation. As we've heard—and again, these are the same studies all of us cite—peace processes are more likely to succeed when women are involved. One study of 40 peace processes since 1989 found that the more that women influenced a negotiation, the higher the likelihood that an agreement would be reached. Another study that we all cite found that the likelihood of a peace agreement lasting more than two years goes up by 20 percent when women are involved. Now why is that? In part, it's because women often demand results. And when negotiations stall, as they inevitably do, women's groups can help push for talks to resume and press the parties to reach consensus. And women tend to demand more than what is politically expedient or in their narrow self-interest. Again, this is on the basis of limited data, because of the limited participation. But women's groups are known for lobbying for causes that do go beyond gender—including for human rights, transitional justice, and reconciliation—to be addressed in peace agreements. These are causes that are all too often deferred or ignored when women aren't there.

Here, I will turn to the example of the Philippines. In negotiations between the government and the Moro Islamic Liberation Front, a group seeking greater autonomy for the country's south, women were active at every level—from working groups to serving as lead negotiators. After negotiators reached an impasse in 2010, these women participants called for a national dialogue that generated new ideas to get the parties talking again. When violence broke out after the signing of the 2012 Framework Agreement, women helped organize protests calling for the parties to get back to the table. Or consider the Colombia peace process, where up to one-third of the participants at the table were women. These female representatives lobbied relentlessly so that those who committed sexual violence in the conflict would not be eligible for pardons, and they advocated for economic support to help women access new development opportunities in rural areas.

But these examples are still the exception. In Syria, South Sudan, and Yemen, men are the ones making decisions—even as we sit here—in negotiations. And maybe it's time to heed the famous aphorism that the definition of insanity is to do the same thing over and over again and expect a different result. Too often, what gets labeled as women's participation is just checking a box—a perfunctory meeting of male negotiators with female members of civil society. This matters not just for the content of a peace agreement itself; when children see peace accords signed by groups of men, the message received is that the men are the ones who matter in affairs of state and who are empowered to end conflicts. We don't want young girls internalizing that message.

We members of the Security Council need to demand that women have the ability to influence the course of negotiations. Not just because women deserve it, which, of course, they do. But because when women are effective participants, meaningful participants, we have a better chance at achieving the mission of this Security Council, which is preserving peace and security.

That brings me to my second and final point. In places where sexual violence is used as a weapon of war, this Council needs to address more fundamental needs: protection of women and accountability for those who commit abuses. Consider, as we've heard, South Sudan. In South Sudan's Unity State, government soldiers killed and raped civilians, pillaged homes, and destroyed livestock—forcing families to flee into swamps to hide. Anyone who left the swamps risked sexual assault. So when women had to start venturing out to find food, these communities reportedly nominated the oldest women to go first to protect the children and teenagers from being raped. And when the first ones grew too weak or had been raped too many times, these communities moved to the next oldest woman. Just imagine for a moment what the impact of these choices must be on the women of Unity State, South Sudan. Imagine that was your mother or grandmother, going out to shield your daughter.

Extremist groups are using medieval tactics elsewhere to subjugate women. We see this with Boko Haram, where the organization kidnaps schoolgirls to be forcibly married to fighters or brainwashed to be suicide bombers. And we see this with ISIL, when Yazidi women and girls are sold as sex slaves in markets.

So building peace in these conflicts must start by stopping the attacks against women, making sure that women will not be attacked with impunity. This means ending impunity generally, which we are not doing a good job of. These women, though, are not just victims of violence; their experiences need to be part of the long process of healing and rebuilding from a conflict. Recognizing their dignity means not just inviting them to negotiations, but making sure that they are not relegated to waiting in a side room for the men to break from the real negotiations and to deign to come in and receive their petition or hear their views.

That may sound simple, but frequently, Member States treat violence against women as a tragic byproduct of conflict, left to resolve itself once the men stop fighting. Protecting women from attacks and holding accountable those who commit these abuses need to be essential components of brokering peace—whether in our resolutions, in mediation processes, or in peace operations.

We've seen—and we live every day—how challenging this is. One place for members of this Security Council to start is to make certain that all components of the UN system do their utmost to keep women in conflicts safe. That is why the United States will continue to demand that peacekeeping missions carry out their mandates to protect civilians; and why the Secretary-General must ensure—as he recommitted to again today and as is stipulated in Security Council Resolution 2272—that when there is credible evidence of widespread or systematic sexual exploitation and abuse by a peacekeeping unit, that that unit is swiftly repatriated. Zero tolerance must come to mean zero tolerance.

Let me conclude with Liberia. Nobel laureate Leymah Gbowee organized women who were fed up with the violence of Liberia's civil war. When the negotiators went to Ghana, Leymah and her growing movement went, too—surrounding the negotiators in their hall to make sure that they did not come out until peace was reached. As she told a reporter at the time, the protest was “a signal to the world that we the Liberian women in Ghana at this conference are fed up with the war...and tired of fighting the killing of our people.” And, Leymah added, “We

can do it again if we want to.” Imagine where we would be if every conflict had groups of women like this. Now imagine our world if people like Leymah were not just calling for peace from outside conference centers, but if she and others like her were sitting at the table on the inside. Before a conflict, during a conflict, and after a conflict, women must have an effective, meaningful, impactful voice. And we on this Council must not rest until paper progress becomes tangible progress and “check the box” participation becomes meaningful participation.

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On December 5, 2016, Ambassador Michele J. Sison delivered remarks at a UN Security Council open Arria-formula meeting on women, peace and security.

Ambassador Sison’s remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7585>

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In 1979, the authors of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, recognized a truth that is at the core of the Women, Peace and Security agenda—that truth is that the full elimination of discrimination against women in political and social leadership is central to the strengthening of international peace and security.

However, nearly 40 years later, we are still making very little headway. Two months ago, the Council convened for our annual debate on Women, Peace and Security. As Ambassador Samantha Power remarked then, the enthusiasm in the room was “palpable,” with more than 90 Member States, organizations, and civil society leaders speaking in support of the Women, Peace and Security agenda. And yet, despite the broad and fervent support for the inclusion of women in the peace processes or in post-conflict peacebuilding, Ambassador Power observed that “we are all drawing from the same handful of examples—and that’s kind of sad, that we only have a limited roster of very inspiring examples to draw from.”

Over the past year, the United States has surpassed the \$31 million in initiatives we announced to the Council last year that protect women from violence, promote justice and accountability, and enhance women’s participation in peace processes and decision-making. Just to name a few highlights: In Kenya, we are engaging women’s organizations in preventing and responding to election-related violence and tackling barriers to women’s political participation in local and national levels. We have funded six UN-led workshops in Rwanda, Burkina Faso, Cameroon, Benin, Niger, and Togo to increase the number of women police eligible to deploy to UN missions, almost doubling the number recommended to deploy from 36 percent to over 50 percent. We also sponsored UN delegations to attend the International Association of Women Police annual training conference and sponsored the International Female Police Peacekeeper of the Year award.

Yet, so much more remains to be done, and it’s clear that we all have more we can do. The Obama Administration supports ratification by the United States of the Convention on the Elimination of All Forms of Discrimination Against Women, and hopes to see our Senate act. Our government believes that ratification would advance U.S. foreign policy and national security interests. That said, the policies and programs of the United States with respect to

Women, Peace and Security—as expressed in our strong support for UN Security Council Resolutions 1325, 2122, 2242, and our own National Action Plan—do reflect many of the principles articulated in the CEDAW.

In addition, we firmly believe that the United Nations and its Member States must also work to dismantle institutional divisions within the UN system that impair the full implementation of the Women, Peace and Security agenda in all aspects of the UN’s work.

For example, Special Representative for Sexual Violence in Conflict Zainab Bangura and her staff have bravely documented the unprecedented depravity of sexual violence and sexual slavery committed by ISIL in Iraq and Syria against ethnic and religious minorities. They have helped to shine a light on ISIL’s use of enslaved women to recruit male fighters.

It is essential that we as a Council support the full integration of the work of the Special Representative for Sexual Violence in Conflict, as well as the Special Representative for Children and Armed Conflict into the broader UN system, to include appropriate reporting to sanctions committees and involvement in the planning of peacekeeping and special political missions.

Finally, we are tremendously encouraged that more than 60 states have adopted National Action Plans. The United States commends Spain’s initiative to establish a Women, Peace and Security National Focal Point Network and is proud of being a founding member of the network. We look forward to the network’s first meeting in Madrid in early 2017.

We reaffirm our conviction that women are agents of peace, reconciliation, development, growth, and stability, and states and societies are more peaceful . . . and more prosperous when women realize their full potential. We are pleased that the U.S. House of Representatives recognized this commitment as well and passed the Women, Peace and Security Act on November 11—which has now gone to the U.S. Senate for approval. We welcome the opportunity to work with our international partners to make the promise of this commitment real.

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**c. Human Rights Council**

On June 16, 2016, at HRC 32, the United States delivered a statement on violence against indigenous women and steps the U.S. government is taking to address the problem. The U.S. statement is excerpted below and available at

<https://geneva.usmission.gov/2016/06/16/human-rights-of-women-violence-against-indigenous-women/>

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The United States is grateful for the opportunity to address the vitally important issue of violence against indigenous women and girls. Last month, the National Institute of Justice released a report that documents how indigenous women in the United States face disproportionate levels of sexual and physical violence. The study found that a staggering 84 percent of American Indian and Alaska Native women have experienced some form of violence, while 56 percent experienced sexual violence. Most survivors have been victimized by non-Indigenous perpetrators.

The U.S. Government is taking affirmative steps to address this persistent problem, partnering with indigenous communities as well as tribal, state and local governments to find solutions. Just two days ago, the White House hosted a “United State of Women Summit” which included a focus area on empowering American Indian and Alaska Native women and girls. Participants discussed measures to address domestic and dating violence, sexual assault, and stalking.

This compliments the ongoing efforts to promote access to protection measures and services, and ensure accountability for perpetrators of violence and access to an effective remedy for survivors. One previous obstacle to effective accountability was the lack of criminal jurisdiction over non-Native perpetrators committing gender-based violent crimes in Indian Country. In 2013, President Obama signed the re-authorization of the Violence Against Women Act which closed jurisdictional gaps by recognizing tribes’ inherent jurisdictional authority to prosecute non-Indian offenders in tribal courts.

Agencies across the U.S. government are presently working with tribes to implement this new basis for accountability.

We recognize the importance of taking real and tangible steps to address the high levels of violence against indigenous women and girls. We look forward to continuing our work with other countries so that together we can work to eradicate the worldwide scourge of violence against indigenous women and girls.

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### 3. Sexual Orientation and Gender Identity

#### *Human Rights Council*

On June 30, 2016, the UN Human Rights Council adopted a resolution on the human rights of lesbian, gay, bisexual, and transgender (“LGBT”) persons, creating an independent expert on violence and discrimination based on sexual orientation and gender identity. U.N. Doc. A/HRC/RES/32/2 (2016). Secretary Kerry and Ambassador Power each issued statements welcoming the resolution. Secretary Kerry’s June 30, 2016 statement is available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/06/259257.htm)

[2017.state.gov/secretary/remarks/2016/06/259257.htm](http://2009-2017.state.gov/secretary/remarks/2016/06/259257.htm) and includes the following:

This Expert will serve as a global focal point on combatting challenges faced by LGBT persons—a step that reflects the growing global momentum against human rights violations and abuses that LGBT persons continue to face around the world.

The United States was pleased to work with countries from many regions of the world in support of this resolution...

Ambassador Power’s statement on the adoption of the resolution establishing an independent expert on violence and discrimination based on sexual orientation and

identity is available at <http://2009-2017-usun.state.gov/remarks/7363> and includes the following:

This expert will track LGBTI issues around the globe and provide technical assistance and capacity building to help countries better address these issues. It will also institutionalize LGBTI issues into the work of the HRC, as the mandate holder will have a three-year term to submit reports to the HRC and partake in country visits.

...The United States looks forward to working closely with the Independent Expert in rooting out discrimination and violence against all LGBTI persons, so they can live in dignity and enjoy truly universal human rights regardless of where they were born or whom they love.

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## C. CHILDREN

### 1. Rights of the Child

#### a. *Periodic Report on the Optional Protocols to the Convention on the Rights of the Child*

On January 22, 2016, the United States submitted to the Committee on the Rights of the Child its Combined Third and Fourth Periodic Reports on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography. The report is available at <https://2009-2017.state.gov/j/drl/rls/252299.htm>. Excerpts follow from the U.S. report. The Committee later published the U.S. report as two separate reports, U.N. Docs. CRC/C/OPAC/USA/3-4 and CRC/C/OPSC/USA/3-4, and responded to the U.S. report with Lists of Issues on each Protocol dated November 8, 2016, U.N. Docs. CRC/C/OPAC/USA/Q/3-4 and CRC/C/OPSC/USA/Q/3-4.\*

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## A. INTRODUCTION

A-1. The United States of America welcomes this opportunity to submit its Combined Third and Fourth Periodic Report to the Committee on the Rights of the Child (Committee) on measures giving effect to its obligations under the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), and on the Sale of Children, Child Prostitution and Child Pornography (OPSC), and on other information of interest to the Committee.[1] The Report consolidates information on both Protocols, in accordance with the Committee's guidelines, and places particular emphasis on developments since the prior U.S.

\* Editor's note: The United States provided responses to the Lists of Issues and made a presentation before the Committee in Geneva in 2017.

reports of 2010. The selection and order of the content generally follows that of the Committee's June 26 and July 2, 2013, Concluding Observations (Observations), UN Docs. CRC/C/OPAC/USA/CO/2 and CRC/C/OPSC/USA/CO/2. A table of contents appears in the Contents Annex.

A-2. This Report draws on the expertise of the U.S. Departments of State (DOS), Defense (DoD), Justice (DOJ), Homeland Security (DHS), Health and Human Services (HHS), Labor (DOL), and Education (ED), as well as the U.S. Agency for International Development (USAID) and the Equal Employment Opportunity Commission (EEOC). The United States held a civil society consultation concerning this Report with nongovernmental organizations (NGOs) on November 12, 2015, and intends to hold further consultations prior to its Committee presentation.

## B. OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

### 1. General Measures of Implementation

B-1. The United States is committed to effective domestic implementation of its OPAC obligations. The legal and policy framework through which the United States gives effect to its undertakings has not changed since the submission of its Second Periodic Report, UN Doc. CRC/C/OPAC/USA/2. The United States refers the Committee to its declaration submitted upon becoming a Party, in OPAC Annex 1.

B-2. Since its Second Periodic Report, the United States has actively promoted the goals of the OPAC. In the multilateral arena, the United States has worked with foreign governments; UN entities, including the UN Working Group on Children and Armed Conflict (CAAC) and the Special Representative for CAAC; NGOs; and others to monitor, report on, and prevent the unlawful recruitment and use of child soldiers and to protect, assist, and rehabilitate children associated with fighting forces through Disarmament, Demobilization, Rehabilitation, and Reintegration (DDRR) programs. These include counseling, formal and informal education, vocational training, and physical rehabilitation (e.g., prosthetics) for former child soldiers.

B-3. Various DOS components, including its Office to Monitor and Combat Trafficking in Persons (TIP Office), the Bureau of Democracy, Human Rights, and Labor, and embassies and missions worldwide, including the U.S. Mission to the United Nations, are involved in addressing unlawful child soldier recruitment and use, including reporting on the unlawful use of child soldiers in the annual Human Rights and Trafficking in Persons Reports. DOL's annual Findings on the Worst Forms of Child Labor report includes information on the prevalence of child soldiering in countries that experience it, and the actions corresponding governments are taking to address it and other worst forms of child labor through legislation, law enforcement, policies, inter-ministerial coordination, and social programs. USAID supports the rehabilitation and reintegration of former child soldiers in certain countries. The United States has insisted on stronger human rights reporting by UN peacekeeping missions, including accurate and timely information on violations of applicable law and other abuses committed against children in the host State. We have also called on the United Nations to ensure that child protection issues are addressed during peace agreement negotiations, and have acted to ensure that DDRR programming is robust and diverse so that it can address the needs of disarmed and demobilized child soldiers, including girls and children with disabilities.

B-4. The United States has actively implemented the Child Soldiers Prevention Act of 2008 (CSPA), which requires publication in the annual Trafficking in Persons (TIP) Report of a list of countries that have governmental armed forces or government-supported armed groups

that unlawfully recruit or use child soldiers, as defined in the CSPA. The governments of CSPA-listed countries, absent a waiver, are subject to restrictions on certain forms of U.S. military assistance and licenses for direct commercial sales of military equipment in the fiscal year (FY) following their placement on the CSPA list. The United States engages diplomatically with such governments and encourages national armies to improve age vetting of recruits; monitor troops to identify, demobilize, and rehabilitate child soldiers; investigate perpetrators of child soldier recruitment and use and hold them accountable; and otherwise implement UN child soldier action plans. The United States has also actively sought to hold perpetrators accountable through immigration bars and other tools made available by the CSPA.

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#### d. Reservations and Related Conventions

B-9. Regarding Observation ¶ 4, the United States supports the goals of the Convention on the Rights of the Child (CRC). The United States signed the treaty but has not transmitted it to the U.S. Senate for its advice and consent, which is required for ratification of a treaty under our constitutional system. Consideration of that potential transmission remains ongoing.

B-10. The United States maintains its position regarding the understandings in its instrument of ratification, attached to the U.S. Initial Report, UN Doc. CRC/C/OPAC/USA/1, as Annex I (Observation ¶ 12), and points to its strong record of implementing its OPAC obligations regarding protecting children in situations of armed conflict. For further discussion of the U.S. understandings, see the Second Periodic Report at ¶¶ 47-48 and 63, and ¶ 8 concerning the U.S. declaration.

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### C. OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION, AND CHILD PORNOGRAPHY

#### 1. General Observations

C-1. The United States is committed to effective domestic implementation of its OPSC obligations, and has been active in promoting the OPSC's goals since its Second Periodic Report, UN Doc. CRC/C/OPSC/USA/2. Among many other actions, the United States has developed and moved forward to implement its National Strategy for Child Exploitation Prevention and Interdiction (National Strategy) and a new Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013-2017 (Federal Strategic Action Plan). These and many other developments are discussed below.

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#### b. *Human Rights Council*

On March 7, 2016, at the annual meeting on the rights of the child at the 31<sup>st</sup> session of the HRC, Attorney Adviser Amanda Wall delivered the U.S. statement. Ms. Wall's statement is excerpted below and available at

<https://geneva.usmission.gov/2016/03/07/hrc-31-annual-full-day-meeting-on-the-rights-of-the-child/>

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The United States supports efforts to protect children from online sexual exploitation, which poses a grave challenge to nations around the world, including our own.

Many federal programs address the online sexual exploitation of children. For example, the U.S. Department of Justice prosecutes federal offenses involving child sexual exploitation, and supports initiatives like Project Safe Childhood. This project brings together federal, state, local, and tribal law enforcement to respond to the abuse and exploitation of minors.

The U.S. Federal Bureau of Investigation investigates child sexual exploitation through its Violent Crimes Against Children Program. This bureau works with federal, state, and local law enforcement agencies on 71 Child Exploitation Task Forces to investigate cases of child sexual exploitation.

The U.S. Department of Homeland Security has dedicated resources to investigate large-scale producers and distributors of child pornography, as well as U.S. citizens who travel abroad to engage in sex with minors. This team uses the latest technology to collect evidence and track the activities of individuals and organized groups.

The United States considers child sexual exploitation a serious offense, and we will continue to take steps to identify offenders, bring them to justice, and protect victims.

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**c. UN General Assembly**

On October 13, 2016, Kelly Razzouk, Senior Policy Advisor for the U.S. Mission to the UN, delivered remarks at the 71st Session of the General Assembly Third Committee on the topic of rights of children. Ms. Razzouk's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7485>.

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In 2016, more than 140 million children will be born around the globe. That gives us 140 million reasons to do more this year to ensure that children around the world grow up in an environment free from violence.

All over the world, children's rights continue to be violated. In Syria, preliminary reporting from Save the Children indicates that children make up half of the casualties that humanitarian workers in Eastern Aleppo are pulling from the rubble or treating in hospitals from recent bombings. In June, the Syrian Network for Human Rights reported that no fewer than 21,000 children had been killed in Syria since the start of the conflict, assigning blame for the majority of deaths to Syrian regime forces. On July 29, Save the Children reported that a deadly airstrike targeted a maternity hospital in the city of Idlib, resulting in two deaths and several injuries to infants.

One can only imagine what those mothers felt as they made their way to that hospital with the hope that within those walls they could give their newborn babies a fighting chance at survival. But the bombs fell on even the incubators holding newborn babies—causing them to crash to the floor.

The ongoing violence has led UNICEF to name Syria as the most dangerous place in the world to be a child.

And across the globe, refugee children are particularly at risk as they flee countries including Syria, Somalia, and Afghanistan.

A few weeks ago, at the Leaders' Summit on Refugees here at the United Nations, President Barack Obama spoke of five-year-old Omran Daqneesh in Aleppo, Syria, sitting in an ambulance, stunned, silent and in shock after a bombing with blood dripping down his face. No child should ever have to endure what Omran experienced.

Our collective response is a test of our common humanity. We must all do our part. Major commitments to refugees by countries including Turkey, Thailand, Chad, and Jordan will help more than one million children who are refugees get an education, and will help one million refugees to get training they need to find a job. As part of the Leaders' Summit, the United States provided nearly \$37 million dollars to the UN High Commissioner for Refugees and \$15 million dollars to UNICEF to help reach our goal of sending one million more refugees to school. The United States also strongly supports Education Cannot Wait, the world's first fund for education in emergencies and protracted crises.

Domestically, the United States has invested more than \$1 billion in early childhood education in recent years, such as through the Preschool Development Grants program that is expanding access to high-quality preschool for children in high-need communities, including from immigrant and migrant families.

We have implemented strategies that close opportunity gaps and awarded billions of dollars through grant programs such as Race to the Top, Investing in Innovation, and Promise Neighborhoods. As a result, U.S. high school graduation rates are at all-time highs, and more students are going to college than before.

To address the range of challenges facing adolescent girls, in March, Secretary Kerry launched the United States Global Strategy to Empower Adolescent Girls. The United States is also proud to highlight the work of Let Girls Learn—a presidential initiative focused on making sure adolescent girls get a quality education—and we are grateful to the countries that have partnered with us in this effort.

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On November 22, 2016, Stefanie Amadeo, U.S. Deputy Representative to ECOSOC, provided the U.S. explanation of position at the 71st meeting of the UN General Assembly Third Committee on the rights of the child. The explanation of position is excerpted below and available at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7572)

[usun.state.gov/remarks/7572](https://2009-2017-usun.state.gov/remarks/7572)\*\*

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\*\* Editor's note: References to operative paragraph numbers and other discrepancies have been corrected from the version posted on the website of the U.S. Mission to the UN to conform to the remarks as they were delivered.

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The United States is pleased to join consensus on this resolution. Doing so underscores the priority we place on our domestic and international efforts to protect and promote the well-being of children. For example, the U.S. Agency for International Development's maternal and child survival efforts in 25 priority countries since 2008 have saved the lives of 4.6 million children. The Every Student Succeeds Act, which contains provisions that ensure educational rights and protections for homeless children and youth, is an example of our domestic efforts.

In joining consensus today, we wish to clarify our views on several provisions. We will not comment explicitly on all of our concerns about the text but instead focus on its most problematic elements.

First, we understand that the provisions of this resolution, and the others adopted by this Committee, do not imply that states must become parties to instruments to which they are not a party or implement obligations under such instruments. Any reaffirmation of prior documents in this resolution and any others adopted by this Committee applies only to those states that affirmed them initially.

We also underscore that this resolution and the other ones adopted by this Committee do not change or necessarily reflect the United States' or other states' obligations under treaty or customary international law. With respect to operative paragraph 3, we note that reservations are an accepted part of treaty practice and are permissible except when prohibited by a treaty or incompatible with the treaty's object and purpose. As for operative paragraph 75, the right to consular notification under the Vienna Convention on Consular Relations is held by the state of a detained person's nationality—not that individual. Finally, with respect to operative paragraph 71 in particular, we underscore that human rights violations result from conduct by state officials and agents, not by private parties.

This resolution rightly emphasizes the importance of protecting vulnerable children. We read this resolution's references to persons in vulnerable or marginalized families or communities or situations to include LGBTI persons and persons with disabilities.

With respect to the section on migrant children, the United States emphasizes that we will fulfill our international obligations to promote and protect the human rights of migrants by providing substantial protections under the U.S. Constitution and other domestic laws to individuals within the territory of the United States, regardless of their immigration status. We also reiterate the well-settled principle under international law that all states have the sovereign right to control admission to their territory and to regulate the admission and expulsion of foreign nationals.

The U.S. government draws from a wide range of available resources to safely process migrant children, including those who are unaccompanied, in accordance with applicable laws. In the circumstances in which migrant children are in the care and custody of the U.S. government, the United States is committed to ensuring that they are treated with dignity, respect, and special concern for their particular vulnerabilities, as reflected in several U.S. laws, regulations, and policies concerning migrant children. We endeavor to promote the best interests of the child principle, but reiterate that the United States does not have an obligation under international or domestic law to apply that principle as a primary consideration at all times or in all actions concerning children, including immigration enforcement and immigration proceedings or criminal proceedings.

In addition, with respect to operative paragraph 68 that is drawn from operative paragraph 33 of the New York Declaration for Refugees and Migrants, General Assembly Resolution 71/1, we reiterate the concerns in our Explanation of Position on that Declaration, which are set forth in UN Document A/71/415.

In closing, the United States expresses our concern about the lack of transparency in the negotiation process for this resolution, as well as the main sponsors' general unwillingness to incorporate states' constructive suggestions. In this regard, we regret that the final text does not reflect many of our proposed edits, which other countries supported.

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## **2. Children and Armed Conflict**

### **a. Child Soldiers—South Sudan**

On August 31, 2016, State Department Spokesperson John Kirby issued a press statement on child soldiers in South Sudan, which is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/261411.htm>. The statement expresses U.S. alarm in response to a UNICEF report implicating the government of South Sudan in the recruitment of child soldiers:

[W]e insist on an immediate halt to the unlawful recruitment and use of child soldiers by government and opposition forces. Individuals responsible for the unlawful recruitment or use of child soldiers for armed groups or forces may be subject to sanction under U.S. law and may be targeted for UN sanctions.

### **b. Child Soldiers Prevention Act**

Consistent with the Child Soldiers Prevention Act of 2008 (“CSPA”), Title IV of Public Law 110-457, the State Department’s 2016 Trafficking in Persons report lists the foreign governments that have violated the standards under the CSPA, *i.e.* governments of countries that have been “clearly identified” during the previous year as “having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers,” as defined in the CSPA. Those so identified in the 2016 report are the governments of Burma, Democratic Republic of the Congo, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen. Regarding the recruitment and use of children by the Afghan National Police (“ANP”) and the Afghan Local Police (“ALP”), the Department concluded that there was not a basis on which to list Afghanistan under the standard specified in the CSPA. Although the ANP and ALP are government security forces, they are not part of the armed forces of Afghanistan; therefore, they are not a “governmental armed force” under the CSPA. “Governmental armed force” refers to a military force, such as the army, navy, or air force, as opposed to other national security actors, such as the national police or local police. Because the ANP and ALP are government security forces, they are also not a “government-supported armed group,” a term in the CSPA which

refers only to non-state actors.

The full text of the TIP report is available at <http://2009-2017.state.gov/j/tip/rls/tiprpt/2015/index.htm> For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments designated in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment. In a memorandum for the Secretary of State dated September 28, 2016, 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 Burma, Iraq, and Nigeria; and 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 (DRC) to allow for provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance to build the DRC military's capacity to respond to critical atrocity prevention priorities in the region such as countering the Lord's Resistance Army and other armed groups, to the extent such assistance or support would be restricted by the CSPA; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Rwanda to allow for the provision of IMET, PKO assistance, and non-lethal Excess Defense Articles for humanitarian and peacekeeping purposes, to the extent such assistance or support would be restricted by the CSPA; to waive in part the application of the prohibition in section 404(a) with respect to Somalia to allow for the provision of IMET, PKO assistance, and support provided pursuant to 10 U.S.C. 2282, to the extent such assistance or support would be restricted by the CSPA; and to waive in part the application of the prohibition in section 404(a) with respect to South Sudan to allow for the provision of IMET, PKO assistance, and support provided pursuant to section 1208 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113– 66), to the extent such assistance or support would be restricted by the CSPA.  
81 Fed. Reg. 72,683 (Oct. 21, 2016).

#### **D. SELF-DETERMINATION**

On February 23, 2016, the Department of Interior held a panel discussion on "Self-Determination in the U.S. Virgin Islands, American Samoa, and Guam." The video of the panel discussion can be viewed at <https://www.doi.gov/oia/self-determination>. The presentation of Meredith Johnston, Attorney-Adviser at the Department of State, Office of the Legal Adviser, on self-determination under international law is excerpted below.  
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\*\*\* Editor's note: Some corrections have been made to the as-delivered remarks for this written record.

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Thank you very much. I really appreciate the opportunity to be here and to be part of this discussion. I will be addressing self-determination from an international law perspective. This is actually one of the most challenging aspects of international law, so I will be going over areas where there is consensus in the international community about some aspects of self-determination, and also some areas where there is disagreement. I will then go into the United States position in areas where there is consensus, and some specific issues.

### Historical Background

I will first start with a history of the principle of self-determination as it has evolved in the United Nations system. Nearly a century ago, President Wilson advocated for the principle of self-determination as a key principle of international relations in his Fourteen Points. That principle was affirmed after WWII as part of the UN Charter. But when the UN Charter was adopted in 1945, there was still no general consensus as to the exact scope or meaning of self-determination.

Through the 1950s and 1960s, the concept evolved in the UN of self-determination not just as a principle, but as a right. I will address specifically three key UN General Assembly resolutions and two international human rights Covenants. But before I go into that, I just want to set the stage at this time. As these discussions are going on, many states are motivated by a desire to see an end to colonialism, and so these documents will refer to “colonies” or “colonial people,” and some of the discussions will refer to those terms. But the U.S. government as a general matter does not use those terms. We use the term that is in the UN Charter itself, which is “non-self-governing territories.”

So the first of the resolutions I want to address was in 1960. It is Resolution 1514, titled the “Declaration on the Granting of Independence to Colonial People”—again, you see this title reflecting an outdated terminology. It states that “[a]ll peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.”

Right after this—the next day, in fact—the General Assembly adopted Resolution 1541, which elaborated on states’ obligations under the UN Charter to provide information to the Secretary General about non-self-governing territories. This resolution describes some of the characteristics that states should consider in determining whether they have this reporting obligation. Two key features of a “non-self-governing territory” identified in this resolution are: (1) that it was “geographically separate”; and (2) that it is “distinct ethnically and/or culturally” from the administering state. If these two features existed, then states may then go on to consider other factors, such as administrative, political, juridical, economic or historical factors. The resolution declared that peoples in non-self-governing territories have the right to freely determine basically three options: (1) independence; (2) independence with free association; or (3) integration with the administering state.

At the same time that these resolutions were being adopted and these issues were being discussed in the General Assembly, states were also negotiating the UN Human Rights Covenants. These were originally intended to be a single covenant, but it split into two: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Soviet Union advocated for the inclusion of a right to self-determination that would apply only to colonial peoples. Eastern European

States and some developing states said, “Yes, there should be some right to self-determination in these covenants, but it should apply both to colonial peoples and to people living under oppressive governments.” Most Western countries were reluctant to support a right to self-determination in the Covenants themselves, in part because of this dispute about who constituted a “people”—they thought the term was vague. But if it were to be included, the Western states thought it should apply to both colonial peoples and those living under oppressive governments. Over the objections of many Western states, the UN General Assembly directed the inclusion of the right to self-determination as an article in both Covenants. And so the language of Article 1 is identical in both Covenants. It is referred to as “Common Article 1.” But even at this point, there was strong disagreement about what this right meant, and neither covenant has a definition of “peoples” or “self-determination.”

Then in 1970, the UN General Assembly adopted a resolution that’s known as the Friendly Relations Declaration. By this point, there was general consensus that the right of self-determination applied to colonial peoples, and the resolution affirms this. It also states that “subjection of peoples to alien subjugation, domination and exploitation” is a violation of the principle of equal rights and self-determination of peoples. The Friendly Relations Declaration also contains what is called a “safeguard clause,” which provides that the territorial integrity of states must be preserved for those states that are “conducting themselves in compliance with the principle of . . . self-determination . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” The right of self-determination and the safeguard clause also appeared in subsequent documents, including the Final Act of the Conference on Security and Cooperation in Europe, and the Vienna Declaration and Program of Action from 1993.

#### Contemporary Views on Self-Determination

So that’s the historical development. The question is: Where are we now? There is general consensus in the international community that “people,” for the purposes of Article 1 of the Covenants, means the entire population of a state, or the entire population of a non-self-governing territory that forms a separate geographical entity. In addition, there is general consensus that the people of a geographically separate non-self-governing territory can choose freely to integrate with an administering state, to become an independent state, or to become an independent state with free association with the former administering state.

However, there is not consensus about whether groups other than the entire population of a state or non-self-governing territory can qualify as “peoples” for purposes of Article 1, and there is some disagreement when it comes to addressing this issue in particular contexts. For example, in 2009 the International Court of Justice (ICJ) held proceedings regarding an advisory opinion on the question of Kosovo’s declaration of independence, and many states provided their views. The ICJ in its opinion essentially simply noted that there were “radically different views” among states and did not address it as a substantive matter in its opinion.

For the U.S. position, the United States has stated that it agrees that a “people” means the entire population of a state, or the entire population of a non-self-governing territory. So, for example, if there were a referendum on the question of self-determination, that should be open to all voting-eligible residents of the territory and not be limited to a subset of the population or a particular ethnic group. The U.S. also agrees with the international community that there are these three options— independence, integration, or independence with free association. In fact, that position is reflected in the U.S. relationship with its own insular areas and former trust territories. For example, the people of Puerto Rico completed an act of self-determination in

1952, when they approved the Puerto Rico Constitution, choosing integration into the United States as a commonwealth. The people of the Northern Mariana Islands completed an act of self-determination through a referendum in 1975—which was observed by the UN—and also chose integration as a commonwealth. The peoples of Palau, Micronesia, and the Marshall Islands completed respective acts of self-determination and chose independence with free association. For Guam, the U.S. Virgin Islands, and American Samoa, the peoples of these current U.S. territories have not yet exercised their respective rights of self-determination under international law, but the U.S. certainly supports self-determination for these peoples.

Now, going to some more specific questions, the U.S. has historically taken the position that the right of self-determination with respect to the administering state—and by this I mean that decision between independence, integration, or independence with free association—can only be exercised once. And once that right has been exercised, then from an international law perspective the question is over.

So, for example, the United States has maintained at the United Nations that the residents of Alaska and Hawaii have completed acts of self-determination by choosing statehood in 1959, and there is not an ongoing international legal right to re-determine that relationship. The same is true for the residents of Puerto Rico. Now, the fact that Alaska and Hawaii elected statehood and Puerto Rico elected commonwealth—from an international law perspective—are both equally valid choices, provided that they really reflected the will of the people, meaning the entire population, at the time the respective decisions were made.

#### United Nations Declaration on the Rights of Indigenous Peoples

I did want to address one separate issue, which is the distinction between the right to self-determination under international law and the right of indigenous peoples to self-determination under the United Nations Declaration on the Rights of Indigenous Peoples. This is a non-binding UN declaration that the United States supports. In our 2010 announcement of our support for the Declaration, the United States explained that the Declaration promotes a new and distinct right of self-determination for indigenous peoples that is separate from the international right; that the non-binding Declaration was never intended to alter or define international law; and that for the United States' purposes, the right of indigenous peoples to self-determination is reflected in our existing recognition of and relationship with federally recognized tribes who have large measures of self-government in a wide variety of areas.\*\*\*\*

#### Conclusion

With that, I think I have covered the full international law perspective, but if there are specific questions about that or the UN system, I would be happy to answer them.

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## E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

### 1. Food

The United States joined consensus on all but operative paragraphs 27 and 10 of the UN General Assembly resolution on “Right to Food,” which was adopted at the 71<sup>st</sup> session

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\*\*\*\* Editor’s note: See *Digest 2010* at 262-84 for the full text of the announcement of U.S. support for the Declaration.

of the General Assembly on December 19, 2016. U.N. Doc. No. A/RES/71/191. The U.S. explanation of position on the resolution follows.

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The United States agrees that hunger and malnutrition have devastating consequences, and maintaining a focus on global food security is critical to realizing our vision of a world free from hunger. For more than a decade the United States has been the world's largest food aid donor. The United States reiterates our commitment to reducing hunger and addressing poverty sustainably through a variety of approaches. We are pleased that this resolution emphasizes the important link between the empowerment of women and the progressive realization of the right to adequate food in the context of national food security and expresses concern about child mortality and morbidity and stunting. Our Feed the Future Initiative and programs to support women entrepreneurs and women farmers exemplify the United States' commitment to incorporating a gender equality perspective in our efforts to address hunger and poverty.

Although we will not block consensus, we are disappointed that this resolution contains problematic, inappropriate language that does not belong in a resolution focused on human rights. As a result, we are dissociating from consensus on paragraphs 27 and 10 in particular. The reference to Doha in paragraph 27 in no way overrides or supersedes the World Trade Organization (WTO) Nairobi Ministerial Declaration, which was agreed by all Members of the WTO and which reflects accurately the current status of the issues in those negotiations. At the WTO Ministerial Conference in Nairobi last year, WTO Members could not agree to reaffirm the Doha Development Agenda (DDA). As a result, WTO Members are no longer negotiating under the DDA framework. Further, the United States firmly considers that paragraph 27, and any other effort in non-WTO fora to undermine decisions reached by consensus in the WTO, has no standing. It only demonstrates how disconnected the UN is on trade issues that are outside of its mandate.

With respect to paragraph 10, the United States does not support the reference to technology transfer. The United States only supports the transfer of technology if it is on a voluntary basis and on mutually agreed terms. The United States does not accept any other reference to the conditions of technology transfer in paragraph 10, and further, from the United States' perspective, paragraph 10 does not serve as a precedent for future negotiated documents. We request that our dissociation from paragraphs 27 and 10 be reflected in the record for the agenda item under which this resolution has been adopted.

We have strong concerns about other aspects of this resolution. The resolution continues to use outdated, inapplicable, or otherwise inappropriate language. In particular, trade and trade negotiations are the purview of the WTO and its membership, and should not have been included in this resolution. We do not accept any reading of this resolution that might suggest that protection of intellectual property rights has a negative impact on food security. The United States notes that intellectual property and the international rules-based intellectual property system promote agricultural innovations that bring wide-ranging benefits to farmers, consumers, and innovators. The United States firmly considers strong protection and enforcement of intellectual property rights as providing critical incentives needed to produce innovation that will enable us to address the development challenges of today and tomorrow. We are also concerned that the resolution's language concerning donor nations and investors is imbalanced. The text

also should have reflected the need for transparency, accountability, good governance, and other elements critical to providing an environment conducive to investment in agriculture.

We also underscore our disagreement with other inaccurate language in this text. For example, this resolution refers to a “global food crisis,” when we are not currently in a global food crisis. Using this term detracts attention from important and relevant challenges that contribute significantly to the recurring state of regional food security, including the lack of strong governing institutions and systems that deter investment. Unfortunately, the resolution mentions none of these significant factors. We also reiterate that the United States is concerned by and does not necessarily agree with this resolution’s unattributed statements of a technical or scientific nature. Similarly, while addressing climate change is a top priority for the United States, while we are taking ambitious steps domestically and internationally to tackle this challenge, and while we are fully committed to implementing the Paris Agreement, we underscore that the resolution draws inaccurate linkages between climate change and human rights related to food.

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. The United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food. To the extent that this resolution purports to define or elucidate any such right, the United States does not accept that definition or elucidation. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). Accordingly, we interpret this resolution’s references to the right to food, with respect to States Parties to the ICESCR, in light of its Article 2(1). We also interpret this resolution’s references to Member States’ obligations regarding the right to food as applicable to the extent they have assumed such obligations. The United States is working to achieve a world in which everyone has adequate access to food but does not treat the right to food as an enforceable obligation. We also do not concur with any reading of this resolution or related documents that would suggest that States have particular extraterritorial obligations arising from a right to food.

Finally, we interpret this resolution’s reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent countries affirmed them in the first place. As for other references to previous documents, resolutions, and related human rights mechanisms, we reiterate any views we expressed upon their adoption.

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## 2. Housing

The UN held its third conference on housing (held every 20 years) in 2016, Habitat III, which concluded with the “New Urban Agenda” as its outcome document. The U.S. explanation of position on the New Urban Agenda follows.

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The United States is pleased that member states were able to reach consensus on this New Urban Agenda. We are pleased that the New Urban Agenda is an action-oriented document which will

set global standards of achievement in sustainable urban development, rethinking the way we build, manage, and live in cities through drawing together cooperation with committed partners, relevant stakeholders, and urban actors at all levels of government as well as the private sector. We encourage all stakeholders from all sectors to work to make this New Urban Agenda a reality in the coming years.

In supporting this document we reaffirm our long-standing commitment to both sustainable urban development and the promotion of human rights. The United States takes its human rights obligations and commitments seriously in cities, just as it does everywhere within its territory. We do not recognize any “right to the city”, nor do we have any obligations or commitments with respect to it. We also reiterate the concerns of the United States regarding the topic of a “right to development,” which are long-standing and well known; it does not have an agreed international meaning, and any related discussion needs to focus on aspects of development related to human rights, which are universal rights held and enjoyed by all individuals and which every individual may demand from his or her own government.

Further, the United States supports the right to an adequate standard of living, including adequate housing, and we support States Parties to the International Covenant on Economic, Social and Cultural (“ICESCR”) as they undertake steps to achieve progressively the full realization of this right. However, the United States joins consensus with the express understanding that the New Urban Agenda does not imply that States must implement obligations under human rights instruments to which they are not a party and the United States is not a party to the ICESCR.

We note that the term “equitable” is used in multiple contexts in the Agenda. While the United States fully endorses the importance of universal access to safe drinking water and sanitation, for example, we must collectively avoid any unintended interpretation of the term “equitable” that implies a subjective assessment of fairness that, among other things, may lead to discriminatory practices.

As we have said many times, the U.S. remains as committed as ever to assisting the most vulnerable on a path to achievement of this agenda. We note that throughout the document, the phrase persons in vulnerable situations is included. We understand that this term is inclusive of all groups that find themselves vulnerable due to various characteristics such as gender, race, religion, sexual orientation, and gender identity.

At the same time, we collectively recognize that this is a universal Agenda, that calls for action by all. We underscore here that, by its terms, paragraph 18 reaffirms the principle of common but differentiated responsibilities only as it was originally set out in principle 7 of the Rio Declaration on Environment and Development, where it was explicitly limited to certain types of global environmental degradation. The reaffirmation of principle 7 in this limited context does not imply, and the United States does not accept, that this principle has relevance or application to the broad range of issues addressed in this Agenda, or to sustainable development as a whole.

Economic sanctions, whether unilateral or multilateral, can be a successful means of achieving foreign policy objectives. In cases where the United States has applied sanctions, they have been used with specific objectives in mind, including as a means to promote a return to the rule of law or democratic systems, to respect human rights and fundamental freedoms, or to prevent threats to international security. We believe that economic sanctions can be an appropriate, effective, and legitimate alternative to the use of force and that U.S. sanctions are fully compliant with international law and the Charter of the United Nations.

Regarding the reference to foreign occupation in Paragraph 19, we reaffirm our abiding commitment to a comprehensive and lasting peace based on a two-state solution to the Israeli-Palestinian conflict. We remain committed to supporting the Palestinian people in practical and effective ways, including through sustainable development. We will continue to work with the Palestinian Authority, Israel, and international partners to improve the lives of ordinary people toward a more sustainable future.

Finally, the New Urban Agenda is not legally binding and does not affect existing obligations under applicable international and domestic law, including where commitments in other instruments are characterized as having been “agreed”. Nor does it change the current state of conventional or customary international law. The United States will pursue the commitments, including those aspiring to changed circumstances, in the Agenda consistent with U.S. law and policy and our limited authority at the federal level. We will pursue the Agenda’s commitments within and subject to our appropriations process.

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### 3. Water, Peace, and Security

On November 22, 2016, Ambassador Isobel Coleman, U.S. Representative to the UN for UN Management and Reform, delivered remarks at a UN Security Council open debate on water, peace, and security. Ambassador Coleman’s remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7570>.

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As we’ve heard, conflict over water is increasingly a serious global issue. In discussing water, peace, and security today, I would like to focus my remarks on two points: first, the example of the Lake Chad Basin as an area struggling with water insecurity; and second, the role that the international community can play in helping prevent water disputes from becoming armed conflicts.

The Lake Chad Basin—spanning the border region of Chad, Niger, Nigeria, and Cameroon—is an example of what happens when water scarcities contribute to conflict. Overuse, poor management practices, and expanding desertification have caused the lake to recede by approximately 90 percent. The disappearance of this critical resource, which is the basis of survival for millions of people, has led to territorial disputes and helped nurture the rise of Boko Haram.

Boko Haram uses the dying lake as a recruiting base, easily exploiting the tens of thousands of displaced people who are searching for a means of livelihood. Boko Haram deploys brutal tactics of abduction, sexual slavery, killing, and looting to terrorize the population, and the resulting armed conflict has left over nine million people in need of humanitarian assistance.

However, there is a glimmer of hope in this otherwise dark reality. The Lake Chad Basin Commission was established by regional governments and civil society to try to peacefully resolve disputes over the lake. The commission also formed a Multinational Joint Task Force to

fight Boko Haram, a powerful testament to the role regional cooperation can play in combatting issues stemming from water scarcity.

It is urgent that the international community bolster its support to the MNJTF to assist in its efforts to counter Boko Haram. In particular, the MNJTF's main challenge is a severe lack of funding, so we all must recommit to contributing to the force. Greater international support would be a strong sign of solidarity with the people of the four countries that are bearing the brunt of a terrorist threat that mocks the value of human life. Support to local governments to help build capacity for rehabilitation and reconstruction would also go a long way in helping to ensure lasting peace and stability.

Conflict over water is not exclusive to the Lake Chad Basin, of course. In Syria, poor drought management resulted in the loss of livelihood for thousands of farmers, leading to mass migration to urban areas and fanning the flames of what was already a deep-rooted discontent with respect to government policies. In Iraq, ISIL has manipulated strategic dams on the Tigris and Euphrates rivers as a key component of its strategy.

I doubt there is a single country in this room that is immune to water challenges. I know that the United States is not. With 50 states that share 21 large rivers and more than 20,000 watersheds, we have had to learn to cooperate.

For more than 100 years, the United States has had close relationships with both our neighbors on water management, and all three countries have benefitted. For example, our 2012 bilateral agreement with Mexico permits Mexico to store water in the United States for drought protection, but also allows U.S. entities to invest in water conservation projects in Mexico, and then share in the water saved. This model has proven to be successful in strengthening the water security of both countries and encourage investments in water conservation and sound resource management.

Drawing from this partnership and others, I'd like to share some thoughts on best practices we have learned in helping keep water disputes from erupting into conflict.

First, the international community should support regional resolution of water disputes by building the capacity of states and stakeholders. Countries require the ability to negotiate, resolve disputes, and implement agreements relating to their water resources. This includes the technical skills needed to understand emerging challenges and opportunities, as well as the means to address them. One model of capacity building is the USAID-funded program in the Kadamjai region of Kyrgyzstan, which provided technical assistance and resources to better manage water inefficiencies. The program enabled the construction of a permanent diversion dam, which benefited nearly 2,000 farmers and residents.

Second, institutions and processes can help "lock in" progress. The establishment of regional organizations, bilateral agreements, and information-sharing platforms can all play a role in institutionalizing and maintaining cooperation. The United States has been working with several other donors to develop the Shared Waters Partnership that supports cooperative efforts on transboundary waters in regions where water is, or may become, a source of conflict. The program is a resource to any country looking for support to resolve water issues.

Finally, sound data and impartial analysis is essential to developing a common view of the challenges and opportunities that face us and help provide a foundation for decision-making. A project in the Okavango River Basin—between Angola, Namibia, and Botswana—effectively used data to give early warning of locations at risk of resource conflict, allowing the involved parties to proactively resolve potential issues before they could develop.

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#### 4. Education

On July 3, 2016, at the 29<sup>th</sup> session of the HRC, Eric Richardson delivered the U.S. explanation of position regarding the Council's resolution on the right to education, on which the United States joined consensus. That explanation is excerpted below and available at <https://geneva.usmission.gov/2015/07/06/u-s-eop-on-hrc-right-to-education-resolution/>.

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The United States is firmly committed to providing equal access to education. We note that our judicial framework provides robust opportunities for redress, but it is appropriately limited to parties who have suffered harm. We interpret this resolution's references to obligations as applicable only to the extent that States have assumed such obligations, and with respect to States Parties to the International Covenant on Economic, Social, and Cultural Rights, in light of its Article 2(1). The United States is neither a party to that Covenant nor to its Optional Protocol, and the rights contained therein are not justiciable as such in U.S. courts. We read this resolution to urge States to comply with their applicable international obligations.

As educational matters in the United States are primarily determined at the state and local levels, we understand the resolution's call on States to strengthen access to quality education in terms consistent with our respective federal, state, and local authorities.

With respect to this resolution's references to private providers, we underscore the importance of education as a public good, but note also that private providers can offer students a viable educational option. We support encouraging all providers to deliver education consistent with its importance as a public good, and take very seriously the responsibility of States to intervene in litigation as appropriate.

The United States does not regard the language in this resolution as assigning primacy to any one issue in the priorities or structure of the Post-2015 Development Agenda or in any other way pre-judging the outcome of these ongoing negotiations.

Despite these and other concerns with the resolution, we join consensus on this resolution because we support its focus on the right to education.

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#### F. RESPONSIBLE BUSINESS CONDUCT

On April 25, 2016, the U.S. Department of State issued a media note on the annual plenary meeting of the Voluntary Principles on Security and Human Rights Initiative

(“VPs Initiative”), co-hosted by the governments of the United States and Colombia in Bogota, Colombia. The media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256561.htm>, summarizes key achievements during the U.S. Government’s one-year chairmanship of the VPs initiative:

revision and clarification of the entry criteria for new members; updates to the reporting guidelines for VPs participants to encourage more robust corporate reporting on security and human rights; and implementation of a framework to allow regular verification of members’ implementation of their respective roles and responsibilities.

Deputy Assistant Secretary Scott Busby’s keynote remarks delivered at the plenary on April 20, 2016 are available at <http://2009-2017.state.gov/j/drl/rls/rm/2016/256445.htm>.

On March 25, 2016, the United States released its annual online report on the VPs Initiative, which is available at <http://www.state.gov/j/drl/rls/vprpt/2015/255172.htm>. For background on the VPs Initiative, see *Digest 2000* at 364-68. See also *Digest 2013* at 354-55 and *Digest 2012* at 409-10.

On December 16, 2016, the White House released the National Action Plan on Responsible Business Conduct, available at <https://www.state.gov/documents/organization/265918.pdf>. The NAP focuses on five categories, detailing how the USG intends to:

- (1) continue to refine the ways in which the USG purchases and finances responsibly;
- (2) work with companies, civil society, and foreign governments to share best practices and support high standards;
- (3) highlight the success stories of leading companies; and
- (4) seek to provide effective mechanisms to address negative impacts when they occur.

A Fact Sheet on the NAP is available at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/16/fact-sheet-national-action-plan-responsible-business-conduct>.

## G. INDIGENOUS ISSUES

### 1. EMRIP Reform

In the World Conference on Indigenous Peoples Outcome Document of September 2014, A/RES/69/2 (2014), the UN General Assembly set forth several commitments related to indigenous peoples. See *Digest 2014* at 239-42 for contemporaneous U.S. statements on the Outcome Document. Among these was a commitment to reform the Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”) so that it better

assists states to achieve the ends of the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”). As discussed in *Digest 2015* at 225-26, the HRC adopted a resolution, A/HRC/RES/30/11 (2015), co-sponsored by the United States, establishing the modalities and a specific timeline for a substantive dialogue among states and indigenous peoples on EMRIP reform. EMRIP created a website on the reform process at <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Reviewofthemandate.aspx>

In advance of the April 4-5, 2016 expert workshop on the review of EMRIP, the United States government responded to a questionnaire from the Office of the High Commissioner for Human Rights (“OHCHR”) in March 2016. The U.S. questionnaire response is excerpted below and available at

<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/MandateReview/States/US.pdf> The U.S. proposal within this questionnaire response to combine the Special Rapporteur on the Rights of Indigenous Peoples with EMRIP was subsequently abandoned for lack of support from other UN members or indigenous peoples.

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In advance of formulating this response, the United States held two separate consultations with indigenous peoples in the United States to learn their views on the reform of EMRIP’s mandate. We are grateful to those who participated for the immensely helpful contributions shared with us during those consultations, and to OHCHR for granting an extension of time so that we could fully consider those contributions. Many of the ideas below reflect input shared with us during these consultations.

As explained in detail under Question 2 below, the most significant change we suggest for EMRIP is to merge it with the Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur) to create a single entity charged with promoting respect for the UN Declaration on the Rights of Indigenous Peoples (Declaration). The Special Rapporteur would become the head of the new entity, which would combine and streamline aspects of the current mandates of EMRIP and the Special Rapporteur and take on new functions, in order to better assist states. The new entity would be designed to have greater flexibility and to make more efficient use of resources. In short, such a body would be designed to be greater than its individual parts.

1. What are the most valuable aspects of the current mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)?

EMRIP is currently charged with preparing studies and conducting research on themes selected by the Human Rights Council (HRC or Council) related to the rights of indigenous peoples. Since EMRIP was established in 2007, it has examined topics of importance to states, the HRC, and indigenous peoples worldwide. It has completed studies on indigenous peoples’ education, participation in decision-making, languages and culture, and access to justice. Work on the right to health, cultural heritage, and disaster risk reduction is ongoing. This function is valuable and could be retained in a modified form, as discussed in our answer to Question 2 below.

**2. How can the Expert Mechanism's role in assisting States to monitor, evaluate, and improve the achievement of the ends of the Declaration be strengthened?**

EMRIP, the Permanent Forum on Indigenous Issues (PFII), and the Special Rapporteur are the three main UN mechanisms devoted to the rights of indigenous peoples...

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In considering what EMRIP's future mandate should be, it is essential to reflect holistically on activities of EMRIP, the PFII, and the Special Rapporteur and consider how these three can function synergistically and without duplication of efforts. In this regard, we note the large degree of overlap in the current mandates of EMRIP and the Special Rapporteur, both of which fall under the purview of the HRC and may be modified through an HRC resolution.

Neither EMRIP, the PFII, nor the Special Rapporteur is currently mandated specifically with examining member states' progress in achieving the goals of the UN Declaration on the Rights of Indigenous Peoples (Declaration). The United States supports the consensus of the 2014 World Conference on Indigenous Peoples (WCIP) that an important step forward would be to explicitly include this responsibility in the mandate of a UN body. While we are open to other ideas and look forward to engaging in a robust dialogue at the Expert Workshop, the United States believes that a modified mechanism that combines EMRIP and the Special Rapporteur into a single entity could appropriately assume this role.

We would therefore suggest, first, that EMRIP's mandate designate its *raison d'être* as "promot[ing] respect for the Declaration, including by better assisting member states to monitor, evaluate, and improve the achievement of the ends of the Declaration," reflecting the wording from paragraph 28 of the WCIP outcome document.

EMRIP's mandate could then specify that it would carry out this broad grant of authority through two principal functions: 1) examining member state achievement of the Declaration's ends within a particular member state and giving pointed advice and recommendations as appropriate; and 2) examining regional, cross-regional, and worldwide indigenous issues with a view to advancing the ends of the Declaration, and preparing studies and focused recommendations.

If framed in this manner, this new mandate would accordingly reflect the most critical functions currently performed by EMRIP the Special Rapporteur, while shifting the body's focus explicitly toward member states' achievement of the ends of the Declaration. ...

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**5. How could a new mandate for the Expert Mechanism contribute to greater engagement between States and indigenous peoples to overcome obstacles to the implementation of indigenous peoples' rights?**

A revised mandate for EMRIP along the lines of what is suggested above would facilitate voluntary discussions between EMRIP and member states on issues of importance to indigenous peoples in the state, with a view toward better achieving specific ends of the Declaration within and across states. This process would involve and encourage dialogue not only between EMRIP and the state, but among EMRIP, the state, and the affected indigenous peoples, NGOs, and other stakeholders in the state about the issues in question. Moreover, recommendations resulting from discussions between EMRIP and a member state could serve as a model for other states with similar circumstances or situations.

6. Do you have any comments or suggestions concerning the composition and working methods of the Expert Mechanism?

Appointment of EMRIP members and membership size. EMRIP now consists of five independent experts. All are of indigenous origin, in accordance with the strong recommendation in HRC Resolution 6/36 establishing EMRIP's mandate. The United States recommends that the revised EMRIP continue to be made up of experts serving in their individual capacity, independent of any government.

To help member states better achieve the ends of the Declaration, EMRIP will likely require more than its current five members. The United States is open to suggestions about the appropriate number, noting that EMRIP's revised functions should help point the way to the correct membership size. At the same time, too many members could prove unworkable, inefficient, and make consensus more difficult. While EMRIP should continue to endeavor to make decisions by consensus, an odd number of members is advisable, should situations arise in which the members cannot take a decision by consensus.

Member states, individually or in regional groupings, and indigenous peoples could propose candidates for consideration. Asking the candidates to submit applications could be considered, if helpful. A consultative group would then review the qualifications of any candidates put forward, and the HRC President, as happens currently, could select the members, keeping in mind equitable geographic and gender representation and the value of having persons of indigenous origin among the membership.

The United States is also open to suggestions about term lengths. One possibility would be for the members to serve three-year terms, as they currently do. To allow expertise to be transferred and to avoid an influx of many new members at once, new members would be phased in over the first three years their terms would be staggered.

PFII and EMRIP annual sessions. Given the importance of certain topics under consideration by both the PFII and EMRIP, some overlap in their annual agendas is to be expected. We would encourage reducing duplication of topics or specific areas of focus within common topics to the greatest extent possible. Similar meeting agendas discourage interest, both on the part of member states and indigenous peoples, in participating in two annual meetings which are held only several weeks apart in different countries. More importantly, having EMRIP endeavor not to take up topics that have already been discussed at the PFII, or to focus only on aspects of a topic the PFII did not address, would enable EMRIP to focus on assisting states to achieve the ends of the Declaration.

Expanding EMRIP's mandate would likely make meeting more than once a year advisable. One possibility would be for EMRIP to meet once a year in person in Geneva, and hold additional electronic/virtual meetings as needed.

Additional U.S. government comments

- Budgetary considerations. The United States would like to see a revitalized EMRIP that is adequately funded, allowing it to achieve its mandate in a cost-effective manner and without duplicating other efforts. Merging the Special Rapporteur and EMRIP to create the single entity described above would entail significant cost savings by streamlining efforts to promote the rights of indigenous peoples, using existing resources in a more efficient way.

- Avoiding creation of another treaty body. We do not recommend turning EMRIP into an entity resembling a treaty body. The treaty bodies continue to be challenged by significant backlogs and delays. In redefining EMRIP's functions, we want to avoid imposing additional reporting requirements on UN member states, with the concomitant resource burden

that would impose on EMRIP. This pitfall can be avoided by carefully defining EMRIP's revised mandate. For example, as noted above, EMRIP should not have a mandate to issue general comments interpreting provisions of the Declaration or to "adjudicate" individual complaints, and its written advice and recommendations should be concise and focused.

- Envisioning a more efficient and effective institution. Although the review process would be voluntary, we predict that member states would have a significant incentive to take advantage of it. Many member states and indigenous peoples recognize that it is essential to work toward the Declaration's ends to better the situation of indigenous peoples worldwide. Revitalizing EMRIP, along with the Special Rapporteur, offers a way to move forward on this objective, and is also an example of using existing UN structures more effectively to accomplish an important task.

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Pursuant to the modalities resolution, OHCHR hosted a two-day workshop April 4–5, 2016, moderated by former special rapporteur James Anaya and attended by delegations from numerous States and indigenous peoples. Ambassador Harper delivered an intervention as part of the first panel at the workshop in which he identified three key areas where EMRIP's mandate could be improved:

*First*, while EMRIP has discussed application of the Declaration consistently in its reporting, neither it nor any other UN body has a mandate to assist states to achieve the Declaration's ends. We believe EMRIP is well placed to become the pre-eminent body charged with promoting respect for the Declaration.

*Second*, while HRC should be able to continue to request EMRIP's expert advice on identified themes, EMRIP's mandate should allow it to identify and address, on its own initiative, issues affecting the rights of indigenous peoples.

*Third*, EMRIP should be able to work directly with states, or groups of states, to assist them in achieving the Declaration's ends.

Ambassador Harper also provided an intervention for the United States at the second panel, reiterating the U.S. suggestions in its questionnaire response relating to streamlining the work of the various mechanisms for addressing indigenous issues. State Department Attorney-Adviser James Bischoff also delivered interventions on behalf of the United States at panels held during the workshop. The intervention at Panel 3 is excerpted below.

We suggest that the reformed EMRIP's mandate should define, as its core function, the role states recommended in the World Conference outcome document: assisting member states to monitor, evaluate, and improve the achievement of the ends of the Declaration.

To carry out this broad mandate, the revitalized EMRIP would have two main functions:

*First*, EMRIP would be authorized to examine achievement of the Declaration's ends within a particular member state and give pointed advice and

recommendations. In carrying out this work, EMRIP could identify, on its own initiative, a particular situation or concern, and garner information on the basis of input from state officials, indigenous peoples, NGOs, and others, including through country visits. Member states could also, if they so choose, ask EMRIP for advice on a given issue. The state's participation would be voluntary. EMRIP would then develop concise, tailored, action-oriented proposals and recommendations to address those concerns, similar to those offered by other special procedures of the HRC. EMRIP would not have the authority to issue binding recommendations, nor to adjudicate complaints by individuals or groups against a state, just as other special procedures do not have such an ability.

*Second*, EMRIP would examine thematic or cross-cutting issues that appear across states, within and among regions, and globally. This is an expanded version of EMRIP's current reporting authority, with the key difference being that it would be able to identify and explore issues on its own initiative and, hopefully, have an enhanced ability to examine situations, including through site visits. EMRIP could engage with more than one state at a time, as well as indigenous peoples and other stakeholders across states. We envision focused studies and recommendations resulting from this effort, as opposed to long reports, which could either apply to specific countries or have broader relevance. We do not, however, recommend having EMRIP function like a treaty body.

Mr. Bischoff's intervention at the fourth panel relating to modalities and methods of work for the reformed EMRIP commended the Indigenous World Association's proposal that membership in EMRIP be based on the seven socio-cultural regional groupings relied upon by the Permanent Forum for the selection of representatives by indigenous peoples: Africa; Asia; Central and South American and the Caribbean; the Arctic; Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific. Mr. Bischoff also provided the U.S. recommendation that qualifications for membership should align with EMRIP's functions such that international human rights lawyers and indigenous rights lawyers should be included if EMRIP is to guide States on achieving the ends of the Declaration.

Mr. Bischoff also delivered the U.S. intervention at the concluding panel, recapping the ideas expressed at the workshop. In particular, the United States prioritized two suggestions for further pursuit in reforming EMRIP, the first of which acknowledged the lack of support for the United States' prior proposal to merge the Special Rapporteur and EMRIP instead of maintaining two separate mandates:

*First*, EMRIP should be able to directly engage states, indigenous peoples, and other stakeholders at the country level, in order to promote dialogue and examine specific situations, with a view to providing pointed recommendations guided by the principles in the Declaration. These would not be general comments like those issued by a treaty body, but interpretations in the context of recommendations on actual situation of concern.

In this regard, we should continue to think about ways to have the Special Rapporteur and EMRIP mutually reinforce each other's work and avoid duplication. We should think about whether the Special Rapporteur should have some status in EMRIP—whether as a member of EMRIP while retaining her own separate mandate; or, at a minimum, the respective mandates should formalize the close coordination and cooperation between the two mechanisms.

We also see considerable merit in Finland's idea of having the Special Rapporteur refer situations to EMRIP for in-depth examination. This function could allow EMRIP to use its expertise to undertake in-depth follow-up on the Special Rapporteur's country visits and implementation of recommendations; and it could allow EMRIP to consider situations of serious violations of the rights of indigenous peoples in a particular country or region, or across regions.

*Second*, EMRIP should be tasked with providing technical advisory assistance to states, on a voluntary basis, to promote best practices. This could be a part of the follow-up on the Special Rapporteur's work.

OHCHR's report on the workshop, U.N. Doc. No. A/HRC/32/26, is available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/26](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/26).

The United States raised the question of EMRIP reform at the annual meeting of the Permanent Forum on Indigenous Issues ("PFII") in May 2015. Mr. Bischoff's statement on "Agenda Item 9(a): Coordination Among the Three UN Mechanisms Pertaining to Indigenous Peoples," delivered on May 16, 2016, is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7278>.

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The United States welcomes this opportunity to discuss ways in which the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur on the Rights of Indigenous Peoples can better work together in order to protect indigenous peoples' rights and improve their livelihoods, and better meet the ends of the UN Declaration on the Rights of Indigenous Peoples. As we stressed in advance of and during the expert workshop in Geneva last month, the activities of EMRIP, the Permanent Forum, and the Special Rapporteur must be considered together, so that the work of all three bodies may better complement one another and to avoid unnecessary duplication of efforts.

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The workshop revealed substantial interest in three reform concepts:

*First*, the expert workshop reaffirmed the determination of the World Conference that EMRIP should be charged with assisting states to achieve the ends of the Declaration. In this regard, the workshop revealed substantial support for the idea that EMRIP's work could include the provision of much-needed technical support to states aimed at achieving the ends of the

Declaration; follow-up on communications sent to the overburdened Special Rapporteur; and follow-up on recommendations made by the Special Rapporteur to states.

*Second*, the workshop prompted a great deal of discussion on ways to have the Special Rapporteur and EMRIP mutually reinforce each other's work and avoid duplication. We should continue to explore how the respective mandates could formalize and enhance the close coordination and cooperation between the two mechanisms. We could, for example, consider whether the Special Rapporteur should have some status in EMRIP—including whether the Special Rapporteur should serve as a member of EMRIP while retaining her own separate mandate.

*Third*, there was general support for the idea that EMRIP should be able to decide for itself the topics of its thematic studies. EMRIP could continue to have the ability to conduct thematic studies, on topics of its own choosing as well as topics suggested by the Human Rights Council, but whether it actually conducts a thematic study would be at its discretion.

We are pleased with the diligent and thoughtful work of the current and former Special Rapporteurs. Nevertheless, they are the first to note that one person with limited staff resources cannot fully address the extent of the mandate with which he or she is tasked. Our hope is that by strengthening EMRIP and formalizing its relationship with the Special Rapporteur, the Special Rapporteur can be more effective.

In closing, there is a great deal of work to do in Geneva and New York to build upon the progress already achieved, but we should take full advantage of this rare opportunity. We look forward to strengthening the mandates of EMRIP and the Special Rapporteur, and to continuing to support the work of the Permanent Forum, thereby strengthening the UN indigenous system as a whole.

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At the 32<sup>nd</sup> session of the HRC, Ambassador Harper delivered a statement on June 23, 2016 on behalf of the United States on progress in the review of EMRIP. His statement is excerpted below and available at

<https://geneva.usmission.gov/2016/06/23/item-5-expert-mechanism-on-the-rights-of-indigenous-peoples-emrip-review/>

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The outcome document from the World Conference on Indigenous Peoples calls for improving UN indigenous mechanisms to achieve the ends of the UN Declaration on the Rights of Indigenous Peoples. The United States strongly supports this goal.

We thank Mexico and Guatemala for their leadership on the reform processes related to the Expert Mechanism on the Rights of Indigenous Peoples, and the Office of the High Commissioner for engaging with stakeholders and hosting the highly productive expert workshop in April. We welcome OHCHR's report, which outlines reforms proposed by States, experts, indigenous peoples, and other civil society actors.

The report identifies several areas of convergence from which we can draw in the coming months.

The United States supports many of the proposals in the report, and would like to comment on three of them.

First, to enhance a coherent, system-wide approach to indigenous rights, as called for in the World Conference outcome document, we believe it is crucial to strengthen the relationship between EMRIP and the Special Rapporteur so that they mutually reinforce each other's work. This could include having the Special Rapporteur serve as a full or *ex officio* member of EMRIP while maintaining his or her own mandate. It could also include establishing a referral system by which EMRIP conducts follow-up on communications sent to the Special Rapporteur.

Second, we support the proposal that EMRIP be able to engage in country-specific situations. EMRIP could perform follow-up on engagement by the Special Rapporteur, and could play a role in facilitating dialogue between states and indigenous peoples.

Third, we see merit in equipping EMRIP to provide technical assistance to states. This could include advice on implementation of recommendations from the Special Rapporteur, the Permanent Forum on Indigenous Issues, or another UN body or mechanism, or at the request of the country concerned.

The United States looks forward to continuing a detailed, substantive dialogue on EMRIP reform at the July EMRIP session.

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At the annual meeting of the EMRIP on July 11, 2016, Anna Naimark of the U.S. Mission to the UN in Geneva delivered a statement on EMRIP reform. Her statement is excerpted below and available at <https://geneva.usmission.gov/2016/07/11/item-3-expert-mechanism-on-the-rights-of-indigenous-peoples-emrip-review/>

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The OHCHR report outlines reforms proposed by states, experts, indigenous peoples, and other civil society actors, and helpfully identifies several areas of emerging convergence.

The United States supports the vast majority of the proposals summarized in the report's Annex, and would like to highlight three that we regard as particularly important.

First, to encourage a coherent, system-wide approach to the protection and advancement of the rights of indigenous peoples, the relationship between EMRIP and the Special Rapporteur should be institutionalized so that they mutually reinforce each other's work and avoid duplication. We should continue to explore how the respective mandates can be modified to formalize and enhance close coordination and cooperation between the two mechanisms, including whether the Special Rapporteur should serve as a full or *ex officio* member of EMRIP while maintaining his or her own mandate. Reform of the relationship could include establishing a referral system between the Special Rapporteur and EMRIP.

For example EMRIP could conduct follow-up on communications sent to the overburdened Special Rapporteur and on recommendations made by the Special Rapporteur to states.

Second, EMRIP should be able to engage on country-specific situations in furtherance of the outcome document's commitment to help states better achieve the Declaration's end, a role for which indigenous representatives have repeatedly expressed support. To this end, EMRIP

should be equipped to provide much-needed technical support to states, on a voluntary basis. This could include advising a particular state, at its request, on how it can implement recommendations from the Special Rapporteur, the Permanent Forum on Indigenous Issues, or another UN body or mechanism.

EMRIP could also play a role in facilitating dialogue between states and indigenous peoples.

Third, EMRIP should have the ability to decide on its own working methods and to select the topics of its thematic studies. While the Human Rights Council could still suggest topics, EMRIP should have the discretion to determine what studies it conducts.

EMRIP's mandate should be designed so that EMRIP's work product consists mainly of concise and focused advice. The United States does not recommend that a revitalized EMRIP prepare lengthy, general reports on achieving the Declaration's goals. Similar to what has occurred in other global and regional human rights bodies, issuing long reports would impose burdens that EMRIP could not manage with its limited resources.

EMRIP's membership qualifications should be guided by what its functions are, but should feature members who are experts in international human rights law and the rights of indigenous peoples, and also members with expertise in providing technical advice at the country level. EMRIP's membership should reflect gender and geographical balance by drawing members from the seven socio-cultural groupings used by the Permanent Forum. We also support an increase in EMRIP's support staff.

We do not recommend turning EMRIP into an entity resembling a treaty body. The treaty bodies continue to face significant backlogs and delays. In redefining EMRIP's functions, we want to avoid creating additional reporting requirements on member states, with the accompanying resource burden that would impose on EMRIP.

EMRIP's mandate should neither state nor imply that EMRIP has the power to issue binding recommendations. While EMRIP will inevitably make reference to provisions in the Declaration in the course of providing specific guidance on real-life situations, EMRIP should not issue general comments interpreting provisions of the Declaration. Nor should it adjudicate individual complaints by persons or groups against a state.

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From July to September 2016, the U.S. Mission to the UN in Geneva negotiated the text of a draft EMRIP reform resolution with other delegations in Geneva. Mexico and Guatemala sponsored the final resolution on EMRIP reform at HRC 33. Ambassador Harper delivered the general comment for the United States at the EMRIP consultations at HRC 33 on September 15, 2016. His statement is excerpted below and available at

<https://geneva.usmission.gov/2016/09/15/ambassador-harper-emrip-mandate-resolution-a-high-priority-at-hrc33/>.

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The EMRIP mandate resolution is one of our highest priorities this session. We thank Mexico and Guatemala for their leadership on this issue and for putting forward a strong text. We intend to co-sponsor this resolution.

I will outline four core elements we hope to see in the new mandate:

- There needs to be a coherent, system-wide approach to the protection and advancement of the rights of indigenous peoples. As such, the relationship between EMRIP and the Special Rapporteur should be institutionalized so that they mutually reinforce each other's work and avoid duplication.
- EMRIP should be empowered to seek and receive information from all relevant sources on situations affecting the rights of indigenous peoples, making recommendations thereon, and engaging with states and indigenous peoples at the country level to find solutions on those situations affecting the rights of indigenous peoples.
- EMRIP should be empowered to provide much-needed technical cooperation to states in furtherance of the Outcome Document's commitment to help states better achieve the ends of the Declaration. EMRIP should also be more responsive to the realities on the ground.
- EMRIP's members should represent the seven socio-cultural groupings used by the Permanent Forum rather than the five regional groups that reflect member states' political alignments. We encourage gender balance.

We recognize there will be a PBI, which will provide the necessary resources for EMRIP to execute its enhanced mandate. We support these near-term increases because we believe that over the long-term there will be cost savings as the current redundancies among EMRIP, the Permanent Forum and the Special Rapporteur will be eliminated. We hope other states will share this view.

It is not everyday that the Council is granted an opportunity to revise and enhance the mandate of a UN body. We should take full advantage of the General Assembly's invitation and strive for meaningful reforms to EMRIP to empower the Mechanism to assist states to monitor, evaluate, and ultimately, to achieve the ends of the Declaration on the Rights of Indigenous Peoples.

We look forward to engaging with states, indigenous peoples, and other stakeholders with the aim to significantly strengthen the Expert Mechanism's existing mandate. My team will convey the specific edits we have to further strengthen the text.

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At the "international issues" breakout session of the annual White House Tribal Nations Conference on September 26, 2016, the United States discussed with U.S. tribal representatives several topics of interest, including the U.S. priorities achieved in the EMRIP reform resolution, which by that date had already been tabled in an almost final form. The resolution on EMRIP reform was ultimately adopted by the HRC on September 30, 2016. U.N. Doc A/HRC/RES/33/25. As discussed by Elizabeth Wilcox of the International Organizations Bureau of the Department of State during the September 26 breakout session, most of the top priorities for the United States were reflected in the operative paragraphs ("OP") of the resolution, including:

- The resolution explicitly cites EMRIP's overarching task as helping member states achieve the Declaration's ends through promoting, protecting, and fulfilling indigenous peoples' rights.
- EMRIP will report annually to the HRC on challenges as well as best practices in implementing the Declaration. EMRIP can also facilitate dialogue between states and indigenous peoples "where specific challenges exist."
- EMRIP will provide technical advice to states and indigenous peoples upon request, including on legislation and policies and on follow-up to other UN bodies.
- EMRIP will be able to seek and receive information from all relevant sources in order to fulfill its mandate.
- The resolution urges enhanced cooperation between EMRIP and the Special Rapporteur.
- There will be EMRIP members from the seven UN indigenous regions, an increase from the five current members. They should be much more representative of the world's indigenous peoples than the standard five UN geopolitical regions. The current annual five-day meeting is augmented by five additional days of meetings at another time of the year. Terms will be staggered to prevent a mass exodus of expertise. And EMRIP will be able to determine its own methods of work. These elements will give EMRIP increased autonomy, resources, and capacity.

Ms. Wilcox noted, however, the United States' disappointment that the resolution lacked a clearer role for EMRIP in calling the world's attention to abuses and other emerging situations as they happen. As Ms. Wilcox explained, despite the significant efforts of our negotiators, consensus on explicit language to this effect was elusive. She noted further that on the whole, the revamped EMRIP would be a much more robust body than it had been, with far greater powers to respond effectively to indigenous peoples' concerns. This outcome would have been unlikely without strong U.S. engagement, armed with ideas shared by indigenous representatives from the United States and elsewhere.

## **2. Enhanced Participation**

In the 2014 World Conference on Indigenous Peoples Outcome Document, States also committed to look into "ways to enable the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them ... " during the UN General Assembly's 70th Session. During the 70th Session of UN General Assembly, in the annual resolution on rights of indigenous peoples, which was co-sponsored by the United States, the President of the General Assembly ("PGA") was directed to conduct consultations with member states and indigenous peoples on measures needed to enable the participation of indigenous

peoples' institutions in relevant UN bodies, and to prepare a compilation of views that would eventually form the basis for a draft text to be finalized and adopted during the 71st Session of the UN General Assembly. U.N. Doc. A/RES/70/232. See *Digest 2015* at 226.

In accordance with Resolution 70/232, the PGA set up a process for a dialogue on enhanced participation, described at

<https://www.un.org/development/desa/indigenouspeoples/participation-of-indigenous-peoples-at-the-united-nations.html>

On February 26, 2016, the PGA appointed four advisers: the permanent representatives to the UN from Finland and Ghana and two indigenous academics, Dr. Claire Charters and Professor James Anaya. The U.S. State Department held a telephonic conversation with U.S. tribal representatives about enhanced participation and other topics on February 25, 2016. From March 8 to April 8, 2016, the advisers conducted an "electronic consultation" with states and indigenous peoples about elements for enhanced participation. The United States submitted detailed proposals, including a markup of the PFII participation procedures that could be used as a basis for general enhanced participation procedures. The U.S. submission to the Indigenous Peoples Advisers is excerpted below.

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(a) Procedures and modalities that will make the participation of indigenous peoples' representatives meaningful and effective

The United States recommends initially considering new participation procedures for selected UN bodies rather than the entire UN. These could include the Permanent Forum on Indigenous Issues (PFII), Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), ECOSOC and its subsidiary bodies, and the Human Rights Council (HRC). These entities work on topics of particular importance to indigenous peoples, or topics that tend to have a greater impact on the rights of indigenous peoples. These topics include, for example, economic and social development, education, health, human rights, culture, women, youth, the environment, and conservation.

The revised procedures could build upon those that ECOSOC established for participation in the PFII. It is important to recall that representatives of indigenous peoples, including tribal governments, are not non-governmental organizations (NGOs) as that term is traditionally used in the UN. ECOSOC recognized that fact in establishing procedures for the PFII that permit the participation of indigenous institutions, communities, and other non-NGO entities. According to ECOSOC Resolution 2000/22 that established the PFII, the participation of "non-NGO" organizations of indigenous peoples was based on procedures that were used for the Working Group on Indigenous Populations (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights. Member states approved them through ECOSOC Resolution 2000/22, and they have enjoyed widespread support among indigenous peoples. The United States herein proposes certain updates to the procedures, with the aim of making them consistent with the suggestions laid out in the other sections of this U.S. response (Tab 1).

The new procedures would be aimed at enabling indigenous representatives to attend selected UN sessions; submit written input; and make oral statements in accordance with rules of procedure.

In refining the new participation procedures, we should avoid changes that would make UN sessions cumbersome, inefficient, or cost-prohibitive, including by adding unwieldy numbers of participants or cumbersome procedures to UN meetings. If the new participation procedures are found to meaningfully improve indigenous peoples' participation in selected meetings, consideration could be given to expanding them to other UN bodies and meetings.

(b) Criteria for determining the eligibility of indigenous peoples' representatives for accreditation as such

As to which indigenous entities would operate under these new procedures, the U.S. government supports enhanced participation for representatives of its federally recognized Indian tribes, which have a nation-to-nation relationship with the United States. We also favor inclusion under the new arrangements of other U.S. entities that can demonstrate that they should be allowed to participate in the UN system as indigenous peoples' representatives, as appropriate. We support applying this principle to the representatives of indigenous entities from other countries as well. We recognize that some member states have different systems in place or may have no formal domestic process for recognition of indigenous peoples; as such, the selection procedure would need to be able to evaluate applications from entities beyond those recognized under a country's established domestic process.

(c) Nature and membership of a body to determine the eligibility of indigenous peoples' representatives for accreditation

To determine eligibility, a hybrid committee could be created consisting of member state representatives and indigenous representatives, the respective numbers of which would need to be determined. The PFII Secretariat may be helpful in supporting the selection process. Its involvement with the PFII accreditation process, working with the UN Division of Social Policy and Development's Civil Society and Outreach Unit, gives it expertise that should prove useful in vetting applications. It would need to be determined whether the PFII Secretariat would require additional resources to assist with this function.

(d) Details of the process, including the information required to be submitted to obtain accreditation as an indigenous peoples' representative.

The application process could consist of a questionnaire requesting pertinent information from an indigenous entity. We envision more selective criteria for the new participation procedures than those currently used to determine PFII participation. The criteria would not be so broad as to accommodate those who self-identify as indigenous persons without satisfying additional factors, such as a shared history, language, or culture with a group. Questions could include:

-- What is the relationship between the indigenous representative and the indigenous people? Is the indigenous representative an elected or traditional leader of an indigenous people? Is the indigenous representative authorized by the indigenous people to speak at the UN on its behalf? Has the indigenous people established a government-to-government relationship with the central government or a sub-national government in the state? Such information would indicate whether the person has a constituency that accepts him or her as a leader.

-- What are the membership size, governance structure, and programs and activities of the indigenous people?

-- Does the indigenous people have a shared history, language, or culture?

TAB 1 – Draft Revised Participation Procedures  
 PARTICIPATION OF ORGANIZATIONS AND INSTITUTIONS OF INDIGENOUS  
 PEOPLES IN THE OPEN-ENDED INTER-SESSIONAL WORKING GROUP [NAME OF  
 BODY/BODIES]

*Notes: (1) By virtue of ECOSOC resolution 2000/22 which established the Permanent Forum on Indigenous Issues, the PFII is to use the participation procedures “which have been applied in the Working Group on Indigenous Populations of the Subcommission on the Promotion and Protection of Human Rights.” (The WGIP has since been discontinued.) This is a mark-up of those procedures, updated and revised as appropriate to reflect both current practice (in both the PFII and EMRIP) and the enhanced participation objective reflected in paragraph 2 below. (2) The phrase “organizations and institutions” of indigenous peoples is used throughout the 2012 Secretary-General report referenced in para. 2 below and in GA resolution 66/296 on the organization of the World Conference, and the term “institutions” is used in the World Conference outcome document.*

1. The procedures contained in the present annex are adopted solely to authorize the participation of organizations and institutions of indigenous peoples not in consultative status with the Economic and Social Council.

2. These procedures are consistent with the procedures set forth in resolution 1296 (XLIV) of 23 May 1968 1996/31 of 25 July 1996 of the Economic and Social Council and do not constitute a precedent in any other situation. They are also consistent with the conclusion in the Secretary-General’s report of 2 July 2012 (A/HRC/21/24) with respect to the further enhancement of procedures to enable indigenous peoples’ participation in all relevant work of the United Nations, as supported by resolution 69/2 of 22 September 2014 of the General Assembly setting forth the outcome of the World Conference on Indigenous Peoples. These procedures shall apply only to the Working Group created by Council resolution ... and they shall remain in effect for the duration of the Working Group [name of body/bodies].

*Note: The referenced SG report is entitled “Ways and means of promoting participation at the United Nations of indigenous peoples’ representatives on issues affecting them.”*

3. Organizations and institutions of indigenous peoples not in consultative status wishing to participate in the Working Group [name of body/bodies] may apply to the Coordinator of the International Decade of the World’s Indigenous People Secretariat of the [name of decision-making entity]. For the purposes of these procedures, institutions may include indigenous communities, nations and other indigenous bodies.

*Note: The objective of this provision is to broaden the range of indigenous entities that, expressly, may participate in UN bodies – partly by memorializing current practice. The terms “communities and nations” come from para. 9 of the UN Declaration on the Rights of Indigenous Peoples (DRIP). The phrase “indigenous bodies” may be deemed to embrace “representative bodies” as used in the SG Report (para. 62) and “indigenous peoples’ governance bodies...including traditional indigenous parliaments, assemblies and councils” as used in the participation proposal submitted to the Human Rights Council by the Expert Mechanism on the Rights of Indigenous Peoples (A/HRC/18/43), as cited in the SG Report (paras. 3, 4). The phrase “indigenous bodies” would also cover other terms used by indigenous participants in the PFII to describe themselves, such as “tribes” and “pueblos”.*

4. Such applications Applications for participation in the [name of body/bodies] must include the following information concerning the subject organization concerned or institution:

- (a) The name of the organization or institution, headquarters or seat its location, address and contact person information for the organization its representative(s);
- (b) A description of the organization or institution, including who it represents and its The aims and purposes of the organization (these should be in conformity with the spirit, purposes, and principles of the Charter of the United Nations);
- (c) Information on the programmes and activities of the organization or institution and the country or countries in which they are carried out or to which they apply and its governance structure;
- (d) A description of the membership of the organization or institution, indicating the total number of members and whether they have a shared history, language, or culture;
- (e) Information on whether the organization or institution has a relationship with the central government or a subnational government of a State;
- (f) Information on the selection procedure used by the organization or institution to choose its representative(s) to the [name of body/bodies], including whether a representative is an elected or traditional leader and has been authorized to speak on its behalf.

5. Upon receipt of applications, the Coordinator of the International Decade Secretariat of the [name of decision-making entity] should may consult with any State concerned pursuant to Article 71 of the Charter of the United Nations and paragraph 9 of resolution 1296 (XLIV) 1996/31 of the Economic and Social Council. The Coordinator Secretariat should promptly forward all applications and information received to the Council Committee on Non-Governmental Organizations [name of decision-making entity] for its decision.

6. Authorization to participate in the [name of body/bodies] shall remain valid for the duration of the Working Group subject to the registration process and the relevant provisions of part VIII of resolution 1296 (XLIV) 1996/31 of the Economic and Social Council.

7. The activities of organizations and institutions of indigenous peoples authorized to participate in the Working Group [name of body/bodies] pursuant to these procedures shall be governed by rules 75 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council.

8. Organizations and institutions of indigenous people authorized to participate in the Working Group [name of body/bodies] will have the opportunity to address the Working Group [name of body/bodies], consistent with the relevant provisions of paragraphs 31 38 and 33 40 of Council resolution 1296 (XLIV) 1996/31, and are encouraged to organize themselves into constituencies for this purpose.

9. Organizations and institutions of indigenous people may make written presentations which, however, will not be issued as official documents.

10. States having indigenous populations should take effective measures to bring the invitation to participate and these procedures to the attention of organizations and institutions of indigenous peoples potentially interested in contributing to and participating in the Working Group [name of bodies/bodies].

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On April 27, 2016, the advisers circulated a first draft of a compilation of views, to be discussed during two consultations held during the 15th annual session of PFI in New York in May 2016. On May 11, 2016, the advisers held the first of these two

consultations during PFII. The United States made interventions on the major topics identified in the April 2016 compilation and met bilaterally with the advisers. Excerpts follow from the U.S. comments on the advisers' compilation of views, delivered by Linda Lum of the International Organizations Bureau of the Department of State, and James Bischoff of the State Department's Office of the Legal Adviser.

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- As the compilation indicates, there is already a great deal of convergence of views on the topic of enhanced participation. We will work collaboratively and flexibly to help refine these discussions, with the goal of adopting a resolution by the end of this year.
- The United States supports most of the statements in Section 3(A) on converging views.
- There is a suggestion that self-identification is an important factor in determining who enhanced participation should pertain to. Finding the right balance between self-identification and state recognition is one of the main challenges to be sorted out in these discussions. We think that the selection criteria should not be so broad as to accommodate all who self-identify as indigenous peoples. Applicants should be required to meet other standards, which could include a shared history, language, or culture.
- The point is also made that existing procedures which enable indigenous peoples' participation, including in the Permanent Forum on Indigenous Issues, should not be undermined by efforts to enhance indigenous participation in the broader UN system.
- We agree with that in principle. In fact we proposed that the participation procedures approved for the Permanent Forum by member states—and which have enjoyed widespread support among indigenous peoples—could form the basis for a new set of procedures that would simply build upon and refine what is already there. This would be in order to address current realities and issues, so as to better serve the goal of broadened and more meaningful participation of indigenous peoples in the work of the UN.
- We also agree that a new category for participation is needed, since indigenous peoples are not synonymous with non-governmental organizations.

Section 3(B): Suggested Forms of Participation

- The United States agrees to some extent with some of the suggestions in this section, and our suggestions are reflected in three bullet points on page 5. We would like the new participation procedures to allow indigenous representatives to attend, speak, and submit written input at UN meetings, in accordance with rules of procedure. We should avoid changes that would lead to cumbersome and inefficient UN meetings, including excessively large number of participants. We think that if the new procedures are shown to work well in selected UN bodies—such as the Permanent Forum, EMRIP, ECOSOC and its subsidiary bodies, and the HRC—we can consider expanding them to other bodies.
- We would caution that indigenous groups' ability to make oral statements should not preempt Member States' speaking role, and reasonable parameters will need to be found to avoid adding unwieldy numbers of speakers to already lengthy speaking lists. We do not support the suggestion that limitations on the length of oral statements should be relaxed

for indigenous peoples, or that they should have priority in all instances over representatives of non-governmental organizations in speaking order or seating.

- We also do not envision inclusion of indigenous peoples during consultations on draft resolutions as appropriate. Consultation with groups of representatives of indigenous peoples, however, could be an appropriate mechanism.
- We note in this section and elsewhere in the compilation reference to a “separate observer status” or “permanent observer status” for indigenous peoples. Aside from the fact that those terms—particularly the latter—can have different meanings in the UN system, we believe it is more accurate to view the goal here as a separate observer “category” which will be governed by a separate set of participation procedures.

#### Section 3(C): Relevant UN Venues for Enhanced Participation

- The proposal to consider new participation procedures for selected UN bodies rather than the entire UN system—at least initially—is from the United States. We suggest starting with ECOSOC, the ECOSOC subsidiary bodies (including the Commission on the Status of Women, Commission for Social Development, and Commission for Population and Development), and the Human Rights Council, in addition to the Permanent Forum and EMRIP.
- The operative words here in this compilation are “initially consider.” There are advantages to beginning with a selected number of entities and being able to demonstrate progress and what is workable.
- First, it will likely be difficult to obtain consensus at this stage on introducing new procedures throughout the UN. Because this is uncharted territory, there would likely be concerns or outright opposition to making changes to the entire UN system without testing them first. By contrast, considering new participation procedures for selected bodies would allow for studying their implementation and assessing whether any adjustments to the procedures are needed.
- Second, the UN entities we name also have governing structures / rules of procedure that can be revised relatively easily to accommodate enhanced participation by indigenous peoples. In our written submission to the online consultation, as noted earlier, we suggest updating the PFII rules of procedure for this purpose, and we included possible line-by-line edits.
- Third, if the procedures are found to significantly improve indigenous peoples’ engagement without negative consequences, we could then reflect on whether they could be applied to other UN bodies and meetings, including the General Assembly and its main Committees.
- We agree there could be greater efforts to inform indigenous peoples about existing possibilities to participate in the UN.

#### Section 3(D): Procedure to Select Indigenous Peoples

- We agree that a General Assembly resolution can be a proper vehicle for putting an enhanced participation regime in place. Such a resolution would presumably address all of the issues—participation procedures, an oversight body, and so on—that are the subject of this consultation process.

#### Section 3(E): Body to Oversee Accreditation

- The suggestion about the hybrid committee of member state representatives and indigenous representatives (toward the end of page 5) comes from the United States. This is consistent with the proposal (toward the top of page 5) to establish an independent

body, for example a Working Group. However, further discussion is required on whether the most feasible parent of such a hybrid committee or Working Group would be the General Assembly or ECOSOC.

- We think it would be useful to have the two key stakeholders involved in decisions on the applications. In addition, if only indigenous representatives made decisions on applications from indigenous peoples, there could be concerns that the selection process would not be impartial.
- We can give further thought as to the exact number of member state and indigenous representatives needed. One consideration is that there would need to be enough people to review the number of applications coming in.
- Further thought should be given to the notion of geographic representation mentioned in the compilation, in light of the disparities in numbers of indigenous peoples, both recognized and unrecognized, in various parts of the world. It may be more representative for additional weight to be given to those areas which are home to the greatest numbers of indigenous peoples, while not ignoring other regions.
- The proposal to select representatives for one year from among the delegates to the PFII seems overly restrictive.

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On May 16, 2016, the advisers released an updated compilation. On May 18, 2016, the advisers held the second of two consultations at PFII. The United States again made interventions on the major topics. Excerpts follow from Ms. Lum’s remarks on behalf of the United States, commenting on the updated compilation.

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- ... one item that we did not mention in our previous interventions, but which may be useful, is that the principles enumerated in Article 46 of the UN Declaration on the Rights of Indigenous Peoples should be borne in mind in the process of assessing applications, in particular Article 46, paragraph 1.
- We also believe it would be useful to base any provisions related to geographic representation on the seven indigenous socio-cultural regions rather than on the usual five UN regions. Again, there is ample precedent for this model in the work of the Permanent Forum.
- Shifting gears a bit, we would caution against reliance upon another existing UN mechanism mentioned that we think has less potential than the current Permanent Forum participation procedures. That is General Assembly decision 49/426 of 1994 that concerns so-called “permanent” observer status in the General Assembly for “States and [for] those intergovernmental organizations whose activities cover matters of interest to the Assembly.”
- One commenter last Wednesday noted that the granting of observer status in the General Assembly is not addressed in the UN Charter, and that participation in the General

Assembly as an observer has developed through practice. Both these statements are accurate.

- The argument was made that GA decision 49/426 could be interpreted broadly to not be limited to States and intergovernmental organizations as such, thus permitting selected organizations and institutions of indigenous peoples to become permanent observers through that route. The granting of observer status to the Parliamentary Assembly of the Mediterranean in 2009 was cited as an example of such flexibility.
- That is actually not the best example, as that organization is comprised of Member States and is officially listed by the United Nations as an intergovernmental organization. A better example of flexibility is another application that was also approved in 2009, from the International Olympic Committee (IOC).
- The fact is that the IOC is just one of five entities that are considered to be entities not strictly covered by GA decision 49/426. The International Committee of the Red Cross is another.
- It is also a fact that UN practice on this issue has become less flexible. The granting of observer status for the International Olympic Committee has been the last one of that nature, and is now regarded by many as an anomaly done for political reasons.
- In this regard, the Advisers' second compilation notes that another GA document—GA resolution 54/195 of 1999—provides that applications for observer status are to be considered by the GA's Sixth (Legal) Committee before they go to the GA plenary for approval.
- We note that the Sixth Committee operates by consensus, and there are certain States in particular that insist that the GA criteria be interpreted very strictly. They ask that an entity's status as a true intergovernmental organization—for example, one with a treaty basis and international juridical personality—be clearly demonstrated. As a result, several applications for observer status have been blocked in recent years.
- The bottom line is that attempting to have indigenous organizations and institutions seek observer status through this avenue is not a promising option. The United States thinks it is much more productive to work toward a new category of observers that is tailored to indigenous peoples.

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On May 27, 2016, the advisers released a further updated compilation. As of this compilation, the conversation began to coalesce around four main topics: (1) venues of participation; (2) modalities of participation; (3) mechanism for accreditation of indigenous representative institutions; and (4) criteria for accreditation. The advisers thereafter released a "discussion paper" to supplement the compilation. Attorneys with the U.S. delegation to the UN in New York provided comments and some proposals for draft resolution language.

On June 16, 2016, the Department held a second telephonic consultation with U.S. tribal representatives. On June 30, 2016, the advisers convened another consultation at the UN. The United States made oral interventions. At that consultation, India proposed that the resolution on enhanced participation incorporate a definition of

“indigenous peoples” drawn from Article 1(b) of ILO Convention 169 to the exclusion of Article 1(a) of that Convention. The United States expressed concerns about this proposal.

On July 8, 2016, the advisers released an updated compilation incorporating the views shared at the various consultations held from March to June 2016. This compilation contained an annex of “Potential Elements for Discussion During the 71st Session of the General Assembly.” Responding to the request in Resolution 70/232, the PGA formally released this compilation as UN Document A/70/990 dated July 25, 2016.

On September 26, 2016, at the “international issues” breakout session of the annual White House Tribal Nations Conference, the United States shared with U.S. tribal representatives views on enhanced participation along the lines of what the United States had discussed during the May 2016 discussions held during the Permanent Forum annual meeting.

Also in September, the PGA reappointed the four advisers to conduct consultations during the 71st Session of UN General Assembly, running until August 2017. On October 3, 2016, the advisers held an “informal launch briefing” at the UN. On October 13, 2016, the advisers circulated an agenda for consultations during the 71st Session, with a view to finalizing and adopting a resolution in the summer of 2017.

On December 14–15, 2016, the advisers held further consultations in New York with States and indigenous peoples, and met bilaterally with the United States. The United States delivered interventions on the four main topics (venues of participation; modalities of participation; mechanism for accreditation of indigenous representative institutions; and criteria for accreditation). Among other things, the United States discussed in its intervention on “selection criteria” some of the challenges presented by attempting to prescriptively define “indigenous.” Excerpts follow from the U.S. interventions on the selection mechanism and selection criteria, delivered by Mr. Bischoff.

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Professor Anaya’s questions are an excellent way to frame this issue so I’ll organize our intervention following that structure. On Prof. Anaya’s first question, whether this would be a new body, the United States favors establishing a new body composed of member state and indigenous representatives. A new body is needed that is separate from the NGO Committee. We do not recommend using an existing body to perform this function, such as the Permanent Forum or EMRIP, because they have multiple and varied other responsibilities—especially EMRIP, which now has many new duties. Further consideration is needed on whether this body is best placed in the General Assembly or ECOSOC.

On Prof. Anaya’s second question, the composition of the new body, we see advantages in having the two key stakeholders—states and indigenous peoples—making decisions on the applications. If only indigenous representatives made decisions on applications from indigenous peoples, some might take the view that the selection process would not be impartial. The indigenous representatives should come from all seven sociocultural regions. As for the state representatives, the seven-region model may also work well; we should give that possibility

further consideration as these discussions continue to evolve. There should, of course, be gender balance and among the membership should be persons who are experts in indigenous issues and the rights of indigenous peoples.

On how selection of the members of the body would be chosen, for the indigenous representatives, we see merit in Prof. Anaya's analogy to how Permanent Forum members are chosen. On how State members would be chosen, we'll give that more thought and hopefully can provide developed views at the January consultation.

On how many member state and indigenous representatives are needed, it's difficult at this stage to give an exact number, but we need enough to review the number of applications that are submitted. The size may therefore need to be adjusted over time depending on the ebb and flow of applications.

On Prof. Anaya's fourth question—what the application process looks like—we think a written application, with supporting documentation with the possibility of filling out a pre-established checklist or questionnaire, would work. In principle, we are skeptical about the prospect of UNGA or another body being able to second-guess determinations of the selection body, but we'll also give that more thought. Deliberations should probably be private to allow for candor. Thought should be given to the body providing its reasoning in writing after it takes a decision, so the manner in which it applies the criteria can be seen by the public and aid future application of the criteria.

We do not support having states use a non-objection procedure in the General Assembly to decide on accreditation. A non-objection procedure would have the potential of excluding indigenous institutions that states do not recognize, or whose views do not coincide with those of specific states. It would politicize the process and undermine its transparency.

Finally, while the body should have equal numbers of mechanism members from each region, the number of indigenous institutions ultimately accredited may vary from region to region. This is a function of population, numbers of indigenous peoples and their distribution, and how many actually apply for enhanced participation.

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[On selection criteria] [i]t's again useful to use Prof. Anaya's two questions as a way to organize our intervention.

As to the first question, in past consultations, the United States and many others recognized that enhanced participation should focus on indigenous peoples' institutions. Our interpretation of UN terminology is that the term "indigenous institutions" includes—but is not necessarily limited to—indigenous governments.

Like Prof. Anaya, we are curious to learn more about how indigenous peoples are organized in other parts of the world. Our experience is, naturally, principally with U.S. Native American tribes, which as has been explained several times by our tribal colleagues, have a government-to-government relationship with the federal government under the U.S. Constitution.

The criteria to be met should be flexible, in order to accommodate the diverse indigenous peoples' organizational structures existing throughout the world today.

As to Prof. Anaya's second question, we agree that self-identification is an indispensable criterion, but isn't enough, on its own, to qualify the applicant for enhanced participation status.

State recognition should also be an important criterion, but cannot be an absolute requirement. In some cases, state recognition may be unworkable, for example, with respect to

indigenous peoples in countries that have no formal domestic recognition process in place for a tribe or analogous entity. Also, we think there are circumstances where an indigenous people not recognized by a state can nevertheless demonstrate that it can usefully contribute to UN deliberations. So for indigenous peoples who live in states where state recognition does exist, recognition or the absence thereof should be given appropriate weight in determining enhanced participation privileges.

As noted, applicants should be required to present additional evidence beyond self-identification and state recognition in making the case for enhanced participation benefits. Relevant factors related to whether an applicant qualifies include those already discussed and listed in the compilation text, such as ancestral connections with lands, territories, or resources; a shared history, indigenous language, or indigenous culture; and self-governance.

We also think that indigenous institutions should have the authority to designate their own representatives through their own procedures.

It is, of course, correct that there is no single or universal definition of “indigenous” under international law.

We should recall that the parties negotiating the Declaration on the Rights of Indigenous Peoples could not come to consensus on a definition of “indigenous” despite over 15 years of discussions.

Yet despite the lack of a universal definition, we think elements of the criteria could usefully be drawn from ILO Convention No. 169’s criteria. Those are longstanding—indeed, dating from ILO Convention No. 107 in the 1950s—and have inspired many non-binding sets of guidelines.

But two important caveats are in order.

First, it simply cannot be that at the end of this process, only some of the world’s indigenous peoples have the opportunity for enhanced status. We think it is imperative that the criteria from the second prong of Convention No. 169’s definition not be used as inspiration for the criteria applied by the accrediting body to the exclusion of the critical first prong of Convention No. 169’s definition. Both prongs have been part of the formulation for decades, and attempts to eliminate the first prong in the negotiation of Convention No. 169 were rightly rejected at that time.

Is “indigenesness” a phenomenon that exists solely in certain parts of the world? Does it apply only to the Americas, to the Arctic, to Oceania? Surely not, and the experience of the UN, as related in reports of the Special Rapporteur on the Rights of Indigenous Peoples, the Permanent Forum, and the Expert Mechanism, is that indigenous peoples exist across the world.

The second caveat: at the same time, it should be clear that the body does not have the authority to pass judgment on who is indigenous or who is a people for purposes other than enhanced participation status. Language in the resolution incorporating this limitation may help eliminate some of the concerns some states have expressed today.

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### **3. American Declaration on the Rights of Indigenous Peoples**

On June 15, 2016, the General Assembly of the Organization of American States (“OAS”) adopted the American Declaration on the Rights of Indigenous Peoples at its 46<sup>th</sup> regular session. AG/doc.5557/16. The United States stopped actively participating in the

process of negotiating the text in 2007 due to a number of factors, including a deadlock in the negotiations on several key issues. U.S. views on the American Declaration appear in footnote 1 to the text, below.

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The United States remains committed to addressing the urgent issues of concern to indigenous peoples across the Americas, including combating societal discrimination against indigenous peoples and individuals, increasing indigenous participation in national political processes, addressing lack of infrastructure and poor living conditions in indigenous areas, combating violence against indigenous women and girls, promoting the repatriation of ancestral remains and ceremonial objects, and collaborating on issues of land rights and self-governance, among many other issues. The multitude of ongoing initiatives with respect to these topics provide avenues for addressing some of the consequences of past actions. The United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding and therefore does not create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law.

The United States reiterates its longstanding belief that implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") should remain the focus of the OAS and its Member States. OAS Member States joined other UN Member States in renewing their political commitments with respect to the UN Declaration at the World Conference on Indigenous Peoples in September 2014. The important and challenging initiatives underway at the global level to realize the respective commitments in the UN Declaration and the outcome document of the World Conference are appropriately the focus of the attention and resources of States, indigenous peoples, civil society, and international organizations, including in the Americas. In this regard, the United States intends to continue its diligent and proactive efforts, which it has undertaken in close collaboration with indigenous peoples in the United States and many of its fellow OAS Member States, to promote achievement of the ends of the UN Declaration, and to promote fulfillment of the commitments in the World Conference outcome document. Of final note, the United States reiterates its solidarity with the concerns expressed by indigenous peoples concerning their lack of full and effective participation in these negotiations.

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#### **4. Annual Thematic Resolutions at the HRC and UN General Assembly**

The United States cosponsored the resolution adopted by the Human Rights Council on September 29, 2016 at its 33<sup>rd</sup> session entitled, "Human rights and indigenous peoples." U.N. Doc. A/HRC/RES/33/13. The United States also cosponsored the resolution adopted at HRC 33 entitled, "Human rights and indigenous peoples: mandate of the Special Rapporteur on the rights of indigenous peoples," which renewed the mandate of that special rapporteur. U.N. Doc. A/HRC/RES/33/12. The United States also cosponsored the

resolution adopted by the General Assembly on December 19, 2016 on the rights of indigenous peoples. U.N. Doc. A/RES/71/178.

#### **H. TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT**

On June 13, 2016, the Department of State released (with excisions) a February 9, 2007 memorandum from Legal Adviser John B. Bellinger, III to Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Council, U.S. Department of Justice, expressing concern with the Office of Legal Council's draft opinion concluding that enhanced interrogation techniques ("EITs") involving nudity and sleep deprivation do not violate Common Article 3 of the Geneva Conventions. The memorandum is discussed and excerpted in Chapter 18. Also discussed in Chapter 18 is the Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations ("Transparency Report") issued by the White House on December 6, 2016.

#### **I. FREEDOM OF ASSEMBLY AND ASSOCIATION**

At the 32nd session of the HRC, Ambassador Harper delivered a statement presenting the resolution on freedom of assembly and association. His statement, excerpted below, is available at <http://geneva.usmission.gov/tag/HRC32/>

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The principal objective of this resolution is to renew the mandate of the special rapporteur who addresses these important freedoms.

Unfortunately, these freedoms are under increasing threat across the globe. It is more important than ever that we have a mechanism that continues to monitor challenges to the freedoms of peaceful assembly and association, and makes recommendations on how better to protect them. We hope that renewing this mandate will continue to help everyone understand best practices in promoting and protecting these fundamental freedoms.

This resolution also highlights one of the many manifestations of freedom of association—professional associations. We recognize that professional associations may take different forms in different places. But in all of our societies, creating, joining, and participating in such associations enables professionals—for example, doctors, lawyers, and engineers—to cooperate, to share experiences, and to address challenges jointly. The activities of these associations may bring significant benefits not only to their members, but to societies at large. These are specific examples of the benefits of the rights underscored in this resolution.

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## J. FREEDOM OF EXPRESSION

On March 31, 2016, at the 31st session of the HRC, 66 countries joined the United States-led statement on Freedom of Expression and Peaceful Transitions Within Democracies. The joint statement, below, is available at

<https://geneva.usmission.gov/2016/03/11/joint-statement-on-freedom-of-expression-and-peaceful-transitions-within-democracies/>.

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A key feature of democracies, new and old, is that at regular intervals they undergo peaceful transitions from one elected government to a newly elected government.

Respect for universal human rights is critical, including during peaceful transitions within democracies; today we would like to highlight one such right: freedom of expression. As former Philippine President Corazon Aquino put it, “Freedom of expression—in particular, freedom of the press—guarantees popular participation in the decisions and actions of government, and popular participation is the essence of [our] democracy.”

We reaffirm our obligation regarding freedom of expression as set forth in Article 19 of the International Covenant on Civil and Political Rights, which includes the right of everyone to hold opinions without interference, as well as 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 their choice. It is a key component of democratic governance, as the achievement of participatory decision-making processes is unattainable without adequate access to information.

In turn this right is intrinsically linked to the rights to freedom of thought, conscience and religion, peaceful assembly and association and the right to participate in public affairs, all of which underpin the vibrant democratic life of a country. Societies are more stable and prosperous when the right to freedom of expression, as well as other human rights, are respected.

Freedom of expression is a fundamental pillar for building a democratic society, and is essential in supporting the peaceful transition of political power. Citizens use this fundamental freedom to tell incumbent governments what they would like to see accomplished. Journalists and media workers use freedom of expression to write, broadcast, and televise stories that help citizens make educated political choices and hold those they have elected accountable.

The right to freedom of opinion and expression is a universal right: Freedom of opinion and expression applies to all persons equally. It needs to be protected regardless of frontiers and for everyone, regardless of who they are and where they live. It must be respected and protected equally online as well as offline.

We welcome actions taken by states undergoing transitions in democratically elected leaders to protect freedom of expression and ensure access to the Internet and telecommunications networks. States have the primary obligation to protect and ensure the right

to freedom of opinion and expression, in accordance with their human rights obligations and commitments.

We also welcome the efforts of UN entities, such as OHCHR, the special procedures, and the UN Democracy Fund, to promote human rights and democracy.

We encourage all states to ensure the freedom and independence of media, which are fundamental for democracy. We encourage all states to protect and promote pluralism, tolerance, and freedom of thought and expression and to enhance dialogue and debate.

We look forward to further discussion in this Council of the important relationship between freedom of expression and democratic transitions.

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## K. FREEDOM OF RELIGION

### 1. Designations under the International Religious Freedom Act

On February 29, 2016, Secretary Kerry designated Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, Tajikistan, Turkmenistan, and Uzbekistan as “Countries of Particular Concern” under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The ten states were so designated “for having engaged in or tolerated particularly severe violations of religious freedom.” 81 Fed. Reg. 23,344 (Apr. 20, 2016). The presidential actions designated for each of those countries by the Secretary are listed in the Federal Register notice.

On October 31, 2016, Secretary Kerry re-designated the same ten as “Countries of Particular Concern.” 81 Fed. Reg. 87,997 (Dec. 6, 2016).

### 2. U.S. Annual Report

On August 10, 2016, the U.S. Department of State submitted the 2015 International Religious Freedom Report to the United States Congress. See August 10, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/260950.htm>.

The report is available at [state.gov/religiousfreedomreport/](http://state.gov/religiousfreedomreport/). The State Department media note summarizing key developments discussed in the 2015 report is excerpted below.

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Now in its 18th year, this congressionally-mandated Report comprises almost 200 distinct reports on countries and territories worldwide and continues to reflect the United States’ commitment to, and advancement of, the right of every person to freedom of religion or belief.

The 2015 Report notes a continuing trend of some governments enforcing strict laws against blasphemy, apostasy, and conversion from the majority religion, or restricting religious

liberty under the guise of combatting violent extremism. Many non-state actors, including terrorists, continued their assault on religious and ethnic minorities.

The Report also notes the positive actions of civil society and other governments around the world to provide greater protections for religious minorities and to safeguard the fundamental freedom of individuals to believe, or not believe—according to their own conscience, and to manifest their religion or belief in worship, practice, observance, and teaching.

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### 3. U.S. Congressional Hearing

On May 26, 2016, Acting U.S. Special Envoy to the Organization of Islamic Cooperation Arsalan Suleman testified before the Senate Human Rights Caucus on the impact of blasphemy laws around the world. His testimony is excerpted below and available at <http://2009-2017.state.gov/s/rga/rls/remarks/257830.htm>.

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First, blasphemy laws enforced in various parts of the world violate the fundamental freedoms of expression and religion or belief, weaken broader protections for human rights, and undermine social stability and prosperity.

By prohibiting expression or acts deemed to be blasphemous or offensive or insulting to religion or religious sensibilities, blasphemy laws on their face are inconsistent with the fundamental freedoms of expression and religion or belief that are enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Blasphemy laws empower the state to be the arbiter of religious truth or orthodoxy, which almost always reflects the views of the majority. When enforced, the end result is that individuals with different beliefs are prevented from fully expressing or carrying out their peaceful religious practice.

The enforcement of blasphemy laws also undermines other human rights, such as non-discrimination and fair trial protections. State enforcement of blasphemy laws is often arbitrary and sometimes used as a tool by governments and non-government actors to target members of marginalized groups including religious minorities and political dissidents. Laws shape societal norms and expectations, and the enforcement, and sometimes mere existence, of blasphemy laws has had a pernicious effect on the rule of law in some countries. Mere accusations of blasphemy have sparked vigilante mob violence and targeted killings in various situations. When government fails to deter such actions, and does not vigorously hold those who engage in them accountable, it breeds an atmosphere of impunity that destabilizes communities and leaves minorities ever more vulnerable.

In this way, enforcement of blasphemy laws, or sometimes their mere existence, can exacerbate divisions within society, undermining social stability and prosperity. According to a 2012 Pew Research Center Study on Religion and Public Life, countries with the most

restrictions on the exercise of religious freedom, including blasphemy laws, also have the highest level of religious hostilities. Other recent studies have highlighted the correlation between blasphemy laws and higher rates of violent extremism within societies. The recent killings of secularist bloggers in Bangladesh illustrate the challenges many countries face in addressing extremist violence motivated by accusations of blasphemy.

Blasphemy laws are a global concern. Many of us are familiar with deeply troubling cases of application of blasphemy laws, or instances of murder or mob violence motivated by accusations of blasphemy, in countries such as Pakistan, Saudi Arabia, Egypt, Bangladesh, and Sudan. But blasphemy laws are not limited just to those countries or their regions of the world. According to the Pew study mentioned above, nearly half of the world's countries have laws and policies that punish blasphemy, apostasy, or defamation. Countries like Russia, Ireland, Italy, Germany, Indonesia, Singapore, and Greece, to name a few, also have blasphemy laws. Indeed, while in the United States, Supreme Court precedent holds blasphemy laws unconstitutional, there remain six states—Massachusetts, Michigan, Oklahoma, Pennsylvania, South Carolina, and Wyoming—that still have blasphemy laws on the books.

Second, the U.S. Department of State has a multifaceted approach to addressing blasphemy laws globally, which includes our human rights reports, bilateral and multilateral diplomacy, and civil society engagement.

The United States is absolutely clear in its opposition to blasphemy laws globally, and we convey that view through various channels of engagement.

#### Human rights reports

As members of the Caucus know, the U.S. State Department submits an annual Human Rights Report which includes reporting on violations of the right to freedom of expression, including through blasphemy laws. The Department also submits an annual International Religious Freedom Report which describes the status of religious freedom in every country. The report covers, among other things, government policies limiting the exercise of religious freedom, including blasphemy laws, and U.S. policies to promote religious freedom around the world. My dedicated colleagues in the State Department's Office of International Religious Freedom, led by Ambassador-at-large David Saperstein, do a tremendous job day in and day out on promoting religious freedom globally.

#### Bilateral diplomacy

The U.S. State Department regularly engages countries with blasphemy laws, advising them on the negative effects of such laws, and encouraging our counterparts to repeal them. Furthermore, we encourage governments to hold accountable those who commit acts of violence motivated by accusations of blasphemy. For example, the United States regularly expresses its concern directly to Pakistani authorities about blasphemy laws and the state of religious freedom in Pakistan, more broadly. In my own engagements abroad with the OIC and countries that have blasphemy laws, I have made a concerted effort to raise our concerns with government officials, religious leaders, academics, and civil society leaders from all backgrounds.

#### Multilateral diplomacy

U.S. opposition to blasphemy laws is a regular feature of our multilateral diplomacy as well. At the United Nations (UN), and at other international organizations, the United States regularly raises concerns regarding blasphemy laws and advocates for the highest protections for freedoms of expression and of religion or belief. In addition, last year the United States helped to form the International Contact Group for Freedom of Religion or Belief (ICG). The ICG is a

consortium of over 20 countries who support UDHR Art. 18, regarding the right to freedom of religion or belief, and are working to advance that right for all. Ambassador Saperstein and Knox Thames, Special Advisor for Religious Minorities in the Near East and South/Central Asia, hosted a meeting of the ICG last Friday.

We have experienced challenges and progress in our multilateral engagement on this topic. For over a decade, we worked successfully to build opposition to a UN resolution sponsored by the Organization of Islamic Cooperation (OIC) aimed at prohibiting “defamation of religions,” or speech deemed insulting or offensive to religion. Some states were using this resolution to justify their own blasphemy laws and other restrictions on speech, and we adamantly opposed that resolution for the same reasons (listed above) that we oppose blasphemy laws.

In 2011, working with the OIC and several other delegations, we achieved a breakthrough in eliminating the “defamation of religions” resolution from the UN. By focusing on our shared concerns about violence, intolerance, and discrimination on the basis of religion or belief, we were able to craft a consensus resolution—UN Human Rights Council Resolution 16/18—that addresses the underlying causes of religious intolerance in a manner that protects the freedoms of religion or belief and expression. That resolution provides a list of positive actions—like enforcing anti-discrimination laws, having officials speak out against intolerance, engaging in interfaith dialogue, and training government officials to engage effectively with religious communities—that states should take to address this issue.

Further to that, given our deep concerns over violence against religious minorities in various parts of the world, we organized an effort with the EU, the OIC, and other delegations to launch an implementation process for Resolution 16/18 so that those positive actions would be translated into real action on the ground to help protect individuals from discrimination or violence on the basis of their religion or belief. That effort began in 2011 with a high-level meeting in Istanbul and an experts meeting in Washington, DC. A separate experts meeting has been held each year since then—with 5 total thus far—in different cities around the world to focus on best practices for promoting implementation of the actions called for in the resolution. Hosts have been secured for the meetings this year and next.

In parallel to that Istanbul Process series of meetings, the United States also launched a series of bilateral workshops to discuss and share best practices for implementation of the resolution. These sessions have been extremely helpful in depoliticizing the issue and sharing with experts on the ground tools to combat religious intolerance without resorting to blasphemy bans or other restrictions on human rights. The workshops feature experts from the U.S. Departments of Justice and Homeland Security engaging with their counterparts from interested countries on ways to best protect religious freedom domestically. So far we have had successful workshops in Bosnia, Greece, Indonesia, and Spain, and several more are being planned.

#### Civil society engagement

We also actively engage civil society globally to help protect and promote universal human rights and fundamental freedoms, including specifically on blasphemy law issues. This includes working with human rights defenders, affected communities, and religious leaders.

Our engagement with religious leaders on this issue has been a source for optimism. Many religious leaders, both domestically and globally, have been working to protect the religious freedom of members of religious minority groups, including as it relates to blasphemy laws. For example, in January 2016, a group of over 300 Islamic scholars, religious and interfaith

leaders, and international observers gathered in Marrakesh, Morocco on the topic of protecting religious minorities in Muslim-majority countries. That group of Islamic scholars issued a declaration, called the Marrakesh Declaration, which provides a framework grounded in Islamic history and law for constitutional, citizenship-based societies with equal rights, including religious liberty, for all. Such initiatives provide human rights advocates around the world with a powerful tool from within the Islamic tradition for advancing religious freedom in Muslim-majority countries.

Efforts by civil society are critical in supporting grassroots efforts to reform and repeal blasphemy laws globally. The United States strongly supports their efforts and engages with governments around the world to ensure that civil society has the necessary space to freely operate.

Third, I would like to share some additional suggested actions for consideration on the issue of blasphemy laws.

Bilaterally the U.S. government should continue to encourage countries—especially allies—with blasphemy laws on the books to repeal them. As noted earlier, a number of our allies in Europe still have such laws, and their repeal can also enhance global efforts for repeal in other regions. Beyond opposition to the laws, we could also increase emphasis on government actions to deter false accusations of blasphemy, as well as encourage specially trained rapid response police forces skilled at mediation and rescue when tensions mount and mob violence seems imminent.

Multilaterally, the U.S. should continue to promote implementation of UN Resolution 16/18. It is important to continue having expert-focused meetings to discuss best practices for implementing each step of Resolution 16/18, and to preserve the international consensus on this topic. Governments need to follow through and implement the experts' findings and recommendations as appropriate. That implementation should focus on all aspects of the comprehensive action plan, not just one prong. And the United States should continue its bilateral workshop efforts to ensure a deeper exchange on this important issue.

The U.S. should also continue to work with civil society to improve the religious freedom environment and encourage other countries to do the same. Civil society plays a critical role in promoting freedom of expression and of religion or belief, and civil society efforts to reform or repeal blasphemy laws should receive appropriate support.

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#### **4. New U.S. Legislation on International Religious Freedom**

On December 15, 2016, the President signed the Frank R. Wolf International Religious Freedom Act and it became law. Pub. L. No. 114-281. The law expresses concern about foreign countries that routinely deny visa applications for religious workers; amends the International Religious Freedom Act of 1998 (IRFA) in several ways; requires training of U.S. foreign service officers regarding religious freedom; and provides new criteria for designations by the President for violations of religious freedom, including designations of non-state actors, among other things.

## 5. Human Rights Council

On March 9, 2016, at a clustered interactive dialogue with the Special Rapporteur on Privacy and the Special Rapporteur on Freedom of Religion or Belief convened at the 31<sup>st</sup> Session of the Human Rights Council, Michele Roulbet delivered a statement on behalf of the United States. Her statement is excerpted below and available at

<https://geneva.usmission.gov/2016/03/09/clustered-interactive-dialogue-with-the-special-rapporteur-on-privacy-and-the-special-rapporteur-on-freedom-of-religion-or-belief/>

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At the conclusion of his tenure in this important mandate, the United States wants to take this opportunity to thank Special Rapporteur Heiner Bielefeldt for his exemplary work over the last six years. Our appreciation extends to his most recent report on two closely interrelated rights: freedom of religion or belief and freedom of expression. We agree with the Special Rapporteur that these rights mutually reinforce each other, facilitating free and democratic societies.

We strongly agree that, as reflected in resolution 16/18, communication is key to building trust between religious or belief communities. Resolution 16/18 and the report both reinforce the fact that "...the open public debate of ideas, as well as interfaith and intercultural dialogue, at the local, national and international levels can be among the best protection against religious intolerance."

We would also highlight other conclusions in the report that we share. These include that some governments, in efforts to combat religious intolerance, are too quick to restrict speech. Instead they should use other measures called for by resolution 16/18, such as education and interreligious communication. We also emphasize that seeking to quell open expression generally has only inflammatory effects.

We strongly support the report's encouragement of continued cooperation through the Istanbul Process to step up implementation of resolution 16/18. We also agree that states should consider reporting on their implementation of 16/18 in the Universal Periodic Review.

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## L. OTHER ISSUES

### 1. Protecting Human Rights While Countering Terrorism

On September 16, 2016, Ambassador Mohamed Auajjar, Permanent Representative of the Kingdom of Morocco to the UN at Geneva, delivered a joint statement on behalf of the Group of Friends on Countering and Preventing Violent Extremism. The United States and Morocco co-chair the Group, which launched on September 7, 2016 and includes representation across regions. The Joint Statement is excerpted below and

available at <https://geneva.usmission.gov/2016/09/16/joint-statement-on-group-of-friends-on-countering-and-preventing-violent-extremism/>

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1. ... We wish to underscore our commitment to preventing and countering violent extremism in all its forms and manifestations, while respecting, protecting, and promoting human rights and fundamental freedoms.

2. We reaffirm that violent extremism is a global threat, which cannot and should not be associated with any religion, nationality, civilization, political or ethnic group. We also underscore that actions by states to prevent or counter violent extremism must not infringe on human rights. In this context, we are of the view that only a holistic and inclusive approach, based on international cooperation, and where education, security, development, human rights, democracy and the rule of law are interlinked, could have a tangible impact in preventing and countering violent extremism, while promoting and protecting human rights.

3. This Group of Friends has joined together to promote and help advance the implementation of the Secretary General's Plan of Action to Prevent Violent Extremism on topics relevant to our work in Geneva. In particular, this Group of Friends promotes substantive dialogue on the human rights dimensions of preventing and countering violent extremism in Geneva with the aim of sharing lessons learned and best practices, promoting international cooperation and collaboration, and developing and implementing approaches to prevent and counter violent extremism. We hope to serve as a platform for promoting this agenda in Geneva and work with other States, National Human Rights Institutions, experts, and civil society. We underline the need for effective coordination and information sharing within the UN and between States, the relevant UN entities and the relevant international, regional, and sub-regional organizations and forums.

4. We thank the Office of the High Commissioner for Human Rights for the Report on best practices and lessons learned on how protecting and promoting human rights contribute to preventing and countering violent extremism (A/HRC/33/29). We believe that preventing and countering violent extremism and the effective promotion and protection of human rights are mutually reinforcing. In the context of the work of the Human Rights Council, we attach particular importance to international human rights education and capacity building as a means of countering all forms of violent extremism; and we commend the work of the High Commissioner in this regard.

5. As members and observers of the Human Rights Council, we believe that the international community should continue to build upon the UN Charter and prior work of this and other UN bodies on this critical issue. We intend to work to promote and continue to advance better understanding of and strong language in appropriate resolutions on respecting, protecting, and human rights in preventing and countering violent extremism, consistent with Pillars I, III, and IV of the UN Global Counter-Terrorism Strategy. We look forward to further attention to this topic in the Council.

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## 2. Privacy in the Digital Age

The United States provided an explanation of position on the resolution on the right to privacy in the digital age at the 71<sup>st</sup> UN General Assembly. The resolution was adopted on December 19, 2016 without a vote. UN Doc. A/RES/71/199. The explanation of position is excerpted below.

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The United States appreciates the efforts of Germany and Brazil, and we join consensus on today's resolution because it again reaffirms privacy rights and their importance for the exercise of the right to freedom of expression and to hold opinions without interference, and the right of peaceful assembly and to freedom of association. These rights, as set forth in the International Covenant on Civil and Political Rights (the ICCPR) and protected under the U.S. Constitution and U.S. laws, are pillars of democracy here in the U.S. and globally.

We are pleased the resolution recognizes that the same rights people have offline must also be protected online, including the right to privacy, as well as recognizing that effectively addressing the challenges related to the right to privacy requires ongoing multi-stakeholder engagement. It is worth noting that data flows and the use of data analytics have the potential to create great benefits for economies and societies when high standards of online data protection and safeguards against the discriminatory use of such data are applied. Further, the references to "free, explicit and informed consent" do not take into account other appropriate mechanisms for choice, such as opt-outs; or situations where appropriate policy or inferences from consumers' behavior reduces the need for consent; or legitimate business models that condition the provision of goods or a service on consent. Further, the United States believes that the UN Guiding Principles on Business and Human Rights provide a valuable, important, and universal framework for working through a wide range of challenges. In that regard, we underline that we understand the responsibility of business enterprises raised in this resolution to be set out in UN Guiding Principles.

We reaffirm our explanation of position provided when we joined consensus on this text in 2014. We also reaffirm those human rights instruments we have long affirmed, in particular the ICCPR. We understand this resolution to be consistent with longstanding U.S. views regarding the ICCPR, including Articles 2, 17, and 19, and interpret it accordingly. Further, we reiterate the appropriate standard applied under Article 17 of the ICCPR as to whether an interference with privacy is permissible is whether it is lawful and not arbitrary, and welcome the resolution's reference to this key concept. An interference with privacy must be reasonable given the circumstances. Article 17 does not impose a standard of necessity and proportionality.

We hope further work on this topic can touch on other areas relating to privacy rights, beyond the digital environment.

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## **Cross References**

*Tuau case regarding citizenship in unincorporated territories*, **Chapter 1.A.2.**

*Asylum, refugee, and migration issues*, **Chapter 1.C.**

*Consideration of torture allegations in extradition case*, **Chapter 3.A.3.a.**

*Trafficking in persons*, **Chapter 3.B.3.**

*Treaties generally*, **Chapter 4.A.1.**

*Meshal v. Higginbotham*, **Chapter 5.A.1.**

*Alien Tort Statute and Torture Victim Protection Act*, **Chapter 5.B.**

*Inter-American Commission on Human Rights (IACHR)*, **Chapter 7.D.**

*Sanctions, including relating to human rights violators*, **Chapter 16.A.**

*Atrocities prevention*, **Chapter 17.C.**

*International humanitarian law*, **Chapter 18.A.3.**

*Unmanned aerial vehicles*, **Chapter 18.B.**

*Detainees*, **Chapter 18**

## CHAPTER 7

### International Organizations

#### A. UNITED NATIONS

##### 1. Strengthening the Role of the UN

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

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

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

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

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

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

On the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, we have consistently stated that the United States does not support that proposal.

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

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

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

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## 2. Criminal Accountability of UN Officials and Experts on Mission

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

[usun.state.gov/remarks/7483](http://2009-2017-<br/>usun.state.gov/remarks/7483)

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

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

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

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

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

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

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

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

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

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### 3. UN Role in Advancing International Law

Ms. Pierce also addressed the Sixth Committee on the UN Program of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. Her remarks, delivered on October 17, 2016, are excerpted below and available at

<https://2009-2017-usun.state.gov/remarks/7515>.

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

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

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

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

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#### 4. Administration of Justice at the UN

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

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

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

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

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

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

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## 5. Appointment of New Secretary-General

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## 6. UN Women

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

[usun.state.gov/remarks/7355](http://2009-2017-usun.state.gov/remarks/7355)

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

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

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

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

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

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

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

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

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

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

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## **7. Rule of Law**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## 8. UN-African Union Cooperation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**B. INTERNATIONAL COURT OF JUSTICE**

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

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

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

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

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

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

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**C. INTERNATIONAL LAW COMMISSION****ILC’s Work at its 68<sup>th</sup> Session**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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### Crimes Against Humanity

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

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

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

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

#### *Jus Cogens*

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

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

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

#### Protection of the Atmosphere

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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#### **D. OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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

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

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

[http://www.oas.org/en/iachr/media\\_center/PReleases/2016/167.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/167.asp),  
[http://www.oas.org/en/iachr/media\\_center/PReleases/2016/104.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/104.asp) and  
[http://www.oas.org/en/iachr/media\\_center/PReleases/2016/069.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/069.asp).

The United States has repeatedly urged the Commission to streamline its case management in order to reduce its sizeable backlog of petitions awaiting an IACHR decision or other IACHR action. Under the leadership of Professor James Cavallaro, one of the seven Commissioners of the IACHR and a U.S. national, the IACHR adopted new case management procedures in the fall of 2016 and has reduced its backlog somewhat. See October 18, 2016 OAS press release, available at

[http://www.oas.org/en/iachr/media\\_center/PReleases/2016/150.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/150.asp). In 2016, the United States subscribed to and began utilizing the IACHR's electronic case-management system, the Individual Petition System Portal,

<http://www.oas.org/en/iachr/portal/> launched in 2015, which is intended to speed up the processing of the parties' filings.

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

<http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> indicated that there were 280 such petitions as of the end of 2015.

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

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

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

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

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

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

## 1. Substantive Response Briefs and Letters

### a. *Case No. 12.958: Reconsideration of Admissibility*

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

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

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

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

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

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

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

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

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

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

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

In May of 2016, the United States filed a lengthy response to Petition No. P-1481-07, filed by several domestic workers alleging they were subjected to exploitative living and working conditions while employed by foreign diplomats serving in the United States.

Excerpts follow (with footnotes omitted) from the sections of the brief on diplomatic law and the lack of a due diligence commitment under the American Declaration.

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

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

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administration jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

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

The privileges and immunities accorded to diplomats under the VCDR, and other international agreements making that Convention applicable, for example, to diplomats at missions accredited to the United Nations in New York, are vital to the conduct of peaceful diplomatic relations and must be respected. If the United States is prevented from carrying out its international obligations to protect the immunities of foreign diplomats, adverse consequences will very likely result. At a minimum, the United States may hear objections for failing to honor its obligations not only from the mission of the specific country affected, but also from the missions of other States with immunities guaranteed by the Vienna Convention.

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

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

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

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

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

The negotiating history of the Vienna Convention confirms that commercial activity did not encompass employment of domestic workers. The United States' interpretation of Article 31(1)(c) is not only consistent with the purposes of diplomatic immunity, but is confirmed by the Vienna Convention's negotiating history. The final version of the Vienna Convention evolved from an initial draft developed in a series of meetings of the United Nations International Law Commission ("ILC"), a body of international law experts. The ILC draft was then considered by States at a formal diplomatic conference convened by the United Nations in 1961. In each forum,

it was clear that, under the Vienna Convention, diplomats would continue to enjoy their traditional immunities for contracts incidental to everyday life.

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

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

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

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

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

\* \* \* \*

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

Petitioners allege that the private conduct of foreign diplomats should be imputed to the United States government because somehow the United States failed to exercise due diligence to protect domestic workers employed by foreign government officials from exploitation. There are

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

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

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

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

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

In arguing that the United States has an "affirmative obligation ... to prevent private acts of violence," Petitioners rely on incorrect and unduly expansive interpretations of the rights and

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

\* \* \* \*

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

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

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\* \* \* \*

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

to state facts that tend to establish a violation of the American Declaration and its manifest groundlessness, and the Commission should reject the Petition as inadmissible under either or both of these grounds under Article 34 of the Rules.

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

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

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

\* \* \* \*

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

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

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

\* \* \* \*

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

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

Moreover, the district court specifically examined and rejected the argument that the prosecutor and court violated the U.S.-Colombia extradition treaty. At the hearing where [Petitioner] pleaded guilty, the prosecutor informed the district court that Counts 1 to 10 had to be dismissed because Colombia had requested their dismissal as a condition of extradition; the prosecutor also informed the court that Count 12 was being dismissed as part of the plea bargain with [Petitioner], leaving only Count 11. The district court then told [Petitioner]: “[Y]ou understand this unwritten position that the Colombian Government takes here that has limited what you can be prosecuted for. In the end, you’re looking at one charge.” [Petitioner] responded, “I do, sir. Thank you.” As the district court recalled, and reaffirmed, in its subsequent

decision on [Petitioner]’s *habeas* petition, the prosecutor, [Petitioner], and the district court all plainly understood that it was the United States’ (voluntary) observance of Colombia’s extradition conditions that led to the dismissal of Counts 1 to 10; and that these counts did not form part of the bargain made between the prosecutor and [Petitioner] by which [Petitioner] agreed to plead guilty in exchange for the prosecutor’s agreement not to prosecute him on any count other than Count 11.

\* \* \* \*

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

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

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\* \* \* \*

Petitioners allege that the United States “violated” certain specific rights recognized in the American Declaration during its detention of [Petitioner] in military custody from June 2002 to January 2006. The United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS). Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally-binding American Convention on Human Rights (“American Convention”), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The United States takes its American Declaration commitments and the Commission’s recommendations very seriously, but notes, as it has in prior communications, that the Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under the American Declaration. The Commission also lacks competence to issue a binding decision vis-à-vis the United States on matters arising under international human rights treaties, whether or not the United States is a party, or under customary international law.

Moreover, as discussed above, [Petitioner] was designated as an enemy combatant in the armed conflict against al-Qaida, the Taliban, and associated forces based on an order from the President of the United States, using his authority under the [Authorization for the Use of Military Force or] AUMF and consistent with the law of war. The U.S. Court of Appeals for the Fourth Circuit, in *Padilla v. Hanft*, upheld the legality of [Petitioner]’s designation and detention

as an enemy combatant based on the AUMF and the law of war, finding that [Petitioner] met the definitions of an enemy combatant that had been applied by the U.S. Supreme Court. With respect to situations of armed conflict, the law of war is the *lex specialis*, as such, it is the controlling body of law with regard to the conduct of hostilities and the protection of war victims. The law of war and international human rights law contain many provisions that complement one another and are in many respects mutually reinforcing, and certain provisions of human rights treaties may apply in armed conflicts.<sup>12</sup> But, [Petitioner]’s detention in military custody was authorized consistent with and its legality is governed by the law of war, which permits States to engage in the capture and detention of enemy combatants until the end of active hostilities.<sup>13</sup> The Commission has no competence under its Statute or Rules of Procedure (“Rules”) to consider matters arising under the law of war and may not incorporate the law of war, whether derived from treaties or customary international law, into the principles of the American Declaration. As the United States has previously noted, OAS member States have not granted the Commission the competence or authority to interpret and apply the law of war in Commission proceedings, and the United States reiterates its strong objection to any attempt by the Commission to interpret or apply in this proceeding the law of war.

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

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

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**a. Alleged violation of Article XXVII**

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

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

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

Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, *in accordance with the laws of each country and with international agreements.*

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

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

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

It is important to note that the majority of asylum applicants in expedited removal proceedings are ultimately provided an opportunity to present their asylum claim in proceedings under INA Section 240. Statistics from the last fiscal year illustrate this point. In fiscal year 2015, DHS completed 48,415 credible fear interviews and 33,988 of those interviews (approximately 70%) resulted in positive credible fear determinations and placement of the applicant into proceedings under INA Section 240. During that same time period, Immigration Judges reviewed 6,630 negative credible fear determinations and vacated 1,344 of those determinations (approximately 20%), resulting in the placement of those applicants into proceedings under INA Section 240. In other words, during fiscal year 2015, only approximately 11% of applicants who pursued their claim for asylum or protection under the CAT in expedited removal (5,286 out of 48,415) were not given an opportunity to present that claim in proceedings

under INA Section 240. The remaining 89% of applicants either: (a) were found to have a credible fear of persecution or torture and placed in proceedings under INA Section 240; or (b) did not pursue their claim by challenging the Asylum Officer's determination. These statistics reflect that the credible fear process is a fair process with numerous procedural safeguards, pursuant to which the vast majority of asylum applicants initially placed in expedited removal proceedings are ultimately provided an opportunity to present their claim for asylum in proceedings under INA Section 240.

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

*b. Alleged violation of Article XXVI*

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

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

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

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

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

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

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

To the extent that Petitioner may be alleging that her removal to El Salvador amounts to a violation of the right to life under Article I of the Declaration due to gang violence in El Salvador, she has failed to state facts that tend to establish a violation of the Declaration. To make an admissible claim based on Article I, the Petitioner would need to allege that *the United States* has taken direct actions against the Petitioner that violated her right to life, not that a non-State entity in a third country may violate her right to life. The United States disagrees with any assertion that Article I of the American Declaration, or any other article thereof, contains an additional implied *non-refoulement* commitment. As explained above, noncitizens in expedited removal are eligible to seek and receive asylum, consistent with Article XXVII of the Declaration and with the United States' international obligations.

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

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

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

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

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

Second, it is unlikely that an execution date will be scheduled soon because Petitioner’s execution has been indefinitely postponed due to the Ohio Supreme Court’s denial of the motion to set an execution date, and is thus is not imminent or urgent. Indeed, as noted above, Petitioner

concedes that his execution date is unlikely *to be set* before 2017. Third, even if an execution date were set in the near future, any execution is not likely to take place urgently or imminently, given the significant delays in already-scheduled executions that have resulted from the [Ohio Department of Rehabilitation and Corrections or] DRC’s postponements of Ohio executions.

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

\* \* \* \*

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

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

This claim is inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the rights in the American Declaration, and lacks merit in any event. While the United States acknowledges that the Commission has taken a different view on this issue, we respectfully maintain our firm position that the Commission does not, in fact, have competence to review claims arising under the Vienna Convention. This lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration. Claims concerning consular notification do not give rise to a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission’s Statute and Articles 23 and 27 of the Rules preclude their consideration here.

As the United States has emphasized in numerous previous submissions, consular notification is not a human right. The Vienna Convention’s consular notification protections are based on principles of reciprocity, nationality, and function, and persons do not enjoy these protections by mere virtue of their human existence. Neither is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. In the *Avena* case, the International Court of Justice noted that neither the text, nor the object and purpose, nor the *travaux* of the Vienna Convention support the conclusion that consular notification is an essential element of due process in criminal proceedings.

Moreover, the American Declaration’s due process rights are not defined by the provisions of the Vienna Convention. The availability of consular notification and access is premised on the existence of consular relations between governments. Consular access and assistance is thus undeniably a right exercised by the detained individual’s State of nationality, through its consular officers, in order to facilitate that State’s access to its national, as clearly stated in the introductory clause of Article 36(1) of the VCCR. As the plain text of Article 36(1)(c) provides: “*consular officers* shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation” (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual.

Furthermore, consideration of other VCCR clauses supports this view. The VCCR's preamble states that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a *state's right* to care for its nationals."

It is therefore up to representatives of the individual's State of nationality to determine whether or not to provide assistance, and the VCCR does not provide the detained individual any right or authority to demand it. While the State of nationality may diplomatically protest any failure to observe the terms of the VCCR and attempt to negotiate a solution, the individual does not have a judicially enforceable right to compel compliance. To accept the argument that Petitioner's consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance from his or her country's consular officers, because of an absence of consular relations or because those consular officers did not provide such assistance, cannot receive a fair trial or due process of law.

Thus, because consular notification is not a right in the American Declaration, nor a component of any right therein, Article 34(a) of the Rules prevents the Commission from entertaining Petitioner's consular notification claims, and any such claims are meritless for the same reason. It also bears noting that Petitioner's consular notification claim has been thoroughly examined and rejected by the Ohio and federal courts in their review of his case.

Although this claim is inadmissible and meritless, the United States wishes to emphasize once again that it takes its consular notification and access obligations under the Vienna Convention very seriously and has made significant efforts over the past several years, discussed in detail in several past proceedings before the Commission, to meet the U.S. goal of across-the-board compliance by domestic authorities. The United States has a robust outreach and training program on consular notification and access that targets federal, state, and local law enforcement, prosecutors, defense attorneys, and judges. The centerpiece of this outreach is the regularly revised *Consular Notification and Access Manual*, a one-of-a-kind public resource also utilized by governments of other States in seeking to improve their compliance with the VCCR's obligations. Among other things, the *Manual* provides detailed guidance on the law, its application in a myriad of specific scenarios, and best practices. The *Manual* also contains sample consular notification statements in English, Spanish, and 20 other languages, sample fax sheets for providing notification, sample diplomatic and consular notification cards, and contact information for foreign embassies and consulates in the United States. Since 1997, moreover, the U.S. Department of State has conducted nearly 1,000 training sessions and distributed millions of manuals and pocket cards so that police and other officials may have easy access to the basic consular notification and access requirements.

In addition, at the urging of the U.S. Departments of State and Justice, the Federal Rules of Criminal Procedure were updated in December 2014 to help facilitate compliance with U.S. consular notification and access obligations. Pursuant to these changes, under Federal Rules of Criminal Procedure 5(d)(1)(F) and 58(b)(2)(H), a defendant who is not a U.S. citizen and who has been charged with a federal crime shall be informed by a federal magistrate judge at the initial appearance that he or she "may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested."

In addition to ensuring prospective compliance with our consular notification and access obligations, the United States is committed to honoring its obligations under *Avena*. The Commission is likely aware of our ongoing, concerted efforts over several years, including before the U.S. Supreme Court, to give effect to the judgment. Indeed, as the Commission is aware, Secretary Kerry has written to Ohio Governor John Kasich and former Texas Governor Rick Perry to request compliance with the United States' *Avena* obligations—in the case of Governor Kasich, that letter concerned Petitioner himself. The U.S. government also continues to promote the enactment of legislation that would ensure compliance with *Avena*, and President Obama has included in the Administration's budget requests, as well as in other proposed legislation, certain consular notification compliance provisions. The United States reiterates its willingness to provide the Commission, at the Commission's request, further updates as to its robust consular notification outreach efforts.

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

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

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

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

In this context, the Commission should provide the State with a margin of appreciation, deferring to the discretion of local actors who are required to make difficult decisions based on their own factual assessments. Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated medical and scientific circumstances in this matter counsel strongly in favor of deferring to the discretion of those responsible for decision-making. In these types of difficult cases, international bodies such as the Commission and the Inter-American Court of Human Rights use this “margin of appreciation” standard to respect state sovereignty and conserve their limited resources while still ensuring that human rights are protected.

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

punishment, taking into consideration extensive information regarding risks of improper administration.

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

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

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

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

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

<sup>118</sup> The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on Member States of the OAS. U.S. federal courts of appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. See, e.g., *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001) ("The American Declaration ... is an aspirational document which ... did not on its own create any enforceable obligations on the part of any of the OAS member nations. ... Nothing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members."); accord, e.g., *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493–94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004).

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

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

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

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

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

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

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

While the matter Petitioner complains about may be a proper subject for a thematic hearing before the Commission—and, as discussed below, the Commission has indeed held hearings touching upon aspects of this issue—it is improper in the context of an individual petition. As this Commission has explained on numerous occasions, the Commission has competence to review individual petitions that allege “concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations . . . .” The Commission’s governing instruments “do not allow for an *actio popularis*.” Consequently, an individual petition is not the proper means by which to request a decision about alleged racially discriminatory application of the death penalty in the United States.

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

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

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

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

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

Applying that standard in Petitioner's case, the district court analyzed the bases for all three of the peremptory strikes exercised by the prosecutor against black persons on the venire panel, and concluded that there was no basis for a claim of discrimination. The district court noted, for example, that both the government and Petitioner's own attorney exercised a peremptory challenge against venire member Boulet. The second black venire member subjected to the prosecutor's peremptory strike, DeBose, was known to the prosecutor's family. The prosecutor chose to subject DeBose to a peremptory strike based upon, among other things, "reputation information," the prosecutor's recollection of his own involvement in drug cases against DeBose's brother and husband, and DeBose's "apparent reluctance about the death penalty." The final black venire member subject to a peremptory strike, Amarh, also expressed reluctance concerning the death penalty, and the prosecutor exercised a peremptory strike as he did not believe that Amarh's answers were sufficient reason to strike her for cause. The district court explained that the prosecutor also struck several non-black venire members who provided answers similar to Amarh's. Moreover, there were no non-black venire members similarly situated to either DeBose or Amarh who were not stricken.

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

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

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

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

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

The Commission ... lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts. The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.

As we recently echoed in another matter, “it is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task.”

The United States' domestic criminal process, including through the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. [Petitioner] has—in numerous courts, over an extended period of time, and in myriad ways—challenged the legality of his trial and conviction. Indeed, [Petitioner] acknowledges as much. Multiple layers of careful judicial review, both state and federal, provided [Petitioner] extended opportunities to challenge his trial and conviction, and he fully availed himself of these opportunities and continues to do so.

Dissatisfied with the outcome of his domestic proceedings, [Petitioner] now asks the Commission reexamine claims that the Pennsylvania Court of Common Pleas, the Superior Court of Pennsylvania, and the U.S. District Court for the Eastern District of Pennsylvania, acting in full conformity with the due process protections reflected in the American Declaration, each independently determined are baseless under the laws of the United States. These decisions are cited throughout this response, and many of them are appended as annexes, so that the Commission may see for itself the rigor and thoroughness that characterized the domestic courts' consideration of [Petitioner]'s many claims. Even his own [Post-Conviction Relief Act or] PCRA counsel Feinstein concluded [these] were “wholly frivolous” and had “absolutely no merit.” [Petitioner]'s broad allegation that U.S. domestic trial and appellate courts have failed to remedy his allegedly unconstitutional conviction does not create admissibility or competence. The Commission has long recognized that “if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance] formula.”

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would amount to the Commission second-guessing the legal and factual determinations of both state and federal courts at all levels, conducted in complete conformity with due process protections under U.S. law, U.S. commitments under the American Declaration, and otherwise in accordance with U.S. commitments and obligations under international human rights instruments. It would also require the Commission to reweigh evidence, something the Commission, by its own admission, cannot do.

[Petitioner] was guaranteed, and received, abundant due process protections in his domestic proceedings. He was not guaranteed, and did not receive, a favorable result, because the evidence showed beyond a reasonable doubt that he murdered another human being, ....<sup>86</sup> While [Petitioner] is obviously unhappy with his fate, justice demands that he face the consequences of his heinous crime. The domestic system functioned precisely as it should have in this matter. This is a compelling case for the application of the fourth instance formula.

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

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

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

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

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

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

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

First, as explained above, Petitioner filed a complaint in federal district court on May 17, 2010, alleging, *inter alia*, that he had a verbal altercation with [Illinois Department of Corrections or] IDOC guard ..., who made threats against Petitioner, filed a false disciplinary charge, and had Petitioner moved to segregated housing that was “filthy” and “roach [and] mice infested.” These are the same allegations Petitioner raises in his fifth set of claims before the Commission. Following a voluntary settlement, the district court upheld the validity of the settlement agreement and dismissed the complaint as settled on April 3, 2012.

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

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

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

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

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. It is a sovereign right of a State conducting judicial proceedings for its national system to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort to an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.” The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies.

In order to give the State the opportunity to correct alleged violation of rights Petitioner must comply with all reasonable procedural requirements established under domestic law. As the Commission has noted in the context of the right to judicial protection under Article 25 of the

American Convention on Human Rights (“American Convention”), the existence and application of reasonable admissibility requirements, prior to examination of the merits of a judicial action, are not incompatible with such a right.

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

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

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

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

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The Commission should declare the Petition inadmissible because Petitioner has not satisfied her duty to demonstrate that she has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules. While the Statute and Rules require the Commission to examine the full array of domestic remedies that may address Petitioners’ claims, the Petition contains few and confusing details on whether and how Petitioner attempted to invoke or exhaust domestic remedies related to the abuses alleged in the Petition, through criminal, civil, or administrative processes. In particular, there is no record of any domestic proceedings related directly to the abuses alleged to have been committed by [Petitioner’s ex-husband, his wife and step-son], or the violations alleged to have been committed by Virginia state authorities, except to the extent that some of these allegations may have been at issue during the divorce and custody proceedings between [Petitioner and her ex-husband].

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

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

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

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

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

However, as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies," meaning that the exception is inapplicable in this instance. As Petitioner has apparently never attempted to bring suit in Virginia or elsewhere on any of the charges leveled at the United States, Virginia state authorities, or private actors in the Petition, despite the fact that Virginia state law as well as federal law provide extensive options for judicial relief, the Petition's arguments that domestic proceedings would be futile appear to be based on a purely subjective

belief that the odds are not in Petitioner's favor because she is African-American and because she is a woman. These arguments are entirely unsubstantiated. ...

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \* \*

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

\* \* \* \*

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

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

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

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

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

The Commission could also consider developing new criteria for filtering petitions so that it may focus on those that present the most pressing human rights claims, the resolution of which could have a broader impact in the State in question and across the region as a whole. Further, it could consider imposing strictly enforced page limits on briefs and annexes, along with font and margin size requirements. With the availability of extensive information online, particularly for U.S. cases, the United States would strongly urge the Commission to do a basic Internet review

of each Petition filed to ascertain whether there is information that would assist the Commission in assessing whether the Petition has met initial processing requirements.

\* \* \* \*

## 2. Other Letters to the Commission

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

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

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

#### *New Legal Developments*

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

The 2012 decision of *Miller v. Alabama* provided additional protections for juvenile offenders, prohibiting mandatory sentencing of a juvenile to life without parole and laying out a set of factors that must be considered in each case for the sentencing of a juvenile to life without parole. As Petitioners concede, the Supreme Court further ruled in 2016 in *Montgomery v. Louisiana* that *Miller*’s prohibition of mandatory JLWOP applies retroactively to juveniles already sentenced at the time *Miller* was decided. *Montgomery* thus left states with only two options for accommodating the retroactive application of *Miller*—an individualized resentencing or consideration for parole. In addition, *Montgomery* clarified *Miller*’s holding and affirmed the “constitutionally different” status of juveniles. In particular, holding that the *Miller* decision dictated more than procedural requirements, *Montgomery* categorically prohibits sentencing juvenile offenders to JLWOP except for those rare cases where the juveniles’ crimes reflect

“permanent incorrigibility.” States are also incentivized to offer juvenile offenders who were sentenced to JLWOP prior to the *Miller* decision in 2012 automatic consideration for parole, which the Supreme Court identified as a possible alternative to holding new resentencing hearings for these offenders.

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

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

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

#### *Reconsideration of Admissibility*

The Commission should reconsider the admissibility of this case, find it inadmissible, and dismiss it under Articles 31 and 34(c) of the Rules of Procedure (“Rules”) and Article 20(c) of the Commission’s Statute. The supervening information presented above and in the Petitioners’ May 5 letter reveals this case to be inadmissible—specifically, Petitioners have not exhausted the new domestic remedies that have been made available to them by the developments described above. ...

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

...

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

\* \* \* \*

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

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

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

To the extent the ... Commission's view [is] that all petition-based proceedings are confidential, or that they remain confidential until a final merits report is issued, such a position is at odds with the United States' understanding that Commission proceedings are presumptively public. Presumptive publicity furthers a critical human rights objective by helping to ensure confidence in the fairness of the system, scrutiny of the conduct of governments, and responsible performance by decision makers, and is a hallmark of the independent judicial systems of democratic countries. Indeed, transparency and accountability are, with rare exceptions, prerequisites for fair judicial proceedings. This principle is reflected in the American Declaration of the Rights and Duties of Man ("American Declaration") (Art. XXVI), the Universal Declaration of Human Rights (Art. 10), and the International Covenant on Civil and Political

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

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

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

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

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

Organizations representing petitioners have also frequently posted documents from Commission proceedings on their respective websites. We have long been aware of this practice

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

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

*Suggestions for enhancing the publicity and transparency of IACHR proceedings*

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

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One possibility for enhancing the publicity and transparency of proceedings would be for the Commission to modify the IACHR [Individual Petition System] Portal to make a version of it public-facing, with documents specifically deemed confidential selectively made inaccessible to a public user. A similar approach was taken by the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), which for years maintained an internal “Judicial

Database” containing parties’ filings and other materials as a resource for judges, prosecution and defense counsel, and Tribunal staff. In 2008, the ICTY launched a public-facing version of the database that allows members of the public access to all court records except certain categories, such as materials marked confidential or *ex parte*, which remain viewable on the internally facing database only to those persons who have a specific need to see them.

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

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

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### 3. Hearings

The United States also participated in six hearings in 2016, all held at the IACHR’s headquarters in Washington, D.C.—three in April (all thematic) and three in December (two thematic and one petition-based). The thematic-based hearings concerned the human rights of migrants, access to water, poverty in Puerto Rico, indigenous rights and extractive industries, and alleged disparities in asylum adjudications in U.S. immigration courts. See

<http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=148> and <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=142>.

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

This hearing—the only U.S. petition-based hearing held in 2016—was on the merits of 60 petitions filed jointly before the IACHR in 1990 (later supplemented by 212 additional petitions), collectively denoted as *Salas et al.*. The December 2016 hearing was the third merits hearing in the case, and fifth hearing overall (the first four hearings all took place in the early-to-mid-1990s). Both parties filed numerous submissions on admissibility and

merits in the 1990s totaling many hundreds of pages. The IACHR declared the case admissible in a 1993 decision. For reasons unknown to the United States, the IACHR did not thereafter dispose of the case by issuing a merits report or archiving the case. After 26 years, *Salas* consequently remains the oldest pending U.S. case on the IACHR's docket, although numerous other cases are pending in which the petition was filed in the late 1990s and early 2000s, including those in which the petitioner died years ago.

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

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

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

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

On November 21, well outside the one-month notice period in Article 64(4) of the Rules, your office transmitted to us a written submission from the Petitioners, in the English language, with some information as to what the Petitioners intend to present at the hearing. In this submission, the Petitioners state they will present testimony of alleged victims. Yet they do not identify these witnesses by name nor give any indication as to the content or scope of the witnesses' anticipated testimony. It thus came as a surprise to us in the late afternoon of December 2—less than one week before the hearing—when we received the letter from your office informing us that two witnesses, Yolanda Cortés and Edilsa Alarcón, would be called to testify and that the United States would be given ten minutes in which to question each witness.

This is the first indication we had of the witnesses' identity, and to date we still have not received witness statements nor any other information about the subject matter of the witnesses' anticipated testimony.

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

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

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

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

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

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

\* \* \* \*

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

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

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

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

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

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

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

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

We agree with the Petitioners that if the IACHR were going to make a final decision on this case, it should have done so long before now. Your predecessors, and ours, put a great deal

of effort into presenting, receiving, and analyzing myriad submissions. Unfortunately, most of that experience departed long ago. It would be enormously burdensome, and highly inefficient, for you try to familiarize yourselves with and make findings on these extraordinarily complex issues now.

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

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

\* \* \* \*

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

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

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

Commissioners, you must also dismiss many of the Petitioners' claims because analyzing their merits would require the Commission to interpret and apply a body of law—the law of armed conflict—that is beyond the Commission's mandate and competence. The United States reiterates its position that, as set forth in the Commission's Statute and Articles 23 and 27 of the

Rules of Procedure, the only relevant instrument by which the IACHR can evaluate the United States is the American Declaration of the Rights and Duties of Man. However, the allegations here are largely founded, and are wholly dependent upon, proof of alleged violations of the Fourth Geneva Convention of 1949 and other international instruments governing the use of force, and other aspects of the law of war. The Commission has no competence under its Statute and Rules to consider matters arising under the law of war, and may not incorporate the law of war into the principles of the American Declaration.

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

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

\* \* \* \*

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

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

\* \* \* \*

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

The United States was fully authorized by the law of war to return fire from the PDF, even where such fire was coming from offensive pockets interspersed among civilian buildings. The inevitable, and unfortunate, outcome of the PDF strategy was that a number of civilian buildings were damaged, some beyond repair, and these had to be cleared away in the interest of protecting military and civilian personnel remaining in the area. None of these actions constitute grave breaches or other violations of the law of war.

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

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

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#### **4. Commission Decisions in 2016**

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

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

<http://www.oas.org/en/iachr/decisions/2016/USPU12834EN.pdf>

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With respect to the Commission's recommendations, we have forwarded the merits report to the Departments of Labor, Justice, and Homeland Security; the National Labor Relations Board; and the Governors and Attorneys General of Kansas and Pennsylvania. We would note that several of the recommendations already reflect U.S. law, policy, and action in this area, as explained in detail in our written submissions and at the March 2015 hearing. In general, these include aggressive enforcement of a robust system of laws that protect workers' rights and prohibit many forms of discrimination and retaliation against workers based on their undocumented status; ongoing efforts to combat employer efforts to discover the immigration status of workers during litigation, investigation of claims, and administrative proceedings; and conducting investigations at worksites and enforcing labor laws, without regard to the worker's immigration status. Our immigration law and policies include safeguards for the protection of various classes of victims and vulnerable individuals. Further, our immigration authorities work collaboratively with labor and employment agencies to ensure consistent enforcement of the law.

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

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

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**b. Case No. 13.027: Detention and Interrogation Program**

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

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

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Mr. El-Masri filed suit in the U.S. District Court for the Eastern District of Virginia in December 2005 against the former Director of the U.S. Central Intelligence Agency (CIA), three private companies, and several unnamed defendants, seeking damages for his alleged unlawful abduction, detention, and torture. The U.S. Government intervened in the suit, filing a motion to dismiss based on the state secrets privilege, which is an evidentiary privilege that may be invoked by the U.S. Government in litigation when it is necessary to protect information whose unauthorized disclosure reasonably could be expected to cause significant harm to the national defense or foreign relations of the United States. The District Court held oral arguments on this issue, after which it granted the U.S. Government's motion to dismiss on May 12, 2006.

Mr. El-Masri appealed this decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the dismissal. He then appealed the decision to the U.S. Supreme Court, which denied Mr. El-Masri's petition for review.

*The SSCI Report*

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

\* \* \* \*

**Cross References**

*International tribunals*, **Chapter 3.C.**

*ILC's work on law of treaties*, **Chapter 4.A.4.**

*Indigenous issues*, **Chapter 6.G.**

*Immunity of international organizations*, **Chapter 10.F.**

*IMF reform*, **Chapter 11.J.4.b.**

*Palestinian effort to accede to Law of the Sea Convention*, **Chapter 12.A.1.**

*UNCITRAL*, **Chapter 15.A.**

*Middle East peace process*, **Chapter 17.A.**

*UN peacekeeping*, **Chapter 17.B.**

## CHAPTER 8

### International Claims and State Responsibility

#### A. CUBA CLAIMS TALKS

On July 28, 2016, the United States and Cuba continued discussions regarding bilateral claims. July 28, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/260632.htm>; see also *Digest 2015* at 305 regarding the opening round of the bilateral claims discussion held in December 2015.

State Department Legal Adviser Brian Egan led the U.S. delegation to the meeting, which involved the further exchange of information regarding outstanding claims and an exchange of views on precedents for claims settlement practices and processes.

A senior State Department official held a briefing the day after the July 28, 2016 session of the bilateral claims discussions, which is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/260666.htm> and excerpted below.

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...We noted after that first round that the reestablishment of diplomatic relations allowed us to more effectively represent U.S. interests in Cuba, and to have a more concerted dialogue with the Cuban Government on a variety of topics that are of importance to the United States. That very much continues to be the case as regards the matter of outstanding claims of the United States and U.S. nationals against Cuba. Yesterday, we concluded a second meeting with the Cuban Government on claims. That meeting occurred in Washington. While at the first meeting the two sides exchanged information on the various claims each side was bringing to the table, the second meeting was more substantive in nature, both in exploring more of the details about the claims that need to be resolved, but also in reviewing the practices of both countries in resolving claims with other countries and how those practices could provide options for resolving these claims that we're discussing now.

The claims being discussed include claims of U.S. nationals that were certified by the Foreign Claims Settlement Commission many years ago, claims related to unsatisfied U.S. court judgments against Cuba, and claims of the U.S. Government. The Government of Cuba also provided further details about claims that it has against the United States. They relate to the embargo and to human damages that have been adjudicated by its courts.

\* \* \* \*

... [W]e do not currently have a scheduled meeting for the next round. The U.S. delegation expressed its desire to resolve the claims as quickly as possible, and we indicated that we were willing to dedicate a substantial amount of time and energy towards trying to get to resolution. I think both sides agreed that we would have more regular meetings and that we would continue to pursue this matter in the established diplomatic channels.

... Our normal practice is to alternate between capitals. So we began in Havana, we had this last meeting in Washington, and we would expect to go to Havana for the next meeting.

In terms of prior settlements that the two governments have entered into, ... we know that Cuba has resolved outstanding expropriation claims with several countries in the last two decades, and we note, though, however, that they were much, much smaller in scope than what we have here. We certainly also have lots of practice in claims settlement involving expropriation claims, involving outstanding court judgments and government-to-government claims. I think ... we all recognize that the complexity and the scope of the claims that we bring to the table will have to allow us to draw on all those examples, but that we'll probably have to figure out something that is unique to this particular claims matter.

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For the U.S. claims, there are claims of U.S. nationals relating to expropriations that date back to the late 1950s and 1960s. Those were adjudicated by the Foreign Claims Settlement Commission in two separate programs, and the total principal of what they negotiated was \$1.9 billion. And the commission then also awarded 6 percent interest on that. So we have indicated that obviously that's part of it. We also know that in terms of U.S. court judgments, there are approximately \$2.2 billion of judgments outstanding against Cuba. ... [T]hat's compensatory damages and a number [of] punitive damages have been awarded as well. In terms of the U.S. Government claims, these are in the hundred to couple hundred millions of dollars and relate to interests that the U.S. Government had in mining interests in Cuba back in the '50s.

And from the perspective of Cuba, what we understand, their embargo claims and their human damages claims relate to two judgments, outstanding judgments that they described against the United States rendered by Cuban courts. The human damages claim—the judgment was for \$181 billion. We understand that that number could be higher. And for the economic damages judgment, we understand that that judgment was for \$121 billion, but again, that number might be higher. Those are essentially—Cuba also has a claim for blocked assets, but there hasn't really been, from what I would say, a solid number that's been discussed with respect to that, because the amount of blocked assets has fluctuated over time.

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...[T]he most traditional type of claim settlement ... for claims of this nature would be a bilateral agreement that sets out the scope of the claims that are to be resolved with releases for those claims from the other government. Sometimes a lump sum of money is then provided in settlement of the claims.

Here, ... both governments have claims that they've put on the table, and so that would all have to be worked out. We know that in the past, some of Cuba's claim settlements have related

to perhaps not payment of a lump sum of money, but sometimes the liquidation of various products that are provided or bonds that are provided. But we're looking at everything at this point and trying to figure out what might be the most appropriate way forward in light of, again, the large numbers of types of claims and the complexities that some of these claims raise.

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I think that with regard to the Cuban embargo, this is kind of a unique situation or an unprecedented set of issues with regard to our relations with Cuba over all these years. So it's not clear to me that there is an absolutely comparable situation that we can point to.

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...[W]henver we embark on a claims settlement negotiation process, the question is always, "How much time do you expect this will take?" And it's very, very difficult to say ... because we just can't predict what kind of turns the discussion will take. And even when it takes those turns, those elements of the discussion can be very constructive in reaching an overall resolution, and my experience has been that it is worth taking the time to have that discussion so that one can eventually reach a mutually satisfactory resolution.

... I think there's nothing about this negotiation that is any different from our experiences in dealing with claims with other countries. ... [T]here may have been a little bit more of a gap in time between our first and second meeting, but one, we're already at the second meeting. We are having very substantive discussions. Two, both sides seem to agree that we need to have more regular meetings. And ... three, I think both sides are committed to try to resolve this in a mutually satisfactory manner, drawing on the experiences of claims resolution by both governments.

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...[I]f you look at prior settlements with Vietnam or China that involved—there was some blocking of assets, there was expropriations, and there was normalization, and there were adjudications of claims by the Foreign Claims Settlement Commission—those were resolved then finally in a bilateral agreement providing for a lump sum payment. There are different ways in which the payments can be made. They can be made in one lump sum, blocked assets can be factored into that, and payments can be made over time in installments.

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## **B. IRAN CLAIMS**

On January 17, 2016, Secretary Kerry announced that the United States and Iran had settled a long outstanding claim at the Iran-U.S. Claims Tribunal in The Hague. See January 17, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/01/251338.htm>. Excerpts follow from the press statement regarding the settlement.

This specific claim was in the amount of a \$400 million Trust Fund used by Iran to purchase military equipment from the United States prior to the break in

diplomatic ties. In 1981, with the reaching of the Algiers Accords and the creation of the Iran-U.S. Claims Tribunal, Iran filed a claim for these funds, tying them up in litigation at the Tribunal.

This is the latest of a series of important settlements reached over the past 35 years at the Hague Tribunal. In constructive bilateral discussions, we arrived at a fair settlement to this claim, which due to litigation risk, remains in the best interests of the United States.

Iran will receive the balance of \$400 million in the Trust Fund, as well as a roughly \$1.3 billion compromise on the interest. Iran's recovery was fixed at a reasonable rate of interest and therefore Iran is unable to pursue a bigger Tribunal award against us, preventing U.S. taxpayers from being obligated to a larger amount of money.

All of the approximately 4,700 private U.S. claims filed against the Government of Iran at the Tribunal were resolved during the first 20 years of the Tribunal, resulting in payments of more than \$2.5 billion in awards to U.S. nationals and companies through that process.

There are still outstanding Tribunal claims, mostly by Iran against the U.S. We will continue efforts to address these claims appropriately.

On September 8, 2016, Assistant Legal Adviser for International Claims and Investment Disputes Lisa Grosh testified before the House Financial Services Subcommittee on Oversight regarding the settlement with Iran. Her statement is excerpted below and available at [http://financialservices.house.gov/uploadedfiles/hhrg-](http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-lgrosh-20160908.pdf)

[114-ba09-wstate-lgrosh-20160908.pdf](http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-lgrosh-20160908.pdf).

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I am the Assistant Legal Adviser for International Claims and Investment Disputes at the Department of State, where I have worked to defend the United States against Iran at the Hague Tribunal for nearly 30 years. Over that time we have won many cases. We lost some. And sometimes we decided to settle. I am here today to explain as best I can in this setting the settlement that was announced in January.

[T]his was only a partial settlement of a very large case. The rest of that case is ongoing at the Hague Tribunal. Because of that, I am limited in what I can discuss in this public setting. ... These are multi-billion dollar claims against the United States. So for some of your questions, I may need to defer the question to a closed setting, like the one we did for House and Senate staff earlier this week.

To provide some background, the United States and Iran entered into the Algiers Accords in 1981, which created the Iran-U.S. Claims Tribunal at The Hague to address claims of nationals and the governments. The agreement was entered into by the Carter Administration, it was endorsed by the Reagan Administration, and it was debated by both houses of Congress. In the first 20 years of the Tribunal process, it focused primarily on resolving claims of U.S. nationals for debt, contract, expropriation and other measures affecting property rights. U.S.

citizens and companies have received over \$2.5 billion in awards and settlements through that process.

Significant government-to-government claims were also filed at the Tribunal. The majority and certainly the largest were by Iran against the United States, including Iran's large contract claims arising out of its former Foreign Military Sales ("FMS") Program.

Like other FMS customers, Iran paid money into a Trust Fund that was used to facilitate prompt payments to the U.S. contractors working on Iranian contracts. By January 1979, Iran had already been struggling to make the necessary payments on its more than 1,000 outstanding FMS contracts. In February 1979 Iran and the United States concluded a Memorandum of Understanding (MOU) providing for the cancellation of many remaining purchases. The two sides worked to implement the MOU and wind down Iran's FMS program over the ensuing months. After the hostages were taken at the U.S. Embassy in November 1979, these efforts essentially ceased.

The dispute over the FMS Trust Fund and interest, which resulted in the settlement in January of this year, was part of Iran's FMS claims that it filed with the Tribunal in 1982. So you can imagine the scale of it and the money involved: it is a multi-billion dollar breach-of-contract dispute covering 1,126 huge military sales contracts.

Before the settlement in January, other parts of the FMS claims were decided or settled some time ago. Indeed, settlement discussions over technical legal matters have been held in this channel for decades, typically led by the State Department Legal Adviser and the Iranian Presidential Legal Adviser. My estimate is that since the early 1980s, through the Reagan, Bush and Clinton Administrations, some 40 rounds of claims meetings occurred at this level. Indeed, the prior settlements with Iran of other portions of the FMS claims occurred during the first Bush Administration.

For example, in 1989, the United States and Iran settled an Iranian claim for military spare parts for \$7.5 million, which was paid from the Judgment Fund. In 1990, the Parties entered into a partial settlement for \$200 million from the Trust Fund; this is the same Trust Fund that was the subject of a final settlement in January. And in 1991, the Parties settled Iran's claim for titled FMS assets for \$278 million, which was paid from the Judgment Fund. Apart from the FMS claims, there were other significant settlements between the parties, including in 1990 when the United States received \$105 million from Iran in settlement of certain U.S. national claims and U.S. government claims. These settlements, and in particular the FMS settlements, were reached at key moments in those cases—such as before key hearings or when they were on the verge of going to decision.

In the past two years, as the proceedings at the Tribunal have been advancing, we revisited the possibility of settlement of Tribunal claims through 2014 and 2015. These discussions led to settlement of small claims that were the subject of ongoing hearings. They involved architectural drawings, which were transferred to the Tehran Museum of Contemporary Art, and for fossils, which are now in the possession of Iran's Ministry of the Environment.

In the spring of 2015, after years of extensive briefing, Iran pressed the Tribunal to schedule comprehensive hearings in these remaining FMS claims. The Tribunal ordered both Parties to file their respective proposals for the structure of hearings. Iran filed its proposal on November 11, 2015. Iran was also pressing for a preliminary ruling on issues including the outstanding balance of the FMS Trust Fund and interest since 1979. They sought interest based on a provision in the 1979 MOU calling for unexpended FMS funds associated with Iran's program to be placed in an interest-bearing account.

With the settlements over the smaller claims concluded in December 2015, and with hearings in the FMS claims on the horizon, we were able to achieve this most recent settlement, which finally and fully resolves Iran's claim for funds in the FMS Trust Fund, as well as its claim for interest since 1979. As we publicly announced in January, pursuant to this settlement, Iran received the balance of \$400 million in the FMS Trust Fund, as well as roughly \$1.3 billion representing a compromise on the interest. The Trust Fund balance of \$400 million was paid from Iranian funds that were deposited in the Trust Fund itself in connection with the FMS Program. The payment for the compromise on interest was provided out of the Judgment Fund, as was the case for the largest prior settlement of the FMS claims during the Bush Administration.

If Iran's claim for the Trust Fund balance and interest had gone to decision in the Hague Tribunal, the United States could well have faced significant exposure in the billions of dollars. Iran was of course seeking very high rates of interest for a period of over three decades. We were able to secure a favorable resolution on the interests and avoid the potential for a much larger award against us.

The details of why we settled for this amount are litigation-sensitive: getting into that explanation would get at other issues still pending at the Tribunal. Iran's lawyers would try to use my words, or maybe even some of your words, against us to help their case. But what I can say here today is that I believed that this settlement was the best thing for the United States. It was the best way to avoid a possible decision from the Tribunal ordering us to potentially pay a lot more.

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## C. HOLOCAUST ERA CLAIMS

### 1. U.S.-France Agreement on Compensation

As discussed in *Digest 2014* at 313-15 and *Digest 2015* at 306-11, the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs" established a claims program that commenced in 2015. On September 15, 2016, the State Department issued a media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261975.htm> announcing that the Department had begun making payments and that a second-round filing period would run through January 20, 2017. The media note explains further:

Approximately 30 survivors of deportation and some surviving spouses have received payment or are about to receive payment. We have also begun making payments to heirs of survivors and surviving spouses who are no longer alive. To date, the Department has paid 68 claims [for] a total of \$8,407,500 and has approved an additional 22 claims totaling an additional \$2,548,500. The Department is continuing to process claims and expects to make additional payments throughout the coming months.

The Department is also pleased to announce that it is establishing a second-round filing period, to allow claimants who may have missed the original

deadline to have an opportunity to submit a claim. The second-round filing period will open on September 15, 2016 and close on January 20, 2017. Program requirements will remain the same, and payments for eligible second-round claims will be made out of the funds remaining after all eligible first-round claims have been paid.

## 2. Pending Litigation

Article 5(2) of the 2014 U.S.-France Agreement creates an international obligation for the United States to secure the termination of U.S. litigation against France concerning any Holocaust deportation claim. However, that provision leaves the means by which termination would be effected to the discretion of the United States, and it requires the Government of France to assist in any such termination “if need be.” As the defendant in such a lawsuit and consistent with the Foreign Sovereign Immunities Act, France would first assert its sovereign immunity by asking the trial court to dismiss the suit. At that point, the United States may then support the request for dismissal with a filing that explains the United States’ interest in the litigation.

The United States filed a statement of interest in *Scalin et al. v. SNCF*, No. 15-cv-3362 (N.D. Ill.) in 2015. See *Digest 2015* at 311-18. The court granted SNCF’s motion to dismiss and dismissed the case without prejudice on September 30, 2016.

## D. CENTRAL AMERICAN CLAIMS

See *Digest 2015* at 319 regarding the lifting of a statutory prohibition on assistance and support to Nicaragua due to the resolution of property claims against the government of Nicaragua.

On August 29, 2016, the State Department certified, pursuant to Section 7045(a)(3)(B) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, Pub. L. 114–113), that the central government of El Salvador is taking effective steps to satisfy a number of criteria, among them the resolution of commercial disputes between United States entities and the Salvadoran government, including with respect to the confiscation of real property. 81 Fed. Reg. 62,547 (Sep. 9, 2016).

On September 30, 2016, the State Department likewise certified that the government of Honduras has taken effective steps to meet the criteria specified in Section 7045(a)(3)(B) of the Fiscal Year 2016 appropriations legislation. 81 Fed. Reg. 71,158 (Oct. 14, 2016). In a taken question at the October 14, 2016 State Department daily press briefing, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263159.htm)

[2017.state.gov/r/pa/prs/ps/2016/10/263159.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263159.htm) State Department Deputy Spokesperson Mark Toner elaborated:

On September 30, 2016, the Department of State certified to the U.S. Congress that Honduras has taken effective steps to meet the criteria specified in the Fiscal Year 2016 appropriation legislation. Still, serious challenges remain that

require sustained effort and political will by the Honduran government. Impunity and corruption pose significant challenges to the country's institutions. But to date, the Honduran government has demonstrated the political will necessary to tackle the country's security and developmental challenges.

...With regard to Honduras, approximately \$55 million in foreign assistance was linked to certification on 12 conditions. That assistance is targeted to improve the security, governance, and economic challenges that drive undocumented migration from the region.

## E. IRAQ CLAIMS

### Claims Under the October 7, 2014 Referral

The Foreign Claims Settlement Commission ("FCSC") began issuing decisions in 2016 under the Second Iraq Referral, dated October 7, 2014. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16. On August 23, 2016, the Commission issued its final decision on Claim No. IRQ-II-161, the first decision on the merits under Category A, which consists of claims by U.S. nationals for hostage-taking by Iraq in violation of international law prior to October 7, 2004. This first decision, which established the standard for hostage-taking under the Referral, reviews the facts underlying the detention of foreign nationals in Iraq and Kuwait during the relevant period and analyzes the act of hostage-taking under international law, drawing heavily on the 1949 Geneva Conventions and the 1979 Hostages Convention. Excerpts follow (with footnotes omitted) from the Commission's final decision on Claim No. IRQ-II-161, which is available at <https://www.justice.gov/fcsc/final-opinions-and-orders-5>

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\* \* \* \*

Category A of the 2014 Referral consists of "claims by U.S. nationals for hostage-taking by Iraq in violation of international law prior to October 7, 2004 . . ." 2014 Referral at ¶ 3 (footnotes omitted). Accordingly, to determine the applicable standard for compensability for hostage-taking claims under Category A, the Commission must look to pertinent sources in international law.

Customary international law prohibits States from taking hostages during an armed conflict. Under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention") and its First Additional Protocol, States are prohibited from taking hostages during an armed conflict. This prohibition on hostage-taking during armed conflict had thus become customary international law prior to the Iraqi invasion of Kuwait in 1990.

We need not decide whether, as a matter of treaty law, the Fourth Geneva Convention's prohibition on hostage-taking specifically applies to U.S. nationals in Kuwait at the time,

because the customary international law prohibition on hostage-taking during armed conflict protects all persons, irrespective of nationality.

Therefore, to be entitled to compensation under Category A of the 2014 Referral, a claimant must show that (1) Iraq was engaged in an armed conflict and (2) during that conflict, Iraq took the claimant hostage.

(1) Armed Conflict

On August 2, 1990, Iraq's armed forces invaded Kuwait. There is thus no doubt that as of that date, Iraq and Kuwait were engaged in an armed conflict. That armed conflict continued as a matter of law until April 8, 1991, the date on which Iraq accepted the United Nations Security Council's offer of a formal cease-fire between Iraq on the one hand and Kuwait and the United Nations Member States (including the United States) who had contributed to the coalition forces defending Kuwait on the other.

Thus, any claimant who alleges that Iraq took the claimant hostage in violation of international law during any portion of the period from August 2, 1990 to April 8, 1991 satisfies the requirement that Iraq have been engaged in an armed conflict.

(2) Hostage-Taking

To show that Iraq took a claimant hostage, the claimant must show that Iraq (a) seized or detained the claimant and (b) threatened the claimant with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release. A claimant can establish the first element by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. We derive this standard from various sources that evidence the customary international law of hostage-taking, including in particular the definition of hostage-taking found in the International Convention against the Taking of Hostages ("Hostages Convention") and the jurisprudence of international tribunals discussing hostage-taking claims.

Although neither the Fourth Geneva Convention nor the First Additional Protocol contains a definition of hostage-taking, what constitutes hostage-taking is well-recognized in international law. In particular, article 1 of the Hostages Convention defines hostage-taking. While the Hostages Convention itself may or may not have been binding customary international law in 1990, we view it as an important and relevant source for providing a definition of hostage-taking under customary international law. The Hostages Convention defines hostage-taking as the offense committed by

any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.

International tribunals have looked to this Hostages Convention definition to explain the elements of the offense of hostage-taking under both customary international law and the Fourth Geneva Convention. For example, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") adopted this definition in *Prosecutor v. Blaskic*, in which the Tribunal specifically analyzed hostage-taking in the context of armed conflict under both the Fourth Geneva Convention and customary international law. In *Blaskic*, the tribunal determined that

a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person.

International tribunals have broken this definition down into three specific elements. For example, the Special Court for Sierra Leone cited *Blaskic* for the proposition that there are “specific elements for the offence of hostage-taking.” Those are

(i) The Accused seized, detained, or otherwise held hostage one or more persons; (ii) The Accused threatened to kill, injure or continue to detain such person(s); and (iii) The Accused intended to compel a State, an international organisation, a natural or legal person, or a group of persons, to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s).

The International Criminal Court’s Elements of Crimes also sets forth these same three elements in its definition of the war crime of hostage-taking:

(1) The perpetrator seized, detained or otherwise held hostage one or more persons.  
(2) The perpetrator threatened to kill, injure or continue to detain such person or persons.  
(3) The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.

In *Prosecutor v. Karadzic*—the most recent decision of an international tribunal to address hostage-taking in violation of the customary international law of armed conflict—the ICTY reiterated that the definition codified in article 1 of the Hostages Convention provides a sound basis for ascertaining the elements of the offense under customary international law.

In sum, for a claimant to satisfy the hostage-taking requirement under Category A of the 2014 Referral, a claimant must show that Iraq (a) seized or detained the claimant, and (b) threatened the claimant with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant’s release.

\* \* \* \*

## F. LIBYA CLAIMS

### 1. Foreign Claims Settlement Commission

As discussed in *Digest 2013* at 242-43, the U.S. Department of State made a third referral of Libya claims to the FCSC on November 27, 2013. As of March 30, 2017, the FCSC had issued final decisions on 46 claims and proposed decisions on all 107 claims received. The total value of awards as of March 30, 2017 was \$37.7 million. See <http://www.justice.gov/fcsc/current-programs>. The following discussion focuses on some of the more noteworthy opinions under the Third Libya Referral. All decisions are available in full at <https://www.justice.gov/fcsc/final-opinions-and-orders-5>.

**a. Claim No. LIB-III-021, Decision No. LIB-III-016 (2016) (Final Decision)**

The Proposed Decision in this claim was the Commission’s first decision under Category D of the Third Libya Referral. Category D authorizes the Commission to award additional compensation to claimants who received physical injury awards under the January 2009 Referral, provided the claimant shows that, among other things, the severity of their injury is a “special circumstance warranting additional compensation.” The claimant was awarded \$4 million, but objected to the decision on the basis that the amount of compensation should have been higher. In the Final Decision, the Commission agreed and increased the award to \$5 million. This amount, also awarded in one other claim (Claim No. LIB-III-011), was the highest amount awarded for additional compensation based on a severe physical injury that met the “special circumstance” provision under the Third Libya Referral. Excerpts follow (with footnotes omitted) from the February 11, 2016 final decision in this case.

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As we have noted numerous times, including in the Proposed Decision on this claim, assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula. Assessing the *relative* value of such claims, as Category D of the November 2013 Referral contemplates, is nearly as difficult. Nevertheless, in its Proposed Decision, the Commission identified specific factors, in addition to the State Department’s recommended maximum of \$7 million, that it would use in determining appropriate compensation—the same factors that had been applied in claims for additional compensation under the 2009 Referral. These factors included the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any disability ratings, if available, and the nature and extent of disfigurement to the claimant’s outward appearance. *See* Proposed Decision, *supra*, at 15 (citing Claim No. LIB-II-118, Decision No. LIB-II-152, at 14 (2012)).

\* \* \* \*

Having considered Claimant’s additional evidence and argument, we conclude that Claimant is entitled to greater compensation than the claimants in Claim Nos. LIB-II-118 and LIB-II-156 and thus to more than the \$4 million we awarded her in the Proposed Decision: As we explain in more detail below, taking all of our factors into account and balancing them appropriately, we find that Claimant’s injuries are more severe than those of the claimants in LIB-II-118 and LIB-II-156.

Initial Injuries: The loss of Claimant’s legs at issue in this claim was horrific. No other claimant in our Libyan claims programs was made a double-amputee by his or her physical injuries. Even when viewed in terms of the catastrophic injuries suffered by the claimants in

LIB-II-118 and LIB-II-156, this Claimant's initial injuries were clearly among the most severe in our Libyan claims programs.

Hospitalization/Subsequent Surgeries: Claimant has spent more time in the hospital than the Claimants in LIB-II-118 and LIB-II-156—or, for that matter, any other claimant seeking “additional compensation” in these Libyan Claims Programs. The evidence suggests that she has spent no less than two years as an in-patient at various medical facilities (although the evidence is not conclusive on the precise nature of one lengthy portion of that period). Moreover, she has undergone countless operations to repair her leg stumps and remove shrapnel embedded in her body, and has endured years of only marginally successful physical rehabilitation, which has included the fitting and re-fitting of prostheses that have often left her in pain due to the poor condition of her amputation stumps. In addition to her in-patient hospitalizations in the first few years after the attack, she has had numerous outpatient appointments over the decades since then. Moreover, the sheer number of subsequent surgeries Claimant has undergone reflects a degree of ongoing treatment greater than any other claim thus far encountered in these Libyan Claims Programs, including the claimants in LIB-II-118 or LIB-II-156.

\* \* \* \*

In sum, the number of days (in this case, months or years) Claimant was hospitalized, the number and type of surgeries she has endured, the persistent failure to find a perfect fit for her prosthetics, and the attendant chronic pain all counsel for greater compensation than in Claim Nos. LIB-II-118 and LIB-II-156.

Permanent Impairment: Claimant's permanent impairment is also significantly greater than any other “special circumstance” claim in these Libyan Claims Programs, including the two claimants in Claim Nos. LIB-II-118 and LIB-II-156. In weighing this factor in our compensation determination, we look not only at the *fact* of permanent impairment, but also at the *level* of that impairment as well. First and foremost, Claimant has lost the bottom halves of both of her legs.

...

Second, Claimant has submitted evidence of disability ratings indicating a greater level of permanent impairment than any other claimant in these Libyan Claims Programs, including claimants in Claim Nos. LIB-II-118 and LIB-II-156. ...

Third, unlike the other claimants to whom we awarded \$4 million, Claimant appears not to have been able to work after her injury.. Claimant states that, as a result of her disability, she “has never been able to work since the attack . . . .” While her own statements to this effect are the only explicit evidence for that claim, the disability determination from the Israeli Institute would appear to support this. The claimants in Claim Nos. LIB-II-118 and LIB-II-156, on the other hand, were both able to return to work in some capacity and did not have such a clear determination of permanent impairment.

Disfigurement: While the claimants in LIB-II-118 and LIB-II-156 certainly suffered some degree of disfigurement, it was far less than the instantly obvious and life-changing deformity that Claimant was left with.

\* \* \* \*

**b. Claim No. LIB-III-044, Decision No. LIB-III-044**

The Proposed Decision in this claim was the Commission's first decision under Category F of the Third Libya Referral. The Claimant was a former pilot for Pan American World Airways who lost his job when the airline ceased operations in December 1991. He alleged that the bombing of Pan Am Flight 103 in December 1988 caused Pan Am's demise in December 1991. Because Libya was responsible for the bombing, Claimant asserted that Libya was also responsible for his lost future wages and benefits, which he claimed he would have earned had Pan Am not gone out of business. After extensive factual and legal analysis (including a detailed examination of causation under international law), the Commission denied the claim on the basis that Claimant had failed to prove that Libya's actions were the proximate cause of his lost future wages and benefits, or that his claim had not been extinguished by a 2005 settlement made by Pan Am and Libya in connection with a civil lawsuit in Scotland. Excerpts follow (with footnotes omitted) from the decision.

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\* \* \* \*

...[W]e deny Claimant's claim for two reasons. First, he has failed to establish that his claim was not extinguished by a 2005 settlement between Pan Am and Libya. Second, he has failed to prove that the December 1988 bombing of Pan Am Flight 103 was a proximate cause of Pan Am ceasing its operations three years later (and, thus, of Claimant's damages).

Claim extinguished: Claimant has failed to establish that his claim was not extinguished by the 2005 Settlement Agreement that ended the case Pan Am brought against Libya in Scotland. If the Settlement Agreement extinguished his current claim, Claimant would not be entitled to an award from the Commission.

\* \* \* \*

Of course, the best way to resolve this lack of clarity would be to examine the Settlement Agreement itself as the "best evidence" of its contents. However, Claimant has not provided a copy of the agreement. We have only the Settlement Motion seeking the bankruptcy court's approval for the settlement. Moreover, Claimant himself states that, because the agreement was sealed by the court as confidential, "[t]here is no way to know the precise terms of the settlement." He thus appears to concede that there is "no way to know" whether the settlement extinguished his claim. The problem, though, is that Claimant has the burden to establish that his claim has not been extinguished.

Without concrete evidence about the actual contents of the Settlement Agreement, Claimant cannot meet that burden.

Accordingly, because Claimant has failed to establish that the 2005 settlement did not extinguish his claims against Libya, we deny his claim. However, for the sake of administrative efficiency, and considering the relatively late stage of claims processing under this program, the Commission will nonetheless proceed to review and decide the other elements of the claim.

Proximate Cause: International law requires that a claimant establish that an alleged wrongdoer have “proximately caused” the claimant’s damages. Claimant here must thus show that Libya’s actions proximately caused his damages. In international law, “proximate” is often contrasted with “remote” or “indirect.” Another way to characterize a wrongdoer’s actions as “proximately causing” a claimant’s damages is to say that those damages were “foreseeable” to the wrongdoer. This approach excludes any damages, including lost earnings or income, that are “speculative” or “contingent.” Moreover, “claims based on the loss of prospective earnings are generally not allowed under international law,” because such earnings are typically viewed as speculative and dependent on future uncertain contingencies.

Claimant has failed to establish that Libya’s actions were even a cause, let alone a proximate cause, of any damages he suffered. Claimant argues that because Libya is responsible for the Lockerbie bombing, it is also responsible for the damages he suffered from losing his job with Pan Am three years later when Pan Am ceased operations. His theory of causation appears to be based on a chain of events with several links: (1) Libya is responsible for the Lockerbie bombing; (2) because of the Lockerbie bombing, people flew less on Pan Am, and in particular, on Pan Am’s transatlantic routes, than they otherwise would have flown but for the Lockerbie bombing; (3) because people flew less on Pan Am, Pan Am received less in revenue in 1989 and 1990 than it otherwise would have received but for the Lockerbie bombing; (4) because Pan Am received less in revenue in 1989 and 1990, it had less “cash available” at the end of 1990 than it otherwise would have had but for the Lockerbie bombing; (5) because Pan Am had less cash available at the end of 1990 than it otherwise would have had but for the Lockerbie bombing, it had to seek reorganization under Chapter 11 in January 1991; (6) because it had to seek reorganization under Chapter 11 in January 1991, it had to cease operations in December 1991.

We address each link in Claimant’s alleged causal chain in turn:

1. Libya is responsible for the Lockerbie bombing.

In 2001, a Libyan official was found by a Scottish court sitting in the Netherlands to be responsible for the Pan Am 103 bombing. For purposes of this case, we accept this finding as establishing this first link in the chain of Claimant’s allegation that Libya’s actions proximately caused his damages.

2. Because of the Lockerbie bombing, people flew less on Pan Am, and in particular, on Pan Am’s transatlantic routes, than they otherwise would have flown but for the Lockerbie bombing.

The evidence suggests that people flew less on Pan Am, and in particular, on its transatlantic routes, because of the Lockerbie bombing. In assessing the causes of Pan Am ceasing its operations three years later, however, this mere fact does not suffice. The issue is not simply whether people flew less on Pan Am than they otherwise would have, but rather the extent to which they did so and just as importantly, for how long. Claimant has not provided any evidence of the extent and length of time the Lockerbie bombing’s effect on reduced passenger loads lasted—a key inquiry given the three-year time period that elapsed between the bombing and the airline’s closure.

\* \* \* \*

3. Because people flew less on Pan Am, Pan Am received less in revenue in 1989 and 1990 than it otherwise would have received but for the Lockerbie bombing.

Two important problems render Claimant's evidence insufficient to prove this alleged link in the causal chain: First, the claim is a factual claim that needs to be proven with evidence, not assumptions. Second, even if true, the important question is not *whether* Pan Am received less revenue than it otherwise would have received but for the Lockerbie bombing, but rather *how much* less revenue; and on that question, Claimant's evidence is decidedly unhelpful.

\* \* \* \*

4. Because Pan Am received less in revenue in 1989 and 1990, it had less "cash available" at the end of 1990 than it otherwise would have had but for the Lockerbie bombing.

Even if we were to accept Dr. Larsen's conclusions about the revenue Pan Am would have received but for the Lockerbie bombing, that increase in revenue would not necessarily translate directly into an equivalent increase in "cash available." Dr. Larsen appears to have assumed that the entire amount of her hypothetical projected increase in revenue would have remained in Pan Am's coffers at the end of 1990 when it sought reorganization under Chapter 11. Dr. Larsen indicates that Pan Am's cash position at the end of 1989 was \$162 million, a fact confirmed by the airline's SEC filings. She projects that, had the bombing not occurred, Pan Am would have instead had \$612 million in cash on hand—a difference of exactly \$450 million. It appears that Dr. Larsen simply added the projected revenue of \$450 million to Pan Am's actual 1989 cash-on-hand to arrive at her projected cash position for 1989.

\* \* \* \*

In sum, Dr. Larsen's contention that Pan Am would have had \$911 million in cash on hand at the end of 1990 is highly speculative and unsupported by the evidentiary record.

5. Because Pan Am had less cash available at the end of 1990 than it otherwise would have had but for the Lockerbie bombing, it had to seek reorganization under Chapter 11 in January 1991.

Whatever difference the Lockerbie bombing may have made to Pan Am's cash position at the end of 1990, the evidence is insufficient to demonstrate that that difference would have prevented Pan Am from seeking reorganization under Chapter 11 in January 1991. While Pan Am's lack of cash may have been the most immediate "cause" of its Chapter 11 filing, the evidence indicates that numerous causes other than the reduction in cash due to the Lockerbie bombing would likely have sufficed to lead Pan Am to seek reorganization under Chapter 11.

Both the effects of the economic recession that began in July 1990 and Iraq's invasion of Kuwait the next month played a far greater and more immediate role in Pan Am's financial troubles in the run-up to its Chapter 11 filing than the Lockerbie bombing. These two events had a catastrophic effect on the entire airline industry. ...

\* \* \* \*

6. Because it had to seek reorganization under Chapter 11 in January 1991, it had to cease operations in December 1991.

The evidence about what happened in 1991 suggests that the road from Pan Am's Chapter 11 filing in January 1991 to its ceasing operations in December of that year was not an inevitable result of its Chapter 11 filing; rather, it had complex causes, many of which were specific to events in 1991 itself. ...

\* \* \* \*

In short, Claimant has failed to establish a sufficiently proximate causal connection between the 1988 Lockerbie bombing and Pan Am's closure three years later in December 1991. Pan Am's finances and passenger traffic were improving before the recession and the Gulf War in 1990. It was those two events that sent the company into the relevant downward spiral, and the airline's losses from that time period eclipsed those from immediately following Lockerbie. Furthermore, to the extent that one can trace the chain of causation to some point prior to the summer of 1990, Pan Am's troubles appear to have been a result of deregulation and other financial pressures over the decade or so prior to the Lockerbie bombing, as evidenced by the sales of its New York headquarters building (1980), the Intercontinental Hotel Chain (1981), and the Pacific Division (1985), as well as the union concessions and other initiatives that led to strikes in 1984-85. Moreover, as its own records show, Pan Am was reeling from external shocks in 1986-87 (the TWA bombing; the Pan Am 73 hijacking in Karachi, Pakistan; the nuclear disaster in Chernobyl, USSR), well before the Lockerbie bombing. Whenever Pan Am's problems began, it was not in December 1988.

We by no means imply that causation always follows a linear path. We understand that the "causes" of Pan Am ceasing its operations were no doubt numerous and complex. Put another way, we have no doubt that a number of factors played some role. We cannot—nor do we—say that the Lockerbie bombing played no role whatsoever. However, Claimant has not met his burden to prove that Libya's role in the Lockerbie bombing was a "proximate cause" of his damages. ...

\* \* \* \*

**c. Claim No. LIB-III-036, Decision No. LIB-III-045**

The Commission consolidated most of the remaining claims under Category F that were brought on the same basis as the claim addressed in Decision No. LIB-III-044, discussed above. The proposed decision on these consolidated claims was issued approximately one month after the proposed decision in LIB-III-044. The majority of the evidence in the consolidated claims was the same as in Claim LIB-III-044, although additional evidence was submitted immediately after the denial of the first decision on Category F claims. Nevertheless, the Commission reached the same conclusions. It also briefly discussed the issue of whether the Claimants even had a compensable property interest in their lost future wages and benefits. The Commission did not decide that issue, however, because the claim was denied on other grounds.

## 2. Litigation

### a. *Aviation v. United States*

On July 7, 2016, the U.S. Court of Federal Claims granted summary judgment in favor of the United States government in a case brought by plaintiffs who did not receive compensation pursuant to the 2008 Claims Settlement Agreement between the United States and Libya. *Aviation v. United States*, No. 14-687C. Excerpts follow from the court's opinion.

\* \* \* \*

This case presents novel Fifth Amendment taking claims arising from the Government of Libya's terrorist attacks in bombing Pan Am Flight 103 over Lockerbie, Scotland in 1988, and in hijacking EgyptAir Flight 648 in 1985. Plaintiffs assert that they had valid causes of action against Libya pending in the U.S. District Court for the District of Columbia, but that President George W. Bush extinguished those actions by restoring sovereign immunity to Libya in 2008. In so doing, President Bush issued an Executive Order terminating the lawsuits against Libya and referring the disputes to the Foreign Claims Settlement Commission. However, the Settlement Commission ruled that it lacked jurisdiction over Plaintiffs' claims, leaving Plaintiffs with no avenue for recovery. Plaintiffs' taking claims followed in this Court. For the reasons explained below, the Court denies Plaintiffs' claims.

#### Factual Background

In its May 26, 2016 opinion and order denying the Government's motion to dismiss, the Court provided a detailed description of the factual bases for Plaintiffs' claims. See *Aviation & Gen. Ins. Co. Ltd. v. United States*, 121 Fed. Cl. 357 (2015). As relevant to the parties' cross-motions for summary judgment, the Court includes a brief recitation of the facts. On November 23, 1985 and December 21, 1988, Libyan-sponsored terrorists hijacked EgyptAir Flight 648 and bombed Pan Am Flight 103, respectively. Plaintiffs are insurance companies and an asset management company that insured in part both aircrafts. Joint Statement of Material Facts ("JSMF") ¶¶ 1, 2. All but one Plaintiff is a foreign corporation. JSMF ¶ 2. As a result of the attacks, Plaintiffs paid approximately \$64 million to their insureds for both aircrafts. JSMF ¶¶ 5, 7, 9.

At the time of the terrorist attacks, as now, Plaintiffs could not bring claims against Libya. The Foreign Sovereign Immunities Act of 1976 prohibits suits against other countries in U.S. courts, with certain exceptions. See 28 U.S.C. § 1604 (immunity for foreign states); §§ 1605-1607 (providing exceptions). One exception, now repealed, stripped a foreign state of immunity in any suit arising from certain acts of terrorism that occurred when the state was designated a sponsor of terrorism. See 28 U.S.C. § 1605(a)(7). On January 28, 2008, Congress amended the Act and designated Libya a sponsor of terrorism. JSMF ¶¶ 17-18; 28 U.S.C. § 1605(A). Then, Plaintiffs filed two separate lawsuits seeking indemnification for their payments to victims of the attacks on Pan Am Flight 103 and EgyptAir Flight 648. JSMF ¶¶ 14-15.

In August 2008, while Plaintiffs' lawsuits were pending in U.S. District Court, Congress passed the Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008), restoring Libya's sovereign immunity and implementing a Claims Settlement Agreement between the

United States and Libya. JSMF ¶¶ 20-21, 28; Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya, 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. In exchange, Libya paid the U.S. Government \$1.5 billion to ensure payment to specified terrorism victims with claims against Libya. JSMF at A185.

On October 31, 2008, President George W. Bush issued Executive Order No. 13,477 providing that any pending suit in any U.S. court by United States or foreign nationals related to Libyan-sponsored terrorism shall be terminated. JSMF ¶¶ 23, 25-27. The U.S. District Court dismissed Plaintiffs' lawsuits for lack of subject matter jurisdiction. JSMF ¶ 27. Pursuant to Executive Order No. 13,477 and to compensate victims, the State Department referred U.S. nationals' claims against Libya to the Foreign Claims Settlement Commission that was funded by the \$1.5 billion payment from Libya. JSMF ¶ 34. Importantly, Executive Order No. 13,477 does not direct the State Department to refer claims by foreign companies to the Foreign Claims Settlement Commission. Nevertheless, in 2010, certain Plaintiffs brought claims before the Settlement Commission. They claimed to "stand in the shoes" of victimized U.S. nationals and to be entitled to compensation through the Foreign Claims Settlement Commission. JSMF ¶¶ 37, 42. Disagreeing, the Settlement Commission dismissed Plaintiffs' claims for lack of jurisdiction. JSMF ¶¶ 39, 43. The Settlement Commission's dismissal is the impetus for Plaintiffs' claims before this Court.

On July 31, 2014, Plaintiffs filed suit in this Court alleging takings of their legal claims against Libya without just compensation in violation of the Fifth Amendment. On December 7, 2015, the Government filed a motion for summary judgment, and Plaintiffs filed a cross-motion for summary judgment on January 15, 2016. On June 16, 2016, the Court heard oral argument. The matter is fully briefed, and both motions are ready for decision. For the reasons set forth below, the Court grants the Government's motion for summary judgment.

#### Discussion

\* \* \* \*

To state a claim for a taking under the Fifth Amendment's just compensation clause, the plaintiff must establish that it was the owner of property and that the United States took the property for a public purpose. *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 239-40 (1983). In its opinion denying the Government's motion to dismiss, the Court recognized, as a matter of law, Plaintiffs' property interest in the insurance contracts they sought to protect with a legal claim against Libya. *Aviation & Gen. Ins. Co.*, 121 Fed. Cl. at 362-66. The Government invites the Court to reconsider its holding. However, the Government fails to present new precedent or a new factual basis that would call into question the Court's prior decision. The Court declines the Government's invitation. For the reasons explained in the Court's May 26, 2015 opinion, Plaintiffs have a cognizable property interest.

Next, the Court must determine if there was a taking for which the Plaintiffs are entitled to compensation. The "Fifth Amendment's guarantee . . . [is] designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). However, the Courts have been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Whether there has been a taking depends largely upon the particular circumstances in each case. *Id.* (quoting another source). In other words, the Court must weigh all relevant factors to determine

whether Plaintiffs' loss is one that in all fairness and justice ought to be shifted to the public rather than be shouldered by Plaintiffs alone. *Belk et al. v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988) (quoting another source).

...The Court agrees with the parties that while the facts of this case do not neatly fit those of a traditional regulatory taking, the principal factors in a regulatory takings analysis apply: the character of the governmental action; the extent to which the regulation has interfered with distinct investment-backed expectations; and the economic impact of the regulation on the plaintiff. *Penn Central*, 438 U.S. at 124; see *Abraham-Youri*, 139 F.3d at 1466-68 (treating a takings claim based on espousal as a regulatory taking).

Plaintiffs cannot claim an investment-backed expectation free of government involvement nor can they characterize the Government's action as novel or unexpected. Where plaintiffs could have reasonably expected their property interests to be adversely affected by Government action, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind. In such circumstances, the call for just compensation on grounds of fairness and justice is considerably diminished. ...

"[T]hose who engage in international commerce must be aware that international relationships sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." *Abraham-Youri*, 139 F.3d at 1468. Businesses, such as Plaintiffs, that engage in international commerce are fully aware that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships among nations. See, *e.g.*, *id.* Where, as here, the relations between countries become strained, the possibility that the President will intervene is properly recognized as both a shared benefit and a shared risk of those who trade abroad. *Shanghai Power*, 4 Cl. Ct. at 245. Our Presidents have exercised the power to settle international claims filed in U.S. courts since at least 1799. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981). Thus, the President's involvement in settling claims against Libya and setting up the Settlement Commission cannot constitute a novel interference with any investment-backed expectation.

Instead, Plaintiffs assert they had an investment-backed expectation to bring suit against and recover from Libya after Congress briefly lifted Libya's sovereign immunity. However, by providing that the State Sponsor of Terrorism exception no longer applies, the United States merely restored the default rule of sovereign immunity. Foreign sovereign immunity "reflects current political realities and relationships" and its availability, or lack thereof, "generally is not something on which parties can rely in shaping their primary conduct." *Republic of Iraq v. Beaty*, 556 U.S. 848, 864-65 (2009) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)) (internal quotation marks omitted). In affairs between nations, outstanding claims filed in one nation against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U.S. 203, 225 (1942). While individuals may have legitimate claims against foreign nations, the presence of these claims and attempts to collect may seriously harm the relations between the two countries. *Shanghai Power*, 4 Cl. Ct. at 244. The President's power to eliminate sources of friction between sovereigns is a long-standing and integral aspect of the President's authority to conduct foreign relations. See, *e.g.*, *id.* at 245.

The last factor the Court must consider is the economic impact of the Government's actions. Undoubtedly, the Government extinguished Plaintiffs' claims without providing an alternative forum in which Plaintiffs could bring their claims. However, the mere fact that Executive Order No. 13,477 did not provide any alternative forum in which Plaintiffs could assert their claims, is not sufficient to establish a taking. *Belk*, 858 F.2d at 709. Plaintiffs' only

remaining challenge is to the Government excluding Plaintiffs from the Settlement Commission's jurisdiction. To be sure, the Government has no constitutional obligation to act as a collection agent on Plaintiffs' behalf. *Shanghai Power*, 4 Cl. Ct. at 244; accord *Pink*, 315 U.S. at 228. Further, the parties do not request and indeed agree this Court lacks jurisdiction to review the Settlement Commission's decision that it lacked subject matter jurisdiction over Plaintiffs' claims. See 22 U.S.C. § 1623(h) (describing the finality of Commission decisions).

Finally, the Court is concerned that the value of Plaintiffs' loss of its causes of action does not have a definite value and thus is speculative. While the Court assumes, without deciding, that Plaintiffs plausibly could have pursued a claim against Libya to final judgment, it is skeptical that Plaintiffs would have been able to collect on the judgment. See, e.g., *Sperry v. United States*, 493 U.S. 52, 53 (1989) ("Had the President not agreed to the establishment of the [Iran-U.S. Claims] Tribunal and the Security Account, [Plaintiff] would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectable."); accord *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009) ("A number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these [Foreign Sovereign Immunities Act] terrorism cases to enforce their default judgments. . . ."). Given these considerations, the Plaintiffs' economic injury is not one that fairness and justice require be shifted to the public at large.

\* \* \* \*

**b. *Alimanestianu***

On December 29, 2016, the U.S. Court of Federal Claims issued its decision in another case related to the Libya claims settlement agreement, *Alimanestianu v. United States*, No. 14-704C. Excerpts follow (with footnotes omitted) from the decision granting summary judgment for the U.S. government.

\* \* \* \*

Plaintiffs in this Fifth Amendment taking case are family members of Mihai Alimanestianu, who was killed in 1989, when, in an act of state-sponsored terrorism, the Socialist People's Libyan Arab Jamairya ("Libya") bombed United Trans Aeriens Flight 772. Plaintiffs were awarded a nearly \$1.3 billion judgment against Libya for the wrongful death of Mihai Alimanestianu. *Pugh v. Socialist People's Libyan Arab Jamahirya*, 530 F. Supp. 2d 216, 267-68 (D.D.C. 2008), vacated, Nos. 08-5387, 08-5388, 2009 WL 10461206, at \*1 (D.C. Cir. Feb. 27, 2009) (per curiam). Plaintiffs allege that the Government effected a taking by espousing and settling their claims with Libya and obtaining a vacatur of their judgment.

As part of the United States' settlement with Libya, Plaintiffs' claims were referred to the Foreign Claims Settlement Commission, and Plaintiffs received compensation of just over \$10 million. Because Plaintiffs' settlement is far less than the \$1.3 billion judgment they were awarded in their District Court action, Plaintiffs assert that the United States owes them additional just compensation for taking their property.

This matter comes before the Court on Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment. Because there are no genuine issues of material fact and Plaintiffs have failed to establish a compensable taking as a matter of law, Defendant's motion for summary judgment is granted.

#### Background

Plaintiffs are family members of Mihai Alimanestianu, who was killed in the 1989 explosion of United Trans Aeriens Flight 772 caused by Libya in an act of state-sponsored terrorism. Compl. ¶¶ 10-11. At the time of the explosion in 1989, there was no exception to the Foreign Sovereign Immunities Act ("FSIA") for state sponsors of terrorism, and Libya was immune from suit in the United States. In 1996, Congress amended FSIA to include an exception permitting claims for money damages for personal injury or death caused by acts of foreign sovereigns designated as state sponsors of terrorism. 28 U.S.C. § 1605(a)(7) (1996).

In 2002, Plaintiffs filed suit stemming from Mr. Alimanestianu's death in the United States District Court for the District of Columbia against Libya and six high-ranking Libyan officials. On January 24, 2008, the District Court granted summary judgment in Plaintiffs' favor and on August 8, 2008, entered final judgment, awarding Plaintiffs approximately \$1.3 billion.

The defendants in the Pugh action filed a notice of appeal on August 14, 2008. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, Nos. 08-5387, 08-5388 (D.C. Cir.) (consolidated). That same date, "[i]n order to further the process of normalization of relations" the United States entered into a "Claims Settlement Agreement" with Libya. Def.'s App. A1. ...

The Agreement established a humanitarian settlement fund. ... The United States deposited \$300 million into the fund which was to be used to compensate Libyan victims of United States airstrikes. Libya deposited \$1.5 billion into the fund. ... The \$1.5 billion included "\$681 million . . . to ensure fair compensation for the claims of nationals of the United States for wrongful death or physical injury in those cases described in the Act which were pending against Libya . . . as well as other terrorism-related claims against Libya." ... Each country agreed to accept these funds "as a full and final settlement of its claims and suits and those of its nationals," and each party was required to "[s]ecure . . . the termination of any suits pending in its courts . . . (including proceedings to secure and enforce court judgments), . . . preclude any new suits in its courts," and restore "sovereign, diplomatic and official immunity to the other Party . . . ." ...

In 2008, Congress enacted the Libyan Claims Resolution Act. Pub. L. No. 110-301, 122 Stat. 2999 (2008) ("LCRA"). The LCRA codified the Agreement and provided that, upon the United States' receipt of funds pursuant to the Claims Settlement Agreement, sovereign immunity would be restored to Libya. ... The LCRA provided that the funds had to be sufficient to ensure "fair compensation of claims of nationals of the United States for wrongful death or physical injury . . . ." *Id.*

On October 31, 2008, the Secretary of State certified receipt of the Libyan funds, and President George W. Bush issued Executive Order No. 13,477, providing that any pending suit by United States nationals and any pending suit in the United States by foreign nationals within the terms of the Claims Settlement Agreement—"including any suit with a judgment that is still subject to appeal . . . shall be terminated." Pls.' Mot. Ex. 5, at A99. The State Department established a fund to compensate individuals with wrongful death or personal injury claims against Libya caused by acts of state-sponsored terrorism and provided that the Foreign Claims Settlement Commission would adjudicate and render final decisions on claims of U.S. nationals referred to the Commission by the Secretary of State. 22 U.S.C. § 1623(a)(1)(C) (1998). The

Commission was obligated to first apply the “provisions of the applicable claims agreement” and then apply “[t]he applicable principles of international law, justice, and equity.” § 1623(a)(2).

\* \* \* \*

...The D.C. Circuit granted the Government’s motion to intervene, vacated the judgment in *Pugh*, and directed the District Court to dismiss the case. *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 2009 WL 10461206, at \*1. On March 6, 2009, the District Court dismissed the *Pugh* action with prejudice.

The State Department determined that a \$10-million payment per death to the estates of individuals who died in acts of Libyan sponsored terror was fair compensation, and the estate of Mihai Alimanestianu received \$10 million. Compl. ¶ 37. Following such payment to all of the estates, the State Department established seven additional categories of claims for referral. Pls.’ Mot. Ex. 6, at A105-07. On December 11, 2008, pursuant to his discretionary authority under 22 U.S.C. § 1623(a)(1)(C), the legal advisor to the Secretary of State referred one category of claims (physical injury) to the Commission for adjudication and certification. *Id.* at A105. On January 15, 2009, the State Department sent a referral letter to the Commission, referring six additional categories of claims (Categories A, B, C, D, E, and F) and requesting that the Commission make determinations on those claims. *Id.*

Plaintiffs brought claims pursuant to Category B, which covered “claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State,” and had been the subject of pending litigation against Libya that was dismissed. *Id.* at A106.

The Commission determined that Mihai Alimanestianu’s children should receive \$200,000 each. Compl. ¶ 37. The Commission denied compensation to the estates of Mihai Alimanestianu’s brothers under Category B, because the brothers were not living at the time of the referral and to Ioana Alimanestianu, because as the beneficiary of the Estate of Mihai Alimanestianu, she was “eligible for compensation from the associated wrongful death claim.” Pls.’ Opp’n 10; Pls.’ Mot. Ex. 6, at A106.

Plaintiffs, along with the other *Pugh* claimants, also sought additional compensation under Category C, permitting claimants with prior U.S. Court judgments to seek additional compensation, so long as the pending litigation against Libya had been dismissed. Pls.’ Mot. Ex. 6, at A106. On May 16, 2012, the Commission denied the claims of all Category C claimants, concluding that no special circumstance warranted additional compensation. Def.’s App. A12. In a May 31, 2012 letter, Plaintiffs, along with other claimants, objected to the Commission’s Proposed Decision, submitted a consolidated brief with supporting exhibits, and presented argument at an oral hearing the Commission held on the claimants’ objections. *Id.* at A12-13.

On February 15, 2013, after it “reviewed all of the documents in the record and carefully considered claimants’ arguments,” the Commission issued a Final Decision, again denying the claimants’ request for additional compensation. *Id.* at A11-A46. ...Following the Commission’s denial of their claims for additional compensation, Plaintiffs filed the instant action.

\* \* \* \*

### Legal Standard for Fifth Amendment Taking

On its face, the Fifth Amendment prohibits the taking of “private property . . . for public use, without just compensation.” U.S. Const. amend. V. The purpose of this prohibition is to bar the few from shouldering a burden that should be borne by the public as a whole. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005) (noting that it is appropriate to inquire into whether plaintiffs have “been singled out to bear any particularly severe regulatory burden”); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (stating that “‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” (internal citation omitted)).

The Constitution “protects rather than creates property interests . . . .” *Phillips v. Wash. Legal Fund*, 524 U.S. 156, 164 (1998). Consequently, to “define the dimensions of the requisite property rights for purposes of establishing a cognizable taking,” courts look to “existing rules and understandings” and “background principles derived from an independent source, such as state, federal, or common law.” *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)). “The concept of property for purposes of the [F]ifth [A]mendment has been interpreted broadly and can include ‘every sort of interest the citizen may possess.’” *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

When the Government takes private property pursuant to a public purpose, it must pay the owner just compensation. See *Lingle*, 544 U.S. at 538-39 . . .

### Plaintiffs Have Not Established a Compensable Taking

#### The Standard: Consideration of the Penn Central Factors is Appropriate

The parties dispute whether Plaintiffs’ takings claim should be analyzed as a per se taking or a regulatory taking. Plaintiffs allege that Defendant effected a per se taking of their property, which they characterize as their District Court judgment, when it settled their claims against Libya pursuant to the Claims Settlement Agreement for substantially less than their judgment and transferred their property to the Government. Plaintiffs assert that because they did not receive just compensation from the United States as a result of the Settlement, they are entitled to \$1,286,336,632, the approximate amount of their District Court judgment.

Defendant argues that the *Penn Central* factors, traditionally applied in the regulatory taking context, govern the Court’s determination of whether the Government’s espousal and settlement of the claims of United States nationals constitutes a compensable taking. Def.’s Mot. 12, 16-19. In a takings analysis under *Penn Central*, the Court examines 1) the extent to which the Government’s action interfered with the plaintiffs’ reasonable investment-backed expectations; 2) the character of the Government’s action; and 3) the economic impact of that action on the plaintiffs.

The Federal Circuit in *Abraham-Youri v. United States*, recognizing the dichotomy between the legal standards governing per se and regulatory takings, provided guidance on the analytical construct governing takings involving Government claim espousal in the foreign claims settlement context. 139 F.3d 1462, 1465-68 (Fed. Cir. 1997). In *Abraham-Youri*, the United States and Iran entered into a Settlement Agreement, under which the United States espoused the small claims of U.S. nationals and later referred those claims to the Commission for consideration and payment. However, in paying the claims, the Commission did not award full interest, and the plaintiffs filed a takings action seeking their unawarded interest. *Id.* at 1465.

The Federal Circuit in *Abraham-Youri* characterized the plaintiffs' causes of action against Iran as "property rights" and acknowledged that these property rights were extinguished (not simply regulated) when the Government espoused and settled their claims. However, the Circuit concluded that a mechanistic application of a per se takings analysis was not appropriate given the nature of the property interest and the context in which the taking occurred. The *Abraham-Youri* Court found that, even though the plaintiffs had superficially met the factors in a strict per se analysis, *i.e.*, they had established a property interest that was "extinguished" and did not receive the full value of that property, there was no compensable taking. See *id.* at 1466-67.

Without concluding that the Government's espousal and settlement of the *Abraham-Youri* plaintiffs' claims constituted a regulatory taking, the Circuit nonetheless pragmatically looked to the *Penn Central* factors as relevant to its analysis. See *id.* 1465-66. The Court found the *Penn Central* factors relevant, recognizing that "takings claims . . . come in a variety of forms arising from a variety of fact patterns, some of which fit less than comfortably into the regulatory or physical takings dichotomy." *Id.* at 1466 (internal citations omitted). In so holding, the Federal Circuit rejected the *Abraham-Youri* plaintiffs' "syllogism" that because they had a property interest, and the Government took their property and undervalued it, those plaintiffs were necessarily entitled to compensation for such taking. *Id.* at 1465-66.

Given the striking similarities between *Abraham-Youri* and the instant case, this Court, consistent with *Abraham-Youri*, considers the *Penn Central* factors as relevant in assessing whether Plaintiffs established a compensable taking.

#### **The Extent to Which the Government's Actions Interfered with Plaintiffs' Expectations**

In both *Abraham-Youri* and the instant case, the plaintiffs claimed a taking based on the United States Government's espousal of its nationals' claims against a foreign government and settlement of those claims for less than their alleged full value. In *Abraham-Youri*, the Federal Circuit examined the plaintiffs' reasonable expectations in their chases in action against Iran and determined that although the plaintiffs' chases in action were extinguished, "the Government provided an alternative tailored to the circumstances which produced a result as favorable to the plaintiffs as could reasonably be expected." *Id.* at 1468.

Similarly here, Plaintiffs had no reasonable expectation for recovery greater than what they received from the State Department and the Commission. After Defendant espoused Plaintiffs' claims pursuant to the Claims Settlement Agreement, Mihai Alimanestianu's estate received \$10 million from the settlement fund, and the children of Mihai Alimanestianu received \$200,000 each.

In contrast to this actual recovery, Plaintiffs, at the time of Libya's terrorist act, had no reasonable expectation of any recovery at all. Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time. *Cf. Republic of Iraq v. Beatty*, 556 U.S. 848, 865 (2009) (stating, in a non-takings context, that "[t]he President's elimination of Iraq's later subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts" (emphasis in original)). In addition, even after succeeding in their District Court action, Plaintiffs had no reasonable expectation to secure monetary payment from Libya for their claims. Plaintiffs' ability to secure payment was speculative and would have depended upon Plaintiffs' ability to enforce and collect their United States court judgment in

Libya. In short, Plaintiffs lacked a realistic expectation of actually collecting their \$1.3 billion judgment. As such, the Government's actions in espousing and settling their claims did not interfere with Plaintiffs' reasonable expectations in their cause of action, vacated judgment and claims against Libya.

#### The Character of the Government Action

Permeating the character of the Government actions here are the Government's conduct of foreign relations and exercise of its executive authority to compromise claims of its nationals against foreign governments to further national interests. The context in which the Government conduct here occurred is an important factor. That context of conducting international affairs colors both the extent of the property interests Plaintiffs have and the reasonableness of any expectations that a taking of these interests would give rise to compensation. Plaintiffs' property interests in their causes of action against foreign governments are necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process.

As the Federal Circuit clarified in *Abraham-Youri*:

Certain sticks in the bundle of rights that are property are subject to constraint by the government, as part of the bargain through which the citizen otherwise has benefit of government enforcement of property rights. As the trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.

139 F.3d at 1468.

The very real potential that the Government might have had to compromise individual nationals' claims against Libya diminishes any reasonable expectation that Plaintiffs would receive full compensation for their claims. As the Supreme Court recognized, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns . . . [and] nations have often entered into agreements settling the claims of their respective nationals." *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (internal citation omitted).

Further, Plaintiffs brought their suit pursuant to the State Sponsor of Terrorism exception to FSIA and the Government's designation of Libya as a state sponsor of terror, which permitted suit against Libya—a somewhat tenuous jurisdictional grant which could have been (and later was) eliminated by the United States. See *Beatty*, 556 U.S. at 864-65 (noting that as foreign sovereign immunity "reflects current political realities and relationships," . . . [it] generally is not something on which parties can rely 'in shaping their primary conduct.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004))); see also *Shanghai Power*, 4 Cl. Ct. at 244. Given this landscape, Plaintiffs had no reasonable expectation that they would receive the full quantum of their District Court judgment in satisfaction of their claims against Libya.

#### The Economic Impact of the Government's Conduct on Plaintiffs' Property Rights

The Government's conduct benefited Plaintiffs economically here. The estate received \$10 million and each child received \$200,000. See *Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988) ("[W]here, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended

incidentally to benefit the public.” (alteration in original) (quoting *Nat’l Bd. of Young Men’s Christian Ass’ns v. United States*, 395 U.S. 85, 92 (1969)).

Here, as in *Abraham-Youri*, the Government’s action in espousing and settling Plaintiffs’ claims gave Plaintiffs as much compensation as they likely would have secured had they been left to their own devices. ...

It is speculative whether Plaintiffs would have secured any recovery from Libya absent the Government’s espousal and settlement of their claims. ... When Plaintiffs’ \$1.3 billion District Court judgment was espoused, it was still on appeal, and no property had been attached.

...

As the United States Court of Appeals for the First Circuit observed:

There may well be situations when the President’s extinction or “settlement” of a claim against a foreign government, without the consent of the claimant, would constitute a “taking” of private property for public “use.” Here, of course, the President has not “extinguished” [Appellant’s] claim, but has provided alternative means for its resolution and satisfaction. Thus, his actions could at very most constitute a “taking” of property only if the alternative method of satisfying the claim (*i.e.*, submission to the Tribunal) is demonstrably and measurably inferior to the rights otherwise available to [Appellant] (*i.e.*, the right to attempt to obtain an unsecured judgment in federal court).

*Charles T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814-15 (1st Cir. 1981). It cannot be said that the alternative forum provided to Plaintiffs here was “demonstrably and measurably inferior” to Plaintiffs’ right to pursue their claims against Libya in federal court and attempt to enforce any judgment sustained on appeal.

Plaintiffs’ dissatisfaction with the settlement amount negotiated by the Government and the compensation awarded by the Commission do not establish a compensable taking. See *Abraham-Youri*, 139 F.3d at 1468 (“[T]he fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.”).

\* \* \* \*

**Cross References**

*TEPCO case regarding compensation for Fukushima nuclear accident*, **Chapter 5.C.5.**

*IACHR cases*, **Chapter 7.D.**

*Relations with Cuba*, **Chapter 9.A.3.**

*Expropriation exception under the FSIA*, **Chapter 10.B.3.**

*Execution of judgments against foreign states*, **Chapter 10.B.6.**

*ICAO settlement of differences proceeding (Brazil v. United States)*, **Chapter 11.A.6.**

*Investment dispute resolution*, **Chapter 11.B.**

*Arbitration on Guatemala labor practices*, **Chapter 11.D.3.**

*International Tribunal for the Law of the Sea*, **Chapter 12.A.**

*Litigation regarding arbitration*, **Chapter 15.C.**

## CHAPTER 9

### Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

#### A. DIPLOMATIC RELATIONS

##### 1. Burma

On September 14, 2016, the State Department issued a fact sheet on U.S.-Burma relations, available as a press statement at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261918.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/261918.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261918.htm). The fact sheet is excerpted below.

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\* \* \* \*

Aung Sang Suu Kyi's historic visit in her new capacities as State Counsellor and Foreign Minister is testament to the far-reaching change Burma has undergone in the past few years. Burma now has a civilian-led, democratically elected government focused on bringing peace and national reconciliation, economic prosperity and social welfare, and respect for human rights to its people.

Building on this progress and in close coordination with the new government, President Obama has decided to make significant adjustments to our policies to help State Counsellor Aung San Suu Kyi, her government, and the people of Burma continue their process of political reform and broad-based economic growth and prosperity. These changes include: forthcoming termination of the national emergency with respect to Burma, reinstating Generalized System of Preferences (GSP) benefits for Burma, establishing a U.S.- Myanmar Partnership, expanding people-to-people ties, deepening bilateral economic engagement, continuing to work toward an Open Skies Treaty, and initiating a new USAID loan portfolio guarantee.

#### Terminating the National Emergency

President Obama's announcement that he will terminate the national emergency with respect to Burma, which has been in place since 1997, reflects Burma's tremendous progress toward democratic consolidation and our continued commitment to help the new government deliver on expectations for democracy and economic growth.

The economic and financial sanctions imposed on Burma under the national emergency were intended to encourage democratic transition. The forthcoming termination of the national emergency will serve to recognize the enormous transformation Burma has achieved through the democratic election of a civilian-led government and its commitment to achieving peace, national reconciliation, and inclusive economic growth. In terminating the national emergency, all of the restrictions implemented by the Department of the Treasury's Office of Foreign Assets Control (OFAC) will no longer be in effect, including the removal from OFAC's Specially Designated Nationals and Blocked Persons (SDN) List of individuals and entities designated pursuant to the Burma sanctions program (although some Burmese SDNs may remain designated under other OFAC authorities).

The forthcoming termination of the national emergency does not end our commitment to support ongoing democratic consolidation in Burma. With the Government of Burma as a democratic partner, however, the United States will have more constructive channels and tools to support change and progress. The United States will use all of our available engagement tools to deepen democratic gains, promote good governance and transparency, and strengthen democratic institutions.

For additional information on the specifics on the termination of this measure, please see our "National Emergency Fact Sheet."

#### Reinstating of GSP Benefits

The President signed a proclamation that designates Burma as eligible for trade benefits under the GSP trade preferences program. We believe this step has the potential to make an important contribution to goals we share with the new government: creation of jobs; reduction of poverty in a country with a per capita income estimated to be \$1,280, the second-lowest figure in ASEAN and East Asia; and ultimately, the success of democratic reform.

This action will take effect on November 13, 2016 following a 60-day Congressional notification period.

For additional information concerning the reinstatement of GSP benefits, we refer you to the press release from the United States Trade Representative's Office.

#### Establishing U.S.-Myanmar Partnership

On September 14, 2016, President Obama and State Counsellor Aung Sang Suu Kyi launched the U.S.-Myanmar Partnership to enhance cooperation, based on mutual respect and common interests. Acknowledging the dramatic transformations that have taken place in Burma, including the inauguration of a democratically-elected government, the announcement of a new partnership reflects our shared desire to build a broad, forward-looking relationship between our two countries.

The Partnership will provide a framework for advancing key priorities in our bilateral relationship, and will create mechanisms for cooperation in areas including political and diplomatic relations, trade and economic ties, science and technology, education and training, environment and health, defense and security, protection and promotion of rule of law, human rights, and people-to-people connections.

In support of the U.S.-Myanmar Partnership, the two countries will hold annual meetings led by the U.S. Department of State and Burma's Ministry of Foreign Affairs. The location of the meetings will alternate between the two countries.

The key thematic areas of engagement could include:

- Supporting Burma's efforts to achieve peace and national reconciliation
- Building a strong economic and commercial partnership

- Promoting inclusive economic development that benefits the people of Burma, protects its environment, and builds resilient communities
- Encouraging Burma's democratic transition and support for the protection of human rights and the rule of law
- Building people-to-people and educational ties
- Cooperating on regional, multilateral, and global issues

#### Expanding People-to-People Ties

The United States seeks to strengthen people-to-people ties with Burma by multiplying the connections between the young people of our two countries, including through the President's Young Southeast Asian Leaders Initiative (YSEALI). Recognizing that 55 percent of Burma's population is under age 30, the United States intends to engage the next generation of young leaders through the full range of U.S. exchange programs, including by providing a 50 percent increase in funding for educational advising to encourage and assist more Burmese students to study in the United States. The funding would expand our reach to more states and regions across Burma, including funding a new advisor in Mandalay.

We will also strengthen English language teacher capacity in Burma through additional direct training for 1,500 English Access Micro-scholarship teachers and other Burmese English language educators from across the country. The training will include workshops and networking opportunities with subject experts on modern teaching methodologies.

Finally, we will also launch a new International Visitor Leadership Program—the U.S. Department of State's premier professional exchange program—focused primarily on engaging Burmese participants on models of democratic federalism.

#### Deepening Bilateral Economic Engagement

The United States and Burma recognize their shared interest in enhancing bilateral economic engagement and exchanging views on laws and practices that affect bilateral investment flows and foreign investment, including the elements of a high-standard Bilateral Investment Treaty.

#### New Loan Portfolio Guarantee

In Burma, a lack of access to credit is one of the largest constraints to small business growth: 74 percent of formal enterprises and 58 percent of informal enterprises lack access to credit. To address this constraint, USAID/Burma intends to launch a Development Credit Authority (DCA) loan guarantee program with five microfinance institutions, mobilizing over \$10 million in loans. This DCA guarantee will target micro, small, and medium-sized businesses working in agriculture, livestock/poultry, and trade and other post-production services. This program will increase the availability of and access to food. It will also foster economic growth and business development involving some of Burma's poorest people. Many of the targeted enterprises are expected to be owned or operated by women. This loan program will be accompanied by technical assistance to both the microfinance institutions and the government on regulatory changes needed to expand access to credit.

#### Initiative to Promote Fundamental Labor Rights and Practices in Burma

The U.S. Government is working with Burma and partners in the international community to develop and support new tools to help Burma improve fundamental labor rights and set a strong foundation for sustainable growth and development.

Launched in 2014 during President Obama's visit to Burma, the governments of Burma, the United States, Japan, Denmark, the European Union, and the International Labor Organization are working together on a joint Initiative to Promote Fundamental Labor Rights

and Practices in Burma. The Initiative is intended to help modernize Burma's labor code, improve compliance with international labor standards, and foster a robust dialogue between the government, business, labor and civil society.

At the first Stakeholder Forum in 2015, the Government of Burma and partners committed to an ambitious agenda of labor law reforms, stakeholder consultations, and efforts to build enforcement capacity. The newly elected government has reiterated its strong support for the approach and will convene the 2nd Stakeholder Forum September 29-30 in Yangon.

#### **Peace Corps' Burma Program**

The United States and Myanmar look forward to the arrival of the first group of Peace Corps volunteers later this month, who will train English teachers as well as teach students in middle and high schools.

#### **Global Health Security Agenda**

The United States and Burma are committed to advancing global health security. In 2017, Burma will complete and publish a Joint External Evaluation (JEE) of national capacity to prevent, detect, and respond to infectious disease threats. The United States completed and published a JEE in 2016. President Obama hopes that together we can make significant progress on the goals of the Global Health Security Agenda (GHSA) this year as partners in building capacity against the threat of infectious disease.

The United States seeks enhanced ASEAN regional engagement and domestic member state action through the GHSA, to help build the capacities necessary to prevent, detect, and respond to infectious disease threats regardless of source. In particular, we are encouraging ASEAN member states to take advantage of the World Health Organization's JEE process, the World Organization for Animal Health's Performance of Veterinary Services Pathway Standards, and other technical expertise from donors interested in the region, including the Republic of Korea, United States, and other G-7 members.

These are global objectives, but the work is particularly critical in the ASEAN region. The issue is not that ASEAN governments are recalcitrant or unaware of the threats - rather they are dealing with risks that are extremely complicated and getting more so. Several serious infectious diseases are endemic (found naturally in the environment). Key conditions in the region - including population density, human-animal contact, international travel, climatic conditions, and limitations in health infrastructure - are increasingly favorable to the spread of disease.

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## **2. Somalia**

As discussed in *Digest 2013* at 251-55, the United States recognized the government of Somalia in 2013. As discussed in *Digest 2015* at 338-40, the U.S. Mission to Somalia, based within the United States Embassy in Nairobi, Kenya, commenced operations in 2015. On June 27, 2016, Stephen M. Schwartz was sworn in as the new ambassador to the Federal Republic of Somalia by Deputy Secretary of State Antony J. Blinken at a ceremony at the State Department. Deputy Secretary Blinken delivered remarks at the swearing in, excerpted below, and available at [http://2009-](http://2009-2017.state.gov/s/d/2016d/259123.htm)

[2017.state.gov/s/d/2016d/259123.htm](http://2009-2017.state.gov/s/d/2016d/259123.htm)

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...It's a special honor to welcome you here ... for what is genuinely a historic day as we swear in the first U.S. ambassador to Somalia in a quarter century.

I have to start today on a little bit of a somber note by expressing our profound sorrow over this weekend's attack in Mogadishu that took more than a dozen lives, including that of a minister in the government, Minister Hamza. Our thoughts and prayers...are with their loved ones and all of the Somali people. We strongly condemn this heinous act of violence that seeks simply to deny the nation the possibilities of peace.

The attack only underscores the importance of the step forward that we're taking today—the result of relentless efforts by Somali leaders, their African neighbors, the United Nations, and the United States—to support a functioning central government, defeat a deadly terrorist threat, rebuild a shattered economy, and pave the way for Somalis to claim an inclusive and democratic future.

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A little over one year ago, when Secretary Kerry arrived in Mogadishu—the first secretary of state to visit Somalia—he reaffirmed our commitment to the nation's promising transformation. We have a stake in what happens in Somalia, he said, announcing the beginning of a process to restore formal diplomatic presence for the United States. There was a time not so very long ago when this future was difficult to imagine, much less actually realize. But hard work, hope, determination on the part of so many have made a difference diplomatically, politically, militarily, economically.

Since the United States formally recognized the government three years ago, Somalia has made significant strides in rebuilding its state under a new federal framework. Al-Shabaab has been pushed out of the major population centers with the support of African Union partners, and a determined international effort has virtually put an end to Somali pirating. Businesses have reopened. Opportunity has regained a foothold.

None of us have any illusions about the challenges that lie ahead: challenges to Somalia's political process, its stabilization efforts, its economic recovery, its fight against terrorists. But Somalis have progressed this far because they see the importance of moving forward as one nation with the institutions that growth, peace, and stability require—institutions that are broadly representative, that include women, that resolve the tension between national and regional interests in a spirit of cooperation and of mutual respect.

That's why the upcoming elections are so essential. Somalia needs leaders who believe in this future and whose legitimacy to realize it is beyond question. The hope of political stability is ultimately not possible without the assurance of security. We have to continue to degrade al-Shabaab and deny them safe haven in Somalia. As the date of elections approaches, the United States will remain a strong partner to the Somali national security forces and to AMISOM.

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Today we have with us the flag that flew and the seal that adorned the U.S. Embassy Mogadishu in 1991. While we work to transition or mission from Kenya back to Somalia, it is our sincere hope, Steve, that you will have the opportunity to raise this flag in Mogadishu once again.

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### 3. Cuba

As discussed in *Digest 2014* at 336, and *Digest 2015* at 340-47, the United States and Cuba restored diplomatic relations after extensive discussions and an exchange of letters by the countries' presidents. On July 20, 2016, the one year anniversary of re-established diplomatic relations, the State Department held a special briefing, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/260295.htm> and issued a fact sheet, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/260306.htm> reflecting on developments during the first year of restored relations. Excerpts follow, first from the briefing and next from the fact sheet.

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...Since July 20th, 2015, we have met our counterparts in the Cuban Government, some for the first time, and have engaged on a range of economic, security, cultural, and social issues. We have forged bilateral cooperation in areas that we believe will improve the lives of citizens of both countries.

President Obama traveled to Havana in March. It was a historic visit and the first by a U.S. president since Calvin Coolidge in 1928. While there, President Obama extended a hand of friendship to the Cuban people, highlighted our commitment to normalizing relations, and also noted the profound differences between our governments. We remain convinced that our shift from a policy of isolation to engagement is the best course for supporting the aspirations of the Cuban people and the emergence of a peaceful, prosperous, and democratic Cuba.

Today, I would like to reflect on those areas where we have made strides—in commerce, law enforcement, health, the environment, and access to the internet. I want to also discuss the challenges we face in the areas of human rights, property claims, and the return of fugitives.

Four Cabinet-level officials and 39 members of Congress joined the President's trip to Cuba and since then, high-level officials from the departments of State, Justice, Commerce, Homeland Security, and the Small Business Administration have visited the island. We have welcomed the Cuban ministers of foreign trade and investment, agriculture, health, and foreign affairs to the United States.

The United States and Cuba continue to manage the bilateral relationship through the Bilateral Commission which last met in Havana on May 16th and which will likely meet again before year's end. I'd like to highlight a few of our accomplishments over the past year.

The United States and Cuba reached a bilateral arrangement to resume scheduled air service. This will foster stronger people-to-people ties and increase travelers' choices. The

Department of Transportation has awarded non-Havana flight routes and expects to make a final decision on Havana routes later this summer with scheduled flights to begin as early as the fall.

The United States and Cuba reached an understanding to re-establish direct transportation of mail between our countries and the first flight with U.S. mail bound for Cuba took place on March 16th.

We also recently signed a public health memorandum of understanding. It is vital that we coordinate efforts to combat regional challenges that do not recognize borders such as the Zika virus, as well as share best practices for addressing other health concerns posed by cancer, diabetes, and other diseases.

This week, we are meeting in Havana to engage in a counternarcotics dialogue. While there, we will sign a nonbinding counternarcotics agreement which will enable our governments to counter the threats posed by illicit narcotics trafficking. More broadly, we continue to look for ways to expand law enforcement cooperation and improve information sharing after successfully initiating direct communication via our respective Interpol offices earlier this year. U.S. and Cuban agencies also held technical exchanges on fraud identification, money laundering, human smuggling, counterterrorism, and cybercrime over the past year.

The environment offers another area where practical cooperation between our countries is generating real progress such as greater protection of fragile marine ecosystems in Cuba, Florida, and the Gulf of Mexico. Given our geographic proximity, environmental cooperation makes good sense. We also signed an arrangement on nautical charting that will increase maritime navigation safety and we continue to work on an agreement to coordinate oil spill response efforts.

The embargo remains in place and Congress must act in order to end it. However, the Administration has taken a number of steps with an executive authority to ease certain travel, commercial, and financial transaction restrictions applicable to Cuba. These regulatory changes encourage more engagement by U.S. telecommunications and internet companies in Cuba to support better connectivity and access to information by the Cuban people. The State Department's Coordinator for International Communications and Information Policy, Ambassador Danny Sepulveda, has led two delegations to Cuba to promote the internet's role in strengthening Cuba's global competitiveness.

Since December 2014, various U.S. companies have reached agreements with ETECSA, the Cuban telecom operator, for direct roaming, voice, and data traffic. We have also held three regulatory dialogues with the Cuban Government, the latest just last week, where we discussed our regulatory changes, how they affect Cuban businesses, and how Cuban structures and regulations governing trade relate to our regulatory changes. We have begun to identify areas where we can work together within the confines of the embargo and create greater prosperity for the people of the United States and Cuba.

U.S. and Cuban delegations also continued ongoing migration talks in Havana last week, readdressing the importance of the U.S.-Cuba accords, which provide for the safe, orderly, and legal migration of Cubans to the United States. The discussions included maritime and overland migration trends, cooperation between the Centers for Disease Control and Prevention and Cuban physicians, as well as cooperation between the U.S. Coast Guard and the Cuban Border Guard.

We've also witnessed an increase in U.S. travel to Cuba. The number of U.S. visitors to Cuba reached approximately 700,000 last year, and many Americans are visiting Cuba for the first time. Carnival Cruise Line launched service to Cuba in May, which spurred the Cuban

Government to change an outdated restriction governing travel by Cuban-born individuals living abroad.

Our regulatory changes now make it possible for Americans to design their own educational travel itinerary. Americans are interacting with Cubans of all walks of life, offering a more complete understanding of our respective countries. We are building bridges. This year's highlights in educational, professional, and cultural exchanges with Cuba include the announcement of a new \$1 million commitment from the Cuban-American community to the 100,000 Strong in the Americas Innovation Fund. The fund will be used to boost Cuban academic participation in the President's signature education initiative, 100,000 Strong in the Americas. While in Havana in March, the President also shared the news that the distinguished Hubert H. Humphrey Fellowship and Benjamin A. Gilman International Scholarship programs are now offered for Cuba. In partnership with the Cuban Government, we're also offering English-language training for Cuban academics teaching English.

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On the issue of human rights, our commitment to democratic reform and fundamental freedom in Cuba is unwavering. Respect for universal human rights is one of our enduring national interests and a top policy priority toward Cuba. We are working with the Cuban Government to schedule a human rights dialogue in Havana. Human rights will continue to be one of the more challenging issues we discuss. We continue to follow President Obama's lead in advocating for human rights in Cuba, including freedoms of expression and peaceful assembly. We will continue to demonstrate our solidarity with and support for democracy activists. We will also continue to publicly criticize the Cuban Government for violations of human rights.

In conclusion, normalization is a long-term process. Human rights, property claims, and the return of fugitives from U.S. justice are complex and thorny issues, but we're making slow and steady progress. In spite of our differences with the Cuban Government, our engagement policy is working. We have made significant progress since the re-establishment of diplomatic relations a year ago. We're moving in the right direction in our bilateral relationship with the Cuban Government and in our relationship with the Cuban people, and we have the support of the majority of the American public.

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...Obviously, we can take actions under executive authority to modify the embargo and allow the possibility for U.S. businesses to engage in certain activities in Cuba, but to a large extent, the willingness of U.S. companies to operate in Cuba will depend on actions of the Cuban Government. What the Cuban Government does to facilitate trade investment to make the country more attractive to private sector business activity is perhaps in many ways even more important.

We've certainly had discussions about the regulatory issues. I mentioned the regulatory commission that has met three times where we have discussed not just U.S. laws and regulations which govern economic activity with Cuba, but certainly also on the Cuban side regulations which they have which adversely impact businesses. I would say it's an ongoing dialogue. Certainly the issue of employment by private companies, the ability to maybe hire Cubans directly and not have to go through government agencies—that's an issue that has been raised.

But we're aware that in Cuba there is a debate underway about the extent of further economic reform. So we certainly are discussing these, but in the end it will be the Cuban Government that takes the decisions on what measures to follow and the timing of their implementation.

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The [Fact Sheet](#) lists accomplishments and notable events during the first year of restored diplomatic relations.

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- **Embassies on July 20, 2015.** When Secretary of State John Kerry traveled to Havana to raise the U.S. flag at our Embassy for the first time since 1961, he said, "President Obama and President Castro made a courageous decision to stop being the prisoners of history and to focus on the opportunities of today and tomorrow." Subsequently, the United States and Cuba launched a Bilateral Commission to meet regularly to advance the normalization process; the Commission has already met on three occasions in Havana and Washington, D.C.
- **Presidential Visit to Cuba:** President Obama traveled to Cuba March 20-22, and his historic visit showed our commitment to normalizing relations with Cuba. While there, the President spoke directly to the Cuban people and said "I have come here to extend the hand of friendship to the Cuban people. The differences between our governments over the many years are real and they are important... we also need to recognize how much we share. Because in many ways, the United States and Cuba are like two brothers who've been estranged for many years, even as we share the same blood." He also spoke about our continued support for a peaceful, prosperous, and democratic Cuba.
- **Scheduled Air Service:** The United States and Cuba reached a bilateral arrangement to establish regularly scheduled air services, in addition to charter flights between the two countries. The reintroduction of scheduled services after over 50 years will provide more travel options for authorized travelers and promote more people-to-people links between both countries. On June 10, the Department of Transportation (DOT) approved six U.S. airlines to begin flights between five U.S. cities and nine Cuban cities (not including Havana) as early as this fall. Additionally, on July 7, DOT issued a proposal for eight U.S. airlines to begin service between Havana and 10 different U.S. cities; DOT plans to reach a final decision on Havana routes later this summer.
- **Regulatory Changes:** The embargo is still in place, and President Obama has repeatedly called upon Congress to end it. Meanwhile, the Administration has taken steps within its authority to ease certain travel, trade, and financial transaction restrictions applicable to Cuba. The four tranches of significant regulatory changes since the President's announcement on December 17, 2014 have made it easier for U.S. persons to engage with their Cuban counterparts to provide resources and share information to help Cuba's private sector continue to grow. The changes also make it easier for U.S. persons to travel to Cuba for authorized purposes and strengthen people-to-people ties. [T]ravel to Cuba has increased significantly over the past year. The United States and Cuba have held three dialogues on regulatory issues to present information on the regulatory changes and address ways both countries can work together within the existing legal framework.

- **Educational, Professional and Cultural Exchange:** President Obama's policy direction supports more interaction between our peoples. This year's highlights include the announcement of a new \$1 million commitment from the Cuban-American community to support young Cubans to study in the United States; the inclusion of Cubans participating for the first time in U.S. fellowship programs; and the participation of young Cuban leaders and entrepreneurs in the Young Leaders of the Americas Initiative and the Global Entrepreneurship Summit. Cuba's rich and diverse culture will be featured at the Smithsonian Folklife Festival in summer 2017 in Washington, D.C.

- **Direct Transportation of Mail:** Direct transportation of mail between the United States and Cuba resumed on March 16, after a 53 year hiatus, increasing social and commercial ties between our countries.

- **Claims:** The U.S. and Cuban governments have begun a dialogue to resolve outstanding claims. The next meeting will take place soon in Washington, D.C., during which the two sides will have an opportunity to build upon the exchange that took place in Havana, Cuba last year. The meeting is the next step in a long-term process, but resolving claims remains a top U.S. priority for normalization.

- **Internet and Telecommunications:** As a key component of the President's goal to increase the Cuban people's access to information and consistent with regulatory changes by the Departments of the Treasury and Commerce, several U.S. telecommunications companies have begun providing data and roaming services in Cuba. The U.S. Coordinator for International Communication and Information Policy, Ambassador Daniel Sepulveda, has visited Cuba twice to discuss internet and telecommunications policy with Cuban officials.

- **Health Cooperation:** In June, both countries signed a Memorandum of Understanding on public health that will help facilitate cooperation in the battle against diseases such as the Zika virus and cancer. During the visit of the U.S. Navy hospital ship Comfort to Haiti in September, U.S. and Cuban medical professionals worked side-by-side to provide care to Haitians.

- **Agriculture:** U.S. businesses export hundreds of millions of dollars of agricultural goods to Cuba. In March, the United States and Cuba signed an arrangement for cooperation on agriculture.

- **Environment:** The United States and Cuba are working together to protect the environment and safeguard fragile marine protected areas. In November 2015, we signed a joint statement on environmental protection cooperation and a memorandum establishing a long-term, cooperative relationship between marine protected areas in Cuba, Florida, and the Gulf of Mexico.

- **Law Enforcement Cooperation:** The United States continues to work with Cuba to expand law enforcement cooperation through the Law Enforcement Dialogue. As part of the process, the Department of Homeland Security signed a Memorandum of Understanding with Cuba's Ministry of Interior to improve security in travel and trade issues. We have improved our ability to share law enforcement-related information and coordinate activities. U.S. and Cuban counterparts also held technical exchanges on fraud identification and human smuggling, money laundering, counter terrorism, counternarcotics, and cybercrime.

- **Maritime Navigation:** The Florida Straits is one of the most heavily traveled bodies of water in the world. With the signing of a Memorandum of Understanding on hydrography and nautical charting in March, the United States and Cuba took a proactive step to

help to improve the safety of mariners and boaters of all nations. Negotiations are also underway to delimit the unresolved maritime boundary between the United States, Mexico, and Cuba.

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#### 4. Russia

On October 3, 2016, the State Department announced the suspension of participation in bilateral channels with Russia that were established to sustain the cessation of hostilities in Syria. See Chapter 17 for a more complete discussion of the cessation of hostilities. Excerpts below from the October 3, 2016 press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262704.htm> explains the U.S. rationale for suspending the bilateral channel relationship.

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The United States is suspending its participation in bilateral channels with Russia that were established to sustain the Cessation of Hostilities. This is not a decision that was taken lightly. The United States spared no effort in negotiating and attempting to implement an arrangement with Russia aimed at reducing violence, providing unhindered humanitarian access, and degrading terrorist organizations operating in Syria, including Daesh and al Qaeda in Syria. Unfortunately, Russia failed to live up to its own commitments—including its obligations under international humanitarian law and UNSCR 2254—and was also either unwilling or unable to ensure Syrian regime adherence to the arrangements to which Moscow agreed. Rather, Russia and the Syrian regime have chosen to pursue a military course, inconsistent with the Cessation of Hostilities, as demonstrated by their intensified attacks against civilian areas, targeting of critical infrastructure such as hospitals, and preventing humanitarian aid from reaching civilians in need, including through the September 19 attack on a humanitarian aid convoy.

The U.S. will also withdraw personnel that had been dispatched in anticipation of the possible establishment of the Joint Implementation Center. To ensure the safety of our respective military personnel and enable the fight against Daesh, the United States will continue to utilize the channel of communications established with Russia to de-conflict counterterrorism operations in Syria.

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On December 29, 2016, the State Department announced actions it was taking in response to Russian interference in the 2016 U.S. election and increasing harassment of U.S. diplomats overseas during the past year. The press statement describing the actions is available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm> and includes the following:

The State Department today declared persona non grata 35 Russian officials operating in the United States who were acting in a manner inconsistent with their diplomatic or consular status. The Department also informed the Russian Government that it would deny Russian personnel access to two recreational compounds in the United States owned by the Russian Government.

... Th[e] harassment has involved arbitrary police stops, physical assault, and the broadcast on State TV of personal details about our personnel that put them at risk. In addition, the Russian Government has impeded our diplomatic operations by, among other actions: forcing the closure of 28 American corners which hosted cultural programs and English-language teaching; blocking our efforts to begin the construction of a new, safer facility for our Consulate General in St. Petersburg; and rejecting requests to improve perimeter security at the current, outdated facility in St. Petersburg.

Today's actions send a clear message that such behavior is unacceptable and will have consequences.

## **B. STATUS ISSUES**

### **1. Ukraine**

The United States continued its support in 2016 for Ukraine's sovereignty, political independence, unity, and territorial integrity within its internationally recognized borders. The United States maintained the position affirmed in UN General Assembly Resolution 68/262 (2014) that Crimea and all of eastern Ukraine remain part of Ukraine. See *Digest 2014* at 345-46 for discussion of Resolution 68/262.

On March 15, 2016, State Department Spokesperson John Kirby issued a press statement on the second anniversary of Russia's attempted annexation of Crimea. The statement is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254750.htm> and includes the following:

Today, as Russia's occupation of Crimea enters its third year, we reaffirm our commitment to a united, sovereign Ukraine. The United States does not recognize Russia's "referendum" of March 16, 2014 or its attempted annexation of Crimea, which violates international law.

We remain deeply concerned by the situation in Russian-occupied Crimea, where occupation "authorities" suppress dissent and where ethnic and religious minorities—especially Crimean Tatars and ethnic Ukrainians—face serious and ongoing repression. Nongovernmental organizations and independent media are still being silenced or driven out, and international observers are still denied access to the peninsula.

We will not accept the redrawing of borders by force in the 21st century. Sanctions related to Crimea will remain in place as long as the occupation continues. We again call on Russia to end that occupation and return Crimea to Ukraine.

Also on March 15, 2016, Assistant Secretary of State Victoria Nuland testified before the Senate Foreign Relations Committee on the situation in Ukraine. Her testimony is excerpted below and available at [http://2009-](http://2009-2017.state.gov/p/eur/rls/rm/2016/mar/254707.htm)

[2017.state.gov/p/eur/rls/rm/2016/mar/254707.htm](http://2009-2017.state.gov/p/eur/rls/rm/2016/mar/254707.htm)

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Of course, Ukraine's greatest challenge remains the ongoing occupation of its territory in Crimea and Donbas, and its efforts to restore sovereignty in the East through full implementation of the September 2014 and February 2015 Minsk agreements. These agreements remain the best hope for peace, and we continue to work in close coordination with the "Normandy Powers"—Ukraine, Russia, Germany, and France—to see them fully implemented.

The last time I came before this Committee, Ukraine was in a better place. The September 1 ceasefire had largely silenced the guns, and some Ukrainians were even returning home to Donbas. But today, things are heating up again. In recent weeks, we have seen a spike in ceasefire violations, taking the lives of 68 Ukrainian military personnel and injuring 317. In February alone, OSCE monitors reported 15,000 violations, the vast majority of which originated on the separatist-controlled side of the line of contact. And, there were more recorded ceasefire violations in the first week of March than at any time since August 2015. And despite President Putin's commitments to the Normandy powers last October, combined Russian-separatist forces continue to deny OSCE monitors access to large portions of Donbas and to harass and intimidate those who do have access.

At the last meeting of Normandy Foreign Ministers in early March, Ukraine supported concrete steps to pull back forces on the line of contact, increase OSCE monitors and equipment in key hotspots, and establish more OSCE bases deeper into Donbas and on the border. Taking these steps now and releasing hostages will greatly improve the environment for compromise in Kyiv on election modalities and political rights for Donbas. In the meantime, neither Moscow nor the self-appointed Donbas authorities should expect the Ukrainian Rada to take up key outstanding political provisions of the Minsk agreement, including election modalities and constitutional amendments, before the Kremlin and its proxies meet their basic security obligations under Minsk. Although the U.S. is not a party to the Normandy process, we maintain a very active pace of diplomatic engagement at all levels with Kyiv, Moscow, Paris and Berlin to facilitate implementation of both the security and political aspects of Minsk, and to help the parties brainstorm solutions.

Here again, with will and effort on all sides, 2016 can be a turning point for Ukraine. If security can improve in coming weeks, if hostages are returned, if the parties can finalize negotiations on election modalities and other political issues, we could see legitimate leaders elected in Donbas by fall, the withdrawal of Russian forces and equipment, and the return of Ukraine's sovereignty over its border before the end of the year. We will keep working with Ukraine to do its part to implement Minsk, and working with our European partners to ensure Russia stays under sanctions until it does its part—all of it. And of course, Crimea sanctions must remain in place so long as the Kremlin imposes its will on that piece of Ukrainian land.

Mr. Chairman, Mr. Ranking Member, members of this committee, we knew Ukraine's road to peace, sovereignty, clean, accountable government and Europe would be difficult and rocky. Today, the stakes are as high as ever. With strong, unified leadership in Kyiv, 2016 can and should be a turning-point year for Ukraine's sovereignty and European future. If and as Ukraine's leaders recommit to drive the country forward, the United States must be there to support them, in our own national interest. At the same time, we must be no less rigorous than the Ukrainian people themselves in demanding Kyiv's leaders take their responsibility now to deliver a truly clean, strong, just Ukraine while they still have the chance. I thank this committee for its bipartisan support and commitment to the sovereignty and territorial integrity of Ukraine and to a Europe whole, free and at peace.

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On March 17, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered remarks entitled "Crimea Was, Is, and Will Remain Part of Ukraine," at an event commemorating the second anniversary of Resolution 68/262. Ambassador Power's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7190>.

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... It has been more than two years since Russia held its sham referendum in Crimea in an attempt to legitimize its occupation of a part of sovereign Ukraine—a sovereign UN Member State. It has been nearly two years since 100 Member States of the United Nations General Assembly, including the United States, adopted a resolution affirming our shared commitment to "the sovereignty, political independence, unity, and territorial integrity of Ukraine within its internationally recognized borders," and underscoring that the referendum, "having no validity," should not be recognized.

It can be easy to forget—as more times passes, and far removed as many of us are from what is happening in your country and to your people—that Russia's attempted annexation of Crimea is not a one-time violation of Ukraine's sovereignty, but rather represents an ongoing, continuous violation, one that persists for every day that Russia continues to occupy the peninsula. The passage of time does not change the facts; Crimea was, is, and must and will remain part of sovereign Ukraine—and we refuse to accept Russia's attempt to use force and to use propaganda to alter that fact. That means we cannot allow ourselves to get used to a new normal, a world in which one of five permanent members of the Security Council—a body whose primary responsibility is maintaining international peace and security—where one of the permanent members itself becomes the source of threats to the sovereignty and territorial integrity of another UN Member State. Failing to hold Russia accountable for these actions sends a dangerous message to governments around the world with similar ambitions.

If that is not reason enough for us to insist that Russia end its occupation and return control of Crimea to Ukraine, the abysmal human rights situation in Crimea should be. As the UN Human Rights Monitoring Mission in Ukraine, special rapporteurs, and independent human rights groups—all of whom have been forced to carry out their work with little or no access to

Crimea—have documented, the occupation authorities have committed serious and widespread abuses targeting members of ethnic and religious minorities, as well as anyone who dares to criticize the occupiers' actions or question their legitimacy.

Let me just give a few recent examples.

On February 15th, the so-called prosecutor general of Crimea filed a request with Crimea's Supreme Court to have the Mejlis—the self-governing body of the Crimean Tatars—to be declared an extremist organization. Just like that. Both Crimea's prosecutor general and the justices of its Supreme Court have been installed by another country—by Russia—since the occupation began. If the prosecutor's request is granted, virtually all Tatar political expression and organization would effectively be criminalized.

Mustafa Dzhemilev is here, of course, with us today—the former head of the Mejlis and current member of Ukraine's Rada. In April 2014, Mr. Dzhemilev was banned by occupation authorities from entering Russian territory for five years, including—by their perverse definition—Crimea. Then, on January 21st of this year, occupation authorities in Crimea issued a warrant for Mr. Dzhemilev's arrest. So let's get this straight, it seems Mr. Dzhemilev is now allowed to go back to his native land, so that he can be arrested. Refat Chubarov, the current leader of the Mejlis, who is here today as well, was also banned from entry into Crimea for five years in July of 2014.

Ever since the little green men first began to pop up in Crimea, human rights monitors have documented abductions of Tatars and pro-Ukrainian activists, in which evidence points to the participation of occupation authorities and their security forces, suggesting these are cases of what we call enforced disappearances. According to the UN Monitoring Mission, Crimean Tatars Islyam Dzhhepparov, who was 18, and his cousin, Dzhevdet Islyamov, 23, were reportedly abducted by men in black uniforms and thrown into a minivan on September 27th, 2014. Similarly, nearly a year later on August 27th, 2015, according to the UN Monitoring Mission, Crimean Tatar Muhtar Arislanov was abducted by two men in uniform and thrown into a minivan. None of these victims, or others whose abductions in Crimea have been documented by the UN Monitoring Mission—along with evidence of the involvement of occupation authorities—has been found, nor has anyone been prosecuted for their disappearances.

It is not only Tatars who are being targeted in Crimea—this is important to note—it is a wide range of critics of Russia's actions. Consider the prosecution of esteemed Ukrainian filmmaker Oleg Sentsov. Sentsov was arrested in his home in Crimea in May 2014. He was sent against his will to Russia—to the town of Rostov—for trial by a military court, where he was charged with setting up a terrorist group and with two attempted arson attacks. Although, as the UN Monitoring Mission has noticed, “the main prosecution witness recanted in the courtroom, stating his testimony had been extorted under torture;” and despite the fact, as the mission noted, that “the process was marred by violations of fair trial standards and of the presumption of innocence,” which, “should have led to the release of the accused,” Sentsov was found guilty and sentenced to 20 years in a high security penal colony. Ukrainian activist Aleksander Kolchenko, who was accused of conspiring with Sentsov, was given a ten-year sentence.

Now just think about that for a moment: two Ukrainian citizens are detained on Ukrainian territory. They are transferred to Russia, and prosecuted in Russian courts, under Russian laws, for crimes they did not commit. And they are tried ... as Russian citizens, having had Russian citizenship imposed upon them, against their will, after they were detained. It is a sequence of events so absurd that it feels like something out of a Bulgakov novel. And yet all of it is

horrifyingly real. As a result, right now—as we sit here—Sentsov and Kolchenko are imprisoned in a Russian penal colony, Kolchenko reportedly in solitary confinement.

Nor is this pattern of abuse limited to Crimea. Also at this moment, Ukrainian pilot and member of parliament Nadia Savchenko—who was also detained in Ukraine and sent to the remote town of Donetsk, Russia to be tried under Russian laws for similarly preposterous charges—is awaiting her verdict. The prosecutor in her case is seeking a 23-year sentence.

Imagine for just one moment if Oleg Sentsov or Nadia Savchenko were a citizen of any of our nations. How would we react? How would we expect our fellow UN Member States to react? We have to put ourselves in the shoes of Ukrainians more often—in the shoes of the Tatars, in the shoes of the people who live in Crimea without basic freedoms. I assure you that, if we do, we will start making a lot more noise about egregious actions like this.

Russia would have us live in upside-down land, where up is down and down is up. We can't accept that. We have to live in right-side up land, and we have to define and remind people about the norms that undergird the international system, on which all of our peace and security and human rights depend.

As we all know, so many of the patterns that we saw when Russia first invaded Crimea—and that we continue to see to this day—have also characterized Russia's actions in eastern Ukraine. The steps Russia must take are straightforward: Russia must respect Ukraine's sovereignty. Russia must stop arming, training, and fighting along separatists, and Russia must fulfill its Minsk commitments, including releasing unlawfully detained persons such as Nadia Savchenko. Of course Ukraine has responsibilities too, and we will keep working with the Ukrainian government so that it does its part to implement Minsk in full.

Until Russia begins taking these steps, let us not forget the responsibilities that we have—and by “we,” I'm referring both to our individual governments, and to the institutions we belong to. Just because Russia is trying to lop off parts of a neighboring country; just because Russia is committing serious human rights abuses with impunity against Ukrainians—and against its own people; just because Russia is consistently violating the core principles of the United Nations—does not mean we should resign ourselves to accepting Russia's behavior, or even getting used to it. We too have a duty to ensure that our shared principles—which are indispensable to our shared security and our conception of what is right—that those principles are respected. We do not want to live a world in which this—what has happened to the people up on this dais—becomes the new normal. To preserve right-side up land, where black is black and white is white and up is up and down is down, we need to stand in solidarity on behalf of Ukraine's territorial integrity, and on behalf of the human rights of its people—all of its people.

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On September 30, 2016, Deputy State Department Spokesperson Mark Toner issued a press statement on the Russian Supreme Court's decision to ban the Mejlis of the Crimean Tatar people. The press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262627.htm>, states:

The United States does not recognize the legitimacy of the Russian Supreme Court's ruling to uphold the ban of Crimean Tatars' self-governing body, the Mejlis. We reject the characterization of the Mejlis as an “extremist” organization and condemn the suspension of this democratic institution. This

decision is particularly troubling given Russia's systematic and unjust mistreatment of Crimean Tatars.

Russia continues to subject Crimean Tatars to arbitrary arrests, abductions, politically motivated prosecutions, restrictions on freedom of movement, and police raids on their homes and mosques. We call on Russia to cease these unacceptable practices immediately.

We do not recognize Russia's attempted annexation of Crimea, and we reiterate our call on Russia to return control of the peninsula to Ukraine.

Our Crimea-related sanctions will remain in place until Moscow returns control over Crimea to Ukraine.

## 2. Georgia

On November 22, 2016, State Department Spokesperson John Kirby issued a statement on Russian ratification of an agreement with de facto leaders in Georgia's Abkhazia region. The statement, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264522.htm)

[2017.state.gov/r/pa/prs/ps/2016/11/264522.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264522.htm), includes the following:

The United States strongly opposes the Russian Federation's ratification of an agreement secured with the de facto leaders in Georgia's breakaway region of Abkhazia regarding a joint military force. We do not recognize the legitimacy of this so-called "treaty," which does not constitute a valid international agreement.

The United States' position on Abkhazia and South Ossetia remains clear: these regions are integral parts of Georgia, and we continue to support Georgia's independence, sovereignty, and territorial integrity.

Russia should fulfill all of its commitments under the 2008 ceasefire agreement, withdraw its forces to pre-conflict positions, reverse its recognition of the Georgian regions of South Ossetia and Abkhazia as independent states, and provide free access for humanitarian assistance to these regions.

## 3. Libya

On March 13, 2016, the Ministers of Foreign Affairs of France, Germany, Italy, the United Kingdom and the United States and the High Representative of the European Union issued a statement on Libya, available as a State Department media note at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254641.htm>. The joint statement commends the members of the Libyan Political Dialogue, gathered in Tunis on the 10th and 11th of March 2016, and expresses full support for the Government of National Accord as "the only legitimate government in Libya."

On March 30, 2016, Secretary Kerry issued a press statement welcoming the arrival of the Libyan Presidency Council in Tripoli, signaling the handover of power to the Government of National Accord, which was supported by the United States and its partners, including in the March 13, 2016 joint statement discussed *supra*. The press statement is available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/03/255329.htm)

[2017.state.gov/secretary/remarks/2016/03/255329.htm](http://2009-2017.state.gov/secretary/remarks/2016/03/255329.htm).

On May 16, 2016, a ministerial meeting of the Libya Joint Communiqué convened in Vienna, Austria. The State Department media note publishing the joint statement of Algeria, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257236.htm>

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We express our strong support for the Libyan people in maintaining the unity of Libya. We reaffirm our support for the implementation of the Libyan Political Agreement (LPA) of Skhirat, Morocco signed on December 17, 2015, and for the Government of National Accord (GNA) as the sole legitimate government of Libya, as stated in the Rome Communiqué of December 13, 2015, and endorsed in UN Security Council Resolution 2259. We urge all parties to work constructively towards the completion of the transitional institutional framework, particularly by enabling the House of Representatives to fully carry out its role as outlined in the LPA.

We renew our firm support to Libya's sovereignty, territorial integrity, and unity. We share the Libyan people's aspiration to transform Libya into a secure and democratic state, achieve unity and reconciliation, and restore the rule of law and state authority. . . .

We commend the efforts of the neighboring countries, the regional countries, the African Union, the League of Arab States, the European Union, and the United Nations to contribute to achieving these goals. We reiterate our full political backing for the efforts of Special Representative of the United Nations Secretary-General Martin Kobler and commend his recent outreach to various Libyan communities.

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Secretary Kerry and other foreign ministers delivered remarks at the Libya ministerial meeting on May 16, 2016. Secretary Kerry's remarks repeat the support of the international community for the GNA and are available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/05/257266.htm)

[2017.state.gov/secretary/remarks/2016/05/257266.htm](http://2009-2017.state.gov/secretary/remarks/2016/05/257266.htm).

The State Department issued, as a media note on July 6, 2016, the Joint Statement on Libya by the Governments of France, Germany, Italy, Spain, the United Kingdom, and the United States. The joint statement stresses the importance of implementing the 2015 Libyan Political Agreement, the 2015 Rome Communiqué, and

UN Security Council Resolution 2259 (2015), and is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/259388.htm>

The Governments of France, Germany, Italy, Spain, the United Kingdom, and the United States issued another joint statement on Libya on August 25, 2016, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/261276.htm>. On September 22, 2016, Algeria, Canada, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union concluded another joint communiqué on Libya, which was posted as a State Department media note at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262285.htm> and is excerpted below.

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We welcome the participation of Prime Minister al-Sarraj in this Ministerial. We salute his leadership and the decision of the Presidency Council (PC) to liberate Sirte from Da'esh and secure the country from other terrorist groups. We reaffirm our solidarity with the Libyan people and express our sympathy for those who lost their lives in the fight against terrorism. We also welcome the efforts against terrorist groups as listed by the UN in other parts of Libya, including Benghazi, and commit to collectively pursue those efforts. We urge all Libyans to unite in their fight against terrorism. We reiterate our support for the Libyan Political Agreement (LPA) of Skhirat, Morocco signed on December 17, 2015 and its fulfillment, and for the Government of National Accord (GNA) as the sole legitimate government of Libya, as endorsed in UN Security Council Resolutions 2259 and 2278. We support the preservation of sovereignty, territorial integrity, unity, and national cohesion of the Libyan people. Libyans should decide their own future without foreign interference. We reaffirm our commitment to the United Nations Support Mission in Libya's efforts under the leadership of the UN Special Representative of the Secretary General, to facilitate the implementation of the LPA and support the PC in addressing the political, security, economic, and institutional crises facing the country. The international community will not provide support to or maintain official contact with parallel institutions that claim to be the legitimate authority, but which are outside the LPA as specified by it.

We call on the Presidency Council to present a new Cabinet to be approved by the House of Representatives (HoR) as the legislative authority of State, and on the HoR to support national reconciliation by gathering all the Members of Parliament and fulfilling its duty to hold a free and fair vote on the revised Cabinet and on the Constitutional amendment to enshrine the LPA in Libyan law without delay. We reiterate our conviction that all segments of society from all Libya's regions must find their rightful place in the political process. Efforts to obstruct progress, including with the proper functioning of LPA-mandated institutions will further jeopardize the security and stability of Libya. We call on the GNA to work urgently to restore essential services, provide humanitarian assistance, and create conditions for the safe and dignified return of internally displaced persons and refugees. We urge the GNA to resume oil production to strengthen Libya's economy for the benefit of all Libyans.

Given recent tensions in various parts of the country, we urge full de-escalation and avoiding provocative actions. We share the Libyan people's desire to transform Libya to become a secure, democratic, prosperous, and unified state, where state authority and the rule of law prevail. This can only be achieved peacefully through inclusive political dialogue and national reconciliation. Only unified national forces can truly ensure security and defend the country from terrorism. We commend the PC's efforts to unify professional military forces which include Libyans from across the country, and to form a capable, professional Presidential Guard to protect the PC. We urge swift progress in this endeavor to unify Libya's military forces under the auspices of the PC and in accordance with the LPA.

The GNA is the sole legitimate recipient of international security assistance. We stand ready to respond to its requests for international assistance to train and equip the legitimate Libyan military and security forces throughout Libya through an appropriately scaled exemption to the arms embargo for procurement of lethal materiel necessary to counter Da'esh and other UN-designated terrorist groups. We fully support the PC's requests for security assistance to counter Da'esh and other UN-designated terrorist groups for a united national security force. We remain committed to upholding the arms embargo, and commend EUNAVFOR Sophia's efforts to prevent illicit weapons shipments on the high seas.

We support the fulfillment of the LPA's mandate to keep oil infrastructure, production, and export under the exclusive control of the National Oil Corporation (NOC) acting under the authority of the PC. All oil revenues generated by the NOC must be transferred to the Central Bank of Libya (CBL), which must put the funds at the disposal of the PC. We support Prime Minister al-Sarraj's call for dialogue to reduce tensions in the oil crescent and applaud his leadership in this regard. We welcome the recent transfer of the oil facilities in the oil crescent to the NOC as well as the plans to increase oil production and exports.

We underscore that Libya's national economic institutions, including the NOC, CBL, and Libyan Investment Authority (LIA), must function for the benefit of all Libyans as set forth in the LPA. The PC is charged with preserving and protecting Libya's resources and patrimony for the benefit of all Libyan people. Libya's oil belongs to the Libyan people.

We are committed to working with the PC on plans for stabilization and reconstruction in Sirte. We take note of the recent UN Humanitarian Appeal for Sirte and welcome contributions for its swift and full implementation. We underline the need for stabilization to all areas liberated from terrorism, based on principles of inclusiveness and local ownership. We urge the PC to launch the Benghazi Reconstruction Fund. We welcome the establishment of the UNDP Stabilization Fund. We express appreciation for the early actions by the UNDP Stabilization Fund to provide assistance to cities in all of the regions of Libya. We underline our firm commitment to providing the GNA with technical and economic assistance as requested.

Over the next year the GNA must prepare for a peaceful transition to a permanent, elected Libyan government. We strongly urge the Constitutional Drafting Assembly to complete its work and present the draft Libyan Constitution for a referendum in 2017.

We commend the continuous efforts of the neighboring countries in support of the UN-led political process. We stress the importance of regional support for Libya and its democratic transition. In this context, we take note of the decision of the Arab League to appoint a Special Envoy for Libya and welcome its determination to pursue its efforts to advance the LPA in support of a political solution. We also welcome the efforts of the African Union and its Contact Group in this regard.

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On December 23, 2016, the State Department issued as a media note another joint statement on Libya by the governments of France, Germany, Italy, Spain, the United Kingdom, and the United States. The December joint statement is available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/265976.htm>, and excerpted below.

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One year after the signing of the Libyan Political Agreement (LPA) in Skhirat, Morocco, the Governments of France, Germany, Italy, Spain, the United Kingdom, and the United States commend the Presidency Council (PC) of the Government of National Accord (GNA) for its efforts to restore unified governance, prosperity, and security to Libya. We congratulate the GNA and the Libyan people on their successful operation to eject Da'esh from Sirte and applaud the Libyan people's courage in confronting the scourge of Da'esh and other terrorist organizations.

The PC of the GNA has our full support as it addresses ongoing security and economic challenges for the Libyan people. We reaffirm our support for the LPA as a transitional roadmap to a democratically elected government in Libya, recalling UN Security Council Resolution (UNSCR) 2259, which endorses the Rome Communiqué of 13 December 2015 and calls on members to support the GNA as the sole legitimate government of Libya and reject official contact with parallel institutions outside the LPA. We commend UNSMIL's efforts and take note of ongoing regional activities towards a broadly based and inclusive implementation of the LPA.

We condemn any threats of use of military force in Libya, including in Tripoli. We call on all parties to resolve their differences through dialogue and national reconciliation. We encourage the PC of the GNA to strengthen its internal cohesion and tackle with renewed determination the multiple security, economic, and social emergencies facing Libya today, first among them building a secure environment where all citizens can feel safe and protected by unified Libyan forces operating under civilian oversight, including the Presidential Guard, devoted to serving and protecting Libyan institutions. We encourage the PC to step up preparations for its establishment and speedy deployment.

We welcome the approval by the Presidency Council of the budget for 2017, and urge Libya's State financial institutions to ensure their full cooperation with the PC, thereby enabling the country's legitimate executive authority to carry out an effective economic policy addressing the most urgent needs of Libya's population.

We call on all Libyan parties to engage meaningfully in continued political dialogue and support the PC as it charts a peaceful transition to national reconciliation and an elected and unified government that represents all Libyans.

Through maintaining a unified approach in support of these principles, the international community will work to help Libya through this transitional period. But in the end, Libyans alone must decide their country's future.

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**Cross References**

*U.S.-Cuba counternarcotics arrangement*, **Chapter 3.B.2.b.**

*Evacuation of U.S. citizens in Yemen*, **Chapter 5.C.1.**

*Taiwan (Lin v. U.S.)*, **Chapter 5.C.3.**

*Cuba claims talks*, **Chapter 8.A.**

*Relations with Russia*, **Chapter 10.E.2.**

*Aviation arrangement with Cuba*, **Chapter 11.A.2.**

*Joint statement with Cuba*, **Chapter 13.C.1.**

*Russia/Ukraine sanctions*, **Chapter 16.A.7.a.**

*Burma sanctions lifted*, **Chapter 16.A.9.c.**

*Middle East peace process*, **Chapter 17.A.**

*Ukraine*, **Chapter 19.B.6.d.**

## CHAPTER 10

### Privileges and Immunities

#### A. AMENDMENTS TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

##### 1. Justice Against Sponsors of Terrorism Act

The Justice Against Sponsors of Terrorism Act (“JASTA”) amended both the Foreign Sovereign Immunities Act (“FSIA”) and the Anti-Terrorism Act. JASTA’s amendment to the FSIA contains an exception to the immunity of foreign states from the jurisdiction of courts in the United States in certain terrorism-related cases, regardless of whether the foreign state has been designated a state sponsor of terrorism. In particular, the exception applies in cases in which money damages are sought against a foreign state “for physical injury to person or property or death occurring in the United States and caused by (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.” The Executive Branch opposed JASTA when it was under consideration. On July 14, 2016, State Department Legal Adviser Brian Egan provided a statement to the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice regarding JASTA. Mr. Egan’s testimony appears below and is also available at [https://judiciary.house.gov/wp-](https://judiciary.house.gov/wp-content/uploads/2016/07/Egan-Testimony-07142016.pdf)

[content/uploads/2016/07/Egan-Testimony-07142016.pdf](https://judiciary.house.gov/wp-content/uploads/2016/07/Egan-Testimony-07142016.pdf).

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Thank you, Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee. I appreciate the opportunity to appear before you with my colleague, Assistant Secretary Anne Patterson, to discuss the views of the Department of State on the Justice Against Sponsors of Terrorism Act.

At the outset, I would like to express my deep sympathy for the families whose loved ones perished in the attacks on September 11. I grew up in a bedroom community in New Jersey that was deeply affected by the World Trade Center attacks. For much of my career in government, at the Departments of State and Treasury and the National Security Council, I have worked on mechanisms that enable our government to confront terrorism, including financial sanctions and the use of military force where appropriate.

I will focus my comments today on the importance of the concept of sovereign immunity to the United States, and our concern that passage of JASTA will lead to harmful, reciprocal legislation and lawsuits against the United States overseas.

The principle of sovereign immunity, which restricts lawsuits against foreign governments, is well accepted in international law and was long recognized by U.S. courts as a matter of common law. The United States benefits greatly from the protection afforded by foreign sovereign immunity, and the Department of Justice regularly and vigorously defends our sovereign immunity overseas. Over the years, Congress and the Executive Branch have worked together to approach issues of foreign sovereign immunity and its exceptions with great caution.

The Foreign Sovereign Immunities Act, or FSIA, was enacted in 1976 following many years of study and consultation between Congress and the Executive Branch, academics, the American Bar Association, and private practitioners. The Act focuses on the narrow instances in which a foreign state's immunity is denied: for example, a foreign state's commercial activities in the United States or having direct effects here. The narrow non-commercial tort exception to immunity was aimed primarily at the problem of traffic accidents, and it provides jurisdiction for torts committed by foreign governments inside the United States that result in injuries here. Later enacted provisions relating to terrorism prudently restrict the ability to sue foreign governments in U.S. courts for acts undertaken abroad to those States that have been designated by the Executive branch as state sponsors of terrorism—currently Iran, Sudan, and Syria.

JASTA would represent a significant departure from this carefully crafted framework. JASTA would strip any foreign government of its sovereign immunity and expose the relevant country to lawsuits in U.S. courts based on allegations in the lawsuit that the country's actions abroad made it responsible for an attack on U.S. soil. As Ambassador Patterson noted, a number of U.S. partners and allies have raised concerns about the potential consequences of this change.

The adoption of legislation like JASTA likely would have reciprocal consequences for the United States and increase our country's vulnerability to lawsuits overseas. Reciprocity plays a substantial role in foreign relations. JASTA could encourage foreign courts to exercise jurisdiction over the United States or U.S. officials for allegedly causing injuries overseas through groups we support as part of our counter-terrorism efforts—circumstances in which we properly would consider ourselves to be immune.

Notwithstanding the care with which the United States operates to ensure that its actions overseas are appropriately calibrated, exposing U.S. national security-related conduct and decision-making to scrutiny in foreign courts would present significant concerns. Such litigation would have the potential for intrusive requests for sensitive U.S. documents and witnesses that we would not be willing to provide. There is a risk of sizeable monetary damages awards in such cases, which could then lead to efforts to attach U.S. government property in far-flung places. Given the broad range of U.S. activities and presence around the world, the United States is a much larger target for such litigation than any other country.

We stand ready to work with this subcommittee and other members of Congress to consider these important issues further. I look forward to taking your questions.

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As Mr. Egan mentioned, Ambassador Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs, also provided a statement to the House subcommittee on July 14. Ambassador Patterson's testimony appears below and is also available at

<https://judiciary.house.gov/wp-content/uploads/2016/07/Patterson-Testimony-07142016.pdf>

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Chairman Franks, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting us to appear before you today to discuss the Justice Against Sponsors of Terrorism Act. I welcome the opportunity to testify with my colleague, Brian Egan, the Department of State's Legal Adviser.

I understand the motivation for the Justice Against Sponsors of Terrorism Act, and all of us in the Administration deeply sympathize with victims of terror and with their families. The State Department has long supported efforts to obtain compensation for U.S. terrorism victims, while also leading international efforts to combat terrorism and prevent more attacks against the homeland and our citizens abroad. I can personally attest that enormous focus and resources have been dedicated to addressing this threat so no other Americans will suffer the same fate as the victims of the September 11th attacks. From the successful efforts against Al Qaeda leadership in the Pakistan-Afghanistan border area, to the vast improvement in our intelligence about terrorist leaders; to the increasingly close and mutually beneficial cooperation with allies; and to our successes in rooting out sources of funding for terrorists, we have worked every day to protect America.

We know that the families of the 9/11 victims have suffered grievously. From the establishment of the original U.S. government compensation fund to today, we have been resolute in uniting to protect our country and to bring to justice those responsible for the attacks. The 9/11 attacks were, and have continued to be, the subject of intense and exhaustive investigation by U.S. government agencies and commissions.

While all of these efforts will continue, I am here today to explain the Administration's strong conviction that JASTA is not the right path forward. Most importantly, the passage of JASTA could undermine our critical fight against terrorism and particularly against ISIL by limiting our flexibility in operating overseas. It could potentially expose the U.S. government to billions of dollars in claims; it raises serious foreign policy concerns; and it could lead to a slowdown of foreign investments in the United States.

The current version of JASTA represents a sea change in longstanding principles which could have serious implications for U.S. interests. JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such countries' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would allow suits against countries that have neither been designated by the Executive Branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here. JASTA would

hinder our ability to protect our national security interests by damaging relationships with countries that are important partners in combating terrorism, at a crucial time when we are trying to build coalitions, not create divisions. We cannot win the fight against ISIL without full international cooperation to deny ISIL safe haven, disrupt its finances, counter its violent messaging, and share intelligence on its activities. Our close and effective cooperation with other countries, both bilaterally and through multilateral vehicles such as the 66-member Global Coalition to Counter-ISIL, could be seriously hindered.

With the broad reach of JASTA, there is the likelihood that some of our critical allies, such as the United Kingdom or other European governments, could face lawsuits in U.S. courts, which could affect their cooperation with us, as well as their broader bilateral relationship with us.

Numerous European and Middle Eastern governments have reached out to the Department to express their concerns about the bill. The parliament in the Netherlands unanimously passed a motion on July 6 calling JASTA a “breach of Dutch sovereignty” that could expose the Netherlands to “astronomically high damages” via exposure to liability in U.S. courts and called on the government to potentially convey its concerns about JASTA to the United States. A British Member of Parliament, Thomas Tugendhat, in an opinion piece last month in the UK’s Telegraph newspaper, wrote that the bill “could also have serious unintended consequences for Britain. The act would expose the British government to the possibility of revealing the secrets of intelligence operations in open court, or paying damages over alleged failures to prevent terrorist attacks. Either outcome would put the special relationship under severe strain.” He expressed the view that it might be used by U.S. citizens to bring suit against the British government for failure “to tackle Islamic radicalism in earlier decades” by not addressing the problem of radical Islamic preachers in the UK, which he notes some say spawned terrorism.

The bill also poses a serious threat to U.S. interests overseas. I have seen firsthand throughout my career at my postings around the world that the United States benefits significantly from the protection afforded by foreign sovereign immunity given its extensive diplomatic, security, and assistance operations. As members of this committee know from their extensive travels abroad, some actions the United States takes overseas are controversial with local citizens and foreign governments. If JASTA is enacted, it could erode our sovereign immunity protections abroad, as some foreign governments will rush to pass similar legislation to allow claims against the United States and its property, and in some cases, even against U.S. officials. Even if they are not eager to do so—in many cases foreign governments are fully supportive of steps the United States has taken—such governments will come under intense public pressure to create rights for their citizens to sue the United States. As the world’s largest economy, the United States has extensive operations overseas, including property ownership, and thus is particularly vulnerable to asset seizures abroad.

The United States funds, trains, or equips numerous counter-terrorism, military, intelligence and law enforcement groups around the world. These groups are essential partners for the United States. As I saw first-hand when I served as Ambassador to Pakistan and Colombia such groups have been courageous in confronting terrorists in Pakistan and in uncovering terrorists and combatting narco-traffickers in Colombia. Likewise they are bravely fighting ISIL in Iraq right now. Exposing the United States to lawsuits in foreign courts with regard to the actions of such groups could open the door to intrusive litigation seeking billions of dollars of claims against the U.S. government and could reduce our ability to work with groups

that have been vital to achieving our national security goals. U.S. counterterrorism strikes that have been a crucial and successful component of our counter-Al Qaeda and counter-ISIL efforts do occasionally, tragically and despite all our safeguards, cause civilian casualties. If foreign courts were to take a JASTA-like approach in the country where such a strike took place, they might allow suits to be brought against the United States for such actions. Additionally, men and women working on such operations could face the risk of being brought to trial or compelled to provide evidence if they traveled to the country where the operation occurred.

We have deep concerns about exposing this broad range of U.S. national security-related conduct to scrutiny in foreign courts. These risks could ultimately have a chilling effect on our own counter-terrorism efforts.

In the course of my 42-year career, I have encountered a number of situations in which legislation like JASTA could have interfered with important U.S. government efforts overseas. Notwithstanding the care that we take in designing our training programs, I have seen abuses committed by rogue elements of groups we have trained which resulted in civilian casualties; I have worked with courageous Americans and others associated with the U.S. government who were involved in dangerous and risky operations. The U.S. military supports allied efforts, which, at times, have regretfully resulted in civilian casualties, which some may allege were wrongful. Perhaps more common than actual abuses, I have heard frequent claims that the U.S. government “should have known” about some abuse that took place, given its allegedly close relationship with elements of the local government or the alleged reach of its intelligence operation. If the principle of sovereign immunity is eroded, foreign courts could enter into an extensive range of suits and discovery against the United States, putting U.S. personnel and property in a precarious situation.

Finally, I want to mention the possibility that JASTA may cause foreign governments to hesitate to invest or maintain their funds in the United States. The administration actively encourages foreign investment in the United States, as high-profile events like Select USA demonstrate. We have the world’s largest and most open economy and take pride in the preeminence of New York as a financial center. Opening up U.S. courts to JASTA-type cases may cause foreign states to think twice about their investments here because they may have concerns that their money would be at risk of being attached in connection with a lawsuit. Foreign governments may simply decide to avoid this risk by keeping their assets outside of the U.S. financial system or avoiding dollar denominated transactions. This is what happened in in 2007 when Iraq threatened to remove its assets from the United States in response to a provision in the NDAA that would have exposed Iraq to potential liability. That prompted a Presidential veto and a later Congressional response adding a waiver for Iraq.

In sum, JASTA could have a serious negative impact on U.S. efforts to fight terrorism and could expose our allies and partners to lawsuits in U.S. courts, which could reduce their willingness to cooperate with us on crucial issues of U.S. national security. I am fully sympathetic to the desire of victims of terrorism to gain justice for their loved ones. However, this bill is not the solution. Before proceeding with the legislation, we believe there needs to be additional, careful consideration of the potential unintended consequences of its enactment. We welcome opportunities to engage with this Subcommittee on that discussion. I also want to thank this Subcommittee for your ongoing support as we continue to advance our national security interests and I look forward to answering your questions.

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On September 9, 2016 JASTA received approval in the U.S. House of Representatives and on September 12 it was presented to the President. On September 23, 2016, President Obama vetoed JASTA and provided the following message to the Senate regarding his veto. The President's veto message is available at

<https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040>.

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I am returning herewith without my approval S. 2040, the "Justice Against Sponsors of Terrorism Act" (JASTA), which would, among other things, remove sovereign immunity in U.S. courts from foreign governments that are not designated state sponsors of terrorism.

I have deep sympathy for the families of the victims of the terrorist attacks of September 11, 2001 (9/11), who have suffered grievously. I also have a deep appreciation of these families' desire to pursue justice and am strongly committed to assisting them in their efforts.

Consistent with this commitment, over the past 8 years, I have directed my Administration to pursue relentlessly al-Qa'ida, the terrorist group that planned the 9/11 attacks. The heroic efforts of our military and counterterrorism professionals have decimated al-Qa'ida's leadership and killed Osama bin Laden. My Administration also strongly supported, and I signed into law, legislation which ensured that those who bravely responded on that terrible day and other survivors of the attacks will be able to receive treatment for any injuries resulting from the attacks. And my Administration also directed the Intelligence Community to perform a declassification review of "Part Four of the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11," so that the families of 9/11 victims and broader public can better understand the information investigators gathered following that dark day of our history.

Notwithstanding these significant efforts, I recognize that there is nothing that could ever erase the grief the 9/11 families have endured. My Administration therefore remains resolute in its commitment to assist these families in their pursuit of justice and do whatever we can to prevent another attack in the United States. Enacting JASTA into law, however, would neither protect Americans from terrorist attacks nor improve the effectiveness of our response to such attacks. As drafted, JASTA would allow private litigation against foreign governments in U.S. courts based on allegations that such foreign governments' actions abroad made them responsible for terrorism-related injuries on U.S. soil. This legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States to carry out an attack here. The JASTA would be detrimental to U.S. national interests more broadly, which is why I am returning it without my approval.

First, JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts.

Any indication that a foreign government played a role in a terrorist attack on U.S. soil is a matter of deep concern and merits a forceful, unified Federal Government response that considers the wide range of important and effective tools available. One of these tools is designating the foreign government in question as a state sponsor of terrorism, which carries with it a litany of repercussions, including the foreign government being stripped of its sovereign immunity before U.S. courts in certain terrorism-related cases and subjected to a range of sanctions. Given these serious consequences, state sponsor of terrorism designations are made only after national security, foreign policy, and intelligence professionals carefully review all available information to determine whether a country meets the criteria that the Congress established.

In contrast, JASTA departs from longstanding standards and practice under our Foreign Sovereign Immunities Act and threatens to strip all foreign governments of immunity from judicial process in the United States based solely upon allegations by private litigants that a foreign government's overseas conduct had some role or connection to a group or person that carried out a terrorist attack inside the United States. This would invite consequential decisions to be made based upon incomplete information and risk having different courts reaching different conclusions about the culpability of individual foreign governments and their role in terrorist activities directed against the United States—which is neither an effective nor a coordinated way for us to respond to indications that a foreign government might have been behind a terrorist attack.

Second, JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests. The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings. These principles also protect U.S. Government assets from attempted seizure by private litigants abroad. Removing sovereign immunity in U.S. courts from foreign governments that are not designated as state sponsors of terrorism, based solely on allegations that such foreign governments' actions abroad had a connection to terrorism-related injuries on U.S. soil, threatens to undermine these longstanding principles that protect the United States, our forces, and our personnel.

Indeed, reciprocity plays a substantial role in foreign relations, and numerous other countries already have laws that allow for the adjustment of a foreign state's immunities based on the treatment their governments receive in the courts of the other state. Enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials—including our men and women in uniform—for allegedly causing injuries overseas via U.S. support to third parties. This could lead to suits against the United States or U.S. officials for actions taken by members of an armed group that received U.S. assistance, misuse of U.S. military equipment by foreign forces, or abuses committed by police units that received U.S. training, even if the allegations at issue ultimately would be without merit. And if any of these litigants were to win judgments—based on foreign domestic laws as applied by foreign courts—they would begin to look to the assets of the U.S. Government held abroad to satisfy those judgments, with potentially serious financial consequences for the United States.

Third, JASTA threatens to create complications in our relationships with even our closest partners. If JASTA were enacted, courts could potentially consider even minimal allegations accusing U.S. allies or partners of complicity in a particular terrorist attack in the United States

to be sufficient to open the door to litigation and wide-ranging discovery against a foreign country—for example, the country where an individual who later committed a terrorist act traveled from or became radicalized. A number of our allies and partners have already contacted us with serious concerns about the bill. By exposing these allies and partners to this sort of litigation in U.S. courts, JASTA threatens to limit their cooperation on key national security issues, including counterterrorism initiatives, at a crucial time when we are trying to build coalitions, not create divisions.

The 9/11 attacks were the worst act of terrorism on U.S. soil, and they were met with an unprecedented U.S. Government response. The United States has taken robust and wide-ranging actions to provide justice for the victims of the 9/11 attacks and keep Americans safe, from providing financial compensation for victims and their families to conducting worldwide counterterrorism programs to bringing criminal charges against culpable individuals. I have continued and expanded upon these efforts, both to help victims of terrorism gain justice for the loss and suffering of their loved ones and to protect the United States from future attacks. The JASTA, however, does not contribute to these goals, does not enhance the safety of Americans from terrorist attacks, and undermines core U.S. interests.

For these reasons, I must veto the bill.

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On September 26, 2016, Secretary of Defense Ashton Carter responded to a September 23 letter from Chairman of the Armed Services Committee William M. Thornberry with a letter urging Congress to respect the President's veto of JASTA. Secretary Carter's letter is excerpted below. Notwithstanding the President's veto, both the House and Senate voted on September 28, 2016, by more than the required two-thirds majority, to pass JASTA, which became Public Law No. 114-222.

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... While we are sympathetic to the intent of JASTA, its potential second- and third-order consequences could be devastating to the Department and its Service members and could undermine our important counterterrorism efforts abroad.

In general terms, JASTA would allow lawsuits in U.S. Federal Courts against foreign states for actions taken abroad that are alleged to have contributed to acts of terrorism in the United States, notwithstanding long-standing principles of sovereign immunity. Under existing law, similar lawsuits are available for actions taken abroad only by designated state sponsors of terrorism. JASTA extends the stripping of immunity to states that are not designated sponsors of terrorism, potentially subjecting many of the United States' allies and partner nations to litigation in U.S. courts.

JASTA has potentially harmful consequences for the Department of Defense and its personnel. Adoption of JASTA might result in reciprocal treatment of the United States and other countries could create exceptions to immunity that do not directly mirror those created by JASTA. This is likely to increase our country's vulnerability to lawsuits overseas and to encourage foreign governments or their courts to exercise jurisdiction over the United States or

U.S. officials in situations in which we believe the United States is entitled [to] sovereign immunity. U.S. Service members stationed here and overseas, and especially those supporting our counterterrorism efforts, would be vulnerable to private individuals' accusations that their activities contributed to acts alleged to violate a foreign state's law. Such lawsuits could relate to actions taken by members of armed groups that received U.S. assistance or training, or misuse of U.S. military equipment by foreign forces.

First, whether the United States or our Service members have *in fact* provided support for terrorist acts or aided organizations that later commit such acts in violation of foreign laws is irrelevant to whether we would be forced to defend against lawsuits by private litigants in foreign courts. Instead, the mere allegation of their involvement could subject them to a foreign court's jurisdiction and the accompanying litigation and intrusive discovery process that goes along with defending against such lawsuits. This could result in significant consequences even if the United States or our personnel were ultimately found not to be responsible for the alleged acts.

Second, there would be a risk of sizeable monetary damage awards in such cases, which could lead to efforts to attach U.S. Government property to satisfy those awards. Given the broad range of U.S. activities and robust presence around the world, including our Department's foreign bases and facilities abroad, we would have numerous assets vulnerable to such attempts.

Third, it is likely that litigants will seek sensitive government information in order to establish their case against either a foreign state under JASTA in U.S. courts or against the United States in a foreign court. This could include classified intelligence data and analysis, as well as sensitive operational information. While in the United States classified information could potentially be withheld in certain narrow circumstances in civil lawsuits brought by private litigants against our allies and partners, no legislation specifically protects classified information in civil actions (unlike protections afforded in criminal prosecutions) or under JASTA. Furthermore, if the United States were to be sued in foreign courts, such information would likely be sought by foreign plaintiffs, and it would be up to the foreign court whether classified or sensitive U.S. Government information sought by the litigants would be protected from disclosure. Moreover, the classified information could well be vital for our defense against the accusations. Disclosure could put the United States in the difficult position of choosing between disclosing classified or otherwise sensitive information or suffering adverse rulings and potentially large damage awards for our refusal to do so.

Relatedly, foreign lawsuits will divert resources from mission crucial tasks; they could subject our Service members and civilians, as well as contractor personnel, to depositions, subpoenas for trial testimony, and other compulsory processes both here and abroad. Indeed, such personnel might be held in civil or even criminal contempt if they refused to appear or to divulge classified or other sensitive information at the direction of a foreign court.

Finally, allowing our partners and allies—not just designated state sponsors of terrorism—to be subject to lawsuits inside the United States will inevitably undermine the trust and cooperation our forces need to accomplish their important missions. By damaging our close and effective cooperation with other countries, this could ultimately have a chilling effect on our own counterterrorism efforts.

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## 2. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act was signed into law on December 16, 2016. Pub. L. No. 114-319. The Act was a response to a federal court decision, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005); 517 F. Supp. 2d 322 (D.D.C. 2007), in which the court held that the presence in the United States of art on loan for temporary exhibit may satisfy one of the requirements for jurisdiction under the expropriation exception to immunity in the Foreign Sovereign Immunities Act (“FSIA”) in a suit against the lender, even if the art itself is subject to immunity from seizure pursuant to 22 U.S.C. § 2459. For background on *Malewicz* and 22 U.S.C. § 2459, see *Digest 2004* at 792-96; *Digest 2005* at 776-77; *Digest 2007* at 742-44. The expropriation exception 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). The Act clarifies that the commercial activity nexus is not satisfied in an action against a foreign sovereign art lender for claims related to the alleged taking of artwork based solely on the presence of the artwork protected under the immunity from seizure statute (§ 2459) in the United States for a temporary exhibit or display.

In particular, the Act adds new sub-section (h) to § 1605 of the FSIA, providing that a foreign state’s activities in the United States associated with the temporary exhibit or display of § 2459-protected works “shall not be considered to be commercial activity for purposes of subsection (a)(3).” However, sub-section (h)(2) provides for two exceptions if a court determines that such activities do amount to “commercial activity” within the meaning of the FSIA and the case involves: (A) certain Nazi-era claims; or (B) certain actions “based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.”

### B. FOREIGN SOVEREIGN IMMUNITIES ACT LITIGATION

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, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of the U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2016 in which the United States filed a statement of interest or participated as *amicus curiae*.

## 1. Application of the FSIA in Enforcement of ICSID Arbitration Awards

On March 30, 2016, the United States submitted a memorandum brief as *amicus curiae* to the U.S. Court of Appeals for the Second Circuit in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, Docket No. 15-707. Mobil sought recognition in U.S. court of an arbitral award against Venezuela rendered pursuant to the Convention on the Settlement of Investment Disputes (the “ICSID Convention”). That arbitral award was conditioned on Mobil repaying amounts that another Mobil entity had recovered in a related arbitration from the International Court of Arbitration of the International Chamber of Commerce (“ICC”). The Second Circuit requested the State Department’s views on three questions:

- Does the enabling statute for the ICSID Convention, 22 U.S.C. § 1650a, embody a grant of subject matter jurisdiction over an action to enforce an International Centre for the Settlement of Investment Disputes (“ICSID”) award against a foreign sovereign that is outside the scope of the FSIA, or does the FSIA provide the sole source of subject matter jurisdiction over such an action? ...
- Does either the ICSID Convention’s enabling statute or the FSIA permit a federal court to “borrow” procedural rules of the forum state...?
- Does the ICSID Convention’s enabling statute permit a federal district court to modify, under 28 U.S.C. § 1961, the interest rate adopted by an ICSID arbitral panel to be paid on an ICSID award?

The U.S. brief takes the positions that: (1) The FSIA is the sole source of subject matter jurisdiction over an action to enforce an ICSID award against a foreign sovereign and its rules must be followed; (2) Neither the ICSID Convention’s enabling statute nor the FSIA permits a federal court to “borrow” procedures from state law that permit an *ex parte* proceeding; (3) The district court correctly held that the interest rate provided in the ICSID award is a pecuniary obligation that must be enforced. The brief is excerpted below (with some footnotes omitted) and available at

<http://www.state.gov/s/l/c8183.htm>.

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- I. The FSIA Governs an Action to Recognize and Enforce a Valid ICSID Award Against a Foreign Sovereign
  - A. ***The FSIA is the sole source of a federal court’s jurisdiction to recognize and enforce a valid ICSID award against a foreign state***

The district court erred in holding that the ICSID implementing legislation, 22 U.S.C. § 1650a, provides an exception to the FSIA’s exclusive grant of subject matter jurisdiction. The FSIA, enacted by Congress in 1976, “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” *Verlinden*, 461 U.S. at 488. As the

Supreme Court has stated numerous times, the FSIA is the exclusive source of subject matter jurisdiction for actions against foreign states. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393-94 (2015); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (“[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.”). Accordingly, the FSIA “must be applied by the District Courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden*, 461 U.S. at 493.

As the Supreme Court held in *Amerada Hess*, the FSIA’s grant of jurisdiction supplants earlier-enacted grants of subject-matter jurisdiction that might have applied to an action against a foreign state. 488 U.S. at 438, 443 (holding that, following enactment of FSIA, a federal court could not exercise jurisdiction over a foreign sovereign under the Alien Tort Statute). Thus, although 22 U.S.C. § 1650a(b) gives federal district courts (and the U.S. Court of Federal Claims) “exclusive jurisdiction over actions and proceedings [to enforce an ICSID award], regardless of the amount in controversy,” that grant of jurisdiction does not apply to actions against foreign sovereigns after the passage of the FSIA. Section 1650a retains its effect “with respect to defendants other than foreign states,” *Amerada Hess*, 488 U.S. at 438, supplying a district court’s subject matter jurisdiction over actions to enforce ICSID arbitral awards against private parties. The ICSID enabling statute provides the substantive right and the applicable legal standard, and it also requires that all enforcement actions be brought in federal, rather than state, courts. But following the enactment of the FSIA, the ICSID enabling statute cannot be the basis for a federal court’s exercise of jurisdiction over a foreign sovereign.<sup>2</sup>

The district court suggested that the FSIA might be inapplicable because the ICSID Convention comes within 28 U.S.C. § 1604’s proviso that its grant of sovereign immunity is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act.” (JA 506). But the Supreme Court made clear in *Amerada Hess* that § 1604’s treaty exception applies only “when international agreements expressly conflict with the *immunity* provisions of the FSIA.” 488 U.S. at 442 (quotation marks and alterations omitted, emphasis added). Nothing in the ICSID Convention contradicts the FSIA’s immunity rules. To the contrary, the Convention expressly notes that it has no effect on domestic law regarding the immunity of foreign states. ICSID Convention art. 55 (“Nothing in Article 54 [governing

<sup>2</sup> The legislative history of the ICSID enabling statute indicates that before the FSIA was enacted—contrary to the district court’s assumption that the ICSID Convention and statute “contemplated domestic lawsuits against foreign sovereigns” without overcoming a foreign state’s immunity—Congress understood that the ICSID statute itself would not provide jurisdiction over a foreign sovereign. (JA 506-07). As the Deputy Legal Adviser of the Department of State—which negotiated the Convention for the United States, along with the Department of the Treasury—testified:

Basically what this convention says is that the district court shall have jurisdiction over the subject matter. As to whether it has jurisdiction over a party, there is nothing in the convention that will change the defense of sovereign immunity. If somebody wants to sue Jersey Standard in the United States, on an award, no problem. If somebody wants to sue Peru or the Peruvian Oil Institute, why it would depend on whether in the particular case that entity would or would not be entitled to sovereign immunity.

(JA 302 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int’l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 57 (1966) (statement of Andreas F. Lowenfeld, Deputy Legal Adviser, Dep’t of State))).

recognition or enforcement of an award] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”). Thus, there is no implied exception to the FSIA’s exclusivity as the source of jurisdiction over actions for recognition of an ICSID award against foreign sovereigns.

**B. An action against a foreign sovereign to recognize and enforce an ICSID arbitral award must comply with the FSIA’s service and venue requirements**

The district court also held that even if the exclusive means to bring an action to enforce an ICSID arbitral award against Venezuela is under the FSIA, Mobil was not required to comply with the FSIA’s service of process or venue requirements. That too was error.

In addition to setting out the exclusive terms upon which a U.S. court can exercise subject matter jurisdiction in an action against a foreign state, the FSIA provides that a court has personal jurisdiction over a foreign state only if an exception to immunity in § 1605 applies and the plaintiff has effectuated service pursuant to § 1608. *See* 28 U.S.C. § 1330(b). Section 1608(a) specifies four methods for serving process on a foreign state: first, by “delivery of a copy of the summons and complaint in accordance with any special arrangement[s]” between the parties; or, if no special arrangements exist, by delivery “in accordance with an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1), (2). If service cannot be made by either of these methods, the clerk of court may mail a copy of the summons and complaint and a notice of suit to the foreign state’s foreign minister; and finally, if service cannot be made within thirty days by that method, the clerk of court may send copies of those same documents to the Department of State, which transmits them “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a)(3), (4). These procedures, which are construed strictly and applied sequentially, are the sole means for serving process on a foreign state. *Magness v. Russian Fed’n*, 247 F.3d 609, 615 (5th Cir. 2001) (citing H.R. Rep. No. 94-1487, at 24 (1976)); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154-55 (D.C. Cir. 1994).

Furthermore, 28 U.S.C. § 1391(f) imposes venue requirements for suits under the FSIA. An action (except a suit in admiralty) against a foreign state must be brought either in the district court for the District of Columbia, or in a judicial district in “which a substantial part of the events or omissions giving rise to the claim occurred, or [where] a substantial part of property that is the subject of the action is situated.” 28 U.S.C. § 1391(f)(1).

The district court reasoned that these requirements do not apply in actions to recognize ICSID awards. According to the court, the FSIA’s treaty exception and the FSIA’s use of terms that “presuppose” litigation over contested issues demonstrate that “Congress did not have ICSID award recognition in mind when it prescribed service, venue, and other requirements for lawsuits against sovereigns.” (JA 512). Neither of those arguments is persuasive.

First, as noted above, the treaty exception only applies “when international agreements expressly conflict with the immunity provisions of the FSIA.” *Amerada Hess*, 488 U.S. at 442 (quotation marks and alterations omitted). As the district court itself recognized, the exception is “addressed to the existence of immunity, not the mechanics by which an action is to be brought against a non-immune sovereign.” (JA 512). The district court nevertheless construed § 1604 to “fairly reflect[] an intention not to revise existing law or practice in an area governed by treaty.” (JA 512). But the mechanics of enforcing ICSID awards are not and never were governed by treaty. Rather, the ICSID Convention reserves the means of enforcement to member states, which enforce awards in the same way that they enforce domestic judgments. ICSID Convention art. 54(1). Article 54(1) thus clearly envisions that domestic law and procedures will apply to enforcement proceedings. In a U.S. court, actions to enforce arbitral awards against foreign

sovereigns must conform to the requirements of the FSIA. The treaty exception thus provides no support for the district court's conclusion that Congress did not intend for the FSIA to apply in the ICSID award recognition context. (JA 512).

The district court further reasoned that the FSIA presupposes contested litigation, and thus does not apply to "the non-substantive, mechanistic context of ICSID award recognition." (JA 513). But the fact that the FSIA refers to certain types of contested matters (such as personal injury actions) or refers to limitations on discovery does not imply that other types of actions are excluded from the FSIA. Indeed, the FSIA expressly encompasses actions to enforce international arbitral awards, *see* 28 U.S.C. § 1605(a)(6), which typically are not fully contested litigation. In enacting that provision, Congress provided no exception to the FSIA's other requirements, including that the foreign state defendant be served in accordance with § 1608. Once again, the FSIA is the comprehensive and exclusive statutory scheme for bringing suit against a foreign state in U.S. courts. *Verlinden*, 461 U.S. at 488.

Notably, bringing an action under the FSIA to recognize an ICSID award rendered against a foreign state is not an overly burdensome process, and does not interfere with the recognition or enforcement of such awards as envisioned by the Convention. The award creditor files a complaint, serves the debtor in one of the manners permitted under § 1608, and then, after the debtor has had the opportunity to respond, seeks a judgment by filing a motion on the pleadings or a motion for summary judgment as permitted by the Federal Rules of Civil Procedure. Because an ICSID award is binding on the parties and not subject to review (except within ICSID), the award debtor may raise no substantive defenses and discovery is unnecessary. Courts may employ case management techniques as necessary to further expedite enforcement proceedings, and ensure that frivolous defenses and dilatory tactics are not allowed to unduly delay the enforcement of an ICSID award.

Finally, the district court reasoned that it was not required to have personal jurisdiction over Venezuela under 28 U.S.C. § 1330(b), and hence Mobil was not required to comply with the service requirements in 28 U.S.C. § 1608, because "[p]ersonal jurisdiction ordinarily is not required in recognition proceedings." (JA 529 n.36). But the federal requirements for exercising jurisdiction over a foreign state in U.S. courts preempt any inconsistent state-law principles governing personal jurisdiction over out-of-state defendants. As explained above, the service requirements of § 1608 must be complied with in every action against a foreign sovereign and are strictly construed. *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154-55. These statutory provisions, rather than any inconsistent procedural rules of the forum state, govern the process for initiating an action to enforce an ICSID award against a foreign sovereign.

**11. Neither the ICSID Convention's enabling statute nor the FSIA permits a federal court to "borrow" procedural rules of the forum state that permit *ex parte* proceedings**

For much the same reasons, the district court was not permitted to "borrow" state-law procedures that permit *ex parte* proceedings to recognize an arbitral award against a foreign state and enter a U.S. judgment against that foreign state. As explained above, *ex parte* proceedings with no notice to the foreign state defendant conflict with the FSIA. The proper procedure for the recognition and enforcement of an ICSID award in the United States is through the commencement of an action that complies with the FSIA.

The district court concluded that borrowing state-law *ex parte* procedures was necessary because requiring plenary actions would be "in tension" with the ICSID Convention and its enabling statute. (JA 514). But there is no such tension: neither the Convention nor the statute

requires or forbids any particular set of procedures for the enforcement of an ICSID award. To the contrary, in providing that enforcement mechanisms may differ in contracting states (including those with federal systems of government), the Convention recognizes that enforcement will be a matter of domestic law. As the drafters of the ICSID Convention explained at the time of adoption, “[b]ecause of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.” *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) ¶ 42, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf); see *Air France v. Saks*, 470 U.S. 392, 396, 400 (1985) (“In interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation.”). That conclusion accords with the Supreme Court’s repeated observation that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” *Breard v. Greene*, 523 U.S. 371, 375 (1998); *accord Medellín*, 552 U.S. at 517; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 351 (2006).

Equally, the legislative history of the ICSID Convention’s enabling statute, 28 U.S.C. § 1650a(a), does not support the district court’s conclusion that Congress intended for ICSID awards to be enforced through an “automatic” *ex parte* process. (JA 521). As the General Counsel of the Department of the Treasury (which, along with the Department of State, negotiated the ICSID Convention on behalf of the United States) testified to Congress, “[t]o give full faith and credit to an arbitral award as if it were a final judgment of a court of one of the several States means that an action would have to be brought on the award in a U.S. district court to enforce the final judgment of a State court.” (JA 288 (*Convention on the Settlement of Investment Disputes: Hearing on H.R. 15785 Before the Subcomm. on Int’l Orgs. and Movements of the H. Comm. on Foreign Affairs*, 89th Cong. 43 (statement of Fred B. Smith, General Counsel, Department of the Treasury))). The same understanding is reflected in the House and Senate Committee Reports regarding the enabling statute. H.R. Rep. No. 89-1741, at 3-4 (1966) (“If an action is brought in a U.S. district court to enforce the final judgment of State court, it is, of course, given full faith and credit in the Federal court. Section 3(a) would give the same status to an arbitral award.”); (JA 331, S. Rep. 89-1374, at 4 (1966) (same)). The legislative history does not suggest that enforcement of ICSID awards in the United States must be “automatic” or *ex parte*, which would represent a departure from what appears to have been prevailing federal court practice with respect to the enforcement of state court judgments.

Likewise, the district court erred in its interpretation of the “full faith and credit” obligation in § 1650a. Under § 1650a, the pecuniary obligations of an ICSID arbitral award “shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” According to the district court, the phrase “full faith and credit” in § 1650a means that an *ex parte* registration process can be used. In the district court’s view, Congress’s use of this term of art is significant because “[u]nder the full faith and credit doctrine, for a sister state’s judgment to be recognized, it is not necessary that there be personal jurisdiction over the judgment debtor in the recognizing court”; instead, “a mechanistic process of interstate registration is commonly used.” (JA 521-23). But the district court appears to have conflated the full-faith-and-credit doctrine with the procedures for registering and enforcing a state-court judgment in another state under the Uniform

Enforcement of Judgments Act. The full-faith-and-credit doctrine simply requires that final judgments rendered in one state have preclusive effect and be immune from collateral attack in every other state. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). It does not require the adoption of practices as to the “time, manner, and mechanisms for enforcing judgments.” *Id.* at 235.

In addition, contrary to the district court’s view that an action under the FSIA—which allows the defendant to respond prior to judicial recognition of the award—would serve no purpose but delay, there are practical benefits to requiring the use of such a process. While district courts may be unable to substantively review ICSID awards, they can be called upon to consider certain limited procedural issues in connection with their enforcement. And in such situations, giving the award debtor notice of the recognition action and an opportunity to respond before the judgment is entered is both efficient and necessary to protect the rights of foreign governments. In *Blue Ridge Investments, LLC v. Republic of Argentina*, 735 F.3d 72, 77-78 (2d Cir. 2013), for example, the plaintiff did not attempt to employ *ex parte* procedures when seeking recognition of its award, and instead provided notice to the award debtor, Argentina. This allowed the foreign state to assert certain procedural defenses to enforcement, including that the plaintiff, an assignee of the award creditor, lacked standing to enforce the award; that the action on the award was barred by *res judicata*; and that the action to enforce the award was time-barred. Here, providing notice to Venezuela under the FSIA would have allowed the foreign state to raise, before entry of judgment, the issue of whether it was appropriate to enforce the face value of the arbitral award without taking into account the amounts that Mobil apparently received under the ICC arbitral award. Furthermore, Venezuela could have requested that the district court stay entry of the judgment until the ICSID tribunal ruled on Venezuela’s application to revise the award. None of these issues relates to attachment or execution on the award, and it is uncertain whether Venezuela would have been permitted to raise them in a future proceeding in which Mobil sought to execute on or attach Venezuela’s property.

Finally, adhering to the FSIA’s requirements and declining to allow state-law rules inconsistent with those requirements to be borrowed in this context gains support from Congress’s desire to avoid “disparate treatment of cases involving foreign governments,” as this “may have adverse foreign relations consequences.” H.R. Rep. 94-1487, at 13 (1976) (report accompanying FSIA). Indeed, the United States proposed the language incorporated into Article 54(1) that permits the enforcement of an ICSID award in federal courts “in order to be able to provide in the United States for a uniform procedure for enforcement” of ICSID awards. (JA 331, S. Rep. 89-1374, at 4 (1966)). Congress followed suit by giving federal district courts exclusive jurisdiction over actions to enforce ICSID awards, *see* 22 U.S.C. § 1650a(b), and requiring that they be treated like state court judgments, *id.* § 1650a(a), thus ensuring a uniform system of enforcement. Borrowing state-law rules to permit *ex parte* proceedings would undermine that consistent scheme.

### III. **The ICSID Convention’s enabling statute does not permit a federal district court to modify the interest rate adopted by an ICSID arbitral panel**

The district court correctly rejected Venezuela’s attempt to modify the interest rate that applies to the Award. The Award states that Venezuela must pay Mobil \$1,600,042,482 plus 3.25% interest, compounded annually, from June 27, 2007, “up to the date when payment of this sums [*sic*] has been made in full.” ... The ICSID Convention and the ICSID enabling statute both require that courts enforce the “pecuniary obligations” imposed by ICSID awards. ICSID Convention art. 54(1); 22 U.S.C. § 1650a(a). The enabling statute also provides that ICSID

awards “create a right arising under a treaty of the United States.” 22 U.S.C. § 1650a(a). The rate of interest applied to the principal of the Award is “pecuniary” as it translates directly into an amount of money Venezuela must pay. Indeed, the modification of that rate could lessen the total amount of the Award by millions of dollars.

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## 2. Exceptions to Immunity from Jurisdiction: Commercial Activity

Section 1605(a)(2) of the FSIA provides that a foreign state is not immune from suit in any case “in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

### a. *Odhiambo v. Kenya*

In *Odhiambo v. Kenya*, No. 14-1206, a case involving the commercial activity exception, the United States filed an *amicus* brief in the U.S. Supreme Court in response to the Court’s invitation and recommended that *Odhiambo*’s petition for certiorari be denied. *Odhiambo* sought review of the decision of the Court of Appeals for the D.C. Circuit, which held that none of the three clauses of the commercial activity exception provided jurisdiction over an action claiming that the Republic of Kenya breached a contract by failing to pay a reward to a Kenyan whistleblower and failing to keep his identity confidential in Kenya. The Court of Appeals found that the action was not “based upon a commercial activity carried on in the United States” by Kenya or upon any alleged act performed in the United States in connection with Kenya’s commercial activity, and that neither the alleged failure to make payments nor the breach of a promise of confidentiality caused a direct effect in the United States. The U.S. brief, excerpted below (with most footnotes omitted), asserts that review of the court of appeals’ rulings was not warranted. The Supreme Court denied the petition for certiorari.

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## A. Further Review Of The Court Of Appeals’ Rulings On Clause One And Clause Two Of The Commercial-Activity Exception Is Not Warranted

1. The court of appeals correctly decided that neither clause one nor clause two of the FSIA’s commercial-activity exception applies in this case.<sup>1</sup>

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<sup>1</sup> Although the parties did not litigate the question in the court of appeals, see Pet. App. 14a n.1, there is substantial reason to doubt that the Kenyan reward program is properly regarded as “commercial activity” under the FSIA. That

a. Clause one provides that a foreign state is not immune from jurisdiction when “the action is based upon a commercial activity carried on in the United States by the foreign state,” 28 U.S.C. 1605(a)(2)—that is, upon “commercial activity carried on by such state and having substantial contact with the United States,” 28 U.S.C. 1603(e). In *OBG Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), this Court held that “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” *Id.* at 396 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 356- 358 (1993)). Determining the “gravamen” requires a court to “zero[] in on the core of the[] suit.” *Ibid.*; see *ibid.* (looking to “acts that actually injured” the plaintiff).

As the court of appeals ruled, petitioner’s suit is not based upon “the meetings that Kenyan officials held with him in the United States to discuss the disputed rewards” (or any other “instances of commercial activity by Kenya” in this country). Pet. App. 13a. The gravamen of petitioner’s claims—the particular acts as to which he is aggrieved—are the Kenyan government’s alleged failure to pay the promised reward in Kenya and to keep his identity confidential in Kenya, not any meetings that its officials attended later to discuss petitioner’s grievances. See *id.* at 13a-14a.

To be sure, the court of appeals applied a more permissive interpretation of “based upon” than *Sachs* later adopted. The court asked only whether the activity “establishe[d] one of the ‘elements of [the] claim that, if proven, would entitle a plaintiff to relief.’ ” Pet. App. 13a (quoting *Nelson*, 507 U.S. at 357). Under *Sachs*, “the mere fact that the [commercial activity] would establish a single element of a claim is insufficient.” 136 S. Ct. at 395. Still, having failed to satisfy the lenient understanding of “based upon” applied by the court below, petitioner cannot meet the more demanding standard dictated by *Sachs*.

b. As the court of appeals explained, petitioner’s “clause two argument falters on the same grounds as his clause one argument: [h]is breach-of-contract claim[s] [are] not *based upon* any alleged ‘act performed in the United States in connection with’ Kenya’s commercial activity.” Pet. App. 16a (quoting 28 U.S.C. 1605(a)(2)). In reaching that conclusion, the court ruled that “the virtually identical statutory text and structure of clauses one and two lead [it] to conclude that ‘based upon’ means the same thing in both clauses.” *Ibid.* Petitioner does not appear to contest that ruling. Pet. 24-26.

c. Petitioner’s arguments that the court of appeals erred lack merit.

i. Petitioner primarily contends (Pet. 12-13, 35) that the D.C. Circuit and other courts of appeals have erred in holding that the “substantial contact” standard for determining whether a foreign state has “carried on” commercial activity in the United States under clause one requires a more extensive connection to this country than the “minimum contacts” standard for personal jurisdiction. But, as to the only relevant activity petitioner identified in the district court, the court of appeals’ ruling that clause one is inapplicable to this case has nothing to do with any question of “substantial contact.” Pet. App. 13a-16a. No one disputes that the meetings between petitioner and Kenyan officials were held in the United States. The court’s ruling turned instead on the determination that those activities were not the foundation of petitioner’s breach-of-contract claims within the meaning of the separate “based upon” requirement. *Id.* at 13a- 14a. It

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program offers monetary rewards as part of a scheme to identify tax evaders and take law-enforcement action, and Kenyan officials have statutory discretion to decline to pay a reward. See D. Ct. Doc. 14-2, Ex. 1 (July 23, 2012). Government efforts to enforce tax laws, and officials’ discretionary decisions about treatment of informants, do not appear to be the “*type* of actions by which a private party engages in ‘trade and traffic or commerce.’ ” *Republic of Arg. v. Weltover*, 504 U.S. 607, 614 (1992) (citation omitted); but see *Guevara v. Republic of Peru*, 468 F.3d 1289, 1298-1305 (11th Cir. 2006).

is irrelevant to that ruling whether “substantial contact” is different from or equivalent to “minimum contacts.”

ii. Perhaps petitioner also means to contend (Pet. 23-25) that the court of appeals was wrong to reject his argument that the entire Kenyan reward program “constitutes a commercial activity” that “had substantial contact with the United States because of his meetings with Kenyan officials in the United States.” Pet. App. 14a. But the court held that petitioner “failed to raise this argument in the district court and therefore has forfeited it.” *Ibid.* The “substantial contact” issue embedded in that argument is therefore not properly presented in this Court. See *Sachs*, 136 S. Ct. at 397-398.

In any event, as the court of appeals also pointed out (Pet. App. 14a-16a), the argument is wrong. *Sachs* establishes that a suit is “based upon” the “particular conduct” at the “core of the[] suit” that forms the gravamen of a plaintiff’s claim. 136 S. Ct. at 396; see *Nelson*, 507 U.S. at 356. The specificity that *Sachs* contemplates makes it inappropriate to treat petitioner’s claims as “based upon” Kenya’s reward program as a whole. Such an approach would allow courts to conclude that the “based upon” requirement is satisfied whenever a foreign state’s commercial activity involves some domestic conduct, even if the “core of the[] suit” consists exclusively of overseas conduct. That would permit plaintiffs to evade the FSIA’s restrictions through the sort of “artful pleading” that this Court was careful to guard against in *Sachs*. 136 S. Ct. at 396. And it would be a far more expansive approach than is employed to assess personal jurisdiction, since it would eliminate the requirement that a claim arise out of or relate to contacts with the relevant forum (as is required for specific jurisdiction) or that the defendant have its home base in that forum (as is required for general jurisdiction). See generally *Daimler AG v. Bauman*, 134 S. Ct. 746, 754-755, 761 (2014); see also Pet. App. 14a-15a.

Moreover, even if Kenya’s entire reward program could be deemed the “commercial activity” on which petitioner’s claims are based, the isolated meetings in the United States alleged here do not give an activity otherwise conducted overseas the requisite “substantial contact” with this country. See Pet. App. 14a; accord *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1133, 1137 (9th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013); *Gerding v. Republic of Fr.*, 943 F.2d 521, 527 (4th Cir. 1991), cert. denied, 507 U.S. 1017 (1993). That conclusion would hold true even if “substantial contact” were interpreted to require nothing more than the sort of “minimum contacts” that suffice for personal jurisdiction purposes. See *Gerding*, 943 F.2d at 527; see also, *e.g.*, *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722-723 (6th Cir. 2000); pp. 14-15, *infra*.

iii. Finally, petitioner argues (*e.g.*, Pet. 26, 30) that Kenya’s alleged failure to satisfy its obligations while he was living in the United States is an “act” in the United States upon which his suit is based for purposes of clause two. That argument is incorrect. Kenya maintains that it has no performance obligations in the United States, and it has never made a payment to petitioner that was not issued in Kenya and paid in Kenyan shillings. See Pet. App. 26a-27a. Under those circumstances, the Kenyan government’s alleged decision not to perform is an act in Kenya, not an act in the United States. See *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 137-138 (2d Cir. 2012).

2. Contrary to petitioner’s assertions (Pet. 11-17, 20, 25), the court of appeals’ decision that clause one and clause two of the commercial-activity exception are inapplicable to this case does not conflict with any decision of another court of appeals or of this Court.

Petitioner primarily argues that the decision below contributes to a circuit conflict concerning the proper interpretation of the term “substantial contact” in 28 U.S.C. 1603(e). As explained above, however, that issue is not presented in this case, see pp. 11-12, *supra*; nor has petitioner shown that application of a “minimum contacts” standard would alter the outcome here.

In any event, no such disagreement exists. Every court of appeals that has analyzed the issue has correctly concluded that “substantial contact” requires a more extensive showing than the “minimum contacts” that suffice to establish personal jurisdiction. See *Shapiro v. Republic of Bol.*, 930 F.2d 1013, 1019 (2d Cir. 1991); *Gerding*, 943 F.2d at 527; *Sachs v. Republic of Austria*, 737 F.3d 584, 598 (9th Cir. 2013) (en banc) (“It is generally agreed that [substantial contact] sets a higher standard for contact than the minimum contacts standard for due process.”), rev’d on other grounds *sub nom. Sachs, supra*; see also *BP Chems. Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005) (FSIA requirements “probably exceed the constitutional standard”); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

Petitioner’s insistence that the issue is the subject of a complex, multi-part division of authority seems to be grounded, at least in part, in a mistaken conflation of the separate “based upon” and “substantial contact” concepts. Thus, petitioner relies (Pet. 13-17) on decisions that use the term “nexus” to refer generally to the requirement under all three clauses that the action be based upon an act or activity with a connection to the United States, see *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts*, 727 F.3d 10, 25-27 (1st Cir. 2013); *Haven v. Polska*, 215 F.3d 727, 736 (7th Cir.), cert. denied, 531 U.S. 1014 (2000); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-273 (3d Cir. 1980), or that describe confusion about the meaning of “based upon” that pre-dates this Court’s decisions in *Nelson* and *Sachs*, see *Vencedora Oceanica Navigacion, S.A. v. C.N.A.N.*, 730 F.2d 195, 199-202 (5th Cir. 1984) (per curiam). Those decisions do not establish any disagreement between the court below and other courts of appeals. Petitioner also cites (Pet. 20, 25) this Court’s decisions in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992)—but none of those decisions resolves how the FSIA term “substantial contact” compares to the due process standard.

#### **B. Further Review Of The Court Of Appeals’ Ruling On Clause Three Of The Commercial-Activity Exception Is Not Warranted**

1. The court of appeals was also correct to conclude that petitioner’s action does not fall within clause three of the commercial-activity exception.

a. Clause three applies to an action that is based upon “an act outside the territory of the United States in connection with a commercial activity of the foreign state” if “that act causes a direct effect in the United States.” 28 U.S.C. 1605(a)(2). In *Weltover*, this Court held that “an effect is ‘direct’ ” under clause three “if it follows ‘as an immediate consequence of the defendant’s . . . activity.’ ” 504 U.S. at 618 (citation omitted). The claims in *Weltover* were based upon Argentina’s failure to pay government bonds that provided for payment “through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor.” *Id.* at 609-610. Because the bondholder had chosen New York, the Court concluded that “New York was \* \* \* the place of performance for Argentina’s ultimate contractual obligations.” *Id.* at 619. Argentina’s nonpayment therefore “necessarily” created the requisite direct effect: “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” *Ibid.*

Following *Weltover*, it is plain that breach-of-contract claims based on nonpayment have the requisite “direct effect” in the United States if the contract designates the United States as the place of payment or if the payee has the right to designate the United States as the place of payment and exercises that right. See, e.g., *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997); see also *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010). If the contract does not designate or give the payee the right to designate the United States as a place of payment, however, nonpayment does not create a direct effect in the United States simply because the financial harm is felt by an entity in the United States. See, e.g., *Rogers*, 673 F.3d at 139-140; *Lu v. Central Bank of Republic of China (Taiwan)*, 610 Fed. Appx. 674, 675 (9th Cir. 2015); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995).

b. As the court of appeals correctly ruled, in this case there was no “direct effect” in the United States from the alleged breach of contract. The court found that the alleged agreement between the parties did not designate the United States as the place of payment or give petitioner the right to do so. See Pet. App. 23a-24a. To the contrary, Kenya’s description of the reward program as involving payment in Kenyan shillings suggested that the place of payment would be Kenya. *Ibid.* Moreover, the court noted, Kenya refused to issue payments outside of that country, and petitioner received certain additional payments after he moved to the United States “only through an intermediary in Kenya who obtained the payments in Kenya and then sent them to [petitioner].” *Id.* at 26a; see *id.* at 25a; cf. *United World Trade*, 33 F.3d at 1239. And the court found no indication that Kenya ever agreed to modify the place of performance. The facts thus failed to establish a “direct effect” in the United States.

As to petitioner’s claim of breach of a promise of confidentiality, that alleged act did not “cause[] a direct effect in the United States,” 28 U.S.C. 1605(a)(2), merely because petitioner ultimately resettled here. See Pet. App. 27a-28a. According to petitioner’s allegations, it was not until after he decided to publicize his own story through a newspaper that the threats against him became sufficiently serious that he decided to seek asylum. See *id.* at 145a-148a. And although the Kenya National Commission on Human Rights supported petitioner’s asylum application, that conduct was quintessentially sovereign, not commercial. See *id.* at 111a n.6. The panel majority properly rejected a rule that “refugees \* \* \* be allowed to bring suits in U.S. courts against their former sovereigns if those sovereigns played a role in the refugees’ relocation to the United States.” *Id.* at 27a.

2. Petitioner contends that the court of appeals erred by “engraft[ing]” onto clause three “the very ‘requirement of ‘foreseeability’ that *Weltover* rejected.” Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). But *Weltover* itself looked to place of performance, see 504 U.S. at 619—not because it demonstrated foreseeability, but because it went to the directness of the harm. If a payee has no right to payment in the United States, then any harm here is likely the “result of some intervening event.” Pet. App. 19a.

Petitioner also contends that the court of appeals’ analysis erroneously requires “ex ante contractual designation of the United States as the place of performance.” Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). That is incorrect. The court recognized that a direct effect exists if the payee exercises a contractual right to elect the United States as one of several payment locations. Pet. App. 18a. The same result may well obtain if the payee has the contractual right to select a payment location of its choice and selects the United States, even if

the United States is not specifically named in the contract. See *Hanil Bank*, 148 F.3d at 132; *DRFP L.L.C. v. Republica Bolivariana de Venez.*, 622 F.3d 513, 516 (6th Cir. 2010), cert. denied, 132 S. Ct. 1140 (2012).

Finally, petitioner asserts that the decision below does not sufficiently examine “all relevant facts, including course of dealing,” in making the “direct effect” determination. Pet. 29 (quoting Pet. App. 36a (Pillard, J., dissenting in part)). But the majority did indeed consider a variety of facts—including Kenya’s course of conduct of making payments only in that country—in considering whether payment was supposed to be made in the United States. See, e.g., Pet. App. 26a. The court thus appropriately recognized that determining whether a “direct effect” exists requires an examination of the facts of the particular case.

3. There is no relevant conflict among the circuits about the meaning of “direct effect.” As noted above, courts of appeals applying clause three of the commercial-activity exception in breach-of-contract cases involving nonpayment have consistently looked to whether the plaintiff has a right to payment in the United States. See pp. 16-17, *supra*.

Petitioner contends (Pet. 18-19) that the Fifth Circuit took a different approach in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir.), cert. denied, 525 U.S. 1041 (1998), which stated that “a financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction.” *Id.* at 893. There is no inconsistency. The contract at issue in *Voest-Alpine* was silent as to place of payment; the Fifth Circuit found that nonpayment had a direct effect in this country because “it [was] the [defendant’s] customary practice to send payments on a letter of credit to wherever the presenting party specifies,” the plaintiff specified payment in the United States, and no account outside the United States that was to receive payments had been identified. *Id.* at 896. In this case, by contrast, Kenya consistently refused to perform the alleged contract anywhere except Kenya. See Pet. App. 26a-27a. Accordingly, applying the reasoning of *Voest-Alpine* would not result in a different outcome here.

Petitioner also mistakenly asserts (Pet. 17-18, 29 & n.8) that the decision below conflicts with decisions of the First, Second, and Sixth Circuits. In *Universal Trading*, *supra*, the First Circuit found a direct effect in the United States where the facts established that the defendant “would have performed its obligations under the Agreements in Massachusetts.” 727 F.3d at 26. In *Hanil Bank*, *supra*, the Second Circuit found a direct effect in the United States where the plaintiff asserting breach of contract “was entitled under the letter of credit to indicate how it would be reimbursed, and it designated payment to its bank account in New York.” 148 F.3d at 132. And in *DRFP*, *supra*, the Sixth Circuit found a direct effect in the United States where the defendant allegedly failed to pay even though “under the terms of the notes,” including Swiss law incorporated into the notes, “the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio.” 622 F.3d at 516-517. Petitioner’s case involves a distinct fact pattern.

Finally, petitioner claims (Pet. 26-29) that the decision below conflicts with various decisions of this Court. But those decisions either support the decision below, see *Weltover*, 504 U.S. at 609-610, 618-619, or are irrelevant to its holding, see *Verlinden*, 461 U.S. at 482, 490, 497-498 (stating that the FSIA does not restrict “the citizenship of the plaintiff”); *Burger King*, 471 U.S. at 475-478, 487. For instance, while petitioner argues that the D.C. Circuit’s analysis conflicts with *Verlinden* by creating “a proscribed class of ‘contract victim[s]’ who ‘move to the United States,’” Pet. 27 (citation omitted), the decision below accepts that plaintiffs who move to

the United States and assert breach-of-contract claims can successfully meet the “direct effect” requirement under certain circumstances.

**C. Finding The Commercial-Activity Exception Applicable To Petitioner’s Claims Would Threaten Adverse Treatment Of The United States In Foreign Courts**

Petitioner contends (Pet. 31) that the issues he raises “present recurring questions of national importance.” Given that the court of appeals correctly interpreted the FSIA and that the decision below does not conflict with the decisions of other courts, petitioner is mistaken. A contrary holding, moreover, could substantially harm the United States by leading foreign courts to take reciprocal action that second-guesses decisions on the implementation of U.S. reward programs. *Contra* Pet. App. 47a (Pillard, J., dissenting in part).

The United States has various reward programs that provide payments to individuals who furnish information to the government. For instance, the State Department administers programs such as Rewards for Justice (targeting terrorists and war criminals) and the Narcotics Rewards Program (targeting narcotics traffickers), both of which give the Secretary of State “discretion” to decide whether to reward an informant. 22 U.S.C. 2708(b). The Department of Defense likewise administers a reward program targeting terrorism that gives the Secretary of Defense discretion to determine whether a reward is warranted. See 10 U.S.C. 127b(a). Under those programs, the government’s decision about provision of a reward is not subject to judicial review. See 22 U.S.C. 2708(j); 10 U.S.C. 127b(g); see also 26 U.S.C. 7623 (establishing tax-related reward program and permitting appeals to the United States Tax Court).

If the United States permits suit against foreign sovereigns based on a claimed failure to pay a reward under a government program, despite the fact that such a program is best regarded as sovereign rather than commercial activity, see note 1, *supra*, then foreign states may reciprocate by permitting similar claims against the United States in their tribunals. See, *e.g.*, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). But serious problems would arise if decisions about U.S. reward programs were subject to review in foreign courts. Foreign courts cannot be counted upon to be sensitive to the concerns that inform decisions by U.S. officials whether to pay a reward, including national security interests. And foreign courts might well seek to inquire into what precisely a confidential informant told U.S. law-enforcement officials and how that information did (or did not) satisfy the terms of the reward program. Courts in other countries may also be unsympathetic to U.S. efforts to invoke the law-enforcement privilege or to resist the disclosure of classified information.

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**b. Helmerich & Payne v. Venezuela**

In 2016, the United States filed an *amicus* brief in response to the Supreme Court’s invitation in another case involving the interpretation of the commercial activity exception at the petition stage: *Helmerich & Payne Int’l Drilling Co., et al. v. Venezuela et al*, No. 15-698. The Court of Appeals for the D.C. Circuit held that the third clause of the FSIA’s commercial activity exception did not provide jurisdiction over claims brought by Helmerich & Payne International Drilling Company (“H&P-IDC”), a United States company, and its Venezuelan subsidiary, Helmerich & Payne de Venezuela, C.A. (“H&P-

V”), relating to the alleged breach of oil drilling contracts between H&P-V and a Venezuelan state-owned corporation. The U.S. brief, excerpted below (with most footnotes omitted), expresses the view that the claimed failure to make payments to H&P-V under the contracts did not have a “direct effect” in the United States and that review of the appeals court’s dismissal of the contract claims was not warranted. The Supreme Court held this petition for certiorari because it partially granted a separate petition for certiorari filed by the Venezuelan government defendants seeking review of the appeals court’s ruling relating to the companies’ claims under the expropriation exception, which is discussed *infra*.

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... This Court’s recent decision in *OBG Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), which issued after the decision below, reinforces the lower court’s conclusion here, and a remand for further consideration in light of *Sachs* would serve no purpose. Accordingly, further review is not warranted.

**A. Further Review Of The Court Of Appeals’ Ruling As To Which Act Might Give Rise To A Direct Effect In The United States Is Not Warranted**

1. a. The petition asks this Court to address whether, under the third clause of the FSIA’s commercial-activity exception, “a breach-of-contract action” is based upon “any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract.” ... The third clause states that a foreign state shall not be immune from suit if “the action is based upon \* \* \* an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. 1605(a)(2). This Court’s decision in *Sachs* governs the analysis of which “act” the breach-of-contract claims in this case are “based upon” for purposes of that exception.

In *Sachs*, a case involving the first clause of the commercial-activity exception, the Court rejected the argument that a plaintiff’s personal-injury suit relating to a train accident in Austria was “based upon” the foreign state’s sale of a train pass to the plaintiff in the United States. 136 S. Ct. at 393-394. The plaintiff contended that the sale was sufficient to satisfy the “based upon” requirement because it established one element of her claim. See *id.* at 394. This Court ruled that “the mere fact that the sale of the \* \* \* pass would establish a single element of a claim is insufficient to demonstrate that the claim is ‘based upon’ that sale for purposes of § 1605(a)(2).” *Id.* at 395.

In reaching that conclusion, the Court explained that the “one-element approach” was “flatly incompatible,” 136 S. Ct. at 396, with the Court’s prior decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). *Nelson* involved an action against a foreign state for wrongful arrest and torture; the plaintiff argued that the action was based upon commercial activities that the state had earlier carried out in the United States when it recruited him. *Id.* at 353-354, 358. The *Nelson* Court explained that the “based upon” inquiry requires a court to “identify[] the particular conduct on which the [plaintiff’s suit] is ‘based.’ ” *Id.* at 356. That, in turn, requires consideration of the “basis” or the “foundation” of the claim—“those elements of a claim that, if

proven, would entitle a plaintiff to relief under his theory of the case.” *Id.* at 357; see *ibid.* (“focus should be on the ‘gravamen of the complaint’ ”) (citation omitted). The Court held in *Nelson* that the plaintiff’s suit seeking recovery for “personal injuries” was not “based upon” the alleged commercial activity that preceded infliction of those injuries. *Id.* at 358.

*Sachs* explained that *Nelson*’s reference to the “elements” of the plaintiff’s claim should not be misunderstood as endorsing a one-element test for determining whether the “based upon” requirement in the commercial-activity exception has been satisfied. *Sachs*, 136 S. Ct. at 395-396; see *id.* at 394, 396-397 (“based upon” requirement is not met merely because a foreign state’s commercial activity is “connected with the conduct that gives rise to the plaintiff’s cause of action”) (citation omitted). Rather, “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit”—and determining the “gravamen” requires “zero[ing] in on the core of the[] suit,” by looking to the “acts that actually injured” the plaintiff. *Id.* at 396.

In *Sachs*, the “gravamen” of the plaintiff’s claims involved “wrongful conduct and dangerous conditions in Austria.” 136 S. Ct. at 396. Because there was “nothing wrongful about the sale of the [train] pass standing alone,” *ibid.*, the Court ruled that the plaintiff’s claim was not “based upon” that commercial activity, *id.* at 397; see *id.* at 396-397 (cautioning against “allow[ing] plaintiffs to evade the Act’s restrictions through artful pleading,” as by “recast[ing]” a “claim of intentional tort” in Austria as a “claim of failure to warn” at the point of the ticket sale).

b. In this case, the court of appeals did not expressly analyze any “based upon” question; instead, it simply stated in a single sentence of its opinion that, in applying the third clause of the commercial-activity exception, any “‘direct effect’ in the United States must arise from the foreign state’s allegedly unlawful act—here, the breach of contract.” Pet. App. 20a; see *id.* at 18a (stating without discussion that “our analysis focuses on \* \* \* whether Venezuela’s breach of the drilling contracts” gave rise to a direct effect in the United States). Nevertheless, to the extent that the court’s decision embodies the conclusion that the breach-of-contract claims in this case are “based upon” the alleged breach rather than on some other aspect of the contract or the parties’ relationship, that conclusion is correct and fully consistent with this Court’s decision in *Sachs*.

The gravamen of the breach-of-contract claims in this case is [the respondents’ (state-owned corporations Petr6leos de Venezuela, S.A. and PDVSA Petr6leo), or] PDVSA’s alleged breach—a failure to pay amounts that PDVSA owed H&P-V under the contracts for work that H&P-V performed. . . . The complaint alleges that PDVSA’s “failure to timely and completely pay [H&P-V] as required” by the contracts “directly harmed” H&P-V and gave rise to damages. . . . The complaint also alleges that PDVSA acknowledged its debt to H&P-V, even while refusing to pay. . . . And, notably, the complaint does *not* allege that there was anything “wrongful” (*Sachs*, 136 S. Ct. at 396) about the formation of the contracts or about PDVSA’s performance under those contracts apart from the non-payment of amounts owed. Under those circumstances, the foundation of the claim is the alleged breach itself, and not any acts that led up to the breach or otherwise were merely connected in some way with the parties’ contracts or the performance of their contractual obligations. . . .

2. a. Petitioners suggest that the Court grant, vacate, and remand to give the court of appeals the opportunity to consider the “based upon” issue in light of *Sachs*. . . . They assert that if the court were to apply *Sachs* here it would ask whether the formation of H&P-V’s contracts with PDVSA or the parties’ course of performance under those contracts is part of the core of the relevant claims, and “would likely conclude that the ‘gravamen’ of H&P-V’s breach-of-contract

claims includes more than PDVSA's breach." ... Indeed, petitioners assert, "the dispute in breach-of-contract cases often focuses on the meaning and enforceability of each party's contractual obligations in light of the language of the contract and the course of performance." ...

But even assuming the accuracy of that statement in some cases, petitioners do not explain how the dispute in *this* case can be said to have that kind of focus. H&P-V is suing for PDVSA's failure to make payments owed under the contracts. ... It is not attempting to recover for any acts PDVSA took with respect to third-party suppliers, or taking issue with prior payments PDVSA made in the United States, or claiming that it was induced to enter into the contracts in the first place by some misrepresentation or other wrongful act by PDVSA. Moreover, in this case there appears to be no dispute regarding "the duty that was owed" ... to make payments for H&P-V's work. Thus, the acts of contract formation and performance to which petitioners point are not the conduct at the core of the breach-of-contract claims. Because the outcome of the "based upon" analysis in this case under *Sachs* is clear, the remand that petitioners suggest would serve no useful purpose.

b. Alternatively, petitioners contend ... that the Court should grant the petition to address the application of *Sachs* to breach-of-contract cases more generally. According to petitioners, while *Sachs* "provides important guidance on the application of the 'based upon' test to tort claims," ... it does not resolve a pre-existing difference of opinion about whether a breach-of-contract claim may be considered to be "based upon" contract formation or performance, rather than on the alleged breach itself, for purposes of the commercial-activity exception ... This Court's review of that issue is not warranted here.

Even assuming that petitioners were correct about the existence of a split in authority that pre-existed *Sachs* and is not fully resolved by that decision, this case would be a poor vehicle for considering how to apply the "based upon" requirement in breach-of-contract cases. First, as noted above, the court of appeals did not directly analyze that requirement. ... While the court did state that it would consider only effects linked to the alleged breach, whether the court understood that limitation to derive from the "based upon" language (and, if so, what its reasoning was) is unclear. See, *e.g.*, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis \* \* \* to the facts of a particular case without the benefit of \* \* \* lower court determinations is not a sensible exercise of this Court's discretion."). Second, even if contract formation or performance might be said to be the gravamen of some breach-of-contract claims, petitioners' claims do not appear to be among them. ... Further consideration of that issue therefore would be highly unlikely to change the result in this case. Third, to the extent that the courts of appeals disagreed before *Sachs* about how to apply the "based upon" requirement in breach-of-contract cases, the courts should be given an opportunity to consider the matter further in light of *Sachs*. That consideration could result in changed or refined views that would obviate any disagreement.

\* \* \* \*

## **B. Further Review Of The Court Of Appeals' Ruling On Whether Nonpayment Caused A "Direct Effect" In The United States Is Not Warranted**

1. Clause three of the commercial-activity exception applies to an action that is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state" if "that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). In *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), this Court held that "an effect is

‘direct’ ” under clause three “if it follows ‘as an immediate consequence of the defendant’s . . . activity.’ ” *Id.* at 618 (citation omitted).

\* \* \* \*

The conclusion of the court of appeals in this case that PDVSA’s alleged failure to pay on the contracts did not have a “direct effect” in the United States . . . is fully consistent with *Weltover*. Unlike the bonds in *Weltover*, the contracts here did not give the payee the unqualified right to demand payment in the United States. Instead, under the contracts, “PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its ‘exclusive discretion’ and ‘judgment,’ it ‘deem[ed] it discretionally convenient.’ ” . . . Because the “alleged effect” in this case of non-receipt of payment in the United States thus “depends solely on a foreign government’s discretion,” the court correctly concluded that the effect cannot be said to be “direct” within the meaning of the third clause—that is, to “flow[] in a straight line without deviation or interruption,” . . .

\* \* \* \*

2. Petitioners express concern that the court of appeals’ decision will permit foreign states to “evade the jurisdiction of U.S. courts by including in the contract an escape clause reserving some unexercised discretion to perform elsewhere,” even “where the parties’ course of dealing indicates that performance was in fact reasonably expected to be made in the United States.” But a company wishing to ensure that a foreign state’s failure to make contractually required payments may be litigated in the United States need only insist upon a contract provision requiring payment in the United States. Thus, no change in the law is necessary to avoid “gamesmanship and abuse” . . . or to give companies entering into contracts with foreign states “assurance that relief may be available in U.S. courts in predictable circumstances” . . .

\* \* \* \*

### 3. Expropriation Exception to Immunity: Standard for Establishing Jurisdiction

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). In 2016, the United States filed briefs as *amicus curiae* both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela v. Helmerich & Payne Int’l Drilling Co., et al.*, No. 15-423. This petition sought review of the Court of Appeals for the D.C. Circuit’s decision to allow expropriation claims by H&P-IDC and H&P-V to proceed under the expropriation exception, including the court’s conclusion that it was sufficient at the jurisdictional stage for plaintiffs to come forward with merely “non-frivolous” allegations that the case places in issue “rights in property taken in violation of international law”. The U.S. *amicus* brief filed on May 24, 2016, advocating a partial grant of the petition of Venezuela limited to the question of the

proper standard for adjudicating the jurisdictional requirements, is excerpted below (with most footnotes omitted).

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I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER STANDARD FOR ESTABLISHING JURISDICTION UNDER THE FSIA'S EXPROPRIATION EXCEPTION

A. The Court Of Appeals' Decision Is Wrong

1. The FSIA provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a). Sections 1605-1607, in turn, set forth the specific standards governing whether a foreign nation is entitled to sovereign immunity. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 497 (1983). Thus, "subject matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 493; see *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same).

For that reason, "[a]t the threshold of every action in a District Court against a foreign state, \* \* \* the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494. When the foreign state moves to dismiss on the ground that the claim, as pleaded, does not satisfy the requirements of the relevant exception to immunity, the court must determine whether the allegations are legally sufficient to satisfy those requirements. In *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007) (*Permanent Mission*), for instance, this Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4), which creates an exception to immunity for suits "in which \* \* \* rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in \* \* \* property," concluding that it extended to non-ownership and non-possessory interests. *Permanent Mission*, 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the property at issue. *Ibid.* The Court accordingly held that the lien-enforcement suit "implicates 'rights in immovable property' " within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.

2. Using language parallel to that of Section 1605(a)(4), at issue in *Permanent Mission*, the expropriation exception to foreign sovereign immunity permits a suit against a foreign state in any case "in which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). Apart from the nexus requirement, which is not at issue in this case, Section 1605(a)(3) contains two primary substantive requirements. First, the case must be one in which "rights in property" are "in issue"—in other words, the complaint must identify the plaintiff's property rights that serve

as the basis for its claims. See *Permanent Mission*, 551 U.S. at 198-199. Second, there must have been a “tak[ing] in violation of international law.” For a court to “satisfy itself” that a claim comes within Section 1605(a)(3), *Verlinden*, 461 U.S. at 494, it must determine that the plaintiff’s allegations fulfill those requirements, *Permanent Mission*, 551 U.S. at 198-199.

Accordingly, a court evaluating its jurisdiction under Section 1605(a)(3) must make a legal determination that the complaint places “in issue” property rights that were “taken in violation of international law.” The court must verify that the complaint contains allegations that describe a taking prohibited by international law. If the allegations are legally insufficient to describe such a violation—if, for instance, the alleged taking constitutes only a violation of municipal law—then the complaint has not placed “in issue” rights in property “taken in violation of international law.” Similarly, if the allegations are legally insufficient to establish that the plaintiff seeks to vindicate its own rights in property, the complaint has not placed “in issue” “rights in property.” In either scenario, the allegations in the complaint do not satisfy Section 1605(a)(3)’s jurisdictional requirements.

3. The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V’s allegations actually state a violation of international law or H&P-IDC’s allegations actually place its own “rights in property” in issue, the court examined only whether respondents’ allegations on those points were “wholly insubstantial or frivolous.” Pet. App. 11a (citation omitted); *id.* at 16a, 20a. The court thus failed to conduct the legal analysis necessary to determine whether the action falls within Section 1605(a)(3)’s exception to immunity. *Verlinden*, 461 U.S. at 493-494.

In framing the question as whether respondents’ expropriation claims were frivolous, the court of appeals relied on *Bell v. Hood*, 327 U.S. 678 (1946). There, this Court construed 28 U.S.C. 41(1) (1940), which conferred on federal courts jurisdiction over any action that “arises under” the Constitution, treaties, or laws of the United States. 28 U.S.C. 41(1) (1940); see 28 U.S.C. 1331. As the Court explained, a claim “arises under” federal law if the claim will be “sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.” *Bell*, 327 U.S. at 685; see *Merrill Lynch v. Manning*, No. 14-1132 (May 16, 2016), slip op. 8-10 (describing “arising under” jurisdiction). Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the claim: a claim may “arise[] under” federal law even if the court’s ultimate construction of federal law will defeat the plaintiff’s claim. The Court applied that principle in *Bell*, holding that “the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.” 327 U.S. at 682. The Court also explained, however, that a suit asserting an “alleged claim under the Constitution or federal statutes” that “is wholly insubstantial and frivolous” may be “dismissed for want of jurisdiction.” *Id.* at 682-683.

The D.C. Circuit has understood *Bell* to establish a general rule, equally applicable to the FSIA as to Section 1331, that “jurisdiction . . . is not defeated . . . by the possibility that” a complaint “might fail to state a cause of action.” Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934, 940 (D.C. Cir. 2008) (*Chabad*). The D.C. Circuit has accordingly held that whenever, as in this case, “the plaintiff’s claim on the merits directly mirror[s] the jurisdictional standard” set forth in the FSIA, the court

should find the jurisdictional standard satisfied so long as the plaintiff's claim is not frivolous. *Simon v. Republic of Hung.*, 812 F.3d 127, 140 (2016).<sup>5</sup>

That approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that would apply to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the specific language of the federal-question statute. Under that statute, jurisdiction does not turn on the legal sufficiency of the claim; rather, the legal sufficiency of the claim is purely a merits question. . . . *Bell*'s rule that a purported federal claim may be dismissed for lack of jurisdiction only if it is frivolous preserves the independence of the jurisdictional and legal-merits inquiries by ensuring that they do not collapse into one another.

*Bell*'s frivolousness standard has no application to the FSIA. Assessing whether a claim falls within a particular statutory grant of jurisdiction is a question of statutory construction. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983). Unlike the federal-question statute, the FSIA establishes substantive federal immunity standards that the court must apply in order to determine whether it has jurisdiction. *Verlinden*, 461 U.S. at 497; see pp. 7-10, *supra*; cf. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-515 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). In the case of the expropriation exception, one of those substantive standards is whether the case involves "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The expropriation exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.

That conclusion adheres to the political Branches' judgment that foreign states should not be subjected to the burden of litigation unless a court "appl[ies] the detailed federal law standards set forth in the Act" and "satisf[ies] itself that one of the exceptions [to immunity] applies." *Verlinden*, 461 U.S. at 494. But the court of appeals' application of the *Bell* standard effectively nullifies the expropriation exception's requirements. Congress would not have anticipated that foreign states would be subject to the burdens of suit for expropriation claims in every case in which the plaintiff makes merely a non-frivolous assertion that the state's conduct violated international law.

#### B. The Proper Standard For Establishing Jurisdiction Under The Expropriation Exception Warrants This Court's Review

1. The courts of appeals disagree on how to evaluate a district court's jurisdiction over an expropriation claim against a foreign state.

The Second Circuit has held, contrary to the decision below, that the court must determine whether the complaint's allegations set forth a taking that, if proven, would violate international law. *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2000) (holding that "breach of a commercial contract alone does not constitute a taking pursuant to international law"). In a subsequent decision, the Second Circuit expressly affirmed that courts

<sup>5</sup> *Simon* reaffirmed the D.C. Circuit's reliance on *Bell* in cases like this one, in which both jurisdiction under the expropriation exception in the FSIA and the legal sufficiency of the plaintiff's claim on the merits turn on whether international law prohibited the alleged taking. 812 F.3d at 140. *Simon* clarified, however, that the court will not apply the *Bell* standard in cases in which the plaintiff's claim on the merits does not rely on international law and therefore "the jurisdictional and merits inquiries do not overlap." *Id.* at 141. In *Simon*, the court declined to apply *Bell* because the plaintiffs asserted common-law conversion claims on the merits, and they alleged a taking that violated international law only to establish jurisdiction. *Ibid.*

must undertake that legal inquiry in determining jurisdiction. See *Robinson v. Government of Malay.*, 269 F.3d 133, 143 (2001); accord *id.* at 147 (Sotomayor, J., concurring in the judgment). In discussing *Zappia*, the court explained that “the applicability of the ‘expropriation’ exception to the FSIA \* \* \* require[s] a determination whether the defendant’s conduct violated ‘international law’ ” as a legal matter, even though “the same question—the liability under international law of the foreign government for the behavior of the corporation—would have been presented on the merits.” 269 F.3d at 143.

The Fifth, Seventh, and Eleventh Circuits similarly assess the legal sufficiency of the plaintiff’s jurisdictional allegations. See, e.g., *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1396, 1395-1397 (5th Cir. 1985) (relevant question is “whether any generally accepted norm of international law prohibits” the foreign state’s alleged expropriation; “[i]f not, \* \* \* the foreign state is immune”) (emphasis omitted); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679- 685 (7th Cir. 2012) (plaintiffs’ complaint did not contain the elements that the court concluded were necessary to allege a taking in violation of international law); *Mezerhane v. República Bolivariana de Venez.*, 785 F.3d 545, 548-551 (11th Cir. 2015) (foreign state was immune because the alleged expropriation of the property of its national does “not constitute a ‘violation of international law’ ”), cert. denied, 136 S. Ct. 800 (2016).

By contrast, the Ninth Circuit, like the D.C. Circuit, has held that, “[a]t the jurisdictional stage,” the court “need not decide,” as a legal matter, “whether the taking actually violated international law” to determine whether a claim comes within the expropriation exception. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (1992), cert. denied, 507 U.S. 1017 (1993). Rather, “as long as a ‘claim is substantial and non-frivolous, it provides a sufficient basis for the exercise’ ” of jurisdiction. *Ibid.* (citation omitted).

2. This Court should grant review to resolve the conflict among the courts of appeals. That conflict undermines the FSIA’s purpose of fostering the “ ‘develop[ment of] a uniform body of law’ concerning the amenability of a foreign sovereign to suit in United States courts.” *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976)). The disagreement may also encourage forum-shopping. Federal venue provisions permit any plaintiff to bring suit against a foreign state in the District of Columbia. 28 U.S.C. 1391(f)(4). The court of appeals’ decision therefore may encourage plaintiffs to file expropriation claims in that court so that they may benefit from the D.C. Circuit’s permissive approach to jurisdiction.

The appropriate standard for establishing jurisdiction under Section 1605(a)(3) is important. Recognizing that “[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States,” *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA’s exceptions to immunity to reflect prevailing customary international-law standards of foreign state immunity, *id.* at 487-488. Section 1605(a)(3) provides a narrow exception to immunity for claims involving “rights in property taken in violation of international law,” where there is a specified commercial-activity nexus to the United States. The D.C. Circuit’s use of the frivolousness standard, however, effectively nullifies key elements of the immunity analysis whenever the plaintiff’s claim purports to rely on international law and the plaintiff can muster a non-frivolous argument that international law recognizes the claim. That permissive approach may result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See *National City Bank v. Republic of China*, 348 U.S. 356, 362 (1955).

In addition, the court of appeals' approach may extend to other FSIA exceptions that contain requirements that parallel the legal merits of the plaintiff's claim. For instance, the terrorism exception provides both an exception to immunity and a right of action for claims for personal injury or death "that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." 28 U.S.C. 1605A(a)(1) and (c). One district court, relying on *Chabad and Simon*, has applied the *Bell* standard to claims brought under that provision. See *Owens v. Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at \*22-\*25 (D.D.C. Mar. 23, 2016) (plaintiffs need only make non-frivolous allegations of legal causation). In addition, the tort exception's requirements may overlap with the merits in some cases, as that exception applies to a claim for personal injury or death "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see *Robinson*, 269 F.3d at 143-144 (discussing overlap between jurisdictional and merits inquiries in cases brought under Section 1605(a)(5)).

## II. THE COURT OF APPEALS' CONCLUSION THAT RESPONDENTS' EXPROPRIATION CLAIMS ARE NOT FRIVOLOUS DOES NOT WARRANT REVIEW

Petitioners also challenge (Pet. 11-26) the court of appeals' holdings that both H&P-V's and H&P-IDC's claims fell within the expropriation exception. Contrary to petitioners' characterization (Pet. 12, 18), the court's conclusions were not based on a determination that respondents' allegations described conduct that actually constituted a taking that was prohibited by international law. Instead, the court held only that respondents' claims were not frivolous. Pet. App. 17a, 22a. Those conclusions do not warrant this Court's review.

### A. The First Question Presented, Concerning Whether H & P-V's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. H&P-V argues that its expropriation claim satisfied Section 1605(a)(3)'s requirement of a "tak[ing] in violation of international law" because international law prohibits taking the property of a domestic corporation to discriminate against the corporation's foreign shareholders. Pet. App. 13a-17a. Petitioners contend (Pet. 12) that the court of appeals held that respondents' claim "does state a [violation of] international law." To the contrary, the court held only that H&P-V's argument was "non-frivolous." Pet. App. 17a. The court based that conclusion primarily on a single fifty-year-old appellate decision. *Id.* at 13a (citing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)), reaff'd on remand by *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967). In *Sabbatino*, the Second Circuit held that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders," a court may disregard "the 'nationality' of the corporate fiction." 307 F.2d at 861.

Rather than asking only whether H&P-V's claim was frivolous, the court of appeals should have determined whether a "*generally accepted* norm" of international expropriation law does prohibit taking a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396 (emphasis added). In the view of the United States, the answer to that question is no. The international law of expropriation generally imposes no limits on a state's taking of its own national's property. See Restatement (Third) of Foreign Relations of the United States § 712(1) (1987) (requiring without exception that a "taking by the state" must be "of the property of a national of another state" before the taking state is "responsible under international law"); see also *United States v. Belmont*, 301 U.S. 324, 332 (1937) (recognizing domestic-takings rule); *Mezerhane*, 785 F.3d at 546, 549-551; *Siderman de*

*Blake*, 965 F.2d at 711. *Sabbatino* is the sole authority that suggests otherwise—but that decision rested on the incorrect premise that international law disregards the nationality of the corporation when it is different from that of most of the shareholders. See 307 F.2d at 861; but cf. *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, 1970 I.C.J. 3 (Feb. 5), ¶¶ 9, 41 (*Barcelona Traction*) (holding, in case involving alleged expropriation of the property of a Canadian corporation whose shareholders were mostly Belgian nationals, that the corporation was to be treated as a national of its state of incorporation, not the state of its shareholders).

2. The court of appeals’ holding that H&P-V’s claim is not frivolous does not warrant review.

Petitioners assert (Pet. 12) that the decision below created a circuit split as to whether “pleading a foreign state’s discriminatory expropriation of the property of its own nationals *does* state a [violation of] international law.” But the decision did not create any such split, because the court of appeals did not actually render such a holding.

The court of appeals did err in permitting H&P-V’s claim to proceed under the expropriation exception. But that error stemmed from its use of the frivolousness standard, not definitive legal conclusions about the conduct prohibited by international law. This Court should therefore review the proper standard for establishing jurisdiction under Section 1605(a)(3). See Pt. I, *supra*. Regardless of how the Court disposes of the frivolousness question, the question whether H&P-V’s claim satisfies Section 1605(a)(3)’s requirements does not warrant review at this time.

If the Court grants review of the frivolousness question and concludes that Section 1605(a)(3) requires a court to determine whether the plaintiff’s allegations actually set forth a violation of international law, that will mean that the court of appeals did not evaluate H&P-V’s claim under the correct standard. Rather than granting certiorari now to conduct that inquiry in the first instance, the better course would be to permit the court of appeals to determine whether H&P-V’s allegations do state a “tak[ing] in violation of international law.” See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view.”). Because respondents’ briefing before the court of appeals focused solely on demonstrating that H&P-V’s claim was not frivolous, Resps. C.A. Br. 34-44, the parties should have the opportunity to litigate the jurisdictional question under the correct standard.

Conversely, if this Court concludes that the frivolousness standard is correct (or denies certiorari on that question, thereby leaving the frivolousness standard in place), then there is no need for this Court to review the court of appeals’ application of that standard to respondents’ complaint. The question whether H&P-V’s allegations are frivolous lacks significance beyond this case. The general standard of frivolousness is one that lower courts have ample experience applying in a range of contexts. See, e.g., *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015). In addition, reviewing H&P-V’s allegations would not provide this Court with an opportunity to decide whether international law actually prohibits discriminatory takings of a national’s property in some circumstances.

**B. The Second Question Presented, Concerning Whether H & P-IDC’s Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review**

1. In addressing the second question presented, the court of appeals held only that H&P-IDC’s claim that its own “rights in property” were “in issue,” 28 U.S.C. 1605(a)(3), was not frivolous. Pet. App. 22a; but cf. Pet. 18. The court acknowledged that because “the corporation and its shareholders are distinct entities,” a shareholder generally does not have an ownership

interest in the corporation's property. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-475 (2003). But the court nonetheless held that H&P-IDC "may have rights in" H&P-V's property. Pet. App. 20a. The court did not examine the source or scope of those potential rights. *Id.* at 20a-22a. The court then concluded, without analysis, that whatever rights H&P-IDC possessed might be "rights in property" for purposes of Section 1605(a)(3), because that provision does not contain any express "limitation" on what constitutes a "right[] in property." *Id.* at 19a.

Because the court of appeals employed the incorrect frivolousness standard, it failed to determine whether respondents' allegations were legally sufficient to place H&P-IDC's "rights in property" in issue. The court should have first examined whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as its shareholder, any direct rights. Municipal law generally accords shareholders "direct rights" related to the corporation that are independent of the rights of the corporation, such as the right to receive dividends or to share in assets upon liquidation. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 47. The court then should have considered whether any such rights constitute "rights in property" for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199 (analyzing rights under New York law and then considering whether they were "rights in immovable property" for purposes of Section 1605(a)(4)). Finally, the court should have determined whether the complaint sufficiently alleges that petitioner's actions constituted a "tak[ing] in violation of international law." 28 U.S.C. 1605(a)(3). While a shareholder's direct rights generally are not implicated by state action that depreciates the value of a corporation's shares, even severely, actions such as taking the shareholder's shares will implicate a shareholder's direct rights. See generally *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 44, 47-49.

2. The question whether H&P-IDC's claim is frivolous does not warrant review. Like the question concerning H&P-V's takings claim, the deficiencies in the court of appeals' analysis stem from its use of the frivolousness standard, not from any actual determination of the scope of H&P-IDC's rights in property or any conclusion about what constitutes "rights in property" for purposes of Section 1605(a)(3). And like the question concerning H&P-V's claim, regardless of how the Court disposes of the pleading-standard question, the court of appeals' holding that H&P-IDC's claim could proceed under Section 1605(a)(3) does not warrant review at this time.

\* \* \* \*

The following is the summary of the argument section from the U.S. *amicus* brief on the merits, filed on August 26, 2016, after the Supreme Court granted Venezuela's petition in part on June 28, 2016, to review the question concerning the standard for establishing jurisdiction under the FSIA's expropriation exception. The Supreme Court heard argument in the case on November 2, 2016.

\* \* \* \*

Section 1605(a)(3) of the Foreign Sovereign Immunities Act creates a narrow exception to foreign sovereign immunity in certain cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). Like the FSIA's other exceptions to immunity, the expropriation exception "codifies the standards governing foreign sovereign

immunity as an aspect of substantive federal law.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). And “whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.” *Id.* at 497-498. The court of appeals erred in holding that merely non-frivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as “exceptionally low.” Pet. App. 11a.

For a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision’s substantive requirements. When the foreign state challenges the legal sufficiency of the complaint’s jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff’s allegations, if true, actually describe a “tak[ing] in violation of international law”—that is, conduct that is prohibited by international expropriation law—and identify “rights in property” that were impaired as a result of the foreign state’s conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed.

That conclusion is dictated by the FSIA’s text and purposes, as well as by this Court’s precedent. The FSIA calls for courts to decide a foreign state’s “entitle[ment]” to immunity, not to hypothesize about what the outcome of that analysis could conceivably be. 28 U.S.C. 1330(a); see 28 U.S.C. 1602. Section 1605(a)(3) requires that “rights in property taken in violation of international law are in issue”—not that such rights may be in issue, or that there may have been a taking that international law might proscribe. 28 U.S.C. 1605(a)(3). And requiring a legal determination of immunity at the “threshold” of the action, *Verlinden*, 461 U.S. at 493-494, is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts. This Court has made just such an analysis of legal sufficiency when considering the application of other FSIA exceptions, including the exception for cases “in which \* \* \* rights in immovable property situated in the United States are in issue.” 28 U.S.C. 1605(a)(4); see *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 198-199 (2007).

In holding otherwise, the court of appeals relied only on this Court’s decision in *Bell v. Hood*, 327 U.S. 678 (1946), which construed the “aris[ing] under” requirement in the federal-question jurisdictional statute. But the *Bell* standard, which is derived from a statute that does “nothing more than grant jurisdiction over a particular class of cases,” *Verlinden*, 461 U.S. at 496-497, has no application in the FSIA context, where Congress—impelled by foreign relations concerns that are specific to suits against foreign sovereigns—made foreign states presumptively immune and imposed substantive preconditions to the existence of jurisdiction that must be satisfied in every case.

The court of appeals failed to assess whether respondents’ allegations were legally sufficient to establish that petitioners’ alleged actions violated international law or that H&P-IDC’s own rights in property were in issue. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard.

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#### 4. Exceptions to Immunity from Jurisdiction: Torts and Terrorism

The tort exception to immunity in the FSIA provides that a foreign state is not immune in actions “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission” of a foreign state. 28 U.S.C. § 1605(a)(5). The FSIA’s definitions section specifies that “[t]he ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.” *Id.* § 1603(c).

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . . engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. § 1605A(a)(1). The provision further specifies that “[t]he court shall hear a claim under this section if” certain additional requirements are met, *id.* § 1605A(a)(2), including that “the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and . . . either remains so designated when the claim is filed . . . or was so designated within the 6-month period before the claim is filed . . .” *Id.* § 1605A(a)(2)(A)(i).

The United States filed a statement of interest on November 21, 2016 in U.S. district court in the District of Columbia in *Schermerhorn v. Israel*, No. 16-0049, a case in which plaintiffs asserted jurisdiction under the FSIA tort and terrorism exceptions. Plaintiffs sought compensation for injuries they allegedly sustained when Israel Defense Forces (“IDF”) intercepted their U.S.-flagged ship on the high seas during the Gaza Flotilla incident of May 31, 2010. Plaintiffs claimed that a tort occurring on a U.S.-flagged vessel occurs in the United States for the purposes of the FSIA’s tort exception and that the terrorism exception applies to any foreign state whether or not it has been designated as a state sponsor of terrorism. Excerpts follow (with most footnotes omitted) from the U.S. statement of interest, which is available in full at <http://www.state.gov/s/l/c8183.htm>.\*

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\* \* \* \*

Plaintiffs contend that the tort exception provides jurisdiction in this case because a U.S.-flagged vessel sailing on the high seas is “territory . . . subject to the jurisdiction of the United States.” . . . In support of their position, plaintiffs point to statements in various cases indicating that “[t]he deck of a private American vessel . . . is considered, for many purposes, constructively as territory of the United States.” . . .

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\* Editor’s note: The district court dismissed the case for lack of jurisdiction on January 25, 2017, and the plaintiffs filed a notice of appeal on February 15, 2017.

Plaintiffs' argument lacks merit. Interpretation of a statute begins with its plain meaning. See *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010). The plain meaning of "territory" signifies land, not the deck of a ship. The root of the term "territory" is "terra," meaning "earth" or "land," and "territory" is defined as "the extent of the land under the jurisdiction of a ruler, state, city, etc." THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 839 (3d ed. 1999) (emphasis added); see e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1329 (1st ed. 1976) (defining "territory" as "[a]n area of land; a district; region" and "[t]he land and waters under the jurisdiction of a state, nation, or sovereign"). Moreover, in FSIA, Congress specified that it was referring to "continental or insular" territory, 28 U.S.C. § 1603(c), making clear that the scope of the term "territory" is limited to U.S. land areas and does not extend to the various locations of all U.S.-flagged vessels at any given moment.

In a case involving a similar issue, the Supreme Court "construe[d] the modifying phrase 'continental and insular' to restrict the definition of United States," for purposes of FSIA's tort exception, "to the continental United States and those islands that are part of the United States or its possessions." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). "[A]ny other reading," the Court explained, "would render this phrase nugatory." *Id.* Although Amerada Hess addressed the applicability of the tort exception to injuries sustained on board a Liberian-flagged vessel on the high seas, as opposed to a U.S.-flagged vessel, the Supreme Court's conclusion that the high seas are not "territory" within the meaning of FSIA's tort exception is equally applicable here.

Other courts have strictly construed the scope of the phrase "in the United States" for purposes of FSIA's tort exception as well. In *Persinger v. Islamic Republic of Iran*, the D.C. Circuit held that injuries sustained on the premises of U.S. embassies abroad do not occur "in the United States" as required by the exception. 729 F.2d 835, 839 (D.C. Cir. 1984). The court noted that it is insufficient that the United States has some jurisdiction over its embassies abroad. The modifying phrase "continental or insular," the Court explained, "is rather clearly intended to restrict the definition of the United States to the continental United States and such islands as are part of the United States or are its possessions." *Id.* "The ground upon which our Embassy stands in Tehran does not fall within that definition." *Id.*; see also *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (same).

Plaintiffs' attempt to overcome the plain meaning of the statute by pointing to various statements that, for some purposes, a ship is said to be "part of the territory" of the country whose flag it flies, *i.e.*, "a kind of floating island," Pls.' Opp'n at 12, is unavailing. The "metaphor" or "fiction" of the floating island, as the Supreme Court has called it, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123-124 (1923), does not signify that Congress intended FSIA's tort exception to extend to U.S.-flagged ships on the high seas. Indeed, the Supreme Court has rejected the same argument plaintiffs make here when interpreting other provisions of law.

In *Cunard*, for example, the Supreme Court held that a U.S.-flagged vessel was not "territory" for purposes of the Eighteenth Amendment's prohibition on the sale or transportation of intoxicating liquors to or from "territory subject to the jurisdiction" of the United States. 262 U.S. at 121-23. The Court explained that the statement "that a merchant ship is a part of the territory of the country whose flag she flies . . . is a figure of speech, a metaphor," and "[t]he immediate context and the purport of the [Eighteenth Amendment] show[s] that the term ['territory'] is used in a physical and not a metaphorical sense—that it refers to areas or districts having fixity of location and recognized boundaries." *Id.* at 122-23; see also *Scharrenberg v.*

*Dollar S. S. Co.*, 245 U.S. 122, 127 (1917) (“It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative, and to expand the doctrine to the extent of treating seamen employed on [a U.S.-flagged ship] as working [in the United States] is quite impossible[,] . . . fanciful and unsound and must be denied.” (internal citation omitted)); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996) (concluding bombing of Pan American Flight 103 over Scotland did not fit within FSIA’s tort exception: “[e]ven if we assume, without deciding, that for some purposes an American flag aircraft is like an American flag vessel, the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is the ‘territory’ of the United States for purposes of the FSIA.” (internal citation omitted)).

The same reasoning applies here. There is no indication that Congress intended to adopt a figurative or metaphorical meaning of “territory” when it enacted FSIA, particularly in light of Congress’ specification that the territory to which it was referring is “continental or insular” territory. See, e.g., *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (Before a word will be assumed to have a meaning broader than or different from its ordinary meaning, “there must be some indication Congress intended such a result.”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”). Plaintiffs have not pointed to any legislative history to suggest that Congress intended anything other than the literal meaning of “territory,” or that Congress intended the tort exception to extend to U.S.-flagged ships on the high seas. The tort exception “was designed primarily to remove immunity for cases arising from traffic accidents.” *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987); see H.R. REP. NO. 94-1487, at 20-21 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618-20. Although the exception is cast in general terms and thus not limited solely to traffic accidents, this purpose “counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law.” *MacArthur Area Citizens Ass’n*, 809 F.2d at 921. It would be inconsistent with Congress’ purpose (and the plain language of the statute) to extend the exception to provide jurisdiction over cases involving U.S.-flagged vessels on the high seas.<sup>3</sup>

<sup>3</sup> Testimony from one of the principal draftsmen of FSIA further confirms that Congress intended the ordinary, geographic meaning of “territory:”

We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities *on our territory* to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities *on their soil*.

...

[W]e would like to afford our local citizens and entities who deal with foreign governments *in the United States* effective redress through the instrumentality of our courts. If a dispute arises as a result of an activity which a government carries on *in this country*, the most appropriate place to resolve such a dispute would be through the courts, which are, after all, designed to do just that: to resolve the dispute *which has arisen here*.

Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 29 (1973) (testimony of Bruno Ristau, Chief of the Foreign Litigation Unit in the Department of Justice) (emphasis added).

Furthermore, even under plaintiffs' proposed interpretation, the deck of a U.S.-flagged ship would only be "territory" for purposes of FSIA's definition of "United States" if it were sailing on the high seas; the moment the ship entered the territorial waters of another country, it would lose its status as "territory." See Pls.' Opp'n at 12, 16 & n.12. The Supreme Court has "never engaged" in the sort of "interpretive contortion" that would be necessary to "giv[e] the same word, in the same statutory provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522 (2008). And this Court should decline to do so here. It is simply improbable that Congress meant to adopt an understanding of the word "territory" that would change based on the location of a ship, particularly without Congress saying so.

Indeed, "[w]hen it desires to do so, Congress knows how to place the high seas," and/or U.S.-flagged ships sailing on them, "within the jurisdictional reach of a statute." *Amerada Hess*, 488 U.S. at 440. For example, in providing jurisdiction over certain criminal acts, Congress has created the "special maritime and territorial jurisdiction of the United States," which expressly extends to, among other things, "[t]he high seas, . . . and any vessel belonging in whole or in part to the United States or any citizen thereof . . . when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." 18 U.S.C. § 7(1); see also *id.* § 2280(b)(1)(A) (providing jurisdiction over the crime of violence against maritime navigation when it is committed, among other things, "against or on board a vessel of the United States"). Similarly, Congress has explicitly empowered the Coast Guard to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction" for "prevention, detection, and suppression of violations of laws of the United States." 14 U.S.C. § 89(a). The absence of similar language in FSIA's tort exception demonstrates that Congress did not intend to remove immunity for alleged torts committed aboard U.S.-flagged vessels on the high seas.

\* \* \* \*

Plaintiffs maintain that FSIA's terrorism exception provides jurisdiction for the torture claim raised by one of the U.S. citizen plaintiffs. . . . Plaintiffs acknowledge that Israel is not currently, and never has been, designated as a state sponsor of terrorism by the Executive Branch, but they argue that the requirements in § 1605A(a)(2) are merely sufficient— not necessary—to remove immunity under the terrorism exception. . . . Plaintiffs' proffered reading of the statute hinges on changes Congress made to the wording of the terrorism exception in 2008. . . . The prior version of the exception stated that "the court shall decline to hear a claim . . . if the foreign state was not designated as a state sponsor of terrorism," Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (1996), whereas the 2008 amendment that created § 1605A provides that "[t]he court shall hear a claim . . . if . . . the foreign state was designated a state sponsor of terrorism," 28 U.S.C. § 1605A(a)(2)(A)(i). According to plaintiffs, the new provision allows a claim to proceed against a designated state sponsor of terrorism but, unlike the prior version, does not require that all claims meet this criterion to go forward. . . .

Plaintiffs' contention does not withstand scrutiny. The structure of FSIA provides a presumption of 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." 28 U.S.C. § 1604. Therefore, a plaintiff must show that one of the Act's exceptions affirmatively authorizes the court to hear its claim in order to overcome the baseline of immunity provided in

§ 1604. The terrorism exception permits a court to hear a claim “if . . . the foreign state was designated a state sponsor of terrorism,” and does not provide jurisdiction in the absence of such a designation. *Id.* § 1605A. For this reason, courts, including the D.C. Circuit, repeatedly and uniformly have held that designation as a state sponsor of terrorism is a prerequisite to establishing jurisdiction under FSIA’s terrorism exception. . . .

Although none of these courts specifically addressed the novel argument plaintiffs make here, the plain meaning of § 1605A is that a court shall hear a claim under the terrorism exception to immunity “if . . . the foreign state was designated as a state sponsor of terrorism.” 28 U.S.C. § 1605A(a)(2)(A)(i) (emphasis added). To assert that this condition is merely an additional basis to allow a claim to proceed is specious. There would be no need for this condition if the general exception to immunity for the specified acts already extended to all foreign states. . . . Moreover, there is no reason to think Congress would have set forth the specific and detailed requirements contained in § 1605A(a)(2) if it had intended those provisions to be merely permissive. Indeed, plaintiffs do not identify what, if any, other requirements might be sufficient for a plaintiff to invoke the terrorism exception if the criteria detailed in § 1605A(a)(2) are not necessary. And, contrary to the premise of plaintiffs’ argument, plaintiffs appear to acknowledge that at least some of the requirements in § 1605A(a)(2) are necessary: plaintiffs only advance the terrorism exception as a basis for jurisdiction for a U.S. citizen plaintiff’s torture claim and not the torture claim of the Belgian plaintiff, presumably because the latter would not satisfy the requirement of U.S. nationality set forth in § 1605A(a)(2)(A)(ii). . . .

In addition, it is improbable that Congress made such a drastic change in sovereign immunity principles without acknowledging that it was doing so. . . . Plaintiffs do not point to any legislative history to suggest that Congress intended to remove the designation requirement from FSIA’s terrorism exception. In fact, the House Report accompanying the 2008 amendments explains that § 1605A was intended, among other things, to “consolidate provisions relating to the exception to sovereign immunity for state sponsors of terrorism” and thus to “permit claims to be brought for money damages, including punitive damages, *against a foreign state designated as a state sponsor of terrorism.*” H.R. REP. NO. 110-477, at 1000-01 (2007) (Conf. Rep.) (emphasis added); see also *id.* at 1001 (“Courts would have jurisdiction to hear a claim brought against a foreign state that was designated as a state sponsor of terrorism . . .”).

Because Israel is not (and never has been) designated a state sponsor of terrorism, FSIA’s terrorism exception also does not provide a basis for jurisdiction over defendants in this case.

\* \* \* \*

Finally, in describing the standard to be applied in determining whether plaintiffs’ claims fit within the FSIA exceptions, plaintiffs assert that they “need only show that their claim is ‘non-frivolous’ at the jurisdictional stage and need not definitively prove [their] claim as they would at the merits stage.” Pls.’ Opp’n at 7. The D.C. Circuit, however, has applied this non-frivolous standard only in cases involving FSIA’s expropriation exception, which removes immunity in cases in which, among other things, “rights in property taken in violation of international law are in issue.” 28 U.S.C. § 1605(a)(3); see, *e.g.*, *Simon v. Republic of Hungary*, 812 F.3d 127, 140-41 (D.C. Cir. 2016).

In any event, even with respect to the expropriation exception, the “non-frivolous” standard has been applied only where “the plaintiff’s claim on the merits directly mirror[s] the jurisdictional standard” set forth in FSIA. *Simon*, 812 F.3d at 140. When the “jurisdictional and

merits inquiries” are not “fully overlap[ping],” the court must undertake a more stringent inquiry that asks “whether plaintiffs’ allegations satisfy the jurisdictional standard.” *Id.* at 141.

Here, the merits of plaintiffs’ claims do not mirror the relevant jurisdictional inquiries. The challenged jurisdictional elements are whether a U.S.-flagged ship sailing on the high seas is “in the United States” within the meaning of FSIA’s tort exception and whether FSIA’s terrorism exception provides a basis for jurisdiction over claims against foreign states that have not been designated state sponsors of terrorism. Neither of these inquiries are elements of the common law torts plaintiffs allege. ... Therefore, it is not sufficient for plaintiffs to make non-frivolous arguments that their claims satisfy the requirements of the tort or terrorism exceptions. Rather, the Court must resolve the legal questions discussed above to determine whether this case actually satisfies the relevant jurisdictional requirements. ...

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## 5. Service of Process

### a. Harrison v. Sudan

As discussed in *Digest 2015* at 386-89, the United States filed an *amicus* brief in the U.S. Court of Appeals for the Second Circuit on a petition for rehearing in *Harrison v. Sudan*, asserting that service on a foreign sovereign via delivery of a summons and complaint to its embassy in the United States addressed to its foreign minister is inconsistent with the FSIA’s service procedures, the legislative history of the statute, and the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations (“VCDR”). The Second Circuit issued its decision on September 22, 2016, denying the petition for rehearing, confirming its earlier opinion that service of process addressed to Sudan’s foreign minister via the Sudanese Embassy in Washington, D.C. was valid under the FSIA and did not violate the VCDR. 838 F.3d 86 (2d. Cir. 2016). The Court’s clarification of its opinion in relation to a provision of the FSIA concerning execution is discussed in section 6, *infra*.\*\*

### b. Court practice of mailing documents to the Mexican Embassy

On March 7, 2016, Principal Deputy Assistant Attorney General Benjamin C. Mizer sent statements of interest on behalf of the United States to several county clerks’ offices in Delaware regarding multiple cases proceeding in those counties’ courts involving private Mexican nationals and residents in which the court had adopted the practice of mailing legal documents to the Mexican Embassy in Washington, D.C. in an attempt to effect service of process on those individuals. The U.S. statement of interest explaining the impropriety of this form of attempted service is excerpted below (with some footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>

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\*\* Editor’s note: On March 9, 2017, the Republic of Sudan filed a petition in the U.S. Supreme Court for a writ of certiorari.

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As set forth further below, delivery of legal papers to a foreign state’s diplomatic mission in the United States is not a proper means of effecting service upon residents or nationals of the foreign state, and this practice is also inconsistent with the inviolability of the mission under the Vienna Convention on Diplomatic Relations. Under that Convention, to which both the United States and Mexico are parties, embassies are inviolable. Courts considering the issue have generally held that this status prevents service of process on the embassy either as an agent for a private, non-immune party or as service on the foreign government. Moreover, the United States regularly objects when a foreign court attempts to serve U.S. persons via U.S. embassies abroad, and thus has strong reciprocity interests at stake. The United States therefore respectfully requests that the Court recognize the inviolability of the Embassy and require that service on Mexican residents or nationals be effected in an alternative manner.

As a general matter, the United States would note that Mexico is a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters, as well as the Inter-American Convention on Letters Rogatory and its Additional Protocol. Both instruments provide mechanisms for the service of legal documents upon individuals in Mexico. The United States would further note that, in cases involving child custody or the termination of parental rights where one or both of the parents resides in Mexico at an unknown address, either the litigants or the court may reach out informally to Mexico’s consulates or to the Embassy. In such cases, it is possible that the consulates or Embassy may be able to assist in identifying potential avenues for locating an address for the individual.

#### BACKGROUND

Since April 2015, the U.S. Department of State has received over a dozen diplomatic notes from the Mexican Embassy in Washington, D.C. informing the Department that it received legal documents intended for Mexican residents or nationals who were defendants or respondents in various Delaware family court cases, including the four cases listed above, and requesting that the Department return the papers to the relevant court.

#### DISCUSSION

##### I. THE MEXICAN EMBASSY IS INVIOABLE AND AS SUCH MAY NOT SERVE AS AN AGENT FOR SERVICE OF PROCESS

The Vienna Convention on Diplomatic Relations (“VCDR”) provides in relevant part that “the premises of [a] mission shall be inviolable.” 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. Although the treaty does not define “inviolable,” courts have held that this principle must be construed broadly, and is violated by service of process—whether on the inviolable entity for itself or as an agent for the foreign government or a private, non-immune party. *See Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004) (holding that the VCDR precludes service of process on inviolable persons entitled to diplomatic immunity where such persons are served on behalf of a non-immune, private entity); *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (“[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law.”); *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 979–81 (D.C. Cir. 1965) (holding that the inviolability principle precludes service of process on a diplomat as agent of a foreign government); *767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir.

1993) (approvingly citing view that “process servers may not even serve papers without entering at the door of a mission because that would ‘constitute an infringement of the respect due to the mission’”); Brownlie, *Principles of Public Int’l Law* 403 (8th ed. 2008) (“[W]rits may not be served, even by post, within the premises of a mission . . .”).

In analogous circumstances, the U.S. Court of Appeals for the Second Circuit rejected an attempt to serve process on the President of Zimbabwe and the Zimbabwean Foreign Minister as agents of a private political party while they visited New York City as delegates to the United Nations Millennium Summit. *Tachiona*, 386 F.3d at 209. The court explained that under the VCDR, these persons were “inviolable,” a principle it considered “advisedly categorical” and “strong,” and thus the court held that the VCDR protected the president and foreign minister from service of process either in their own capacity or as agents for the political party. *Id.* at 221–22, 24.

In the family court cases at issue here, just as in *Tachiona*, service on a private party has been attempted by way of an entity protected by inviolability pursuant to the VCDR. The inviolability of the embassy should be as broadly construed in these circumstances as it was in *Tachiona*. Moreover, the legislative history of the Foreign Sovereign Immunities Act, which governs suits against foreign governments, explicitly recognized that service on an embassy would be at odds with the VCDR. The House Report for the FSIA states that “A second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to the diplomatic mission of the foreign state. Section 1608 [of the FSIA] precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations. . . . Service on an embassy by mail would be precluded under this bill.” H.R. Rep. 1487, 94th Cong., 2d sess., reprinted in 1976 U.S.C.C.A.N. 6604, 6625. The House Report also approvingly references cases in which courts recognized the impropriety of service on inviolable diplomatic representatives. *See id.* at 21, 1976 U.S.C.C.A.N. at 6620 (“It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965)).<sup>2</sup>

Furthermore, permitting courts in the United States to treat foreign embassies as a forwarding agent for purposes of litigation that does not involve the foreign government itself would result in the diversion of embassy resources to determine the significance of a

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<sup>2</sup> The United States maintains that service on an embassy is improper in all circumstances. The Second Circuit has permitted such service in one limited circumstance, not applicable to the above-referenced cases. In *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015), the plaintiffs brought suit against Sudan and thus were required to effect service on the foreign state by following the steps outlined in the FSIA. The relevant provision of that statute states that, if other options are unavailable, foreign states may be served by the clerk of the court mailing the summons and complaint “to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). The plaintiffs in *Harrison* attempted to comply with the statute through a mailing of the summons and complaint to the Sudanese Embassy in Washington, D.C. addressed to Sudan’s Minister of Foreign Affairs, rather than mailing the papers to the Ministry of Foreign Affairs in Sudan’s capital, Khartoum. The Second Circuit determined that, because the statute was silent as to the address required for the mailing, the summons could be mailed to the Minister of Foreign Affairs via the embassy. The court further concluded that this was not inconsistent with the VCDR and the FSIA’s legislative history because service was not *on* the embassy, but only “*via or care of*” the embassy. *Harrison*, 802 F.3d at 405. “Moreover,” the court noted, “Sudan has not sought to rely on this legislative history.” *Id.* The court’s reasoning in *Harrison* was in apparent conflict with the Second Circuit’s earlier decision in *Tachiona*, and the United States disagreed with the *Harrison* decision on a number of grounds and has supported Sudan’s petition for rehearing, which remains pending. In any event, the decision in *Harrison* rests on an interpretation of the proper method of serving a foreign *state* under a specific provision of the FSIA, which is inapplicable where, as here, private parties rather than foreign states are being served.

transmission from the court, and to assess whether or how to respond. Indeed, the Mexican Embassy has been served in more than a dozen cases from Delaware state courts alone in less than a year, demonstrating the significant impact that allowing such service would have. Moreover, the United States has strong reciprocity interests at stake. The United States has long maintained that its embassies abroad are not agents for service of process. When a foreign court or litigant purports to serve a U.S. resident or national through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the embassy is not an agent for service of process and therefore that service on the individual has not been effected. If the VCDR were interpreted to permit courts in the United States to serve papers through an embassy, it could make U.S. embassies abroad vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See e.g., Medellin v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests, including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling").

#### CONCLUSION

The United States has a substantial policy and legal interest in assuring that the inviolability of embassies under the VCDR is correctly construed and applied. In accordance with that interest and the authorities set forth herein, the United States respectfully urges the Court to recognize the impropriety of service on Mexican nationals or residents via the embassy and require that service be effected in an alternate manner.

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#### c. **Fu Yu Xia v. Parkinson**

On August 2, 2016, the United States submitted a statement of interest in state court in New York in *Fu Yu Xia v. Samuel Parkinson*, No. 7573/2016, explaining that plaintiff's attempt to effectuate service by way of personal delivery of the summons and complaint to the Consulate General of the People's Republic of China in New York was improper under both the FSIA and the Vienna Convention on Consular Relations ("VCCR"). Plaintiff alleged that a consulate security guard injured him on a sidewalk in front of the Chinese consulate. The U.S. statement of interest is excerpted below (with footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>

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The FSIA is "the sole basis for obtaining jurisdiction over a foreign state" in United States courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). A lawsuit against a consulate is considered a suit against the foreign state itself for purposes of the FSIA. *See, e.g., Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 385 (S.D.N.Y. 2006); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993). Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b); *U.S. Titan, Inc. v.*

*Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 151 (2d Cir. 2001) (“[S]ubject matter jurisdiction plus service of process equals personal jurisdiction under the FSIA.”).

The FSIA sets out, in hierarchical order, four exclusive methods for service of process on foreign states in 28 U.S.C. § 1608. The first two procedures allow for service according to a special arrangement between the parties or “an applicable international convention on service of judicial documents.” 28 U.S.C. § 1608(a)(1)–(2). If service cannot be made using either of these methods, it may be accomplished by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned. *Id.* at § 1608(a)(3). If service cannot be accomplished in that fashion within thirty days, it must be done under section 1608(a)(4), which provides for service

by sending two copies of the summons and complaint and a notice of suit together with a translation of each into the official language of the foreign state by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

*Id.* at § 1608(a)(4). None of these options, however, permits personal delivery of a summons and complaint to a foreign state’s consulate in the United States. Plaintiff therefore has failed to comply with the FSIA’s requirements in this case.

Moreover, under the FSIA, unless service is pursuant to a special arrangement between the parties or accomplished in accordance with the requirements of an applicable international convention, the summons and complaint must be translated into the official language of the foreign state, and that state must be provided sixty days after service has been made to answer or otherwise respond to the complaint. 28 U.S.C. §§ 1608(a)(3)–(4), 1608(d). The twenty-day limit Plaintiff here has attempted to impose does not comply with these requirements. Courts have made clear that section 1608(a) “mandate[s] strict adherence to its terms, not merely substantial compliance.” *Finamar Investors, Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983).

In addition, both China and the United States are parties to the VCCR, which provides that “[c]onsular premises shall be inviolable.” 21 U.S.T. 77, art. 31. Courts have held that service of process on consular premises is contrary to this inviolability. *See Swezey v. Merrill Lynch*, 997 N.Y.S.2d 45, 47 (N.Y. App. Div. 2014); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987) (“Service of process at diplomatic or consular premises is prohibited.”). Thus, under both the FSIA and the VCCR, the attempted personal service on the Chinese Consulate in this case is inappropriate and ineffective.

The United States has strong reciprocity interests in the enforcement of the applicable rules governing service of process on sovereign states, including application of and strict adherence to the requirements of the FSIA and the VCCR. The United States has long

maintained that the United States must be served in a manner consistent with international law when it is sued abroad, and the United States regularly objects when such service does not take place. If the FSIA and VCCR were interpreted to permit parties in the United States to serve papers personally on a consulate, it could make U.S. consulates abroad vulnerable to similar treatment by foreign courts, contrary to the United States' consistently asserted view of the law.

Absent service in strict compliance with the FSIA, 28 U.S.C. § 1608(a), this Court does not have personal jurisdiction over the People's Republic of China in this case.

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**d. Hmong I v. Lao People's Democratic Republic**

On February 12, 2016, the United States filed a suggestion of immunity on behalf of President Choummaly Sayasone and Prime Minister Thongsing Thammavong of Laos in a case in federal district court in the Eastern District of California. The portions of the U.S. submission addressing the immunity of the foreign official defendants are discussed in section C of this chapter, *infra*. Excerpts follow from the portion of the U.S. submission regarding plaintiffs' purported service on Laos. The submission in its entirety is available at <http://www.state.gov/s/l/c8183.htm>

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The United States also has an important interest in preserving the inviolability of diplomatic missions and ensuring that foreign states do not have to respond or appear in U.S. courts without proper service of process. These interests are based, in part, on considerations of reciprocity. The Department of State regularly objects to attempts by foreign courts or litigants to serve American diplomatic missions overseas with any type of order directing the United States to respond or appear in litigation. Ensuring that service upon foreign states in U.S. courts complies with domestic and international law encourages other nations to accord the United States the same consideration in their judicial systems.

Here, the record shows that the plaintiff's attempt to serve the Lao People's Democratic Republic was improper. In particular, the plaintiff's service on the Lao embassy was inconsistent with the FSIA and the VCCR.

1. The FSIA does not allow the plaintiff to serve Laos by delivering a copy of the summons and complaint to the Lao ambassador at the Lao embassy in Washington.

The FSIA establishes "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Personal jurisdiction exists under the statute where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b). Section 1608(a) of the act contains the four exclusive means of service of process on a foreign state, and specifies the order in which they must be attempted. *See id.* § 1608(a); *accord Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010). These methods include (1) service according to a "special arrangement between the plaintiff and the foreign state," (2) service under "an applicable international convention on service," (3) service by mail to the foreign minister of the foreign

state, or (4) service by transmission of process to the State Department, which will forward necessary papers “through diplomatic channels to the foreign state.” 28 U.S.C. § 1608(a). Consistent with the United States’ position, most courts have required “strict compliance” with § 1608(a). *See, e.g., Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2010); *Transaero, Inc. v. La Fuerza Aérea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). The Ninth Circuit, by contrast, has held that “substantial compliance” will do. *Peterson*, 627 F.3d at 1129.

Even under a more liberal substantial compliance standard, however, the plaintiff’s attempt to serve Laos was ineffective to satisfy any of § 1608(a)’s four methods of service. Subsection (a)(1) is inapposite, because there is no suggestion in the record of a “special arrangement” between the plaintiff and Laos. Subsection (a)(2) is similarly inapplicable, because there are no international treaties on service of process in force between the United States and Laos.

Plaintiff’s purported service also failed to “substantially comply” with subsection (a)(3). To satisfy that provision, a plaintiff must:

send[] a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1609(a)(3). But here, the summons and complaint were not sent via the clerk of the court. They did not include a “notice of suit”—a particular legal document whose components are specified in 22 C.F.R. § 93.2. They were not translated into Lao. And they were not addressed to the Lao minister of foreign affairs. *See* Affidavit of Process Server.

Finally, the plaintiff has made no attempt to effect service under subsection (a)(4) by requesting the clerk of the court to dispatch the requisite documents to the Secretary of State for transmission through diplomatic channels.

The plaintiff’s efforts to serve Laos by delivering papers to its embassy, addressed to the ambassador, cannot satisfy any of §1608(a)’s requirements. Congress considered and rejected this very method of service in enacting the FSIA, particularly given its concern that such service would be inconsistent with the inviolability of embassy guaranteed by the VCDR (discussed in greater detail below). *See Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007) (citing H.R. Rep. No. 94-1487, at 26 (1976)). For the foregoing reasons, the plaintiff’s purported service was ineffective under the FSIA, and the Court lacks personal jurisdiction over Laos.

## **II. The plaintiff’s service of process was inconsistent with the VCDR’s recognition that foreign embassies and foreign ambassadors are “inviolable.”**

The VCDR, to which both the United States and Laos are parties, provides that the premises of a diplomatic mission are “inviolable.” VCDR art. 22, 23 U.S.T. at 3237–38, 500 U.N.T.S. at 106–08. So is “[t]he person of a diplomatic agent.” *Id.* art. 29, 23 U.S.T. at 3240, 500 U.N.T.S. at 110. As several courts have recognized, efforts to serve legal documents upon an embassy or ambassador as an agent of a foreign state are contrary to this inviolability. *See, e.g., Autotech*, 499 F.3d at 748; *Tachiona v. United States*, 386 F.3d 205, 221–24 (2d Cir. 2004); *see also* Restatement (Third) of the Foreign Relations Law of the United States §§ 464–66 n.2 (1987). The fact that validating the plaintiff’s service in this case would be inconsistent with the United States’ treaty obligations further informs the proper understanding of the FSIA — and provides an additional reason why the plaintiff has failed to properly serve Laos.

As noted above, the United States has strong reciprocity interests at stake in this matter. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. If U.S. courts were to allow plaintiffs themselves to directly serve papers on an embassy, the United States could be vulnerable to similar treatment in foreign courts — contrary to the United States' consistently asserted view of the law.

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## 6. Execution of Judgments against Foreign States and Other Post-Judgment Actions

### a. Restrictions on the Attachment of Property under the FSIA and TRIA

#### (1) Calderon-Cardona v. Deutsche Bank Trust Co. Americas

On July 20, 2016, the United States filed a statement of interest in *Calderon-Cardona v. Deutsche Bank Trust Co. Americas*, No. 11-3288 (S.D.N.Y.), regarding judgment holders' attempt to attach blocked assets to collect on a judgment against North Korea for providing material support for acts of terrorism that impacted their families. See *Digest 2012* at 302-05 for background on the case and discussion of the U.S. *amicus* brief filed in the Court of Appeals for the Second Circuit. Excerpts follow (with footnotes omitted) from the statement of interest, available in full at <http://www.state.gov/s/l/c8183.htm>. In response to the statement of interest, petitioners withdrew their request for turnover of the Deutsche Bank accounts, without prejudice to renewal.

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#### A. Petitioners Have Not Shown That the Blocked Assets Are Subject to Attachment Under FSIA Section 1610

First, petitioners have not sufficiently shown that the assets held in the DBTCA blocked accounts are subject to attachment under FSIA § 1610. In actions under the FSIA, a judgment creditor bears the burden of identifying particular property to be executed against and proving that it falls within a statutory exception to immunity. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011); see also, e.g., *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785-86 (7th Cir. 2011). Petitioners here bear the burden of establishing that the blocked accounts are the property of [Korea Foreign Insurance Corporation, or] KFIC, that KFIC is an agency or instrumentality of North Korea, and that KFIC engages in commercial activity in the United States. They have not demonstrated that any of these requirements are met.

The FSIA authorizes in appropriate circumstances the attachment of “the property *of* a foreign state . . . and the property *of* an agency or instrumentality of such a state.” 28 U.S.C. § 1610(g)(1) (emphases added). This textual requirement that the property to be attached must be “of” the foreign state (or agency or instrumentality) in question unmistakably requires actual ownership; indeed, the Supreme Court has held that, in this context, “the use of the word ‘of’ denotes ownership.” *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (internal quotation marks omitted). This statutory language is also notably narrower than the language used in OFAC’s blocking regulations themselves, which, though codified separately as to separate nations or other subjects of sanctions, generally apply not only to property of the foreign state at issue, but also to that state’s “interests in property.” *See, e.g.*, 31 C.F.R. § 510.201(a). If Section 1610(g) were intended to extend to all blocked assets, it could have been drafted to include broader language referencing “interests in property,” but instead it includes narrower language requiring an ownership interest. *See* 28 U.S.C. § 1610(g)(1).

A number of policy reasons support the conclusion that attachment pursuant to the FSIA applies only to property of a foreign state (or agency or instrumentality of that state), rather than to all property and interests in property. First, an interpretation that permits attachment of blocked assets that the foreign state does not own would have the perverse effect of subsidizing states with outstanding terrorism-related judgments by permitting judgments against them to be satisfied by collections of assets that the state (or its agency or instrumentality) does not own, and that instead are owned by potentially innocent third parties. *See Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 939-40 (D.C. Cir. 2013) (concluding that Congress could not have intended that potentially innocent parties pay some part of a Section 1605A judgment debt). Second, there is a strong public interest in preserving the President’s ability to use blocked assets as a tool of foreign policy. A rule that allowed plaintiffs to attach blocked assets that are not owned by the sanctions target would drain the pool of blocked assets, thereby reducing the leverage that these assets provide in the President’s conduct of foreign policy. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 441 (D.D.C. 2012) (“Plaintiffs’ sweeping interpretation would effectively—through future attachments and executions—eliminate the President’s ability to use blocked assets as bargaining chips in solving foreign policy disputes.”), *aff’d*, 735 F.3d 934 (D.C. Cir. 2013); *Villoldo v. Castro Ruz*, 821 F.3d 196, 203 (1st Cir. 2016) (same).

Petitioners have not shown that the assets in the DBTCA blocked accounts are owned by North Korea, or by an agency or instrumentality of North Korea, as the FSIA requires. Indeed, petitioners do not even specifically contend in the DBTCA Stipulation that the blocked assets are the property of KFIC. *See* Dkt. No. 75. Importantly, the Second Circuit’s specific holding in this case with respect to the ownership of EFTs blocked midstream does not bear on the ownership of the assets in the DBTCA accounts. The Second Circuit held, with reference to New York law, that where a foreign state itself (or an agency or instrumentality of that state) directly transmitted an EFT to the intermediary bank where that blocked EFT now resides, the EFT is the property of that transmitting state. *Calderon-Cardona II*, at 1001-02; *see supra* Section B.3 (Background). In contrast, the funds held in the blocked DBTCA accounts are, apparently, “completed funds transfers, not midstream EFTs,” and no party claims that the funds were directly transmitted by North Korea or by an agency or instrumentality of North Korea; rather, they were transmitted by General Re. . . .

The United States does not take a position as to the ownership of the assets held in the DBTCA blocked accounts. However, petitioners have set forth almost no facts, and no legal analysis, to support the proposition that the funds in the DBTCA accounts are the property of North Korea or of an agency or instrumentality of North Korea, and are therefore otherwise subject to attachment under section 1610(g). For example, the details of the relevant agreements between General Re and DBTCA, pursuant to which DBTCA presumably created at least some of the blocked accounts, are not in the record, and it is therefore not clear whether KFIC in fact has any possessory rights to the blocked assets. Nor is it known whether, for example, any entity may have any setoff rights as to the blocked assets. The record also does not reflect the account names under which the blocked accounts are held; this could bear on the ownership of the accounts, as courts in this Circuit have noted that “under New York law, an account is presumed to be the property of the entity in whose name it is held.” *Villoldo v. Ruz*, No. 1:14-mc-0025, 2016 WL 81492, at \*15 (N.D.N.Y. Jan. 7, 2016) (internal quotation marks omitted); *see also, e.g., Karaha Bodas Co., LLC v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002) (“when a party holds funds in a bank account, possession is established, and the presumption of ownership follows”). The ownership of the funds in the DBTCA accounts may also turn on whether the accounts are “general” or “special” under New York law; if the accounts are special, ownership of the funds therein may rest with General Re, because “when funds are deposited into a special account . . . the title . . . remain[s] with the [depositor].” *D.C. Precision, Inc. v. United States Gov’t*, 73 F. Supp. 2d 338, 343 (S.D.N.Y. 1999).

Petitioners also have not shown that KFIC is an agency or instrumentality of North Korea, as required to attach KFIC’s assets pursuant to FSIA § 1610(g). KFIC is not on OFAC’s Special Designated Nationals (“SDN”) list, and petitioners have failed to demonstrate how KFIC qualifies as an agency or instrumentality of a foreign state within the meaning of FSIA § 1603(b).

In addition, petitioners have not demonstrated that KFIC engages in commercial activity in the United States, as required by FSIA § 1610(b). FSIA § 1610(g) does not create an independent, freestanding exception to the baseline immunity from attachment of foreign state property, without need to meet the other requirements of Section 1610. Rather, Section 1610(g) authorizes “attachment in aid of execution, and execution, upon that judgment *as provided in this section.*” 28 U.S.C. § 1610(g)(1) (emphasis added); *see also, e.g., Rubin v. Islamic Republic of Iran*, \_\_\_ F.3d \_\_\_, No. 14-1935, 2016 WL 3903409, at \*9 (7th Cir. July 19, 2016). Therefore, attachment pursuant to FSIA § 1610(g) must also satisfy the other provisions within Section 1610 governing the exceptions to a foreign state’s immunity from attachment and execution on judgments under the terrorism exception set forth in Section 1605A, including the “commercial activity” requirement in Section 1610(b). *See id.* at \*13 (holding that “Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments,” and that “terrorism victims with unsatisfied § 1605A judgments against foreign states . . . must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b).”); *but see Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016) (holding that section 1610(g) contains a freestanding exception to execution immunity).

In sum, petitioners have not met their burden to demonstrate that the assets held in the DBTCA blocked accounts may be attached pursuant to FSIA § 1610(g).

## B. FSIA Section 1610(g) Does Not Permit the Turnover of the Blocked Assets Without an OFAC License

Second, irrespective of whether petitioners have complied with any other provision of the FSIA, and regardless of whether the funds in the DBTCA blocked accounts are subject to attachment, those funds may not be turned over without an OFAC license, which petitioners have not obtained. The North Korean Sanctions Regulations provide that any attachment or judgment concerning any property or interest in property blocked pursuant to those regulations and to Executive Order 13,466, “[u]nless licensed pursuant to this part” by OFAC, is “null and void.” 31 C.F.R. §§ 510.202(c), (e); *see supra* Section A.1 (Background). The United States has consistently stated that, where “funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs.” Statement of Interest of the United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502, ECF No. 105 (D.D.C. Jan. 23, 2015), at 18. *See also* Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, ECF No. 101 (2d Cir. Nov. 6, 2015), at 7-8 (same); Statement of Interest of the United States, *Martinez v. Republic of Cuba*, No. 07 Civ. 6607, ECF No. 79 (VM) (S.D.N.Y. Oct. 16, 2015), at 15 n.10 (same); *Martinez v. Republic of Cuba*, No. 10-CV-22095, at \*2 (EGT) (FAM) (S.D. Fla. Aug. 22, 2011) (“Plaintiff cannot satisfy the default judgment that she obtained against the Government of Cuba by garnishing payments owed by the listed air charter companies. Since Plaintiff does not have the required license from [OFAC], the writs of garnishment are null and void.”).

The license requirement of FSIA section 1610(g) contrasts with TRIA, as to which the United States has not required an OFAC license to attach blocked assets of a terrorist party. *See, e.g.*, Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, at 7. The terms of TRIA permit attachment of blocked assets in specified circumstances “[n]otwithstanding any other provision of law.” TRIA § 201(a); *see supra* Section A.3 (Background). FSIA § 1610(g), by contrast, contains no such “notwithstanding clause,” and does not override other applicable rules of the North Korean Sanctions program, including the need to obtain an OFAC license. While FSIA § 1610(g)(2) provides that foreign state property “shall not be immune from attachment” to satisfy a judgment under Section 1605A “because the property is regulated by the United States Government by reason of action taken against that foreign state under . . . [IIEPA],” that provision, consistent with the paragraph’s title (“United States sovereign immunity inapplicable”), simply removes a specific sovereign immunity defense. 28 U.S.C. § 1610(g)(2).

In its recent ruling in *Harrison*, the Second Circuit suggested that no OFAC license needs to be obtained in order to attach foreign property pursuant to *both* TRIA and FSIA § 1610(g). *See Harrison v. Republic of Sudan*, 802 F.3d 399, 407-08 (2d Cir. 2015). Respectfully, the United States disagrees with that conclusion and has so advised the Second Circuit in that case. In *Harrison*, both the district court and the court of appeals relied on previous Statements of Interest filed by the United States in TRIA cases, where the United States stated that attachment pursuant to TRIA does not require an OFAC license, but did not reference any Statement of Interest or amicus brief addressing FSIA § 1610(g) and the OFAC license requirement. *Id.* at 406-09. The panel in *Harrison* incorrectly applied, without separate analysis, the Government’s construction of TRIA to FSIA § 1610(g). The United States has pointed out this error to the Second Circuit in its Amicus Brief in support of panel rehearing or rehearing *en banc* in *Harrison*. *See* Amicus Brief of the United States, *Harrison v. Republic of the Sudan*, ECF No. 101, at 7-8. The petition for rehearing in *Harrison*, filed by appellant the Republic of Sudan, is still pending.

Accordingly, it remains the Government’s position that any attachment of funds in the DBTCA blocked accounts pursuant to FSIA § 1610(g)—apart from any other issue relating to petitioners’ compliance with that statute—requires a license from OFAC.

\* \* \* \*

On November 30, 2016, the United States provided the court with a further submission to follow-up on its July 20, 2016 statement of interest. The November 30 filing, available at <http://www.state.gov/s/l/c8183.htm> adds to the U.S. statement opposing turnover of funds pursuant to § 1610 of the FSIA absent a license by informing the Court that the petitioners’ application for a license had been denied by OFAC. On December 9, 2016, the court issued the following order:

On November 30, 2016, the Office of Foreign Assets Control (OFAC) denied the petitioners application for a license to unblock funds that are presently blocked pursuant to North Korea Sanctions Regulations, 31 C.F.R. Part 510. ...[T]he Government submitted a letter opposing the petitioners November 7 turnover motion due to OFAC’s denial of the license. ...[T]he Court ordered the petitioners to show cause by December 8 why the turnover motion for the blocked accounts should not be denied and this action on remand closed. No cause having been shown, it is hereby ORDERED that petitioners November 7 turnover motion is denied. IT IS FURTHER ORDERED that the Clerk of Court shall close this case and all related actions.

(2) Harrison v. Sudan

In *Harrison*, discussed in section 5.a., *supra*, the Court’s September 22, 2016 opinion denying rehearing also addresses whether execution of a judgment against a state sponsor of terrorism through the turnover of blocked assets is possible without an OFAC license. Excerpts follow from that portion of the opinion.

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The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406- 07. This holding was based on the United States’ position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act (“TRIA”), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an

OFAC license. *Harrison*, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the “terrorism exception,” 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to “give American Citizens an important economic and financial weapon against . . . outlaw states” that sponsor terrorism. H.R. Rep. No. 104–383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as “state sponsor[s] of terrorism.” *See Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post judgment attachment in some terrorism cases, provides, in relevant part:

*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 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 in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note) (emphasis added).

Sudanese assets in the United States are subject to such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. The Panel Opinion held that, based on previous statements of interest made by the United States, blocked assets that are subject to the TRIA may be distributed without a license from OFAC. *Harrison*, 802 F.3d 408-09.

The Panel Opinion framed the issue, however, as “whether § 201(a) of the TRIA and § 1610(g) of the FSIA, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. *Id.* at 407-08.

The Panel Opinion should not have included the reference to § 1610(g) of the FSIA. Section 1610(g)(2) of the FSIA, while providing that certain property “shall not be immune from attachment,” does not contain the TRIA’s same broad “notwithstanding any other provision of law” language. Therefore, it does not override other applicable requirements, such as the requirement of an OFAC license before the funds may be transferred. To be clear, when the TRIA does not apply and the funds at issue are attachable by operation of the FSIA alone, an OFAC license is still required.

In this case, plaintiffs obtained a terrorism judgment from the D.C. District Court pursuant to § 1605A of the FSIA. The Southern District of New York then issued three turnover orders. The first two orders specified that they were issued pursuant to 28 U.S.C. § 1610(g) but did not mention the TRIA. Only the third order specified that assets were “subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002.” Joint App. at 76. While the district court did not explicitly discuss whether the funds at issue in the December 12 and 13, 2013 orders were subject to turnover pursuant to the TRIA, based on our review of the record,

which includes the complaint and judgment in the D.C. District Court proceedings, and the turnover petition and orders in the proceedings below, we conclude that the funds were subject to turnover pursuant to the TRIA. Plaintiffs have “obtained a judgment against a terrorist party on a claim based upon an act of terrorism,” the blocked assets are the assets of that terrorist party, and, accordingly, those assets “shall be subject to execution or attachment in aid of execution in order to satisfy [plaintiffs’] judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.” *See* TRIA § 201(a) (codified at 28 U.S.C. § 1610 note). Because the funds at issue in all three turnover orders were subject to turnover pursuant to the TRIA, plaintiffs were not required to obtain an OFAC license before seeking distribution.

\* \* \* \*

(3) Baker v. Nat’l Bank of Egypt

On September 28, 2016, the United States filed a statement of interest in *Baker v. Nat’l Bank of Egypt*, No. 12-7698 (S.D.N.Y.). The plaintiffs sought to attach blocked electronic fund transfers (“EFTs”) under TRIA in order to execute on a default judgment awarding compensation for a 1985 terrorist incident in which three Americans were shot and thrown from an Egypt Air plane onto a tarmac. The United States argued that plaintiffs’ “quitclaim” theory was contrary to applicable law. Excerpts follow from the U.S. statement of interest, which is available in full at

<http://www.state.gov/s/l/c8183.htm>\*\*\*

\* \* \* \*

The Second Circuit has held that, under New York property law principles, TRIA and/or the FSIA may permit attachment of EFTs that have been blocked midstream, but only if the foreign state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block. *See Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1002 (2d Cir. 2014); *see also Hausler v. JP Morgan Chase, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014). Accordingly, under *Calderon-Cardona* and *Hausler*, Petitioners must establish that the foreign government or agency or instrumentality thereof transmitted the EFTs sought to be attached directly to a garnishee bank in order to show that the assets are attachable property under TRIA and the FSIA. As both parties agree, Petitioners cannot make such a showing here.

In *Vera*, the plaintiffs filed a petition seeking turnover of a \$3 million EFT “emanating from Cuba, or its agencies or instrumentalities, transmitted to New York banks for clearance purposes, and blocked pursuant to the [CACR].” *See Vera* Slip Op. at 2. In response to the petition, HSBC Bank USA N.A. (“HSBC”), the New York intermediary bank that held the blocked account, filed an interpleader petition to resolve claims on the \$3 million transfer. *Id.* at 2. HSBC stated that the blocked transfer was initiated by a Cuban bank, Banco Internacional de

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\*\*\* Editor’s note: On March 8, 2017, the court issued an order denying the turnover petition, on the ground that the applicant did not satisfy the requirements that the Second Circuit has clearly recognized for turnover of EFTs.

Comercia, S.A. (“BICSA”), which instructed ING Bank France, Succursale de ING Bank N.V. (“ING”) to transfer the \$3 million from a BICSA account at ING to another BICSA account at Banco Bilbao Vizcaya Argentaria, S.A. (“BBVA”). *Id.* at 3. Consistent with this statement, the parties later stipulated that a Cuban bank had initiated the \$3 million transfer, and was also the intended beneficiary of the transfer. *Id.* at 4. Neither BICSA nor ING responded to the interpleader petition. *Id.* at 3.

In opposing the attachment motion in *Vera*, HSBC argued that the blocked EFT was not subject to attachment under TRIA or the FSIA, because the plaintiff could not establish that the EFT was the property of Cuba for purposes of New York law. *Vera* Slip Op. at 4-5. In making this argument, HSBC relied on the Second Circuit’s decisions in *Calderon-Cardona* and *Hausler* holding that an EFT blocked midstream is the property of a foreign state or of its agency or instrumentality only if the state or its agency or instrumentality transmitted the EFT directly to the bank holding the blocked EFT. See *id.* HSBC reasoned that, because the funds were transmitted to HSBC (a U.S. bank) by HSBC Bank plc, a United Kingdom bank, the EFT was not Cuban property for purposes of TRIA or the FSIA. *Id.*

The *Vera* court’s rejection of this argument was erroneous. The *Vera* court ruled that, because HSBC Bank plc was not interpled, and because ING did not respond to the interpleader petition, “any potential interest in the chain of transactions leading from BICSA to HSBC has been disclaimed.” Ex. A at 6. The court further concluded—without citing any legal authority—that, for the purposes of *Calderon-Cardona* and *Hausler*, the blocked assets were to be “considered to have been transmitted to HSBC directly from BICSA.” *Id.* Thus, *Vera* appears to be premised on the unsupported assumption that where originating and intermediary banks “disclaim” interests in blocked assets, the assets may be considered to be the property of the originator. Because the originator in *Vera* was an instrumentality of Cuba, Judge Hellerstein found that the blocked EFT was Cuba’s property, and that it was therefore attachable under TRIA and the FSIA. *Id.*

The reasoning in *Vera* conflicts with governing OFAC regulations, which the *Vera* opinion does not address. Under the Cuban Asset Control Regulations that governed in *Vera*, a foreign bank is prohibited from disclaiming any interest in property subject to the jurisdiction of the United States, if Cuba also has an interest in that property. Specifically, section 515.201(b)(2) of the CACR prohibits “[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States” if the transfers involve property in which Cuba (or its agency or instrumentality) has or had “any interest of any nature whatsoever, direct or indirect.” The word “transfer” is specifically defined to include “any actual or purported act or transaction, . . . the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly any . . . interest with respect to any property.” 31 C.F.R. § 515.310 (emphasis added).

In *Vera*, there was no dispute that the blocked EFT was subject to the jurisdiction of the United States or that Cuba had an interest in the property. Therefore, under section 515.310, ING and HSBC Bank plc were prohibited from “surrender[ing]” or “releas[ing]” their interests in the EFT that was blocked in New York and intended for a Cuban beneficiary. Moreover, the CACR specifically provides that any transfer in violation of the CACR involving property in which Cuba has an interest “is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.” 31 C.F.R. § 515.203(a); see also *Zarmach Oil Services, Inc. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 157 (D.D.C. 2010) (“OFAC regulations . . . provide only one method by which the

Sudanese Government's interest in the funds may be extinguished: a valid license from OFAC...and contain no provision by which the efforts of a sanctions target and a company it wishes to do business with can, on their own, 'un-block' assets frozen by OFAC." (citations omitted)). Thus, under the CACR, any "disclaimer" by ING or HSBC Bank plc would be "null and void," and could not operate to transfer the property interest in the blocked asset to Cuba, or its agencies or instrumentalities.

The same holds true under the SSR, whose relevant provisions are functionally identical to those in the CACR described above. See 31 C.F.R. §§ 542.201(a) (prohibiting transfers involving property of Syria or its agencies or instrumentalities); 542.317 (defining "transfer" as including, among other things, the "surrender" or "release," directly or indirectly, of any interest with respect to any property); 542.202(a) (any such attempted surrender or release would be "null and void"). Petitioners raise the same incorrect argument that Judge Hellerstein adopted in *Vera*—namely, that the originating banks waived their interest by failing to respond to the interpleader petition, that Commerzbank disclaimed any interest in the accounts Petitioners seek to attach here, and that this disclaimer renders the accounts attachable under TRIA and the FSIA. The United States takes no position as to whether Commerzbank ever purported to disclaim any interest in the EFTs at issue here, but, even if it did, then under the SSR, Commerzbank cannot surrender or release its interests in the blocked EFTs, nor can the originating banks waive their interest, as any attempt to do so would be "null and void." See 31 C.F.R. § 542.202(a). Thus, the reasoning in *Vera* should not be adopted and applied here. *Vera* did not consider or analyze the impact of the CACR on intermediary banks' purported attempt to "disclaim" or waive an interest in an asset subject to the regulations. The result it reached is erroneous, and contrary to the United States' important interest in guarding against unauthorized dissipation of assets that are properly subject to its international sanctions programs.

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(4) Bennett v. Bank Melli

As discussed in *Digest 2015* at 396-400, in *Bennett v. Bank Melli*, Nos. 13-15442, 13-16100 (9<sup>th</sup> Cir. 2015), the United States filed a brief in response to a request for the United States' views, which supported a petition for rehearing of a decision of a panel of the U.S. Court of Appeals for the Ninth Circuit concerning the proper interpretation of section 1610(g) of the FSIA and the TRIA. Section 1610(g) provides that, for individuals holding judgments under section 1605A of the FSIA, "the property of a foreign state," as well as the "property of" its agency or instrumentality, "is subject to attachment in aid of execution, and execution, ...as provided in this section." Section 201(a) of TRIA provides that "[n]otwithstanding any other provision of law," certain terrorism-related judgment holders may attach "the blocked assets of" certain foreign states, including the blocked assets of any of their agencies or instrumentalities. Creditors holding judgments against Iran arising out of several terrorist attacks invoked TRIA and/or section 1610(g) in an attempt to attach assets owed to Bank Melli (an instrumentality of Iran) and held by institutions in the United States. The district court denied Bank Melli's

motion to dismiss and a panel of the Ninth Circuit affirmed. In February 2016, the Ninth Circuit denied the petitions for rehearing or rehearing *en banc*, but issued a new, divided opinion affirming the court’s prior holding but with revised analysis and with one judge dissenting. Bank Melli again sought rehearing, and that petition was also denied in July 2016, although the majority issued another amended opinion. 825 F.3d 949 (9<sup>th</sup> Cir. 2016).\*\*\*\*

(5) Weinstein v. Iran

As explained in *Digest 2015* at 497-502, the *Weinstein* case, before the U.S. Court of Appeals for the D.C. Circuit, raised the question of whether country-code top-level domains (“ccTLDs”) for Iran, Syria, and North Korea (.ir, .sy, and .kp, respectively), the top-level domains associated with Internet names and addresses in those geographic regions, constitute “property” or “assets” of a foreign state under the FSIA and TRIA. Excerpts follow from the opinion of the court, issued August 2, 2016, affirming the district court’s dismissal of efforts to attach the ccTLDs. *Weinstein v. Iran*, 831 F.3d. 470 (D.C. Cir. 2016). Additional excerpts appear in Chapter 11.

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[The Internet Corporation for Assigned Names and Numbers or] ICANN contends that, because the plaintiffs did not adequately establish an exception to attachment immunity under the FSIA, 28 U.S.C. §§ 1609–1611, the district court lacked subject matter jurisdiction to “execute against” the defendant sovereigns’ property. Appellee’s Br. at 39–40. ICANN is mistaken, however, about the jurisdictional nature of attachment immunity. Although the Supreme Court has never expressly addressed whether attachment immunity is jurisdictional, it has in dicta suggested otherwise. . . . In *NML Capital*, the Court referred to the first “kind of immunity” as “jurisdictional immunity” and the latter as both the “immunity defense” and “execution immunity.” 134 S.Ct. at 2256. We are without “substantial reason for disregarding” this distinction, *see ACLU of Ky.*, 607 F.3d at 447, and the majority of our sister circuits that have considered the issue are in accord, *see Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (“[S]overeign immunity from execution does not defeat a court’s jurisdiction”); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 800 (7th Cir. 2011) (same). We follow suit and reject ICANN’s challenge to the district court’s subject matter jurisdiction.

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\*\*\*\* Editor’s note: The Ninth Circuit’s holding in *Bennett* that §1610(g) contains “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” 825 F.3d at 959, conflicts with the U.S. government view articulated in its *amicus* brief, as well as with the Seventh Circuit’s 2016 decision interpreting §1610(g), *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (2016). Petitions for writs of certiorari to the U.S. Supreme Court have been filed in both *Bennett* and *Rubin*. On January 9, 2017, the Court invited the Acting Solicitor General to file briefs in the two cases expressing the views of the government as to whether to grant those petitions.

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.... We assume without deciding that local law applies to the determination of the “attachability” of the defendant sovereigns’ ccTLDs. In addition, we assume without so holding that local law does not operate to bar attachment of the defendant sovereigns’ ccTLDs.

### C. FSIA’S EXEMPTIONS TO EXECUTION IMMUNITY

Although attachment immunity is not “jurisdictional,” it is nonetheless a “default presumption” that the judgment creditor must defeat at the outset. *See Rubin*, 637 F.3d at 800; *see also Peterson*, 627 F.3d at 1125 (execution immunity begins with “presumption that a foreign state is immune and then the plaintiff must prove that an exception to immunity applies”); *see also* 28 U.S.C. § 1609 (defendant sovereign’s property “shall be immune ... *except* as provided in sections 1610 and 1611” (emphases added)). In particular, the plaintiffs *now* rely on one or more of three exceptions. The first is the terrorist activity exception, which provides in relevant part that

[T]he 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 or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g). The second is the commercial activity exception, which provides in relevant part that

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 entered by a court of the United States or of a State ... if the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(7). And the third exception the plaintiffs press to us is section § 201 of the Terrorism Risk Insurance Act (TRIA), which provides in relevant part that

[I]n 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 of [the FSIA] ..., the blocked assets of that terrorist party ... 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.

To preserve an argument on appeal a party must raise it both in district court and before us. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014) (“[Plaintiff] does not renew [his FSIA exception] argument on appeal, so we do not consider it.”). The party must brief the issue with specificity. *See Railway Labor Executives' Ass'n v. U.S. R.R. Retirement Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984).

Regarding the terrorist activity exception, the plaintiffs made minimal reference thereto both in district court and in their opening appellate brief. In its motion opposing extended discovery, ICANN argued that “the FSIA divests this Court of subject matter jurisdiction,” ICANN’s Opp. to Pls.’ Mot. for Six-Month Discovery at 8, to which the plaintiffs responded, *inter alia*, that “Section 1610(g) [removes immunity from] property of a foreign state against which judgment is entered under 1605A,” and that “ICANN completely ignores Section 1610(g).” Reply in Supp. of Pls.’ Mot. for Discovery 19 & n.13. On appeal the plaintiffs noted that we have “federal question jurisdiction” under “28 U.S.C. § 1610” and included as an addendum the text of section 1610(g). Appellants’ Br. at 1, a3.

...Once a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign. There is no genuine dispute that four of the plaintiffs’ judgments were entered or converted under 1605A. Granted, the plaintiffs must show that the assets in question are “property of” the foreign sovereign, 28 U.S.C. § 1610(g), whether Iran, North Korea or Syria. In our view, there is no additional “argument” that must be preserved. *See Odhiambo*, 764 F.3d at 35. To the extent the plaintiffs must establish that the data at issue are “property” that each defendant has at least *some* ownership interest in, those matters were the subject of additional discovery requests (ultimately deemed moot by the district court) and so it would be premature for us to decide that their attachability is forfeited on that basis. On appeal the plaintiffs included the exception in their opening brief addendum and this was sufficient to put both us and ICANN on notice that they continued to rely on that exception.

Four of the seven underlying judgments, *Haim II*, 784 F.Supp.2d 1 (D.D.C. 2011); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258 (D.D.C. 2003) (*Rubin*); *Wyatt v. Syrian Arab Republic*, 908 F.Supp.2d 216 (D.D.C. 2012); *Calderon–Cardona v. Democratic People’s Republic of Korea*, 723 F.Supp.2d 441 (D.P.R. 2010), were entered under section 1605A. ICANN, however, argues that “the plaintiffs presented no explanation or evidence” regarding these judgments. Appellee Br. at 49 (quotation marks omitted). We are at a loss to discern what “evidence” the plaintiffs would be required to show under ICANN’s approach, particularly given that ICANN does not appear to dispute that four judgments were entered under section 1605A. *Id.* at 50 (“[The terrorist activity exception] is clearly inapplicable to three of the seven underlying judgments at issue here.”). Therefore, the plaintiffs have not forfeited reliance on the terrorist activity exception to attachment immunity regarding the *Haim II*, *Wyatt*, *Rubin* and *Calderon–Cardona* judgments.

The two remaining exceptions are easily disposed of. There is no reference to the commercial activity exception in the plaintiffs’ opening brief notwithstanding ICANN vigorously contested in district court whether the three ccTLDs were “used for a commercial activity in the United States.” 28 U.S.C. § 1610(a); *see* ICANN’s Mot. to Quash at 18 (“ICANN is aware of no evidence that the [ ] ccTLDs are used for commercial activity of the defendants in the United States.”). The plaintiffs rebutted this assertion in district court, ... but on appeal they failed even to reference their objection in their opening brief. *See* Appellants’ Br. at 1–2 (“[I]ssues presented” includes only whether the assets are attachable property under D.C. law,

whether the district court erroneously failed to allow additional discovery and whether we should pursue certification to the D.C. Court of Appeals). Their failure to brief the issues in their opening brief amounts to forfeiture. *Odhiambo*, 764 F.3d at 35. Their reliance on the TRIA exception likewise merits no close analysis. Notwithstanding the section 1605A plaintiffs need only to identify “the blocked assets” of the defendant sovereigns under this exception, 28 U.S.C. § 1610 note, they failed to raise the issue in district court.

Finally, we consider the plaintiffs’ claim to the IP addresses under all of the three exceptions. The district court did not reach the IP addresses. The plaintiffs contend that its silence amounts to an abuse of discretion but the district court’s failure to discuss the IP addresses is easily explained. In their self-styled “preliminary response” to ICANN’s motion to quash and their accompanying motion for extended discovery, the plaintiffs only twice referenced the IP addresses—once to claim “ICANN has presented virtually no facts concerning its role in the distribution of IP addresses or the ownership and value of IP addresses” and once to claim that “ICANN’s Motion to Quash does not address the economic value of IP addresses.” By contrast, the plaintiffs’ same submissions (their preliminary response and their discovery motion) referenced the ccTLDs times, replete with allegations regarding ownership, monetary value and ICANN’s administrative role. In light of the plaintiffs’ omission of *any* argument touching on the IP addresses, the district court did not abuse its discretion in omitting to discuss them. On appeal, Amicus United States expressly doubted whether the plaintiffs had “preserved ... arguments about IP addresses,” Br. for United States as *Amicus Curiae* at 19, which assertion the plaintiffs left un rebutted, *see* Br. for Appellants in Response to the United States as *Amicus Curiae*. We consider it waived on appeal. *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the *intentional relinquishment or abandonment of a known right.*”) (emphasis added and internal quotations omitted).

To sum up, those plaintiffs seeking to attach the underlying judgments in *Haim I*, *Weinstein* and *Stern* have forfeited their claims *in toto*. Those plaintiffs seeking to attach the underlying judgments in *Haim II*, *Rubin*, *Wyatt* and *Calderon-Cardona* have forfeited all but their claim grounded in the terrorist activity exception to attachment immunity.

\* \* \* \*

**b. Post-judgment discovery into foreign state assets: Chabad**

On February 3, 2016, the United States filed another statement of interest in the U.S. District Court for the District of Columbia in *Chabad v. Russian Federation*, No. 1:05-cv-01548. *See Digest 2015* at 419, *Digest 2014* at 410-13, *Digest 2012* at 319-23, and *Digest 2011* at 445-47 for discussion of previous statements of interest. The case concerns Chabad’s efforts to secure the transfer of certain books and manuscripts (“the Collection”) from the Russian Federation. The Collection consists of materials that were seized at the time of the Bolshevik Revolution and are now held by the Russian State Library, and materials seized by Nazi Germany and later taken by Soviet forces and now held at the Russian State Military Archive. In 2010, the district court entered a default judgment in Chabad’s favor directing transfer of the Collection to Chabad. In 2013, the court imposed monetary contempt sanctions for Russia’s failure to make the transfer. In

2015, the court granted Chabad’s motion for an interim judgment of accrued sanctions of \$43.7 million.

The 2016 U.S. statement of interest pertains to efforts by Chabad to obtain discovery regarding Russian assets. Excerpts follow (with footnotes omitted) from the statement of interest, which is available in full (along with exhibits) at

<http://www.state.gov/s/l/c8183.htm>.

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\* \* \* \*

The discovery now being sought by Chabad about Russian assets is improper because it would not lead to the identification of any executable assets and thus is irrelevant as a matter of law. Moreover, efforts toward enforcement of monetary contempt sanctions, such as the restraint of funds, even temporarily, could cause significant harm to the foreign policy interests of the United States.

A. Discovery about Russian assets would not lead to the identification of any executable assets and is therefore improper

Discovery about Russian assets for purposes of enforcing the sanctions judgment is impermissible because Chabad is unable to attach any Russian assets held in the United States or abroad to satisfy that judgment, thereby rendering information about those assets irrelevant to post-judgment proceedings. A party is permitted to obtain through discovery only information that is “relevant” to its claim or defense. Fed. R. Civ. P. 26(b)(1); see also Fed. R. Civ. P. 69(a)(2) (allowing a judgment creditor to seek discovery “[i]n aid of the judgment or execution” but only “as provided in these rules or by the procedures of the state where the court is located”). As the Supreme Court has recognized, “information that could not possibly lead to executable assets is simply not ‘relevant’ to execution in the first place.” *NML Capital*, 134 S. Ct. at 2257 (2014). Subpoenas seeking information about a foreign sovereign’s assets that are immune from attachment should therefore not be enforced. See *id.*

Here, Chabad cannot execute against any Russian assets because (1) U.S. law precludes the enforcement of monetary contempt sanctions against a foreign state and (2) such contempt sanctions cannot be enforced outside of the United States. Accordingly, Chabad should not be permitted to seek discovery into Russian assets which, as a categorical matter, it is unable to attach.

1. *U.S. law does not authorize enforcement of monetary contempt sanctions against a foreign state*

Chabad should not be permitted to take discovery about Russian assets located in the United States because the FSIA does not authorize attachment of those assets for purposes of satisfying the sanctions judgment. The FSIA provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in United States courts. See *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). “After the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.” *NML Capital*, 134 S. Ct. at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

A foreign state's property located in the United States is immune from attachment, arrest, or execution unless one of the narrow exceptions enumerated in the FSIA apply. See 28 U.S.C. § 1609; §§ 1610-11 (listing exceptions). The FSIA "explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution," *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). Indeed, this Court previously has noted that there is a distinction between the imposition of a sanctions order and a court's ability to enforce such an order, observing that the latter "is carefully restricted by the FSIA." See Mem. Op. on Contempt Sanctions, ECF No. 116 at 6; see also *FG Hemisphere*, 637 F.3d at 377 ("[I]t is not anomalous to divide . . . the question of a court's power to impose sanctions from the question of a court's ability to enforce that judgment through execution."). The limited nature of execution immunity under the FSIA reflects a deliberate policy choice on the part of Congress, which in enacting the FSIA "was primarily codifying pre-existing international and federal common law." See *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995). "Prior to the enactment of the FSIA, the United States gave absolute immunity to foreign sovereigns from the execution of judgments. This rule required plaintiffs who successfully obtained a judgment against a foreign sovereign to rely on voluntary repayment by that State." *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007); see also *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (noting that pre-FSIA practice "left the availability of execution totally up to the debtor state"). The narrow exceptions to execution immunity further reflect Congress' awareness that, "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002).

None of the exceptions to execution immunity set forth in the FSIA permit execution against Russian assets for purposes of satisfying the sanctions judgment; indeed, absent a specific waiver of immunity by a foreign state, it is doubtful that any order of monetary contempt sanctions could fall within any of the exceptions. Russia has not waived the immunity of its property from execution to allow enforcement of a sanctions judgment, rendering the exception at 28 U.S.C. § 1610(a)(1) inapplicable. . . . The sanctions judgment at issue here, as to which Chabad seeks discovery in aid of execution, while resulting from Russia's non-compliance with a default judgment ordering it to return certain property to Chabad, does not in and of itself grant any property rights to Chabad. Instead, it simply sanctions Russia for its non-compliance with the Court's specific performance order.

Accordingly, none of the FSIA exceptions to execution immunity permit attachment of Russian assets in the United States. See *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006), cert. dismissed, 549 U.S. 1275 (2007) (noting that §§ 1610-11 "do not present a situation in which the order [for monetary sanctions] could stand"). And because the FSIA precludes Chabad from being able to attach any Russian assets located in the United States, discovery into these assets should not be permitted. See *NML Capital*, 134 S. Ct. at 2257; *id.* at 2259 (Ginsburg, J., dissenting) (summarizing the majority's holding as prohibiting "inquiry into a foreign sovereign's property in the United States" where no immunity exception applies because such an inquiry does not satisfy the Rule 26(b)(1) relevancy requirement).

2. *The enforcement of monetary sanctions against Russia would not be permitted overseas*

Even assuming that it is appropriate for a litigant to use the U.S. legal system's discovery tools to locate extraterritorial assets of a foreign government to satisfy a judgment that is unenforceable in the United States, such discovery would be unwarranted in this case. Chabad should not be allowed to seek discovery through U.S. courts about Russian assets located abroad because attachment of those assets would be inconsistent with international practice. As the party seeking discovery, Chabad bears the burden of demonstrating that the information it seeks is relevant. . . . Chabad therefore must show that it would be permitted to execute on Russian assets located in other countries. International law and practice, however, do not support the imposition of penalties on foreign states for noncompliance with a court order, let alone permit litigants to take measures to enforce such penalties. Any effort by Chabad to attach Russian assets held abroad would be inconsistent with this widespread practice.

To the United States' knowledge, no foreign state has permitted enforcement of a sanctions judgment against property of another foreign state within the first state's territory. On the contrary, several countries have entered into international agreements affording foreign states broad grants of immunity or have enacted sovereign immunity laws on their own which bar the imposition of civil contempt sanctions. For example, thirty-four states—including Russia—have signed or ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention states that “[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.” U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 24(1), G.A. res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005) (emphasis added). Although the Convention has not yet entered into force, many of its immunity provisions, including Article 24, reflect current international norms and practice, and Article 24 was uniformly supported by the member states that helped negotiate the Convention. See Int'l Law Comm'n, Jurisdictional Immunities of States and Their Property, Comments and observations received from Governments, U.N. GAOR Supp. No. 10, U.N. Doc. A/CN.4/410 (Feb. 17, 1988), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_410.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_410.pdf) Similarly, the European Convention on State Immunity prohibits all execution against the property of a contracting state within the territory of another contracting state except where the former has “expressly consented thereto in writing in any particular case.” European Convention on State Immunity, Article 23 (E.T.S. No. 074) (entered into force on June 11, 1976). Nine states have ratified this Convention. *Id.*

In addition to these multilateral immunity agreements, some foreign states have codified laws placing restrictions on the execution of property of a foreign state and/or have enacted specific prohibitions on imposing sanctions on foreign sovereigns for failure to comply with an injunctive order. In total, more than forty states have affirmatively expressed support for a general prohibition on monetary contempt sanctions or non-consensual execution against property of foreign states, whereas no state has ever supported such an action, let alone permitted execution of monetary contempt sanctions to proceed. Given this uniformity in international practice, any effort by Chabad to identify and attach Russian assets located in foreign states on the basis of this Court's sanctions judgment would find no support in international practice. Consequently, Chabad should not be permitted to use discovery in this case—including the five

subpoenas it issued in December 2015—to obtain information about any assets that Russia may hold abroad.

B. Attempts to enforce monetary contempt sanctions could have significant adverse consequences for U.S. foreign policy interests

Not only would the discovery sought by Chabad be legally improper and irrelevant, but such enforcement efforts could have significant adverse consequences for the foreign policy interests of the United States. These efforts implicate “particular question[s] of foreign policy,” to which deference is owed to “the considered judgment of the Executive.” See *Republic of Austria v. Altman*, 541 U.S. 677, 702 (2004); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”). Indeed, this Court recently acknowledged “the serious impact which the outcome of this case could have on the foreign policy interests of the United States,” see Order Soliciting Views of the United States, *Chabad v. Russian Federation*, Misc. Case No. 15-01153-RCL (D.D.C.), ECF No. 27, and the discovery sought by Chabad, as well as any other enforcement efforts, could have significant adverse consequences for the foreign policy interests of the United States.

Judicial seizure of a foreign state’s property “may be regarded as ‘an affront to its dignity and may affect our relations with it.’” *Republic of Phil. v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mex. v. Hoffman*, 324 U.S. 30, 35-36 (1945)). Indeed, the international community views “execution against a foreign state’s property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action.” *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d at 255-56. Any restraint of the assets of a foreign state, its agencies or instrumentalities, or its officials, in and of itself, can reasonably be expected to cause disruption to the activities of the entities whose assets are at issue and result in immediate and significant interference in U.S. relations with that foreign state.

Permitting Chabad to proceed with its present discovery efforts, or any other effort to enforce this Court’s judgments, would also result in other more specific harms. Such efforts are antithetical to the goal of securing the return of the Collection to Chabad, open the doors to reciprocal measures being taken against the United States by Russia, and would be out of step with international practice such that they could cause considerable friction with other foreign governments.

This Court previously has noted the difference between the entering of a sanctions order against a foreign state and enforcement of such an order. Mem. Op. on Contempt Sanctions, ECF No. 116 (observing that “the latter is carefully restricted by the FSIA”); see also Mem. Op. on Pl.’s Mot. for Interim J., ECF No. 143, at 3-5. Absent any restriction placed on Chabad, the enforcement stage of this proceeding is imminent. As noted above, on January 27, 2016, Chabad registered its interim judgment for \$43.7 million in sanctions accrued in the Southern District of New York, which positions Chabad to take immediate steps in that jurisdiction to enforce the sanctions order, including steps that do not require any further involvement of this Court. Under New York law, a judgment creditor such as Chabad is able to issue a restraining notice to a judgment debtor that prevents the debtor from transferring up to twice the judgment amount for as long as one year. See N.Y. Civ. Practice Law and R. § 5222(a)-(b). The process for issuing a restraining notice is similar to that for issuing a subpoena and does not require further litigation. *Id.* Thus, if Chabad were to obtain information about accounts held in the United States by any of the entities or individuals listed in the subpoenas, it may attempt to issue unilaterally a restraining notice temporarily freezing the transfer of money from such accounts. Given the broad

sweep of the subpoenas, it appears Chabad could seek to restrain accounts belonging not only to the Defendants but also to a wide array of Russian government instrumentalities, government officials, non-governmental entities, and Russian individuals that have no involvement in this litigation.

Several potential harms could flow from the restraint of Russian accounts or from Chabad taking any other type of enforcement action. As an initial matter, discovery into assets of Russian entities and individuals, as well as other enforcement steps, will significantly hinder the ability of the United States to facilitate a negotiated transfer of the Collection to Chabad. The United States has invested significant resources in diplomatic efforts over many years to resolve this dispute, and it continues to believe that out-of-court dialogue with Russia, rather than litigation, presents the best opportunity for ultimate resolution. See Letter dated February 2, 2016, from Katherine D. McManus, Deputy Legal Adviser, United States Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, United States Department of Justice (Attached as Exhibit B). Resolution of a long-standing dispute such as this, in which both sides have entrenched positions, typically takes an extended period of time, with small steps leading to larger breakthroughs and eventually resolution of the dispute. *Id.* at 2. By contrast, blunt coercive instruments, such as restraining Russian assets located in the United States, have the potential to delay resolution for years. *Id.* Indeed, Russian officials regularly have raised the instant litigation with their U.S. counterparts for several years, and they have done so with greater frequency, and at higher levels of the government, since this Court issued the sanctions order in 2013. *Id.* at 3. Russian officials have indicated in these discussions that they considered the sanctions to be a violation of Russian sovereignty and that Russia will not be pressured by such sanctions to enter into negotiations. *Id.* Rather than compelling Russia to return the Collection, enforcement actions are more likely to cause Russia to harden its position against transfer as well as lead to the further deterioration of U.S.-Russian relations overall. *Id.*

Further enforcement efforts, including disclosure of Russian assets in the United States, are likely to prompt Russia to take reciprocal measures against U.S. property and to justify such measures by asserting that U.S. courts violated international law first. As the United States advised the Court during the hearing on Chabad's Motion for Interim Judgment of Accrued Sanctions, see *Mots. Hr'g Tr.* 16:14-23, Aug. 20, 2015 (attached as Exhibit C), the Russian Ministry of Culture and the Russian State Library filed a civil lawsuit in Moscow against the United States and the Library of Congress seeking the return of seven books from the Collection that were lent to the Library of Congress in 1994. In May 2014, the Moscow court entered a judgment ordering the United States and the Library of Congress to return the books and imposing a \$50,000 fee for each day of noncompliance. See Decision, Case No. A40-82596/13, slip op. at 11 (Comm'l Ct. of Moscow May 29, 2014) (Russ.) (attached as Exhibit D). Furthermore, following this Court's entry of the interim judgment in September 2015, the Russian government sent a diplomatic note protesting that judgment and warning that any attempts to enforce it would lead to reciprocal countermeasures. See Ex. B at 3. It is possible that Russia might rely on recent legislation to take such steps. In November 2015, Russian President Vladimir Putin signed into law a bill concerning the jurisdictional immunity of foreign states and their property in Russia. Although the bill is generally consistent with the restrictive view of sovereign immunity, as reflected in the FSIA and the U.N. Convention on Jurisdictional Immunities of States and their Property, it contains a provision that permits Russian courts to limit the immunities of a foreign state and that state's property on the basis of reciprocity, depending on the treatment of Russia and Russian property in that foreign state. See Russian

Federation Federal Law On the Jurisdictional Immunities of Foreign States and the Property of Foreign States in the Russian Federation, art. 4 (attached as Exhibit E).

Finally, were the Court to permit the sweeping discovery into Russian property being sought by Chabad as part of its effort to enforce the sanctions judgment, it likely would cause friction with other foreign governments and could open the door to reciprocal orders being entered against the United States in foreign courts. Any constraint placed on property of the Russian entities named in the subpoenas in the context of this case would isolate the United States in the international community and raise doubts about the United States' respect for other foreign sovereigns. See Ex. B at 3. This friction could in turn embolden foreign courts to permit similar actions against the United States in foreign litigation. *Id.* The United States has a significant presence abroad, is frequently subject to litigation in foreign courts, and may on occasion decline to comply with orders entered by foreign courts for a variety of reasons. *Id.* For example, the United States recently declined to produce post-judgment discovery about its assets after a default judgment was entered by a trial court in Spain. *Id.* Because of this conduct, the Spanish court imposed monetary contempt sanctions and recommended that U.S. officials be subject to criminal proceedings. See *Montasa-Montajes e Instalaciones v. Gobierno Estados Unido de America*, No. 177/1997, slip op. at 2, S. Juz. Prim. (Rota), May 24, 2014 (Spain) (attached as Exhibit F). Although the trial court's decision was reversed on appeal upon a finding that the United States enjoys immunity from such sanctions, see *Montasa-Montajes e Instalaciones v. Gobierno Estados Unidos de America*, No. 177/1997, slip op. at 3, I Instancia n° 1 Rota, Jan. 22, 2015 (Spain) (attached as Exhibit G), other foreign courts might be less willing to extend immunity if United State courts do not treat foreign states in like fashion. Consequently, allowing discovery here for the purpose of enforcing the monetary contempt sanctions for Russia's non-compliance with the specific performance order risks creating an adverse precedent that could subject the United States to similar adverse treatment abroad. See Ex. B at 3.

\* \* \* \*

On March 9, 2016, Chabad filed a motion to strike the February 3 U.S. statement of interest, asserting that the United States lacks standing to prevent its discovery efforts and that the court had rejected similar arguments previously as premature. Excerpts follow (with footnotes omitted) from the March 28, 2016 supplemental U.S. statement of interest responding to Chabad's motion to strike. The supplemental statement of interest is available in full at <http://www.state.gov/s/l/c8183.htm>.

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For the reasons that follow, the Court should reject Chabad's request for the two types of relief it seeks in its motion. The issues presented in the Statement of Interest are ripe for the Court's consideration and should not be stricken; moreover, the issues raised in the Statement of Interest provide a basis for foreclosing Chabad's discovery efforts. In addition, the Court should make clear that Chabad must comply with the FSIA by obtaining prior judicial authorization before it

attempts to restrain, attach, or execute on any property in connection with the sanctions order, including by issuing restraining notices as to particular accounts in its effort to enforce the sanctions judgment. Finally, should the Court decide to authorize discovery to proceed, the Court should reject Chabad's motion to rescind its prior order requiring Chabad to give the United States notice of its discovery efforts.

A. *The United States' concerns raised in the Statement of Interest are neither foreclosed by the Court's prior orders nor barred by case law*

Chabad contends that the issues raised by the United States in its Statement of Interest are foreclosed by this Court's prior rulings. It further claims that the United States' arguments run counter to the Supreme Court's ruling in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). Neither contention is accurate.

To begin, contrary to Chabad's assertion that the Court has already "authorized Chabad to move forward with discovery," this Court's prior rulings did not resolve questions related to discovery. While the Court has noted its intention to "give plaintiff some of the tools to which it is entitled under law," that statement was made in the context of its decision to issue the sanctions judgment. Mem. Op. in Supp. of Order Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 7. That decision did not address questions relating to the propriety of Chabad's discovery efforts; indeed, that same day, the Court decided to solicit the United States' views before ruling on Sberbabnk USA's pending motion for a protective order, recognizing "the serious impact which the outcome of this case could have on the foreign policy interests of the United States." Order Soliciting Views of the United States, Case No. 1:15-mc-1153, ECF No. 27.

Chabad's contention that the subpoenas fall within the purview of permitted discovery under *Argentina v. NML Capital, Ltd.* is inaccurate. In *NML Capital*, a bondholder (NML) obtained a monetary judgment against Argentina after that country defaulted on its external debt. *NML Capital*, 134 S. Ct. at 2253. NML then served subpoenas on two banks in an effort to locate Argentinian assets, including assets held abroad. *Id.* Argentina moved to quash the subpoenas, contending that discovery into a foreign state's extraterritorial assets was not permitted under the FSIA, because such assets do not meet one of the exceptions to execution immunity delineated in § 1610. *Id.* at 2257. The Court rejected this argument, holding that the FSIA does not "specif[y] a different rule" for post-judgment discovery when the judgment debtor is a foreign state. *Id.* at 2256; see also *id.* n. 6 (noting that "[a]lthough this appeal concerns only the meaning of the [FSIA], we have no reason to doubt that, as NML concedes, 'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope.>").

Contrary to Chabad's assertions, *NML Capital* does not control the analysis of the propriety of Chabad's subpoenas. Unlike in the present case, there was no contention that asset discovery was categorically improper; rather, the question was whether the FSIA limits the scope of such discovery to assets as to which there is a reasonable basis to believe a statutory exception to immunity applies. See *id.* at 2256. By contrast, in this case it is clear that the sanctions judgment itself is unenforceable against any assets, and the contention is that no discovery is proper. In particular, none of the exceptions to execution immunity applies to the sanctions order Chabad is seeking to enforce, and thus the FSIA does not authorize attachment of any foreign state assets in the United States for purposes of satisfying that judgment. See Statement of Interest, ECF No. 151, at 7-11. Nor would enforcement of the sanctions order be permitted in any other country. *Id.* at 11-14. Consequently, because Chabad's subpoenas seek "only information that could not lead to executable assets in the United States or abroad," the

subpoenas here concern information that is not relevant to execution and they are not relevant under Federal Rule of Civil Procedure 26(a) as a result. See *NML Capital*, 134 S. Ct. at 2258.

Chabad erroneously claims that even if it were seeking only information that could not lead to executable assets, in that event, the United States should have no foreign policy concerns. Pl.'s Mot. to Strike at 11. To the contrary, a fishing expedition into a foreign state's assets as well as those of its officials and affiliated entities, in and of itself, can be expected to damage the United States' foreign policy interests, and such concerns are further heightened where the underlying judgment (here, for monetary contempt sanctions) is unenforceable. See Statement of Interest at 14 ("Permitting Chabad to proceed with its present discovery efforts . . . would also result in other more specific harms" to U.S. foreign policy.). As between these competing views of the United States' foreign policy interests, it is only those of the United States to which the Court owes deference. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

*B. The United States' concerns are not premature and Chabad should be required to seek prior judicial review of any enforcement steps that would restrain, attach, or execute upon property in connection with enforcement of the sanctions order, including issuance of a restraining notice*

The Court's prior decisions also do not fully address the United States' immediate concerns that any assets identified by the subpoenas not be restrained or attached without compliance with the advance judicial approval requirements of the FSIA. To be sure, the Court previously has stressed the difference it sees between issuing a sanctions order and enforcing such an order, noting that the latter is "carefully restricted by the FSIA." Mem. Op. in Supp. of Order Granting Mot. for Civil Contempt Sanction, ECF No. 116, at 6. The Court has also drawn a line demarcating where it views the enforcement stage of the case as commencing, stating that "concerns related to [] enforcement are premature until such time as plaintiff has identified property to attach and execute, provided notice to defendants of such attachment and execution, and given defendants 'reasonable time' to respond." Mem. Op. in Supp. of Order Granting Mot. for Interim J., ECF No. 143, at 4 (citing 28 U.S.C. § 1610(c)).

As set forth in the Statement of Interest, however, if Chabad is permitted to obtain the information it seeks via subpoena, then there is a risk that it could attempt to restrain Russian assets without further judicial consideration, thereby reaching, of its own accord, what the Court has described as the enforcement stage. This issue is properly considered now, before any discovery proceeds, as it may be the last opportunity to address the matter before an actual attempt to restrain assets. Under New York law, a judgment creditor (such as Chabad) is ordinarily able to issue—without a prior court ruling—a restraining notice to a judgment debtor that itself prevents the debtor from transferring funds up to twice the judgment amount for as long as one year. See N.Y. Civ. Practice Law and R. § 5222(a)–(b). Thus, if Chabad is able to obtain information about accounts held in the United States by the Russian entities or individuals listed in the subpoenas, it could invoke this provision of New York law in an attempt to freeze Russian accounts—including accounts belonging to Russian government instrumentalities, individuals, and non-governmental entities that have no involvement in this litigation—with no opportunity to challenge the hold until after the restraint is in place. Chabad acknowledges in its Motion to Strike the availability of restraining notices and avers generally that it intends to comply with the FSIA, but it does not specifically represent that it would refrain from availing itself of the restraining notice procedure without first obtaining court approval. This may therefore be the last opportunity for the Court to address the issues raised in the Statement of Interest, including the validity of the subpoenas, before Chabad seeks to place restraints on

Russian property or on property that is held by a person or entity associated with the Russian government.

Under the FSIA, the Court is obliged to make a determination—*sua sponte*, if necessary—that foreign state property is not immune before any attachment or enforcement can take place. See 28 U.S.C. §§ 1609, 1610(a), (c) (creating a presumption of immunity for foreign state property and requiring judicial review before permitting an order of attachment or execution); H.R. Rep. No. 94-1487, at 8, 27, 30 (1976), reprinted in U.S.C.C.A.N. 6604, 6606, 6626, 6629 (explaining that allowing a judgment creditor to attach or execute on a foreign state’s property simply by applying to the clerk or local sheriff “would not afford sufficient protection to a foreign state”); see also *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785–86 (7th Cir. 2011) (“The presumption of [execution] immunity also requires the court to determine—*sua sponte* if necessary—whether an exception to immunity applies; the court must make this determination regardless of whether the foreign state appears.”); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) (“In light of the special sensitivities implicated by executing against foreign state property, courts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution *sua sponte*.”).

In a proceeding to obtain the requisite pre-execution court order under § 1610(c) of the FSIA, the judgment creditor bears the burden of identifying the particular property to be executed against and demonstrating that it falls within a statutory exception to immunity from execution. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011). Consequently, any attachment of property belonging to the Russian government, or to its agencies or instrumentalities, would be improper absent a prior judicial determination that Chabad has met its burden of demonstrating that such assets are not immune. See, e.g., *Avelar v. J. Cotoia Constr., Inc.*, No. 11-CV-2172 RRM MDG, 2011 WL 5245206, at \*5 n.8 (E.D.N.Y. Nov. 2, 2011) (“[T]he FSIA requires that any steps taken by a judgment creditor to enforce the judgment must be pursuant to a court order authorizing the enforcement, independent of the judgment itself, and not merely the result of the judgment creditor’s unilateral delivery of a writ . . .”).

Particularly relevant to the circumstances of this case, courts have extended the prior-determination requirement to cover the issuance of restraining notices under New York law. See *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000) (vacating restraining notice issued to foreign sovereign where judgment creditor failed first to obtain a § 1610(c) order), *aff’d*, 281 F.3d 48 (2d Cir. 2002); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420, 423 (S.D.N.Y. 1987) (“The *ex parte* restraining notices served [by the judgment creditor pursuant to N.Y. Civ. Practice Law and R. § 5222] are just the type of restraining notices against which § 1610(c) of the [FSIA] protects foreign states.”); *Trans Commodities, Inc. v. Kazakstan Trading House*, No. 96 CIV. 9782 (BSJ), 1997 WL 811474, at \*3 (S.D.N.Y. May 28, 1997) (vacating restraining notice for lack of court order “specifically pass[ing] upon the propriety of the New York Restraining Notice,” even though a state court had issued an order permitting the judgment creditor to generally undertake attachment or execution against the foreign judgment debtor).

Moreover, this Court previously has insisted that “no attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required . . .” See Mem. Op. Granting Mot. for Interim J. of Accrued Sanctions, ECF No. 143, at 3 (quoting 28 U.S.C. § 1610(c)). Thus, the law is clear that Chabad cannot restrain any

assets even temporarily without advance judicial approval. While the United States appreciates that Chabad has declared its intent to comply generally with the FSIA, see Mot. to Strike at 8-9, Chabad has not expressly indicated that it will seek a pre-enforcement order pursuant to § 1610(c) as to the propriety of issuing a restraining notice under New York law to restrain particular accounts in its effort to enforce the sanctions judgment. As the United States previously has explained, even a short-term freeze of Russian accounts could have serious repercussions for U.S. foreign policy interests, see Statement of Interest of the United States at 14–20, and there would be no opportunity to challenge the propriety of a restraining notice until after it is already in place. The Court therefore should now address and make clear that Chabad is required to seek judicial authorization in advance of any enforcement steps that restrain, attach, or execute upon Russian property, including the issuance of a restraining notice as to particular accounts.

*C. Chabad should continue to be required to provide the United States with same-day notice of its discovery efforts*

Chabad’s motion not only seeks to have the United States’ Statement of Interest stricken, but further requests that the Court rescind its order from September 10, 2015 requiring Chabad to provide the United States with same-day notice of its discovery efforts in connection with this Court’s judgments in this case. See Order, ECF No. 145, at 1–2. Should the Court be inclined to allow any discovery to proceed, this request should be denied.

The notice requirement is a crucial component of the United States’ ability to stay informed of developments in this case. As the United States previously has informed the Court, discovery into the assets of Russian entities and individuals could significantly hinder the ability of the United States to facilitate a transfer of the Collection to Chabad. See Statement of Interest at 17. In addition, if Chabad were to prevail in its quest for discovery, including by obtaining information about Russian assets in the United States, it would likely prompt Russia to take reciprocal measures against U.S. property held in Russia. *Id.* at 18–19. More broadly, authorizing sweeping discovery such as the subpoenas issued by Chabad here could cause friction with foreign nations other than Russia and could open the door to reciprocal orders being entered against the United States in foreign courts. *Id.* at 19. Notice of Chabad’s discovery efforts is a key mechanism by which the United States is able to stay abreast of any developments and take appropriate steps to seek to prevent or mitigate any harms.

The Court previously has stated that it “is sensitive to the[] foreign policy interests” of the United States in this case. See Mem. Op. in Supp. of Order Granting Mot. For Interim J., ECF No. 143, at 11. Indeed, even prior to the notice requirement being in place, the Court sought to ensure that the United States was aware of all related proceedings and had the opportunity to assert any interest it may have. See Mots. Hr’g Tr., Aug. 20, 2015, ECF No. 151-3, at 11:3–7 (directing Chabad to provide the United States with copies of a subpoena served on Sberbank CIB USA and a motion for a protective order filed by Sberbank CIB because the United States “may want to assert their interest in that as well”). If anything, the importance of notice of discovery efforts in this matter has only increased now that Chabad clearly has begun to move into the execution phase of the proceeding. For these reasons, the Court should retain the requirement of notice to the United States.

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## C. IMMUNITY OF FOREIGN OFFICIALS

### 1. Overview

In 2010, the U.S. Supreme Court held in *Samantar v. Yousuf* that the FSIA does not govern the immunity of foreign officials. See *Digest 2010* at 397-428 for a discussion of *Samantar*, including the *amicus* brief filed by the United States and the Supreme Court's opinion. The cases discussed below involve the consideration of foreign official immunity after the Court's 2010 decision.

### 2. *Warfaa v. Ali*

As discussed in *Digest 2015* at 420-25, the U.S. Supreme Court denied the third petition for a writ of certiorari in *Samantar*. The Fourth Circuit Court of Appeals issued a decision in *Warfaa v. Ali* on February 1, 2016 that Ali was not immune from suit under the Torture Victim Protection Act ("TVPA") for the alleged torture and attempted extrajudicial killing of Warfaa, while dismissing claims under the Alien Tort Statute ("ATS") for war crimes and crimes against humanity. Ali filed a petition for certiorari, No. 15-1345, on the immunity question and Warfaa filed a conditional cross-petition, No. 15-1464, on the ATS question. On October 3, 2016 the Supreme Court invited the Solicitor General to file briefs on both petitions expressing the views of the United States.

### 3. Immunity of Former Defense Minister of Israel

On June 10, 2016, the United States filed a suggestion of immunity in the U.S. District Court for the Central District of California in *Doğan et al. v. Barak*, No. 2:15-CV-08130. The United States suggested the immunity of Ehud Barak, former defense minister of Israel. Plaintiffs sued after their son was killed by Israeli Defense Forces ("IDF"), alleging that Barak commanded the attack on the Gaza flotilla that led to their son's death. On October 13, 2016, the district court issued its decision, granting Barak's motion to dismiss the case on immunity grounds. Plaintiffs have appealed. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity, which is available in full at <http://www.state.gov/s/l/c8183.htm>. The portions of the suggestion of immunity discussing claims under the Torture Victim Protection Act ("TVPA") are discussed in Chapter 5.

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In the absence of a controlling statute, the common law governing foreign official immunity constitutes a "rule of substantive law" requiring courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; see

also *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“When 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.”)

The Court of Appeals for the Ninth Circuit consistently has acknowledged and followed this practice. See, e.g., *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126 (9th Cir. 2010) (noting that if the Executive Branch filed a Suggestion of Immunity, “the district court dismissed the case for lack of jurisdiction”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992) (“When the State Department issued a suggestion of immunity in a particular case, the court followed it . . . .”); *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) (discussing pre-FSIA practice and noting that “the courts treated such ‘suggestions’ as binding determinations, and would invoke or deny immunity based upon the decision of the State Department”), abrogated by *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Hassen v. Nahyan*, No. CV 09-01106 DMG MANX, 2010 WL 9538408, at \*5 (C.D. Cal. Sept. 17, 2010) (“Because the State Department has [filed a Suggestion of Immunity], [the defendant] is entitled to immunity.”).

This Court should not follow the analysis of the Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar*, which held that that while the Executive Branch’s determination regarding status-based immunity under the common law receives “absolute deference,” the Executive’s determination regarding conduct-based immunity is not controlling, but “carries substantial weight.” 699 F.3d 763, 773 (4th Cir. 2012). The Fourth Circuit’s approach constitutes legal error and cannot be reconciled with the Supreme Court’s decision in *Samantar*, which itself involved conduct-based immunity. The defendant in that case was a former Somali official. See *Samantar*, 560 U.S. at 308-09, 310 n.5. Under international law, former officials enjoy conduct-based immunities for official acts taken while in office. See, e.g., 1 *Oppenheim’s International Law* 1043-44 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Yet, in concluding that Congress did not intend to alter “the State Department’s role in determinations regarding individual official immunity,” *Samantar*, 560 U.S. at 323, the Court made no distinction between status- and conduct-based immunity determinations.

And in discussing the Department of State’s historic role, the Supreme Court explained categorically that when the Department of State submitted a Suggestion of Immunity, a “district court surrendered its jurisdiction.” *Id.* at 311. Indeed, two of the cases cited by the Supreme Court in *Samantar* regarding foreign officials—*Heaney v. Government of Spain*, 445 F.2d 501, 504-05 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960)—involved consular officials who had only conduct-based immunity for acts carried out in their official capacity. And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, see *Samantar*, 560 U.S. at 322, the Supreme Court cited a third case, *Greenspan v. Crosbie*, ... (1976), in which the district court deferred to the Department of State’s recognition of conduct-based immunity of individual foreign officials...

\* \* \* \*

...After careful consideration of this matter, including a full review of the pleadings and other materials relied upon by Plaintiffs, the Department of State has determined that Barak is immune from suit. See Ex. 1 (Letter from Brian J. Egan, Legal Adviser, Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, Department of

Justice, requesting that the United States suggest the immunity of Barak). All of Plaintiffs' claims challenge actions undertaken by Barak in his former role as Israeli Minister of Defense. Indeed, Plaintiffs allege that Barak "is sued in his personal capacity for acts taken in his official capacity." Opp'n to Def.'s Mot. to Dismiss at 25 (ECF No. 37) [hereinafter Opposition]. Plaintiffs note in their Complaint that Barak "held the position of Minister of Defense during the planning of the IDF operation," and contend that "[w]hile serving in that position[,] he planned and commanded the attack and interception of the Flotilla"—an operation that allegedly "resulted in the torture and extrajudicial killing of [their son]. . . ."

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#### 4. Immunity of Rabbinical Judges and Administrator

As discussed in *Digest 2015* at 425-27, a state court in New Jersey accepted the U.S. suggestion of immunity and dismissed claims against rabbinical judges and a rabbinical court official in Israel relating to child custody disputes. *Ben-Haim v. Edri*, No. L-3502-15 (Sup. Ct. N.J.). Ben-Haim appealed that decision in the appellate division of the Superior Court of New Jersey. The U.S. brief on appeal is excerpted below (with footnotes omitted) and available at <http://www.state.gov/s/l/c8183.htm>

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#### I. UNDER CONTROLLING SUPREME COURT PRECEDENT, THE SUPERIOR COURT PROPERLY DISMISSED BEN-HAIM'S SUIT PURSUANT TO THE UNITED STATES' SUGGESTION OF IMMUNITY

A. The United States Constitution allocates the Nation's foreign-relations power to the federal government. See *Medellín v. Texas*, 552 U.S. 491, 511 (2008). "Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). And "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). As an exercise of its foreign-relations powers, the Executive Branch has, historically, defined the principles governing a foreign state's immunity from suit in the United States, taking into account international law and the foreign-relations interests of the United States.

International law is composed, in part, of rules and principles governing the conduct of nation states. Restatement (Third) of the Foreign Relations Law of the United States, § 101 (1987) (Restatement). Although international law may take the form of a treaty or other formal agreement, it also consists of the "law of nations" or "customary international law," *i.e.*, uncodified rules and principles that "result[] from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).

For centuries, principles of customary international law have specified the circumstances under which a state may be sued in the courts of another state. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (recognizing the immunity of a French warship from suit *in rem* under then-prevailing customary international-law norms). The United States' failure to respect the customary international-law limitations on suits against another state could have serious implications for the Nation's foreign relations. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (discussing category of law of nations "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs"); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 840-41 (D.C. Cir. 1984) (discussing possible foreign policy consequences of overly expansive interpretations of customary international law governing foreign-state immunity). Suits against foreign states therefore directly implicate the federal government's exercise of the Nation's foreign-relations powers. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."). Suits against foreign officials raise the same concerns. See, e.g., *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) ("[T]he acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.").

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B. In this case, the State of Israel sent diplomatic correspondence to the State Department, providing its view that Ben-Haim's claims relate to acts the individual defendants took in their capacities as governmental officials, and asking the State Department to recognize the immunity of the defendants from this suit. Pa155 (McLeod Letter). The State Department agreed that Ben-Haim's claims challenge the defendants' exercise of their powers as officials of the Government of Israel. Pa155-Pa156 (McLeod Letter). And, taking into account principles of immunity recognized by the Executive Branch and informed by customary international law, the State Department determined that the defendants are immune from Ben-Haim's suit. Pa156 (McLeod Letter). The United States conveyed that determination to the Superior Court in a suggestion of immunity. Pa147. The Superior Court accepted the immunity determination and dismissed Ben-Haim's suit. Pa162.

The Superior Court's order of dismissal was required by the applicable Supreme Court precedent and should be affirmed. See *Samantar*, 560 U.S. at 323; see also *Hoffman*, 324 U.S. at 35 ("It is \* \* \* not for the courts to deny an immunity which our government has seen fit to allow.").

## II. BEN-HAIM'S ARGUMENTS TO THE CONTRARY LACK MERIT

On appeal, Ben-Haim contends that the Superior Court erred in concluding that the United States' suggestion of immunity required dismissal of his suit against the Israeli official defendants, because the Executive Branch's determinations are not controlling if they involve conduct-based immunity or implicate preemptory *jus cogens* norms. Ben-Haim further argues that the State Department's immunity determination was mistaken and failed to take into account an opinion of the Attorney General of Israel, and that he was not permitted to respond to the suggestion of immunity. None of those arguments have merit.

\* \* \* \*

2. Ben-Haim further argues (Pb17-Pb20) that the Executive Branch's foreign-official immunity determinations are not binding in suits in which the foreign official is alleged to have violated *jus cogens* norms, *i.e.*, rules of international law that are "peremptory, permitting no derogation." Restatement § 102, cmt. k. Ben-Haim again relies on the Fourth Circuit's *Yousuf* decision for that proposition. After concluding that the Executive Branch's determination was not binding, the Fourth Circuit adopted the categorical rule that foreign officials cannot enjoy immunity for alleged violations of *jus cogens* norms because a state cannot officially authorize a violation of such a norm. *Yousuf*, 699 F.3d at 773-77. Ben-Haim's argument is incorrect for two reasons.

First, even if it were correct that a foreign official could not be immune from suit for an alleged violation of a *jus cogens* norm, Ben-Haim makes no attempt to show that the claims *he* asserts—aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress—allege violations of *jus cogens* norms, nor is there any basis for such a contention. *Jus cogens* is "an elite subset of the norms recognized as customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). Customary international law generally is based on state practice and consent: "A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm." *Id.* *Jus cogens* norms, by contrast, are binding on all states, regardless of their consent. *Id.* at 715-16. There are, however, only a very small number of norms that have been recognized by members of the international community as having the status of *jus cogens*, and there is not complete agreement even about which norms qualify. See Restatement § 102, reporters' n. 6 ("Although the concept of *jus cogens* is now accepted, its content is not agreed."). In any event, the norms on which Ben-Haim relies—prohibitions against aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress—are not among the few norms considered by the international community as having *jus cogens* status. See, *e.g.*, Restatement § 702 & reporters' n. 11 (describing as *jus cogens* violations: genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination); see also, *e.g.*, *Taveras v. Taveras*, 477 F.3d 767, 782 (6th Cir. 2007) (holding that "parental child abduction" does not violate a *jus cogens* norm of customary international law).

Second, and fundamentally, the Fourth Circuit's *per se* rule of non-immunity is inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36. The Executive Branch has not recognized the categorical rule adopted by the Fourth Circuit. In multiple cases, both before and after the Supreme Court's decision in *Samantar*, the Executive Branch has suggested immunity for foreign officials who were alleged to have committed acts that may constitute *jus cogens* violations. The courts deferred to the Executive Branch's suggestions of immunity in those cases. Accordingly, the Executive Branch's suggestion of immunity is controlling in this suit, regardless of whether Ben-Haim alleged *jus cogens* violations.

B. Ben-Haim's remaining claims are meritless.

1. Ben-Haim argues that the defendants' alleged acts are not official and so cannot be entitled to foreign-official immunity. He contends (Pb20- Pb23, Pb25) that the defendants' acts were taken on behalf of a religious tribunal and not on behalf of the State of Israel. But the State Department considered and rejected that very argument: "Although Plaintiff asserts that the rabbinical courts are religious, rather than judicial, institutions, the orders he complains of were

issued by courts of the State of Israel.” Pa156 (McLeod Letter) (citation omitted); see also Pa155-Pa156 (“By expressly challenging Defendants’ exercise of their official powers as employees of Israel’s rabbinical court system, [Ben-Haim’s] claims challenge Defendants’ exercise of their official powers as officials of the Government of Israel.”) (McLeod Letter). In light of the controlling nature of the Executive Branch’s immunity determination, there is no basis for Ben-Haim to second-guess the State Department’s evaluation of the nature of the defendants’ acts.

2. Ben-Haim contends that the State Department’s determination is mistaken and fails to take into account an opinion filed by the Attorney General of Israel in the Supreme Court of Israel in the litigation between Oshrat and Ben-Haim stemming from the rabbinical courts. ... As Ben-Haim characterizes it, the Israeli Attorney General’s opinion concludes that the defendants “lacked the authority to take the actions that [they] did against [Ben-Haim].” Pb22-Pb23. Those acts were therefore “outside of the law” (Pb23) he contends, and so could not qualify as “official acts” for which defendants could be immune (*id.*). There are two problems with that contention.

First, Ben-Haim mischaracterizes the Israeli Attorney General’s opinion. That opinion does say that the rabbinical courts lack the authority to require sanctions not authorized by statute. Israeli AG Op. ¶ 31. But the opinion expressly considered Ben-Haim’s argument “that the decision of the Rabbinical Court was granted *ultra vires*.” *Id.* ¶ 14. And it concluded that, while the rabbinical court could not require extra-statutory sanctions, “it may provide a non-obligating opinion of Jewish law as for the manner in which [Ben-Haim] should be treated, in light of his refusal to divorce his wife despite the ruling of the Rabbinical Court obliging him to do so.” *Id.* ¶ 7. And that is how the opinion characterized the third sanctions order, which is the basis of Ben-Haim’s current suit. See *id.* ¶ 33 (“Under these circumstances, the official decision of the rabbinical court dated July 31st 2012 must be viewed as a non-binding opinion of the court as to how [Ben-Haim] should be treated in light of [his] refusal to grant his wife a divorce, despite the ruling of the rabbinical court requiring him to do so.”). Thus, the Israeli Attorney General’s opinion on which Ben-Haim relies recognizes the third sanctions order as a valid (though non-binding) order of the rabbinical court.

More importantly, the Government of Israel formally communicated to the State Department its official view “that the claims in this case relate to the acts Defendants performed in their official capacities in the exercise of governmental authority.” Pa155 (McLeod Letter). And, after considering the matter, the State Department accepted that determination. Pa156. (McLeod Letter). Again, Ben-Haim has no basis to second-guess the State Department’s evaluation of the official status of the defendants’ acts.

3. Finally, Ben-Haim argues (Pb26) that he was not given the opportunity to present his views to the State Department, that the Executive Branch did not take into account the Israeli Attorney General’s opinion, and that he was not given an opportunity to respond to the suggestion of immunity. Those assertions, however, are incorrect. As was made clear at the hearing in the Superior Court, Ben-Haim submitted materials he believed relevant to the immunity determination to the State Department—at the State Department’s own invitation. Pa170 (1T13). After the United States filed the suggestion of immunity, the Superior Court continued the hearing to give Ben-Haim an opportunity to respond. Pa197(2T7-2T8). And after Ben-Haim subsequently raised the Israeli Attorney General’s opinion, the State Department reviewed the document and concluded that it did not alter the State Department’s determination concerning the defendants’ immunity from this suit. Pa170(1T14).

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## D. HEAD OF STATE IMMUNITY

### 1. President and Foreign Minister of Burma

On February 12, 2016, the United States submitted a suggestion of immunity in a lawsuit against President Thein Sein and Foreign Minister Wunna Maung Lwin of Burma. *Burma Task Force v. Thein Sein*, No. 15 Civ. 7772 (S.D.N.Y. 2016). Excerpts follow (with footnotes omitted) from the suggestion of immunity. The submission in its entirety, including the Letter from Deputy Legal Adviser Katherine D. McManus to Principal Deputy Assistant Attorney General Benjamin C. Mizer, dated February 4, 2016, is available at <http://www.state.gov/s//c8183.htm>. The district court dismissed claims against the president and foreign minister on March 30, 2016. The court dismissed the entire case on July 21, 2016 after the plaintiffs failed to respond to its June 2, 2016 order to show cause in a written submission, to be filed by July 15, 2016, why the action should not be dismissed.

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1. The United States has an interest in this action because President Thein Sein is the sitting head of a foreign state and Foreign Minister Wunna Maung Lwin is the sitting foreign minister of that same foreign state. Accordingly, this lawsuit raises the question of President Thein Sein's and Foreign Minister Wunna Maung Lwin's immunity from the Court's jurisdiction for suits brought while in office. The Constitution assigns to the President of the United States, and to the President alone, responsibility for representing the nation in its foreign relations. That power gives the Executive Branch authority to determine the immunity of sitting heads of state and foreign ministers from suit. After considering the relevant principles of customary international law, the implementation of the United States' foreign policy, and the potential implications for international relations, the Executive Branch has decided to recognize President Thein Sein's and Foreign Minister Wunna Maung Lwin's immunity from this suit. As discussed below, this determination is controlling and is not subject to judicial review. Indeed, no court has ever subjected a sitting head of state or foreign minister to suit after the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the Department of State has informed the Department of Justice that the Government of Burma has formally requested that the Government of the United States "take the steps necessary to have this action dismissed as against" President Thein Sein and Foreign Minister Wunna Maung Lwin "on the basis of their immunity from jurisdiction as a sitting foreign head of state and a sitting foreign minister, respectively." Letter from Katherine D. McManus to Benjamin C. Mizer, dated February 4, 2016 (attached as Exhibit A). The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Thein

Sein as a sitting head of state and of Foreign Minister Wunna Maung Lwin as a sitting foreign minister from the jurisdiction of the United States District Court in this suit.” *Id.*

3. Historically, the Executive Branch determined the immunity of both foreign states and foreign officials, and courts deferred completely to those 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 (“FSIA”), 28 U.S.C. §§ 1330, 1602–11, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. *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.”).

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“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, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. *See id.* at 323 (“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.”). Thus, the Executive Branch retains its historic authority to determine a foreign official’s immunity from suit, including the immunity of foreign heads of state. *See id.* at 311 & n.6 (noting the Executive Branch’s role in determining head of state immunity).

5. The doctrine of head-of-state immunity is well established in customary international law. *See* SATOW’S DIPLOMATIC PRACTICE 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as “head-of-state immunity,” it applies to heads of government and foreign ministers as well. Longstanding authority provides that a foreign minister is entitled to immunity by virtue of his or her office because of that official’s inherent role in acting as a representative of the state. *See Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (noting that *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), “generally viewed as the source of our foreign sovereign immunity jurisprudence,” found that “members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign”). *Accord* Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that the immunity of a foreign state is enjoyed by heads of state, heads of government, and foreign ministers); *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20–21 (Feb. 14) (Merits) (holding that heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states). Thus, U.S. courts, beginning with the Supreme Court in *Schooner Exchange*, have specifically recognized the immunity of sitting foreign ministers based on their status. *Rhanime v. Solomon*, No. 01 Civ. 1479 (RWR), slip op. at 6 (D.D.C. May 15, 2002) (“Being a foreign minister is one of the two traditional bases for a recognition or grant of head-of-state immunity.” (internal quotation marks omitted)) (attached as Exhibit B); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y.

2001) (extending head-of-state immunity to Zimbabwe's foreign minister), *rev'd in part on other grounds, Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

6. In the United States, head-of-state immunity determinations are made by the Department of State, exercising the 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 Republic of Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Republic of Peru*, the Supreme Court decided, in the context of pre-FSIA foreign state immunity, that “[u]pon recognition and allowance of the [immunity] claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the [matter] and remit the libelant to the relief obtainable through diplomatic negotiations.” 318 U.S. at 588; *see also id.* at 589 (“The certification and the request [of immunity] . . . must be accepted by the courts as a conclusive determination by the political arm of the Government.”). Such deference to the Executive Branch's determinations of foreign state immunity is compelled by the separation of powers. *See, e.g., Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy.”).

7. For the same reason, courts have also routinely deferred to the Executive Branch's head-of-state immunity determinations. *See Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (“We must accept the United States' suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations.” (internal quotations marks omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) (“The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.”); *see also In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (noting that “in the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state” and that “flexibility 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”).

8. When the Executive Branch makes a head-of-state immunity determination, judicial deference to that determination is “motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved.” *Ye*, 383 F.3d at 626; *see also Spacil*, 489 F.2d at 619.3 As noted above, in no case has a court subjected a sitting head of state or foreign minister to suit after the Executive Branch has determined that the head of state or foreign minister is immune.

9. Under the customary international law principles accepted by the Executive Branch, head-of-state immunity attaches to a president's or a foreign minister's status as the current holder of either of those offices. In this case, the Executive Branch has determined that President Thein Sein and Foreign Minister Wunna Maung Lwin, as the sitting President and Foreign Minister of Burma, respectively, enjoy head-of-state immunity from the jurisdiction of U.S. courts. Accordingly, President Thein Sein and Foreign Minister Wunna Maung Lwin are entitled to immunity from this suit, and the Court lacks jurisdiction over them.

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## 2. President and Prime Minister of Laos

On February 12, 2016, the United States filed a suggestion of immunity on behalf of President Choummaly Sayasone and Prime Minister Thongsing Thammavong of Laos. The portion of the U.S. submission relating to plaintiff's attempt to serve Laos is discussed in the FSIA section, *supra*. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity and statement of interest, which is available in full (with referenced exhibits, including the February 8, 2016 letter from Deputy Legal Adviser McManus to Principal Deputy Assistant Attorney General Mizer) at <http://www.state.gov/s/l/c8183.htm>. Portions of the U.S. suggestion of immunity and statement of interest regarding the Laotian officials that are similar to the submission regarding the Burmese officials, which is excerpted above, are omitted below.

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The United States respectfully informs the Court of its interest in the pending claims against President Choummaly, Laos's sitting head of state, and Prime Minister Thongsing, its sitting head of government, and hereby informs the Court that both officials are immune from suit. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has the sole authority to determine the immunity from suit of incumbent heads of state and heads of government. The interest of the United States in this matter arises from a determination by the Executive Branch, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, that President Choummaly and Prime Minister Thongsing are immune from this suit while in office. As discussed more fully below, this determination is controlling and is not subject to judicial review. Indeed, the United States is aware of no case in which a court has ever subjected a sitting head of state or head of government to suit once the Executive Branch has determined that he or she is immune.

Here, the Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the government of Laos has formally requested that the United States recognize President Choummaly's and Prime Minister Thongsing's immunity from this lawsuit. *See* Dep't of State Letter, *supra*. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Choummaly as a sitting head of state and Prime Minister Thongsing as a sitting head of government from the jurisdiction of the United States District Court in this suit." *Id.*

\* \* \* \*

Under the customary international law principles recognized and accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of his or her office. Because the Department of State has determined that President Choummaly and Prime Minister Thongsing enjoy immunity from the jurisdiction of U.S. courts in light of their current status as Laos's head of state and head of government, respectively, the claims against them should be dismissed.

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### 3. Emperor and Prime Minister of Japan

On February 11, 2016, the United States filed a suggestion of immunity on behalf of Emperor Akihito and Prime Minister Abe of Japan. *He Nam You v. Japan*, No. 15-03257 (N.D. Cal.). The U.S. submission also addresses service under the FSIA, and discusses the political question doctrine as applied in an earlier case in the D.C. Circuit. On February 26, 2016, the court dismissed as against Japan, the Emperor, and the Prime Minister. Excerpts follow (with footnotes omitted) from the U.S. suggestion of immunity, which is available in full (along with the letter from Deputy Legal Adviser McManus to Principal Deputy Assistant Attorney General Mizer) at <http://www.state.gov/s/l/c8183.htm>. The portions of the U.S. submission addressing the political question doctrine are excerpted in Chapter 5.

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The United States informs the Court of the interest of the United States in the pending claims against Emperor Akihito, the sitting Head of State of Japan, and Prime Minister Shinzo Abe, the sitting Head of the Government of Japan, and hereby informs the Court that both Emperor Akihito and Prime Minister Abe are immune from this suit. In support of its interest and determination, the United States sets forth as follows:

The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state and of government. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize Emperor Akihito and Prime Minister Abe's immunity from this suit while in office. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state or of government to suit once the Executive Branch has determined that he or she is immune.

The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Embassy of Japan has formally requested the Government of the United States to determine that Emperor Akihito and Prime Minister Abe are immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the

“Department of State recognizes and allows the immunity of Emperor Akihito as a sitting head of state and of Prime Minister Abe as a sitting head of government from the jurisdiction of the United States District Court in this suit.” Letter from Katherine D. McManus to Benjamin C. Mizer (copy attached as Exhibit A).

\* \* \* \*

Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state’s or head of government’s status as the current holder of the office. In this case, because the Executive Branch has determined that Emperor Akihito and Prime Minister Abe, as the sitting head of a foreign state and a foreign government, respectively, enjoy immunity from the jurisdiction of U.S. courts in light of their current status, Emperor Akihito and Prime Minister Abe are entitled to immunity from the jurisdiction of this Court over this suit.

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## **E. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES**

### **1. Foreign Litigation**

In 2016, the United States government’s immunity was addressed in multiple legal proceedings initiated by former employees of its consulates and embassies in foreign courts.

In *Andre Bahbah v. the United States*, Israel’s National Labor Court (the highest labor court in Israel), explicitly recognized that Israel’s Foreign State Immunities Act allows for a foreign state to retain immunity in labor cases involving locally engaged staff in “exceptional” circumstances that could change over time. The court found that the employee who brought suit had been dismissed on “authentic” national security grounds and the employee’s position was one of trust that involved sovereign functions. The court also found that such foreign sovereign immunity extends to defamation claims, including those that arise within the context of an employment relationship. Although the court reviewed the strong public policy interest in preserving labor rights, it found a countervailing strong interest, as expressed through the legislative history of the Immunity Law and in customary international law, in protecting sovereign immunity. Consequently, it held that sovereign immunity could apply to labor cases in certain limited circumstances, including when there are “authentic” national security considerations motivating dismissal.

The Vilnius Country Court issued a ruling on October 27, 2016 on a claim brought by former employee Paulius Markevicius against the U.S. Embassy in Lithuania after his security clearance was revoked. In the absence of briefing by the United States, the court looked to the UN Convention on Jurisdictional Immunities of States and Their Property (to which the United States is not a party and which has not yet entered into force) to identify customary international law principles regarding sovereign immunity.

The court reasoned that the nature of the claimant's position and the reason for his termination were related to the security interests of the United States. The court regarded the United States' declining to participate in the proceedings as tantamount to invoking sovereign immunity and that such immunity rendered the claims inadmissible in the court. The court reasoned that the claimant's position as a political specialist at the Embassy "suggests that he was not a technical employee of the embassy. The duties that the claimant performed would satisfy the criteria of a relationship of civil service relating to the exercise of the sovereign powers of the United States of America."

The Court of Cassation in Belgium issued a decision on October 28, 2016 reversing a lower court's decision that diplomatic immunity should not prevent a landlord from seeking payment of allegedly overdue rent and rental damage from the tenant, who was a member of the Permanent Mission of the United States to NATO. The Court of Cassation determined that the European Convention on Human Rights guarantee of access to court is not an absolute right, but can be constrained by the Vienna Convention on Diplomatic Relations and the Ottawa Agreement (The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, done at Ottawa, September 20, 1951, 5 UST 1087; TIAS 2992; 200 UNTS 3), which accords privileges and immunities to certain NATO personnel. The Court noted that the extension of privileges and immunities to diplomatic agents is essential for the functioning of diplomatic missions and to promote relations between States.

## 2. Determinations under the Foreign Missions Act

Effective December 30, 2016, the State Department prohibited entry and access to two facilities owned by the Government of the Russian Federation (one in Maryland and one in New York) pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. 4304(b)). 82 Fed. Reg. 5628 (Jan. 18, 2017). The denial of access to the two recreational facilities was "part of a comprehensive response to Russia's interference in the U.S. election and to a pattern of harassment of our diplomats overseas that has increased over the last four years, including a significant increase in the last 12 months." State Department December 29, 2016 press statement, available at [https://2009-](https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm)

[2017.state.gov/r/pa/prs/ps/2016/12/266145.htm](https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266145.htm) The Department also declared 35 Russian officials operating in the United States as *personae non grata* because they "were acting in a manner inconsistent with their diplomatic or consular status." *Id.* As described in the press statement, the harassment that was the basis for the Foreign Missions Act designation:

has involved arbitrary police stops, physical assault, and the broadcast on State TV of personal details about our personnel that put them at risk. In addition, the Russian Government has impeded our diplomatic operations by, among other actions: forcing the closure of 28 American corners which hosted cultural programs and English-language teaching; blocking our efforts to begin the construction of a new, safer facility for our Consulate General in St. Petersburg;

and rejecting requests to improve perimeter security at the current, outdated facility in St. Petersburg.

See Chapter 16 for discussion of sanctions imposed on December 28, 2016 on Russian persons for malicious cyber-enabled activities.

### **3. Enhanced Consular Immunities**

Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel. This authority was provided previously in the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L. 114-113) (“FY 2016 SFOAA”). See *Digest 2015* at 436-37. Section 501(b) states:

(1) IN GENERAL.—The Secretary of State, with the concurrence of the Attorney General, may, on the basis of reciprocity and under such terms and conditions as the Secretary may determine, specify privileges and immunities for a consular post, the members of a consular post, and their families which result in more favorable or less favorable treatment than is provided in the Vienna Convention on Consular Relations, of April 24, 1963 (T.I.A.S. 6820), entered into force for the United States on December 24, 1969.

(2)— CONSULTATION.—Before exercising the authority under paragraph (1), the Secretary of State shall consult with the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate regarding the circumstances that may warrant the need for privileges and immunities providing more favorable or less favorable treatment than is provided in the Vienna Convention.

## **F. INTERNATIONAL ORGANIZATIONS**

### **1. *Georges v. United Nations***

As discussed in *Digest 2015* at 437-46, the U.S. District Court for the Southern District of New York decided in *Georges v. United Nations*, No. 13-7146 (2015), that the UN and UN officials were immune from a suit alleging their liability for a cholera outbreak in Haiti. See *Digest 2014* at 434-47 for discussion of the U.S. statement of in interest in the case. Plaintiffs appealed the district court’s decision. On August 18, 2016, the U.S. Court of Appeals for the Second Circuit issued its decision affirming the district court. Excerpts follow from the decision (with footnotes omitted).

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The principal question presented by this appeal is whether the fulfillment by the United Nations (“UN”) of its obligation under Section 29 of the Convention on Privileges and Immunities of the United Nations (the “CPIUN”), Apr. 29, 1970, [21 U.S.T. 1418] to “make provisions for appropriate modes of settlement of” certain disputes is a condition precedent to its immunity under Section 2 of the CPIUN, which provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity,” such that the UN’s alleged disregard of its Section 29 obligation “compel[s] the conclusion that the UN’s immunity does not exist.”

We hold that the UN’s fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity. For this reason—and because we find plaintiffs’ other arguments unpersuasive—we AFFIRM the January 15, 2015 judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*) dismissing plaintiffs’ action against defendants the UN, the UN Stabilization Mission in Haiti (“MINUSTAH”), UN Secretary-General Ban Ki-moon (“Ban”), and former MINUSTAH Under-Secretary-General Edmond Mulet (“Mulet”) for lack of subject matter jurisdiction.

#### BACKGROUND

Plaintiffs are citizens of the United States or Haiti who claim that they “have been or will be sickened, or have family members who have died or will die, as a direct result of the [cholera] epidemic that has ravaged the Republic of Haiti since October 2010. In this putative class action, plaintiffs seek to hold defendants responsible for their injuries, and to that end, assert various causes of action sounding in tort and contract against them.

Specifically, plaintiffs allege that, in October 2010, “[d]efendants knowingly disregarded the high risk of transmitting cholera to Haiti when ... they deployed personnel from Nepal to Haiti, knowing that Nepal was a country in which cholera is endemic and where a surge in infections had just been reported.” According to plaintiffs, defendants not only failed to test or screen these Nepalese personnel prior to their deployment, allowing them to carry into Haiti the strain of cholera that is the epidemic’s source; they also stationed them at a base on the banks of the Meille Tributary, which flows into the Artibonite River, the primary water source for “tens of thousands” of Haitians. From this base, defendants allegedly “discharged raw sewage” and “disposed of untreated human waste,” which “created a high risk of contamination.” Eventually, plaintiffs contend, “human waste from the base seeped into and contaminated the Meille Tributary” and, ultimately, the Artibonite River, “resulting in explosive and massive outbreaks of cholera... throughout the entire country.”

Defendants did not enter an appearance before the District Court. But on March 7, 2014, the executive branch of the United States government (the “Executive Branch”) submitted a statement of interest pursuant to 28 U.S.C. § 517, in which it took the position that defendants are “immune from legal process and suit” pursuant to the UN Charter, June 26, 1945, 59 Stat. 1031; the CPIUN; and the Vienna Convention on Diplomatic Relations (the “VCDR”), Apr. 18, 1961, 23 U.S.T. 3227.

The District Court agreed with the Executive Branch. Accordingly, on January 9, 2015, it dismissed plaintiffs’ action for lack of subject matter jurisdiction. With respect to the UN and MINUSTAH, the District Court relied on Section 2 of the CPIUN. To reiterate, Section 2 provides that the UN “shall enjoy immunity from every form of legal process except insofar as in

any particular case it has expressly waived its immunity.” The District Court reasoned that, because “no party contend[ed] that the UN ha[d] expressly waived its immunity,” the UN was “immune from [p]laintiffs’ suit.” With respect to Ban and Mulet, the District Court relied on Article 31 of the VCDR, which provides that “[a] diplomatic agent shall enjoy immunity ... from [a receiving State’s] civil and administrative jurisdiction,” except in circumstances undisputedly not presented here. The District Court concluded that, because Ban and Mulet both held diplomatic positions at the time plaintiffs filed their action, they were immune as well.

Plaintiffs timely appealed. Defendants did not enter an appearance before this Court either, but the Executive Branch “submit[t]ed an *amicus curiae* brief, pursuant to 28 U.S.C. § 517 ... , in [their] support.”

## DISCUSSION

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On appeal, plaintiffs raise three principal arguments. First, they argue that the District Court erred in holding that the UN and MINUSTAH are immune because the UN’s fulfilment of its obligation under Section 29 of the CPIUN to provide for appropriate dispute-resolution mechanisms is a condition precedent to its Section 2 immunity. Second, they argue that the District Court’s holding was in error because the UN materially breached the CPIUN by failing to fulfill its Section 29 obligation, such that it is no longer entitled to the benefit of immunity under Section 2. Third, they argue that the District Court’s application of the CPIUN to dismiss their action violated their constitutional right of access to the federal courts. We address each argument in turn.

### I. Condition Precedent

Plaintiffs’ first argument requires us to interpret the CPIUN, so we begin by describing the framework that governs any such inquiry. “The interpretation of a treaty, like the interpretation of a statute, begins with its text,” and “[w]here 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.” Additionally, because “[a]s a general matter, a treaty is a contract ... between nations,” it is “to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.” Further, “while the interpretation of a treaty is 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.”

Here, application of two particular “principles which govern the interpretation of contracts” demonstrates why plaintiffs’ first argument is unavailing.

The first such principle is *expressio unius est exclusio alterius*—“express mention of one thing excludes all others”—which is also known as the negative-implication canon. This principle has guided federal courts’ interpretations of treaties for over a century.

As noted above, Section 2 of the CPIUN provides that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” Especially when coupled with the compulsory “shall”—which “is universally understood to indicate an imperative or mandate”—Section 2’s “express mention of” the UN’s express waiver as a circumstance in which the UN “shall [not] enjoy immunity” negatively implies that “all other[ ]” circumstances, including the UN’s failure to fulfill its Section 29 obligation, are “exclude[d].” It necessarily follows that the UN’s fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity.

This conclusion is buttressed by the second principle of contract interpretation relevant to our analysis—that “conditions precedent to most contractual obligations ... are not favored and must be expressed in plain, unambiguous language.” To manifest their intent to create a condition precedent, “[p]arties often use language such as ‘if,’ ‘on condition that,’ ‘provided that,’ ‘in the event that,’ and ‘subject to.’” No such language links Sections 2 and 29 in the CPIUN. Of course, “specific talismanic words are not required.” But “there is [also] no ... [other] language [in the CPIUN] which, even straining, we could read as imposing” the UN’s fulfillment of its Section 29 obligation as a condition precedent to its Section 2 immunity.

It is also significant that the Executive Branch’s interpretation of the CPIUN—an interpretation “entitled to great weight”—accords with our own. The Executive Branch sees “[n]othing in Section 29 ... [that] states, either explicitly or implicitly, that compliance with its terms is a precondition to the UN’s immunity under Section 2.” Neither do we.

Plaintiffs’ arguments to the contrary are unconvincing. For example, plaintiffs argue that “[t]he UN’s post-ratification ... practice pursuant to ... Section 29 ... demonstrates that entitlement to immunity is premised on the provision of alternative dispute settlement.” Plaintiffs’ chief example of this supposed practice is the UN’s statement before the International Court of Justice that the UN’s immunity “*does not leave a plaintiff without remedy* [because] ... in the event that immunity is asserted, a claimant seeking redress against the Organization *shall* be afforded an appropriate means of settlement [under Section 29].” This statement, however, suggests at most that the UN views Section 29 as “more than merely aspirational”—as “obligatory and perhaps enforceable.” It does not in any way suggest that the UN views Section 29 as a condition precedent to Section 2.

Plaintiffs also argue that “foreign signatories to the CPIUN have repeatedly held that the availability of alternative dispute settlement is a material condition to international organizations’ entitlement to immunity,” and that “these foreign courts’ views provide persuasive authority for this case, per the direction of the U.S. Supreme Court.” This argument is misleading. The Supreme Court has indeed held that, “[i]n interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight.” But in so holding, the Court was obviously referring to the opinions of states that are parties to the treaty that is being interpreted *regarding that same treaty*, not the opinions of states that happen to have ratified the treaty at issue *regarding another treaty entirely*. Most of plaintiffs’ examples fall into the latter category—they are cases from the courts of states that have ratified the CPIUN, but they pertain to unrelated agreements, including the agreement between France and the UN Educational, Scientific and Cultural Organization; and the agreement between Italy and the International Plant Genetic Resources Institute regarding its headquarters in Rome. Another of the plaintiffs’ examples appears to have involved the CPIUN, but the portion of the holding relevant to the plaintiffs’ argument is based on an interpretation of the state’s constitution rather than the CPIUN itself.

As we have seen, whether a term constitutes a condition precedent depends on the particular language of the instrument that is being evaluated. For the most part, plaintiffs have not suggested that the aforementioned agreements contain language that is even comparable—much less identical—to that found in Sections 2 and 29 of the CPIUN. Thus, plaintiffs’ reliance on cases interpreting those agreements is misplaced.

Plaintiffs do argue that the agreement between France and UNESCO, at issue in *UNESCO v. Boulois*, Cour d’Appel [CA] [Court of Appeal] Paris (Fr.), June 19, 1998, is “virtually identical” to the CPIUN. Notwithstanding textual similarities between the two treaties,

we do not find the French court's interpretation relevant to this case. The France-UNESCO agreement arose in a materially different context than the CPIUN: it is a bilateral agreement between France and UNESCO whereas the CPIUN is a multilateral treaty signed by a number of countries. That a French court interpreting an agreement between France and a UN agency found that the agreement required the establishment of an alternative forum for dispute resolution has little bearing on the interpretation of the CPIUN in this case.

For these reasons, we hold that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity.

## II. Material Breach

Plaintiffs next argue that "[t]he District Court's finding of immunity was erroneous ... because Section 29 is a material term to the CPIUN as a whole." According to plaintiffs, the UN's material breach of its Section 29 obligation means that it "is no longer entitled to the performance of duties owed to it under" the CPIUN, including its Section 2 immunity. We need not reach the merits of this argument, however, because plaintiffs lack standing to raise it.

As we have recently reiterated, "absent protest or objection by the offended sovereign, [an individual] has no standing to raise the violation of international law as an issue." The plaintiffs have not identified any sovereign that has objected to the UN's alleged material breach. To the contrary, the United States has asked us to affirm the District Court's judgment, and no other country has expressed an interest in this litigation.

It is true that there is an exception to this rule where a treaty contains "express language" "creat[ing] privately enforceable rights ... , or some other indication that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by ... affected individuals," such as plaintiffs in this case. "[B]ut [plaintiffs have] not identified, nor can we locate," any such indication in the CPIUN, and "[s]tanding is therefore lacking."

It is plaintiffs' position that the case law described above is "inapposite." They contend that, "[r]egardless of whether a treaty provides an enforceable private right of action, individuals may invoke breach in a responsive posture." In support of this position, plaintiffs cite a law review article stating that "case law is consistent with [the] understanding that a treaty may be enforced defensively even when there is no private right of action." But the same article makes clear what it means by "defensive enforcement," which it contends "can be found in two types of cases": those in which a private party uses a treaty (1) "to defend against a claim by the United States government" or (2) "to defend against a claim by another private party under state or federal law." Neither of these situations is presented here. No claim has been asserted against plaintiffs; rather, it is plaintiffs who have asserted the claims underlying this action. Accordingly, plaintiffs' argument fails even on its own terms.

## III. Right of Access to Federal Courts

Lastly, plaintiffs argue that the District Court erred "because it violated the U.S. citizen Plaintiffs' constitutional rights to access the federal courts by applying immunity in this case." This argument fails to convince.

As we stated in *Brzak v. United Nations*, in which we rejected a virtually indistinguishable challenge to an application of Section 2 of the CPIUN, plaintiffs' argument does little more "than question why immunities in general should exist." But "legislatively and judicially crafted immunities of one sort or another have existed since well before the framing of the Constitution, have been extended and modified over time, and are firmly embedded in American law." Plaintiffs' argument, if correct, would seem to defeat not only the UN's immunity, but also "judicial immunity, prosecutorial immunity, and legislative immunity."

Plaintiffs do not persuasively differentiate the quotidian and constitutionally permissible application of these doctrines from application of Section 2 of the CPIUN here.

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## 2. **Zuza v. OHR**

*Zoran Zuza v. Office of the High Representative, et al.*, No. 16-7027, is before the U.S. Court of Appeals for the District of Columbia. The case concerns the circumstances under which international organizations and their personnel enjoy privileges and immunities under the International Organizations Immunities Act (“IOIA”), codified at 22 U.S.C. §288 et seq. The IOIA confers upon the President the authority to extend certain privileges and immunities to public international organizations. The Office of the High Representative (“OHR”), the Defendant in the lower court, was created as part of the Dayton Accords to help implement certain aspects of the settlement that led to the end of hostilities in Bosnia and Herzegovina. As discussed in *Digest 2015* at 450-53, the United States filed a statement of interest in the district court asserting the immunity of the individual defendants. The U.S. *amicus* brief filed in the Court of Appeals on November 17, 2016 argues that the district court correctly interpreted an amendment to the IOIA (codified at 22 U.S.C. §288f-7) to authorize the President to extend immunity to OHR and its officers and employees; that the President had validly done so by executive order; and that certain named officials of OHR had been duly notified to and accepted by the State Department as officers of the organization. Excerpts follow from the U.S. brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>

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### A. Pursuant To Specific Statutory Authorization, The President Has Extended To The OHR The Immunity Provisions Of The International Organizations Immunities Act.

In 2010, Congress enacted an amendment to the International Organizations Immunities Act that authorized the President to extend statutory immunity to the Office of the High Representative and its officers and employees, and the President has done so. Analyzing the “plain text” of the 2010 amendment, the district court determined that Congress authorized the President to extend statutory immunity to the Office of the High Representative without requiring participation by the United States. *Zuza*, 107 F. Supp.3d at 95 (JA 9-10). Putting it differently, the court held that the amendment “waived section 1’s ‘participation’ requirement as to OHR.” *Id.* This reading of the statute was well founded and correct.

1. In order to be eligible for designation under the Immunities Act as originally enacted, an entity had to be an international organization in which the United States participates. Section 1 of the statute defines a qualifying “international organization” as “a public international organization” (a) in which “the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for

such participation,” and (b) “which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.” 22 U.S.C. 288.

However, when Congress authorized the extension of statutory privileges, exemptions, and immunities to the Office of the High Representative in 2010, it exempted OHR from the original statutory participation requirement. The amendment expressly provides that the provisions of the Immunities Act may be extended to the Office of the High Representative “in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates,” and to officers and employees of the organization. 22 U.S.C. 288f-7. Pursuant to that authority, the President extended immunity to the Office of the High Representative by ordering that “all privileges, exemptions, and immunities provided by the International Organizations [Immunities] Act be extended to the Office of the High Representative in Bosnia and Herzegovina and to its officers and employees.” Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011).

2. Mr. Zuza criticizes the district court’s interpretation, arguing principally that the lack of United States participation in the Office of the High Representative means that the Office of the High Representative and its officers and employees cannot be immune under the statute. . . . The fact that the Office of the High Representative is not an international organization in which the United States participates . . . is the main reason that Congress had to enact a specific provision for extending coverage of the Immunities Act to include the OHR.

The amendment explicitly provides that immunity may be extended to the Office of the High Representative to the same extent as it may be extended “to a public international organization in which the United States participates.” 22 U.S.C. 288f-7. As the district court correctly recognized, that plain language eliminates the participation requirement. Mr. Zuza objects to the district court’s characterization of the language as having “waived” the requirement of United States participation, *Zuza*, 107 F. Supp.3d at 95 (JA 10), and he argues that “Congress did not use the words ‘waive’ or ‘notwithstanding,’” Br. 43. But while Congress did not use the word “waive,” it did authorize immunity to the Office of the High Representative without requiring United States participation in the Office. In doing so, Congress eliminated the participation requirement for the Office. At bottom, Mr. Zuza fails to explain why, if the Office of the High Representative were to remain subject to the requirement in the original statute that the United States participate in the organization, Congress would have enacted a special provision authorizing the extension of immunity that did not change anything.

3. Mr. Zuza also contends that, because the 2010 amendment uses the passive voice (“may be extended”), it does not authorize the President to extend immunity. *Zuza* Br. 38-39. But the passive voice, by definition, has no subject, and if Mr. Zuza were correct, no one could extend the immunity. Indeed, in the Immunities Act, Congress identified the President as the official who extends immunity to an organization only in section 1; in all of the special provisions for organizations in which the United States does not participate (see note 1, *supra*), Congress did not identify the official who may extend the immunities to the organization. This consistent statutory practice confirms the district court’s proper conclusion that it is the President who has the authority to extend statutory immunity to the Office of the High Representative. In short, the district court was correct that the statutory language authorizes the extension of statutory immunity to the defendants in this case.

## B. Both The Current And Former High Representatives Were Notified To And Accepted By The State Department.

The district court was also correct in holding that the current High Representative, Valentin Inzko, and the former High Representative, Paddy Ashdown, are immune as officers of the Office of the High Representative.

1. In district court, the United States filed a statement of interest attaching a letter from Clifton Seagroves, Acting Deputy Director of the Office of Foreign Missions at the Department of State, informing the court that both officials “have been notified to the Secretary of State and accepted by the Director of the Office of Foreign Missions, acting pursuant to delegated authority from the Secretary of State.” JA 104. That is, both have been “duly notified to and accepted by the Secretary of State as a representative, officer, or employee” of the Office of the High Representative. 22 U.S.C. 288e(a).

The individuals accorded statutory immunity do not have to be formally designated as officers or employees in the corporate sense; the district court was correct to use a functional approach. That approach is properly derived from the statutory language, which refers to the functions of an officer or employee. See 22 U.S.C. 288d(b) (officers and employees “shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions”). Moreover, this Court has previously suggested that a “functional necessity” approach should govern an inquiry into the official-capacity aspect of the statutory standard. *Tuck v. Pan American Health Org.*, 668 F.2d 547, 550 n.7 (D.C. Cir. 1981) (quoting *United States v. Enger*, 472 F. Supp. 490, 502 n.4 (D.N.J. 1978)). The definition of an officer or employee should be similarly accommodating of practical realities. See *Zuza*, 107 F. Supp.3d at 98-99 (JA 14-16). And in any event, whatever the scope of the term “officer,” the term would certainly have to apply to the Office’s chief officer, namely the High Representative.

2. Furthermore, the process of notification and acceptance may occur at any time before or during the litigation; it does not need to be completed before a suit is brought. The statute itself imposes no requirement of advance notification and acceptance. Other types of foreign-official immunity are routinely determined while a suit is pending. See, *e.g.*, *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (per curiam) (determination of foreign head-of-state immunity based on suggestion of immunity filed by State Department after suit was brought). Advance notification and acceptance of all officers and employees of international organizations anywhere in the world would impose a significant burden on the United States government. There are numerous international organizations covered by the Immunities Act, with thousands of officers and employees located around the world, who, in most cases, will never be subject to suit in the United States. If advance notification and acceptance were required, the State Department would have to review notifications and issue acceptances, as appropriate, for all of these employees to confer immunity upon them in the unlikely event they might someday be sued in the United States. Nothing in the statute precludes the State Department from considering their eligibility for immunity only if and when they are actually named in a suit.

As the statement of interest filed in district court demonstrates, the two defendants here, Messrs. Ashdown and Inzko, have both been notified to and accepted by the Secretary of State. This brings them within the immunity provisions of the Immunities Act, absent a waiver of immunity by the Office of the High Representative. There has been no such waiver.

Mr. Zuza complains that the State Department letter is not authenticated ...and worries that private parties can “photoshop factitious contents onto White House letterhead” and fool the courts. ... But that unlikely scenario is not a basis for disturbing the decision here. In this case,

the United States, through counsel authorized to represent it in court, 28 U.S.C. 517, introduced the letter in response to a request from the district court. There can be no serious allegation that this letter is inauthentic.

3. Finally, an officer or employee does not lose statutory immunity after separating from the international organization. The text of the 2010 amendment confirms that the President may provide that statutory immunity of the Office of the High Representative continues even “after that Office has been dissolved.” 22 U.S.C. 288f-7; see also Exec. Order No. 13,568 . . . For similar reasons, it is even more obvious that immunity for official acts must continue when the organization still exists and the officer has merely left a position. . . . The notion that Mr. Ashdown’s immunity for official acts ended when he left office runs counter to three district-court decisions that have upheld the immunity of former officers or employees under the International Organizations Immunities Act. See *Zuza*, 107 F. Supp.3d at 99 (citing *Brzak v. United Nations*, 551 F. Supp.2d 313, 319-20 (S.D.N.Y. 2008); *D’Cruz v. Annan*, No. 05-cv-8918, 2005 WL 3527153, at \*1 (S.D.N.Y. Dec. 22, 2005); *De Luca v. United Nations Org.*, 841 F. Supp. 531, 534-35 (S.D.N.Y. 1994)). And Mr. Zuza’s reliance on the Supreme Court’s decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010) (Zuza Br. 59), is inapt, because that decision assumed for purposes of argument that the acts of the former official that were at issue were taken in an official capacity. *Id.* at 314 (“The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a ‘foreign state’ within the meaning of the [Foreign Sovereign Immunities Act].”). Thus, Mr. Ashdown’s status as the former High Representative does not alter the immunity conferred by statute.

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### 3. *Koumoin v. Ban Ki-Moon*

On November 29, 2016, the United States government filed a statement of interest in U.S. District Court for the Southern District of New York in *Koumoin v. Ban Ki-Moon*, No. 16-2111, asserting the immunity of the UN and Secretary-General Ban Ki Moon. Plaintiff Koumoin filed the suit alleging discrimination and retaliation in the non-renewal of his employment contract with the UN. Excerpts follow (with footnotes omitted) from the U.S. statement of interest. On December 14, 2016, the district court issued its opinion dismissing the case for lack of subject matter jurisdiction based on the immunity of UN Secretary-General Ban. The statement of interest and opinion are available at

<https://www.state.gov/s/l/c8183.htm>

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The UN Charter provides that “officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion [sic] with the Organization.” UN Charter art. 105, § 2. The UN Charter also provides that the UN General Assembly “may propose conventions to the Members of the United Nations” for the purpose of determining the “details” of the immunities enjoyed by the UN, representatives of

member states to the UN, and UN officials. *Id.* art. 105, § 3. The [Convention on the Privileges and Immunities of the United Nations, or] CPIUN, which the UN adopted shortly after the UN Charter, specifically provides that “the Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19. Because the CPIUN “is a self-executing treaty,” its provisions are “binding on American courts.” *Brzak*, 597 F.3d at 113.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States in 1972. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. 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 id.* art. 31, § 1. The purpose of diplomatic immunity under the Vienna Convention is “to protect the interests of comity and diplomacy among nations.” *Devi v. Silva*, 861 F. Supp. 2d 135, 143 (S.D.N.Y. 2012). Federal courts repeatedly have recognized the immunity of United Nations officials pursuant to the CPIUN and the Vienna Convention. *See, e.g., Brzak*, 597 F.3d at 113 (noting that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”); *Georges*, 84 F. Supp. 3d at 250 (dismissing suit against Secretary-General Ban because he “currently hold[s] [a] diplomatic position[.]” and is thus “immune from Plaintiffs’ suit”); *see also* 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, . . . or under any other laws extending diplomatic privileges and immunities, shall be dismissed.”).

Furthermore, Article V, Section 18(a) of the CPIUN provides that UN officials are “immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.” CPIUN art. V, § 18(a). Under this provision, both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacities. *See Van Aggelen v. United Nations*, 311 F. App’x 407, 409 (2d Cir. 2009) (summary order) (applying this “functional immunity” to a UN official who did not “enjoy full diplomatic immunity”); *McGehee v. Albright*, 210 F. Supp. 2d 210, 218 (S.D.N.Y. 1999) (applying this immunity to then-Secretary-General Kofi Annan), *aff’d*, 208 F.3d 203 (2d Cir. 2000) (summary order); *see also De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (recognizing that UN officials were entitled to immunity), *aff’d mem.*, 41 F.3d 1502 (2d Cir. 1994); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371-73 (S.D.N.Y. 1996) (dismissing complaint against UN official for lack of subject matter jurisdiction because he was immune from suit under Article V of the CPIUN).

Because none of the three exceptions outlined in the Vienna Convention is relevant in the instant case, and because the UN has not waived the immunity of Secretary-General Ban in this matter, as discussed below, but has expressly asserted it, Secretary-General Ban enjoys immunity from suit, and this action should be dismissed for lack of subject matter jurisdiction.

#### B. The UN Enjoys Absolute Immunity

Plaintiff’s suit is also barred by absolute immunity if it is construed to be brought against the UN itself. The UN Charter provides that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” UN Charter art. 105, § 1. The CPIUN defines the UN’s privileges and immunities, and specifically

provides that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, § 2.

As courts in this district have long recognized, the United States is a party to both the UN Charter and the CPIUN. *See, e.g., Brzak*, 597 F.3d at 111; *Sadikoğlu v. United Nations Dev. Programme*, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at \*3 (S.D.N.Y. Oct. 14, 2011) (“The scope of immunity for the UN and its subsidiary bodies derives primarily from two multilateral agreements to which the United States is a party: the Charter of the United Nations . . . and the Convention on Privileges and Immunities of the United Nations . . . .”); *Askir*, 933 F. Supp. at 371. The United States understands Article II of the CPIUN to mean what it unambiguously says: the UN enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity.

To the extent there could be any alternative reading of the CPIUN’s text, the Court should defer to the Executive Branch’s interpretation. *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.” (internal 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 v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the CPIUN and noting that, “in construing treaty language, ‘respect is ordinarily due the reasonable views of the Executive Branch’” (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)) (brackets omitted)).

Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, so its views are entitled to deference. Consistent with the applicable treaty language and the Executive Branch’s views, courts repeatedly have recognized that “the UN is immune from suit unless it expressly waives its immunity.” *Georges*, 84 F. Supp. 3d at 249; *see also, e.g., Boimah v. United Nations Gen. Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987) (“Under the [CPIUN] the United Nations’ immunity is absolute, subject only to the organization’s express waiver thereof in particular cases.”); *Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN’s absolute immunity. *See Brzak*, 597 F.3d at 112 (“[T]he United Nations enjoys absolute immunity from suit unless ‘it has expressly waived its immunity.’” (quoting CPIUN art. II, § 2)).

Therefore, because there was no waiver in this case (as discussed below), the UN enjoys absolute immunity from suit, and this action should be dismissed as against the UN for lack of subject matter jurisdiction. *See Brzak*, 551 F. Supp. 2d at 318 (“[W]here, as here, the United Nations has not waived its immunity, the [CPIUN] mandates dismissal of Plaintiffs’ claims against the United Nations for lack of subject matter jurisdiction.”).

### C. Neither Secretary-General Ban Nor the UN Has Waived Immunity

The CPIUN provides that the “Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the courts of justice and can be waived without prejudice to the interests of the United Nations.” CPIUN art. V, § 20. Far from waiving Secretary-General Ban’s immunity, the UN has expressly asserted that immunity this matter. Accordingly, Secretary-General Ban is entitled to immunity. *See, e.g., McGehee*, 210 F. Supp. 2d at 218 & n.7 (noting that the Under-Secretary-General for Legal Affairs for the UN “informed the Court that the United Nations is not waiving

its immunity in this action as to defendant [then-Secretary-General Kofi] Annan” and dismissing lawsuit against him on immunity grounds pursuant to the CPIUN and the IOIA).

Plaintiff argues that the UN, including Secretary-General Ban, has waived its immunity in this case because Plaintiff’s claims were allegedly accepted in a UN Dispute Tribunal and, allegedly, that final judgment is binding upon all parties. *See, e.g.*, Compl. ¶¶ 8-9 (asserting that, “in light of the binding character of the decisions rendered by the United Nations Dispute Tribunal . . . , the United Nations System can no longer claim immunity from service of process and from execution of UN-Tribunal final judgments”). This argument should be rejected.

There has been no express waiver of immunity in this matter. To the contrary, the UN has expressly asserted its absolute immunity and the immunity of Secretary-General Ban. In a letter dated June 20, 2016, Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, asserted with respect to this lawsuit: “Please be advised that the immunity of the Secretary-General has not been waived in respect of [this] case in the United States District Court for the Southern District of New York.” Exhibit A at 2; *see also id.* at 1 (requesting “the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials”).

Plaintiff fails to identify any applicable waiver of immunity. While Plaintiff contends that he participated in an internal UN dispute-resolution process that purportedly resolved in his favor, this allegation is irrelevant to the question of waiver. As established by the CPIUN, any waiver of the UN’s absolute immunity from suit or legal process must be “express[.]” CPIUN art. II, § 2. Even if Plaintiff’s allegation that the UN Dispute Tribunal entered a decision in his favor were accurate, . . . the UN has not expressly waived its immunity with respect to the enforcement of such decisions.

Thus, Plaintiff’s claim that the UN Dispute Tribunal’s judgment was not properly implemented, or that internal UN dispute resolution mechanisms failed to effectively address his grievances, has no bearing on the question of the immunity of the UN and Secretary-General Ban or a waiver of that immunity. *See Brzak*, 597 F.3d at 112 (“Although the plaintiffs argue that purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word ‘expressly’ out of the CPIUN.”); *see also Georges*, 84 F. Supp. 3d at 249 (holding that allegations of inadequacies with a UN dispute resolution program could not subject the UN to plaintiff’s suit, because doing so “would read the strict express waiver requirement out of the CPIUN”); *McGehee*, 210 F. Supp. 2d at 212 n.1, 218 (dismissing claim against immune then-Secretary-General Kofi Annan, notwithstanding the plaintiff’s allegations that the UN’s administrative tribunal “abused its discretion, violated its own rules, and denied her due process in rendering its decision” regarding her reinstatement).

The UN has not waived its immunity or that of Secretary-General Ban in this case. Thus, the UN and Secretary-General Ban enjoy immunity from suit, and this action should be dismissed for lack of subject matter jurisdiction.

#### **D. Because Secretary-General Ban and the UN Are Immune, Plaintiff’s Attempted Service Was Ineffective**

Consistent with its absolute immunity, the UN is also immune from service of legal process. *See* CPIUN art. II, § 2 (providing that the UN “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity”). In addition, the CPIUN specifically provides that the “premises of the United Nations shall be inviolable.” *Id.* art. II, § 3. Moreover, the Agreement Between the United Nations and the United

States Respecting the Headquarters of the United Nations (“Headquarters Agreement”), June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (entered into force Nov. 21, 1947), Article III, Section 9(a), provides that the “service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General.”

Secretary-General Ban has not consented to Plaintiff’s service of legal process within the headquarters district. Accordingly, Plaintiff’s attempts to serve the UN or Secretary-General Ban in New York, *see* Dkt. No. 10 ¶¶ 9-14, were ineffective, and any attempt to employ an alternative method of service would likewise be ineffectual. Plaintiff has thus failed to effect service on either the UN or Secretary-General Ban in light of their immunity, the inviolability of the premises of the UN, and the inviolability of the UN headquarters district.

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**Cross References**

*Meshal case regarding extraterritoriality*, **Chapter 5.A.1.**

*Alien Tort Claims Act and Torture Victim Protection Act*, **Chapter 5.B.**

*He Nam You v. Japan*, **Chapter 5.C.4.**

*ILC's work on immunity*, **Chapter 7.C.**

*IACHR case regarding domestic workers of diplomats*, **Chapter 7.D.1.b.**

*Holocaust claims litigation (Scalin v. SCNF)*, **Chapter 8.C.**

*Aviation v. United States*, **Chapter 8.F.2.a.**

*Alimanestianu v. United States*, **Chapter 8.F.2.b.**

*Diplomatic relations with Russia*, **Chapter 9.A.4.**

*Weinstein case regarding internet names as property under FSIA*, **Chapter 11.G.2.**

*Immunity of naval vessels*, **Chapter 12.A.3.b.**

*Sanctions in response to Russian interference in U.S. election*, **Chapter 16.A.11.**

## CHAPTER 11

### Trade, Commercial Relations, Investment, and Transportation

#### A. TRANSPORTATION BY AIR

##### 1. Air Transport Agreements

Information on recent U.S. air transport agreements, by country, is available at <https://www.state.gov/e/eb/rls/othr/ata/>. The United States signed new air transport agreements in 2016 with Azerbaijan, Côte D'Ivoire, and the Kingdom of the Netherlands, in respect of Curaçao. The United States and Japan amended their air transport agreement in 2016. And a new air transport agreement between the United States and Mexico entered into force in 2016, superseding the 1960 air transport agreement between the parties.

On June 14, the United States and Azerbaijan completed an exchange of diplomatic notes that brought into force the U.S.-Azerbaijan Open Skies Agreement, which was signed on April 6, 2016. See June 14, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258455.htm>.

On August 16, 2016, U.S. Ambassador to the Republic of Côte d'Ivoire Terence McCulley and Minister of Foreign Affairs for the Government of the Republic of Côte d'Ivoire Abdallah Albert Toikeusse Mabri signed an air transport agreement, available at <https://2009-2017.state.gov/e/eb/rls/othr/ata/c/cdi/261264.htm>.

On September 26, 2016, U.S. Consul General Margaret D. Hawthorne and the Curaçao Minister for Traffic, Transport and Urban Planning Suzanne Camelia-Römer signed an Open Skies Agreement between the United States and the Kingdom of the Netherlands, in respect of Curaçao. See State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262438.htm>.

On February 18, 2016, the United States and Japan concluded negotiations to amend their open skies agreement to allow daytime flights to and from the United States at Haneda airport in Tokyo. The amended agreement entered into force in 2016. The February 18, 2016 State Department media note containing the announcement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252608.htm)

[2017.state.gov/r/pa/prs/ps/2016/02/252608.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252608.htm).

Under the current agreement, U.S. airlines have a total of four slot pairs (four arrivals and four departures) for service to and from Haneda, which are now restricted to use during nighttime hours. Under the proposed amendment, these four slot pairs would be transferred to daytime hours. In addition, a fifth daytime slot pair for scheduled service to and from Haneda would be added and U.S. airlines would be able to continue operating one nighttime slot pair. Several U.S. carriers have expressed strong interest in offering daytime service to Haneda, and their passengers will benefit from convenient access to downtown Tokyo.

## 2. Aviation Arrangement with Cuba

As discussed in *Digest 2015* at 459, the United States and Cuba negotiated a bilateral arrangement to establish scheduled air services between the two countries. On February 16, 2016, Assistant U.S. Secretary of State Charles H. Rivkin and U.S. Transportation Secretary Anthony Foxx signed the arrangement on behalf of the United States at a ceremony in Havana. Assistant Secretary Rivkin's remarks at the ceremony are excerpted below and available at <http://2009-2017.state.gov/e/eb/rls/rm/2016/252528.htm>.

...By restoring scheduled air service between our two countries, our governments are creating more opportunities for Cubans and Americans to engage with one another in the years to come.

Around the world, we have seen that expanding air travel strengthens cultural and economic ties between countries. And that will certainly be true here, as well. Even as the two sides were negotiating this arrangement, we saw a significant increase in the number of authorized U.S. travelers to Cuba due to the policy changes of the past year.

For example, recent U.S. regulatory changes in January made it easier for airlines from both countries to enter into commercial arrangements, such as code-sharing and aircraft leasing. With our new arrangement, we expect the number of travelers between our countries to grow even faster. That will benefit the people of both Cuba and the United States.

I am also pleased to note, that with this arrangement, our two governments reaffirm our commitment to cooperation on aviation safety and aviation security matters.

## 3. Preclearance Agreement with Sweden

On November 4, 2016, the governments of the United States and Sweden signed an agreement on air transport preclearance. The agreement allows travelers on non-stop flights to the United States who are pre-cleared at Stockholm Arlanda Airport to be free from any further customs and immigration processing upon arrival in the United States. The text of the agreement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

#### 4. Foreign Air Carrier Permit for Norwegian Air International and Norwegian UK

On April 14, 2016, Brian Egan, Legal Adviser for the U.S. Department of State, and Karl R. Thompson, Principal Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) at the U.S. Department of Justice, provided opinions to the Department of Transportation (“DOT”), at DOT’s request, addressing the interpretation of Article 17 *bis* of the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and 30, 2007, as amended. This request arose in the context of two pending applications for foreign air carrier permits, submitted by Norwegian Air International (“NAI”) and Norwegian UK (“NUK”). Some parties to the regulatory proceedings before the DOT argued that the issuance of permits to these carriers would be inconsistent with Article 17 *bis*, which states:

- 1) The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.
- 2) The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

Mr. Egan conveyed the State Department’s views on the dispute to Principal Deputy Assistant Attorney General Thompson on April 13, 2016. Excerpts follow (with some footnotes omitted) from Mr. Egan’s April 13, 2016 letter to Mr. Thompson.

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This letter provides the State Department’s views on whether Article 17 *bis* of the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on April 25 and 30, 2007, as amended,<sup>1</sup> provides a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement when the carrier is otherwise qualified to receive such a permit. It is the Department’s view that this Article does not provide a basis to unilaterally deny another Party’s

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<sup>1</sup> The 2007 Agreement was amended by the Protocol to Amend the Air Transport Agreement between the United States of America and the European Community and its Member States, signed on June 24, 2010. For purposes of this analysis, the Department refers to these agreements collectively as the “Agreement.” Article 17 *bis* was added to the Agreement by the 2010 Protocol. In addition, the United States of America, the European Union and its Member States, Iceland and Norway signed the Air Transport Agreement of June 16 and 21, 2011, which incorporated the 2007 Agreement, as amended by the 2010 Protocol, to provide for its application to Norway and Iceland, as if they were European Union Member States. These agreements are not yet in force but are being provisionally applied consistent with their terms.

carrier a permit to provide services when the carrier is otherwise qualified to receive such a permit.

#### Background

We understand that, in connection with applications for foreign air carrier permits filed by Norwegian Air International (NAI), a carrier that is registered in Ireland and is therefore a carrier of the European Union (EU), and Norwegian UK (NUK), a carrier that is registered in the United Kingdom and is also a carrier of the EU, the Department of Transportation (DOT) has requested your office's views on whether Article 17 *bis* of the Agreement allows the United States to unilaterally deny an application for a permit assuming the air carrier is otherwise qualified to receive one. Certain parties to the regulatory proceedings before DOT that oppose NAI's application have argued that DOT should deny the permit on the basis of Article 17 *bis* of the Agreement, which refers to "the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards." These parties maintain that NAI was incorporated in Ireland as an affiliate of Norwegian carrier Norwegian Air Shuttle to avoid application of Norway's allegedly more stringent labor laws to NAI's crew. We understand that similar arguments are being made in opposition to NUK's application.

DOT is required by statute to "act consistently with obligations of the United States Government under an international agreement." 49 U.S.C. § 401 05(b)(A). In addition, the Secretary of Transportation must consult with the Secretary of State in carrying out DOT's authorities related to foreign air transportation. 49 U.S.C. § 40105(a). The Department has therefore also provided its analysis of Article 17 *bis* to DOT.

#### Applicable Legal Framework

As you know, the Department's interpretation of the Agreement is entitled to deference. As the agency "charged with supervision of our foreign relations," the Department's construction of treaties and other international agreements [is] afforded "much weight," both within the Executive Branch and by Federal Courts. 5 Op. Off. Legal Counsel 80. 82 (1981); *see also Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926 (1961); 14 Op. Atty. Gen. 302, 308 (1873). Deference is further supported where, as here, the Department led negotiations of the Agreement. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 183, 102 S. Ct. 2374, 2379 (1982) ("the meaning attributed to treaty provisions by Government agencies charged with their negotiation ... is entitled to great weight").

Article 31 of the Vienna Convention on the Law of Treaties, which provides the basic framework for analyzing the meaning of the Agreement, states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, 1155 U.N.T.S. 331. Based on the "ordinary meaning" of Article 17 *bis* and "in light of [the] object and purpose" of the Agreement, the Department has concluded that Article 17 *bis* does not provide a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement, when the carrier is otherwise qualified to receive such a permit. The considerations set forth in Article 17 *bis* are not factors that may be considered in determining whether to issue a permit under the Agreement.

### A. Ordinary Meaning

The factors that may be considered by a Party in determining whether to issue a permit under the Agreement are clearly and unambiguously defined in Article 4 of the Agreement. Article 4 states that “on receipt of applications from an airline or one Party” in the appropriate form and manner, the other Party “shall grant appropriate authorizations and permissions with minimum procedural delay” provided that the criteria identified in Article 4 are met. In other words, Article 4 imposes an obligation to issue a permit provided that the criteria in Article 4 are met. The criteria identified in Article 4 are (1) ownership and control requirements, (2) whether the airline seeking the permit is qualified to “meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application,” and (3) that the provisions set forth in Articles 8 (Safety) and 9 (Security) are being maintained and administered. Article 4 does not reference Article 17 *bis* or incorporate concepts of a “social dimension” as a factor in the authorization of a permit.

As noted above, Article 17 *bis* was added to the Agreement by the 2010 Protocol. The other amendments in the 2010 Protocol confirm that Article 4 provides the exclusive criteria for issuance or denial of permits. For example, Article 6 *bis*, which was also added by the 2010 Protocol, provides that in connection with applications by airlines submitted under Article 4, the Parties shall “recognize any fitness and/or citizenship determination made by the aeronautical authorities” of the other Parties “as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters,” unless the Party in receipt of the application has a specific reason for concern that the applicant does not meet “the conditions prescribed in Article 4.” The reference to Article 4 in Article 6 *bis* of the Agreement as the source for the conditions applicable to the authorization of permits further supports the conclusion that the only conditions that must be satisfied by NAI and NUK in order to receive a foreign air carrier permit are listed in Article 4.

The language of Article 17 *bis* does not support a contrary conclusion. Paragraph (1) of Article 17 *bis* does not impose a legal obligation for the Parties to take any particular action, reflecting instead a recognition of “the benefits that arise when open markets are accompanied by high labour standards” and a shared understanding that “[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.” Paragraph (2) provides that the Parties’ implementation of the Agreement is to be guided by the principles in Paragraph (1). Consistent with this Paragraph, if a Party has concerns about some aspect of labor rights regarding its own implementation or the implementation of the Agreement by another Party, that Party could consider on its own what, if any action is appropriate (and consistent with the Agreement) or could potentially raise the issue with some or all other Parties. However, Paragraph (2) does not authorize actions that would run counter to express legal obligations of the Parties under other provisions of the Agreement—such as the obligation at issue here, to grant a permit where Article 4’s requirements are satisfied. In that context, Paragraph (2) at most provides for the Joint Committee to consider labor-related concerns raised by the Parties and leaves to the discretion of the Joint Committee any further actions to be taken related to such concerns.”

### B. Object and Purpose

Article 17 *bis* must also be interpreted in light of the object and purpose of the Agreement. The central purpose of the Agreement was to increase opportunities to provide air services between the Parties. The preamble expresses the desire to “promote ... competition

among airlines in the marketplace with minimum government interference and regulation,” expand “international air transport opportunities,” and enable airlines “to offer ... competitive prices and services in open markets.” The preamble also reflects the Parties’ expectation that “all sectors of the air transport agreement, including airline workers” would benefit from “a liberalized agreement.” The way to accomplish these outcomes was to establish clear and unambiguous standards for each Party to apply in the authorization of a foreign carrier’s permit to provide services, an outcome that would be defeated by allowing a Party to deny permits based upon the incorporation in the Agreement of generally-worded language about how the opportunities of the Agreement are not intended to undermine labor standards or the labor-related rights and principles contained in the Parties’ respective laws.

#### C. Negotiating History

The Department is of the view that the terms of the Agreement are unambiguous and that recourse to supplementary means of interpretation is therefore unnecessary. Notwithstanding this conclusion, the Department, which led the U.S. delegation that negotiated the Agreement, believes that the negotiating history of the treaty confirms the conclusion that Article 17 *bis* does not constitute a basis for a Party to unilaterally deny a permit to an otherwise qualified carrier of another Party.

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For the foregoing reasons the Department has concluded that the considerations set forth in Article 17 *bis* are not factors to be considered in determining whether a permit may be issued, and Article 17 *bis* does not provide a basis upon which a Party to the Agreement may unilaterally deny an air carrier of another Party a permit to provide services under the Agreement when the carrier is otherwise qualified to receive such a permit.

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On December 2, 2016, the Department of Transportation issued its final order granting a foreign air carrier permit to NAI. The final order references the OLC and Legal Adviser’s opinions:

Therefore, we have decided to finalize our tentative decision to grant NAI’s request for a foreign air carrier permit under 49 U.S.C. §41301 to enable it to conduct foreign scheduled and charter air transportation of persons, property, and mail to the full extent permitted under the U.S.-EU Agreement, as specified in the foreign air carrier permit attached as the Appendix to this Order. Having carefully reviewed the submissions filed in response to Order 2016-4-12, we find that the clear weight of legal analysis in this case directs us to uphold the tentative findings and conclusions previously made.

The opponents’ position on what they view as the proper interpretation of Article 17 *bis* relies on arguments submitted to us before we reached our tentative decision, and we fully considered and rejected those arguments there. As stated above, our tentative decision reflected our own General Counsel’s analysis of Article 17 *bis*, and that interpretation was subsequently supported by the legal analyses of DOS and an authoritative legal opinion from OLC. In these

circumstances, we conclude that our tentative findings with regard to Article 17 *bis* should be finalized, and we do so here.

## 5. Investigation of the Downing of Malaysia Airlines Flight MH17 in Ukraine

Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, welcomed the interim findings of the Joint Investigation Team (“JIT”) regarding the shoot down of Malaysia Airlines Flight MH-17, which were released on September 28, 2016. See U.S. Mission to the UN press release, available at <http://2009-2017-usun.state.gov/remarks/7459>. Ambassador Power’s statement includes the following:

The thorough, impartial report—carried out by independent investigators from five nations—offers strong evidence that, the night before the attack, a Buk surface-to-air missile system was transported from Russia to separatist-controlled territory in eastern Ukraine; that MH-17 was shot down by a Buk missile system, which was fired from separatist-controlled territory; and a Buk missile system was returned shortly after the attack from separatist-occupied territory in eastern Ukraine to Russia. The report also contains extensive findings pointing to attempts to cover up the movement of this missile system into and out of separatist-held territory in eastern Ukraine after the attack, on the part of Russia and Russian-backed separatists.

...

Investigators have said their next step will be to identify suspects involved in this crime, in preparation for seeking criminal indictments. We fully support this step. Those responsible for carrying out and ordering this attack must be held accountable. The loved ones of the victims, the eleven nations from which they came, and the international community all demand it.

Four days after MH-17 was shot down, members of the Security Council, including Russia, unanimously adopted Resolution 2166, which expressed its support for efforts to establish an independent international investigation and demanded that all states cooperate fully with efforts to establish accountability. We continue to support the full implementation of Resolution 2166, and we call on the Russian Federation to do the same.

## 6. ICAO Settlement of Differences Proceedings: Brazil and the United States

On December 12, 2016, the Secretary General of the International Civil Aviation Organization (“ICAO”) provided notification to the ICAO Council that the Delegation of Brazil had submitted an application and memorial for the settlement of a disagreement naming the United States as the respondent. The application, submitted to ICAO on December 2, 2016, relates to “the interpretation and application of the Convention and its Annexes following the collision, on September 29th 2006, of the air carrier Boeing 737-8EH operating a regular flight GLO 1907, and air jet Legacy EMB-135BJ operating a

flight by ExcelAire Services Inc.” The Secretary General of ICAO found that the submission by Brazil complied with the requirements of the ICAO *Rules for the Settlement of Differences* (Doc 7782/2).

## B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

### 1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement

#### a. *Windstream v. Canada*

On January 12, 2016, the United States made a submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”) in the arbitration under Chapter 11 of the NAFTA between Windstream Energy, LLC, Inc. (“Windstream”) and the Government of Canada. Windstream’s claims relate to its efforts to build and operate an offshore electric wind generation facility in Lake Ontario. The submission offers interpretations of Article 1110 (Expropriation and Compensation); Article 1105(1) (Minimum Standard of Treatment); Article 1108(7) (Procurement Exception); and Articles 1102 (National Treatment) and 1103 (Most Favored Treatment). Excerpts follow (with footnotes omitted) from the section on the procurement exception in the U.S. Article 1128 submission, which is available in full at

<https://www.state.gov/documents/organization/252148.pdf>

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#### Article 1108(7) (Procurement Exception)

23. NAFTA Article 1108(7) exempts “procurement by a Party or state enterprise” from Chapter Eleven’s obligations with respect to national treatment and most-favored-nation treatment.” In interpreting the meaning of this and other NAFTA Chapter 11 articles, NAFTA Article 1131(1) requires that Chapter Eleven tribunals “decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” Article 102(2) requires the NAFTA to be interpreted “in accordance with applicable rules of international law.” Thus, the NAFTA requires Chapter Eleven tribunals to apply rules of customary international law both in interpreting the NAFTA’s provisions and as a rule of decision in the cases before them. There is no basis to apply this requirement differently to so-called “carve out” clauses such as Article 1108(7) than any other NAFTA Chapter 11 provision.

24. The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (“Vienna Convention”). Article 31(1) of the Vienna Convention sets forth the cardinal rule in construing international agreements such as the NAFTA: they must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The context includes the treaty’s text, its

preamble and annexes and any related agreements or instruments. Consistent with Article 31, treaties must be construed to avoid unreasonable results.

25. The term “procurement” is not defined in the NAFTA. The ordinary meaning of the term, however, encompasses any and all forms of procurement by a NAFTA Party. Consistent with the ordinary meaning of the term “procurement,” the exception under Article 1108(7) applies to treatment accorded at all stages of the procurement process.

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**b. Eli Lilly & Co. v. Canada**

On March 18, 2016, the United States filed an Article 1128 submission in the arbitration under NAFTA Chapter 11 between Eli Lilly and Company and the Government of Canada. The submission addresses: the three-year limitations period in Articles 1116 and 1117 for claims to brought; the meaning of the minimum standard in Article 1105 and its application to judicial measures; Article 1110 (Expropriation) and its application to patents; and Article 1709. Excerpts follow (with footnotes omitted) from the submission, which is available in full at

<https://www.state.gov/documents/organization/255090.pdf>

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Articles 1116(2) and 1117(2) (Limitations Period)

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3. Articles 1116 and 1117, as their titles indicate, concern claims by an “investor of a Party,” which is defined in Article 1139 as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” The time limitations period in Articles 1116(2) and 1117(2) must therefore relate to the particular investment for which the investor seeks a remedy for the breach and loss. The time limitations period thus runs from when the investor first acquires knowledge of the alleged breach and loss in connection with that particular investment.

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Article 1105 (Minimum Standard of Treatment)

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Claims for Judicial Measures

20. As noted above, the obligation to provide “fair and equitable treatment” under Article 1105(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[.]”

21. 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.

22. 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 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.

23. In this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court’s application of domestic law. Thus, an investor’s claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law. Moreover, an investor bringing an Article 1105(1) claim may not invoke an alleged host State violation of an international obligation owed to another State or its home State, for example an obligation contained in another treaty or another Chapter of NAFTA such as Chapter Seventeen. A violation of that Chapter, which is subject to the State-to-State dispute resolution provisions of NAFTA Chapter Twenty, may be the basis of a claim by one NAFTA Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Eleven, Section A. And, as stated previously, the FTC Interpretation provides that a “determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of” the minimum standard of treatment.

24. For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 1105(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 Eleven tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit. Nor may judicial measures be challenged under Article 1105(1) for violating another rule of international law. Such a result would extend the obligations of the NAFTA Parties well beyond the customary international law minimum standard of treatment and what they consented to under Article 1105(1), as reflected in the FTC Interpretation.

Article 1110 (Expropriation and Compensation)

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28. The obligation not to expropriate except as set forth in Article 1110(1) reflects customary international law and forms part of the customary international law minimum standard of treatment. A State is, of course, responsible under international law for acts committed by any of its organs. Judicial measures applying domestic law may give rise to a claim for denial of justice under the circumstances described above with respect to Article 1105(1). As previously explained, a denial of justice may exist where there is, for example, an obstruction of access to courts, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. Additional instances of denial of justice have included corruption in judicial proceedings and executive or legislative interference with the freedom of impartiality of the judicial process.

29. Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular “dearth” of international precedents on whether judicial acts may be expropriatory. Moreover, the United States has not recognized the concept of “judicial takings” as a matter of domestic law.

30. Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances. Were it otherwise, States might seek to evade international responsibility for wrongful acts by using the courts as the conduit of executive or legislative action.

Article 1110(7)

31. Article 1110(7) provides that: “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).” The question of Article 1110(7)’s scope is a matter of first impression for a Chapter Eleven tribunal. Article 1110(7) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty.

32. The ordinary meaning of Article 1110(7) is that it excludes the listed measures from the scope of Article 1110, establishing a “safe harbor,” to the extent those measures are consistent with Chapter Seventeen. Specifically, the provision preserves the ability of the NAFTA Parties to adopt or maintain intellectual property laws, consistent with Chapter

Seventeen, even where those measures might be claimed to contravene Article 1110. As some commentators have recognized, in the absence of such a provision, investors might allege that any revocation of a patent under domestic law constitutes an expropriation requiring compensation or restitution. “The mischief that such a claim would cause domestic intellectual property regimes is evident.”

33. Article 1110(7) therefore should not be read as an element of an investor’s claim under Article 1110(1) or as a jurisdictional hook that allows a Chapter Eleven tribunal to examine whether alleged breaches of Chapter Seventeen by a NAFTA Party constitute an expropriation of intellectual property rights. Nor should Article 1110(7) be read as an invitation to review a NAFTA Party’s measures, each time they arise, for consistency with Chapter Seventeen.

34. Instead, a tribunal must first analyze whether an expropriation in violation of international law has occurred with respect to the standard set out in Article 1110(1). In fact, a NAFTA Party’s conduct may be inconsistent with Chapter Seventeen, yet not be expropriatory. Thus, a claimant must first demonstrate an expropriation has otherwise occurred pursuant to Article 1110(1). If the claimant is successful in so demonstrating, the disputing NAFTA Party may invoke Article 1110(7) as a safe refuge, provided that the challenged measures were taken consistent with Chapter Seventeen. If the disputing NAFTA Party does so, a Chapter Eleven tribunal may then assess the consistency of the relevant measure with those provisions of Chapter Seventeen so placed in issue.

35. This interpretation is confirmed by the context and structure of Article 1110, which is entitled “Expropriation and Compensation.” The Article’s first paragraph outlines the nature and scope of the obligation on NAFTA Parties not to expropriate covered investments, except in accordance with the stated conditions. The Article’s second through sixth paragraphs outline the requirements for providing compensation in the event of an expropriation. Paragraph 7 of Article 1110 begins with the phrase “[t]his Article,” clearly referring back to the obligations contained in paragraphs 1-6. Thus, the structure is plain that if a NAFTA Party’s measures did not first implicate “[t]his Article” (*i.e.*, paragraphs 1-6), there would be no reason to examine whether the conduct is excluded from the scope of Article 1110(1) by virtue of Article 1110(7).

36. This interpretation is also consistent with the context and structure of NAFTA Chapters Eleven and Seventeen. Chapter Eleven tribunals are tribunals of limited jurisdiction, and investors may allege a breach of a NAFTA Party’s obligations under Chapter Eleven Section A. Chapter Seventeen obligations, by contrast, are subject to the State-State dispute settlement provisions of NAFTA Chapter Twenty. Thus, Article 1110(7) should not be read to provide a NAFTA Chapter Eleven tribunal with jurisdiction to review alleged inconsistencies or breaches of Chapter Seventeen absent a threshold determination by a tribunal that an expropriation has otherwise occurred pursuant to Article 1110(1).

37. Finally, this interpretation is consistent with the purpose of the provision as a “safe harbor.” To interpret Article 1110(7) as an element of an investor’s claim for expropriation or a jurisdictional hook to assess the consistency of a NAFTA Party’s measures with Chapter Seventeen, absent an *a priori* determination that an expropriation has occurred under Article 1110(1), would defeat the purpose of the provision by encouraging such claims. This outcome would subject the obligations set forth in Chapter Seventeen routinely to challenge by investors.

38. In view of the foregoing, the United States offers its views on the interpretation of some provisions of NAFTA Article 1709 (Patents).

Article 1709

39. Article 1709(1) provides that the NAFTA Parties “shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application.” The Article also clarifies that the term “capable of industrial application” may be deemed to be synonymous with the term “useful.”

40. Article 1709(1) thus establishes that, subject to certain permissible exclusions from patentability, each Party shall make available patents with respect to patent applications that disclose an invention that satisfy three requirements, one of which is commonly referred to as the “utility” requirement. To satisfy the utility requirement, such inventions must be “capable of industrial use” or “useful.” The NAFTA does not prescribe any particular definition of the terms, “capable of industrial application,” or “useful,” but the text notes that these two terms may be deemed to be synonymous. Article 1709(1) provides each NAFTA Party with the flexibility to determine the appropriate method of implementing the requirements of Chapter Seventeen, including the utility requirement in Article 1709(1), within its own legal system and practice.

41. Article 1709(1) must be interpreted in accordance with its ordinary meaning in its context and in light of the object and purpose of the treaty. Reference to the domestic laws and practice of the NAFTA Parties is not dispositive when ascertaining the ordinary meaning of the “utility” requirement under Article 1709(1). The Parties retain discretion to change or refine their domestic law, but that discretion is not without limits. Were it otherwise, the obligation stated in 1709(1) would be without meaning or effect. A NAFTA Party may not apply requirements or conditions that would vitiate the obligation to make patents available for inventions that meet the requirements, including the “utility” requirement, of Article 1709(1).

42. Article 1709(7) obligates the Parties, subject to certain other provisions of Article 1709, to make patents “available and patent rights enjoyable without discrimination as to the field of technology, the territory of the Party where the invention was made and whether the products are imported or locally produced.”

43. Differential effects of a measure on a particular sector, even if shown, do not necessarily prove discrimination as to the field of technology within the meaning of Article 1709(7). As a WTO Panel Report found with respect to the identically worded Article 27.1 of the TRIPS Agreement, *de facto* discrimination in most legal systems involves both the presence of differentially disadvantageous effects of a measure and the existence of discriminatory objectives. Without these “basic elements of a discrimination claim” the Panel did not find a breach under the TRIPS Agreement.

44. Article 1709(8) provides that a Party may revoke a patent only when, *inter alia*, “grounds exist that would have justified a refusal to grant the patent[.]” Thus, if a court, in determining whether to revoke a patent, finds that “grounds exist” that would have provided the Party’s patent examining authority to refuse to grant the patent, then revocation of that patent would not be inconsistent with Article 1709(8). Article 1709(8) does not mean that courts are limited to reviewing the specific grounds of refusal before the patent examiner; the use of the present tense “exist” in Article 1709(8) confirms this interpretation. Nor can it mean that NAFTA Parties are required to freeze their intellectual property laws indefinitely from the date of review of a given patent. Article 1709(8) allows for evolvement of patent law.

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The United States made a further Article 1128 submission in the Eli Lilly arbitration on June 8, 2016. The supplemental submission addresses: Article 1131(1); Article 1105(1); and the relationship between Chapter 11 and Chapter 17 of the NAFTA. The submission is available at <https://www.state.gov/s/l/c63964.htm>.\*

## 2. Non-Disputing Party Submissions under other Trade Agreements

### a. Aven v. Costa Rica

David Aven and other U.S. nationals filed a Chapter Ten claim against the Republic of Costa Rica alleging that Costa Rica’s enforcement of environmental laws prevented the claimants’ property development in violation of Articles 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of the Dominican Republic – Central America – United States Free Trade Agreement (the “CAFTA-DR”). On December 2, 2016, the United States filed an Article 10.20.2 submission on questions of interpretation of the CAFTA-DR in the case. That submission is excerpted below (with footnotes omitted). The submission in its entirety, and a link to further information about the arbitration, are available at <https://www.state.gov/s/l/c73942.htm>.

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#### Article 10.11 (Investment and Environment)

4. Article 10.11 provides that:

“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

5. Article 10.11 informs the interpretation of other provisions of CAFTA-DR Chapter Ten, including Articles 10.5 and 10.7, and shows that Chapter Ten was not intended to undermine the ability of governments to take measures otherwise consistent with the Chapter, including measures based upon environmental concerns, even when those measures may affect the value of an investment.

#### Relationship between Chapters Ten and Seventeen

6. Article 10.2 (“Relation to Other Chapters”), paragraph 1 provides that: “In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.” Article 10.2 subordinates the provisions of Chapter Ten to the provisions in all other Chapters of the CAFTA-DR, in cases where there is an inconsistency with another Chapter. 1 The mere coverage of a particular matter or issue by a Chapter other than

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\* Editor’s note: On March 16, 2017, the tribunal rendered its award, dismissing Eli Lilly’s claims under NAFTA Articles 1110 and 1105 primarily because the claimant failed to prove a fundamental or dramatic change in Canada’s patent law, as it acknowledged it must do to prevail on its claims. *Eli Lilly and Company v. Government of Canada* (NAFTA/UNCITRAL), Case No. UNCT/14/2 (Award of Mar. 16, 2017) ¶¶387-88, available at: [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf)

Chapter Ten does not necessarily remove the relevant matter or issue from the scope of Chapter Ten in the absence of an inconsistency.

7. A Chapter Ten tribunal does not have jurisdiction to address matters that arise under Chapter Seventeen. Rather, the jurisdiction of a Chapter Ten tribunal is limited, according to Article 10.16(1), to claims that a respondent Party breached an obligation of Chapter Ten (Section A), an investment authorization, or an investment agreement.

8. Nevertheless, Chapter Seventeen provides relevant context for purposes of interpretation of Chapter Ten, including Articles 10.5 and 10.7. As a recent tribunal observed, Chapter Seventeen highlights generally the critical importance the CAFTA-DR Parties placed on ensuring respect for domestic levels of environmental protection and enforcement. The provisions of Chapter Seventeen, together with the Preamble and Article 10.11, serve to inform the interpretation of other provisions of Chapter 10. Specifically, these provisions demonstrate the Parties' commitment to preserving policy discretion in the adoption, application and enforcement of domestic laws aimed at achieving a high level of environmental protection, provided that doing so is not otherwise inconsistent with the express provisions of Chapter 10.

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**b. Corona v. Dominican Republic**

Corona Materials, LLC ("Corona") filed a Chapter Ten claim against the Dominican Republic in connection with Corona's efforts to build and operate a construction aggregate mine in the Dominican Republic. Corona alleges CAFTA-DR violations of Article 10.3 (national treatment), Article 10.5 (minimum standard of treatment), and Article 10.7 (expropriation). On March 11, 2016, the United States made a submission pursuant to Article 10.20.2 on questions of interpretation of the CAFTA-DR. Excerpts follow from the submission (with footnotes omitted). The full text is available at <https://www.state.gov/documents/organization/254913.pdf>

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Article 10.18.1 (Limitations Period)

2. 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 or enterprise.

3. Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten.

4. A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly 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 breach and loss.

5. Where a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression in that series.” To allow an investor to do so would, as the tribunal in *Grand River* recognized, “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. Accordingly, once a claimant first acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1. In the case of a challenge to a measure adopted or maintained by a Party, the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard. Moreover, when a court decision is being challenged, the limitations period will not begin without a final decision of a State’s highest judicial authority.

6. The interpretation provided by the Tribunal in *UPS v. Canada* with respect to this point is misplaced. That tribunal found that “it was true generally in the law” that continuing courses of conduct constituting continuing breaches may renew claims limitation periods under international law. Irrespective of whether the tribunal in *UPS v. Canada* properly characterized the law, a general rule would not override the specific requirements of Article 10.20.1, which operates as a *lex specialis* and governs the operation of the limitations period for claims brought under CAFTA-DR Chapter Ten. Acquiring more detailed information about the breach or the loss does not reset the limitations period. As other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage.

7. Finally, because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,<sup>8</sup> the claimant must prove the necessary and relevant facts (*i.e.*, the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.

Article 10.18.2(b) (Waiver Requirement)

8. One of the preconditions to the Parties’ consent to arbitrate claims under Chapter Ten of the CAFTA-DR is the waiver required by Article 10.18.2. That provision states in relevant part that:

2. No claim may be submitted to arbitration under this Section unless: ...

(b) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

9. Under the ordinary meaning of this provision, a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Therefore, a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim that is capable of being submitted for purposes of any provision of Chapter Ten, including, and in particular, Articles 10.16.4 and 10.18.1. Where a valid waiver is filed subsequent to a Notice of Arbitration, the claim will be considered to have been submitted on the date on which the waiver, and not the Notice of Arbitration, was submitted.

### Article 10.5 (Minimum Standard of Treatment)

10. CAFTA-DR Article 10.5.1 requires that each Party “accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” CAFTA-DR Article 10.5.2 specifies that:

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.

11. These provisions demonstrate the States Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR 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. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide “fair and equitable treatment.” This includes, for example, the 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 with “a reasonable standard of civilized justice” and is fairly administered.

13. Instead, a denial of justice arises, for example, 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.” There can be no denial of justice without a final decision of a State’s highest judicial authority, unless seeking appeal would be obviously futile or manifestly ineffective. This rule applies to claims of denial of justice brought under treaties, such as the CAFTA-DR, that require claimants to waive their rights to pursue claims before other fora in order to submit a claim to arbitration.

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## C. WORLD TRADE ORGANIZATION

### 1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at

<https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/dispute-settlement>

The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2016 is drawn largely from Chapter II “The World Trade Organization” of the 2016 Annual Report of the President of the United States on the Trade Agreements Program (“2016 Annual Report”), available at

<https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>

WTO legal texts referred to below are available at

[https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm)

**a. Disputes brought by the United States**

(1) *China – Tax Measures Concerning Certain Domestically Produced Aircraft (DS501)*

As discussed in the 2016 Annual Report at 59, consultations held by the United States and China in January 2016 led to a resolution of an issue raised by the United States in 2015 concerning tax advantages accorded by China to the sale of certain domestically produced aircraft in China. China rescinded the discriminatory tax exemptions as a result of the consultations process.

(2) *China – Export Duties on Certain Raw Materials (DS508)*

Consultations with China in 2016 regarding China’s restraints on the exportation of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum, and tin did not lead to a resolution. See 2016 Annual Report at 59. The United States requested that the WTO Dispute Settlement Body (“DSB”) establish a panel to consider the dispute, which it did on November 8, 2016.

(3) *European Union and certain Member States – Measures affecting trade in large civil aircraft (DS316)*

As discussed in *Digest 2010* at 480-81, the Dispute Settlement Body panel established to consider U.S. challenges to subsidies that the European Union, France, Germany, Spain, and the United Kingdom provided to Airbus issued its report in 2010, agreeing with the United States that the EU measures were inconsistent with the Subsidies and Countervailing Measures (“SCM”) Agreement. As discussed in *Digest 2011* at 373-74, the Appellate Body affirmed the panel’s main findings and the EU purported to comply with the DSB rulings. As discussed in *Digest 2012* at 378, the parties disagreed on compliance and the United States requested the matter be referred to the original panel in accordance with Article 21.5.

The 2016 Annual Report at 63-64 summarizes the report of the Article 21.5 Panel that was issued on September 22, 2016:

The panel found that the EU breached Articles 5(c) and 6.3(a), (b), and (c) of the SCM agreement, and that the EU and certain Member States failed to comply with the DSB recommendations under Article 7.8 of the SCM Agreement to “take appropriate steps to remove the adverse effects or ... withdraw the subsidy.”

Significant findings by the compliance panel against the EU include:

- 34 out of 36 alleged compliance “steps” notified by the EU did not amount to “actions” with respect to the subsidies provided to the Airbus or the adverse effects that those subsidies were to have caused in the original proceeding.

- As a result, the EU failed to withdraw the subsidies, as recommended by the DSB.
- Those subsidies were a genuine and substantial cause of lost sales to U.S. aircraft, and displacement and impedance of exports of U.S. aircraft to Australia, China, India, Korea, Singapore, and the United Arab Emirates.

The EU has appealed aspects of the Article 21.5 Panel's report.

(4) *India – Solar Local Content I / II (DS456)*

The dispute settlement panel established to consider whether India's requirement of domestic content for its National Solar Mission program is inconsistent with its WTO obligations issued its final public report on February 24, 2016, finding in favor of the United States on all claims. As summarized in the 2016 Annual Report at 66-67:

The Panel found that India's domestic content requirements under its National Solar Mission are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994, and Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMS Agreement). Because an Indian solar power developer may bid for and maintain certain power generation contracts only by using domestically produced equipment, and not by using imported equipment, India's requirements accord "less favorable" treatment to imported solar cells and modules than that accorded to like products of Indian origin.

India appealed the panel decision to the WTO Appellate Body and the Appellate Body issued its report on September 16, 2016, affirming the panel's findings. On October 14, 2016, the DSB adopted the panel and Appellate Body reports. India has notified the DSB that it intends to comply with the DSB's rulings.

(5) *Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455, DS465, and DS478)*

On December 22, 2016, the panel established to consider Indonesian measures restricting imports of horticultural and animal products issued its report. The panel found that the measures are inconsistent with Article XI:1 of the GATT 1994 and are not justified under any general exception available under the GATT 1994. The United States and New Zealand requested the establishment of a panel in 2015 after consultations failed to resolve the dispute. See 2016 Annual Report at 67-68.

**b. Disputes brought against the United States****(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Mexico) (DS381)**

As discussed in *Digest 2011* at 375-76, *Digest 2012* at 378-79, *Digest 2013* at 320, and *Digest 2015* at 478-79, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The United States has sought to comply with rulings of the original DSB panel and subsequent compliance panel. In 2016, Mexico and the United States each requested further proceedings on compliance. The 2016 Annual Report summarizes developments in 2016 at page 78:

On March 10, 2016, Mexico sought authorization to suspend concessions or other obligations under the covered agreements. The United States objected to Mexico's proposed level of suspension of concessions or other obligations on March 22, 2016, which referred the matter to arbitration pursuant to Article 22.6 of the DSU. The arbitrator held a meeting with the parties on October 25-26, 2016. The proceeding is ongoing.

On March 22, 2016, the [National Oceanic and Atmospheric Administration or] NOAA promulgated an interim final rule amending the U.S. dolphin safe labeling measure, and, on April 11, 2016, the United States requested that the DSB establish a compliance panel to determine whether the U.S. dolphin-safe labeling provisions, as amended by the new final rule, are consistent with U.S. WTO obligations. The DSB referred the matter to the original panel at its meeting on May 9, 2016. On May 27, 2016, the compliance panel was composed, including a new chairperson, Mr. Stefan Johannesson, due to the unavailability of the original chairperson. On June 9, 2016, Mexico also requested the establishment of a compliance panel pursuant to Article 21.5 of the DSU. At its meeting on June 22, 2016, the DSB referred the matter to the same panel as the other compliance proceeding. The schedules of the two proceedings have been harmonized, and the United States and Mexico submitted written submissions in fall of 2016.

**(2) Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Vietnam (DS429)**

On July 18, 2016, the United States and Vietnam signed an agreement that resolved this matter and notified the DSB of their resolution to this dispute. See 2016 Annual Report at 85. See *Digest 2015* at 479-80 for background on the dispute.

**(3) United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)**

The panel established to consider antidumping and countervailing duty measures imposed by the United States regarding large residential washers from Korea circulated its report on March 11, 2016. The panel found in favor of Korea on its claim that aspects

of Commerce's antidumping determination were inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, but rejected other claims by Korea with respect to antidumping ("AD"). With respect to countervailing duty ("CVD") claims, the panel found that Commerce's "disproportionality analysis" was inconsistent with Article 2.1(c) of the SCM Agreement, but rejected Korea's other claims. See 2016 Annual Report at 89-90. The Annual Report summarizes actions taken by the parties after the panel issued its report:

On April 19, 2016, the United States appealed certain of the panel's findings. Korea filed another appeal on April 25, 2016. The oral hearing in the appeal was held on June 20-21, 2016, in Geneva.

On September 7, 2016, the Appellate Body circulated its report. The Appellate Body upheld several of the panel's findings under the AD Agreement, including the panel's finding that the average-to-transaction comparison methodology should be applied only to so-called pattern transactions, the panel's finding that the use of zeroing is inconsistent with the second sentence of Article 2.4.2 and Article 2.4, both "as such" and as applied, and the panel's finding that the differential pricing methodology is inconsistent "as such" with the second sentence of Article 2.4.2 of the AD Agreement. The Appellate Body reversed other findings made by the panel. For instance, the Appellate Body found that an investigating authority must assess the price differences at issue on both a quantitative and qualitative basis, and the Appellate Body mooted the panel's finding concerning systemic disregarding, finding instead that the combined application of comparison methodologies is impermissible. With respect to the CVD issues, the Appellate Body upheld the panel's rejection of Korea's regional specificity claim, but found that certain aspects of Commerce's calculation of subsidy rates were inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

On September 26, 2016, the DSB adopted the panel and Appellate Body reports. On October 26, 2016, the United States stated that it intends 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.

(4) *Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)*

The panel circulated its report on October 19, 2016 in a challenge brought by China to the U.S. Commerce Department's application in certain investigations and administrative reviews various methodologies, including: a "targeted dumping methodology," "zeroing," a "single rate presumption for non-market economies," a "NME-wide methodology" including certain "features," a "single rate presumption" and the use of "adverse facts available" "as such." As summarized in the 2016 Annual Report at 91, the panel sided with China only in part:

The panel found that a number of aspects of the “targeted dumping methodology” applied by Commerce in three challenged investigations were not inconsistent with the requirements of the AD Agreement, including certain quantitative aspects of Commerce’s methodology. However, the Panel found fault with other aspects of Commerce’s methodology and with Commerce’s explanation of why resort to the alternative methodology was necessary. The panel also found that Commerce’s application of the alternative methodology to all sales, rather than only to so-called pattern sales, and Commerce’s use of “zeroing” in connection with the alternative methodology, were inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. The panel found that Commerce’s use of a rebuttable presumption that all producers and exporters in China comprise a single entity under common government control – the China-government entity – to which a single antidumping margin is assigned, both as used in specific proceedings and generally, is inconsistent with certain obligations in the WTO Antidumping Agreement concerning when exporters and producers are entitled to a unique antidumping margin or rate. Finally, the Panel agreed with the United States that China had not established that Commerce has a general norm whereby it uses adverse inferences to pick information that is adverse to the interests of the China-government entity in calculating its antidumping margin or rate. The panel also decided to exercise judicial economy with respect to the information Commerce utilized in particular proceedings.

China has appealed the panel’s ruling.

(5) *Conditional Tax Incentives for Large Civil Aircraft (DS487)*

On November 28, 2016, the panel issued its report on the EU’s claim that tax incentives offered by the State of Washington to aircraft companies are illegal subsidies under the SCM Agreement. The panel found that one particular measure—the Washington State B&O tax incentive—was a prohibited subsidy. The other challenged tax incentives were deemed legal under WTO rules. See 2016 Annual Report at 91-92. The United States has appealed some of the panel’s findings.

**2. WTO Declaration on Expansion of Trade in IT Products**

On June 30, 2016, President Obama issued Proclamation 9466 “To Implement the World Trade Organization Declaration on the Expansion of Trade in Information Technology Products and for Other Purposes.” 81 Fed. Reg. 44,129 (July 6, 2016). Excerpts follow from the proclamation.

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1. On July 28, 2015, the United States and other Members of the World Trade Organization (WTO) issued a Declaration on the Expansion of Trade in Information Technology Products (Declaration), which established a framework for eliminating duties on certain information and communication technology products. These products include advanced semiconductors, medical equipment, and a range of audio and video equipment. The Declaration sets forth commitments for immediate or staged elimination of duties on the covered products, expanding on duty-elimination commitments set forth in the 1996 Declaration on Trade in Information Technology Products, which the United States implemented in Proclamation 7011 of June 30, 1997.

2. On December 16, 2015, the United States and other WTO Members issued a Ministerial Declaration in which ministers endorsed the Declaration of July 28, 2015, and acknowledged that the conditions for implementation had been met.

3. Section 111(b) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3521(b)) authorizes the President to proclaim the modification of any duty or staged rate reduction of any duty set forth in Schedule XX for products in tariff categories that were the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round, if the United States agrees to such action in a multilateral negotiation under the auspices of the WTO, and after compliance with the requirements of section 115 of the URAA (19 U.S.C. 3524). The products covered by the Declaration were the subject of reciprocal duty elimination negotiations during the Uruguay Round, and the requirements of section 115 of the URAA have been met.

4. Accordingly, pursuant to section 111(b) of the URAA, I have determined to proclaim modifications to the tariff categories and rates of duty set forth in the Harmonized Tariff Schedule (HTS), as set forth in Annexes I and II to this proclamation.

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### 3. WTO Accessions

Liberia joined the WTO on July 14, 2016, becoming the 163rd member. On July 29, 2016, Afghanistan joined, as the 164th Member. There were 21 applicants for WTO membership pending at the end of 2016. See 2016 Annual Report at 103.

## D. TRADE AGREEMENTS AND TRADE-RELATED ISSUES

### 1. Trade Agreements

#### a. *Trans-Pacific Partnership*

As discussed in *Digest 2015* at 481-83, negotiations of the Trans-Pacific Partnership (“TPP”) agreement concluded in 2015. The United States and the other 11 parties signed the TPP in New Zealand on February 4, 2016. The full text of the agreement is available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

\*\* On April 12, 2016, Secretary Kerry delivered remarks,

\*\* Editor’s note: On January 30, 2017, the U.S. Trade Representative notified New Zealand, the TPP depositary, and the other TPP countries that the United States does not intend to become a party to the TPP and accordingly has no legal obligations arising from its signature.

available at <http://2009-2017.state.gov/secretary/remarks/2016/04/255766.htm>, at the Pacific Council on International Policy, describing the high standards enshrined in the TPP.

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TPP is the highest-standard trade deal ever reached, period.

It improves governance by setting high standards on transparency, corruption, and government accountability. It defends the rights of men and women to collective bargaining. It requires every country to refrain from using underage workers and unsafe workplaces. It sets a high bar for environmental protection, for clean air, clean water, and wildlife preservation, putting it on a par with things that we always complained about because other countries didn't do them. Now they will.

It enhances fairness by compelling governments to ensure that state-owned enterprises compete on a level playing field with privately owned companies. Think of the consequences of that step. And it establishes strong, balanced rules to protect intellectual property and the 40 million Americans working in creative and digital industries, which I don't have to tell you is a huge issue for California film studios and for Silicon Valley.

The list goes on. But here's the most important thing: Unlike in most past trade agreements, these standards are not part of a trade side deal. They're not contained in a letter. They're not contained in a separate document. They are defined within the text of the agreement itself, and they are binding—fully enforceable—as a result. That means that each participant in TPP has to keep the promises that they make or face tough sanctions for every violation.

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**b. *Trans-Atlantic Trade and Investment Partnership***

Negotiations of the Trans-Atlantic Trade and Investment Partnership ("TTIP") agreement continued in 2016. Further information is available at the United States Trade Representative ("USTR") website at <https://ustr.gov/ttip>. On October 7, 2016, following the 15<sup>th</sup> round of TTIP negotiations, Chief Negotiator for the United States Dan Mullaney delivered the following remarks.

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The rationale for T-TIP remains strong. This agreement is vital to strengthening our transatlantic relationship in a time of significant geopolitical uncertainty and uneven economic growth internationally. It will also give the U.S. and the EU an opportunity to work together to raise global standards based on shared values.

The U.S. delegation came to this round prepared to push forward across the broad range of negotiating areas and, in fact, we have done that. We have made excellent progress over the past few days.

We tabled a number of new texts just before and during this round, including on rules of origin, autos, intellectual property, trade remedies and textiles. We had a good discussion of these proposals this week.

We also made good progress in resolving conceptual and language differences in several negotiating areas during this round, especially in customs and trade facilitation, good regulatory practices, regulatory cooperation, technical barriers to trade, and regulatory compatibility in key sectors, like autos, pharmaceuticals and medical devices.

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All total, more than 20 different negotiating groups met during this round. In addition to the negotiating areas already mentioned, we achieved forward movement in investment, state-to-state dispute settlement, cross-border services, financial services, government procurement, environment, labor, agriculture, including market access and sanitary and phytosanitary (SPS) measures, industrial tariffs, energy and raw materials, small- and medium-sized enterprises (SMEs), and legal and institutional issues.

Looking ahead, we plan to keep working to make progress in the coming months to deliver real, near-term benefits to our people. Our EU colleagues share that goal. In the remaining time of the current U.S. Administration, there is still much that we can accomplish together.

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## **2. Trade Legislation and Trade Preferences**

### **a. Generalized System of Preferences**

Pursuant to the GSP 2015/2016 Annual Review, on June 30, 2016, the President designated an array of travel goods (including luggage, backpacks, handbags, and wallets) as eligible for duty-free status when imported from least developed beneficiary developing countries and African Growth and Opportunity Act (“AGOA”) countries. Proclamation 9466.

On September 14, 2016, President Obama notified Congress of his intent to reinstate the GSP eligibility of Burma as a “least-developed beneficiary developing country”. Proclamation 9492. President Obama’s message to Congress explains that the reinstatement of Burma’s designation under the GSP program complies with Section 502 of the Trade Act of 1974, as amended (the “1974 Act”) (19 U.S.C. § 2462), which provides that the President may designate countries as least-developed beneficiary developing countries if conditions set forth in Section 502(b) are met, taking into account factors set forth in Section 502(c) and having due regard for the considerations set forth in Section 501 (19 U.S.C. § 2461). Burma’s eligibility for trade benefits became effective on November 13, 2016.

### **b. AGOA**

On December 15, 2016, President Obama designated the Central African Republic (“CAR”) as a beneficiary sub-Saharan African country under AGOA. Proclamation 9555.

The President determined that CAR met the eligibility requirements set forth in Section 104 of the AGOA (19 U.S.C. § 3703) and the eligibility criteria set forth in Section 502 of the Trade Act of 1974 (19 U.S.C. § 2462).

### 3. Trade-related Arbitration and Litigation

#### *Dominican Republic-Central America-United States Free Trade Agreement*

In 2015, an arbitral panel established pursuant to the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) undertook its review of claims by the United States that Guatemala was failing to adhere to its CAFTA-DR obligations regarding its labor laws. This is the first such matter under the CAFTA-DR to be brought before an arbitral panel. The United States originally requested the establishment of a panel in 2011. See *Digest 2011* at 384. In 2013, the panel suspended its work at the request of the Parties to allow them to negotiate and implement an Enforcement Plan. See *Digest 2013* at 329-31. However, the United States requested that the panel resume its work in 2014 after engagement through the Enforcement Plan failed to effectively address concerns. 80 Fed. Reg. 4027 (Jan. 26, 2015). The United States filed its opening submission on November 3, 2014. Guatemala filed its first submission on February 2, 2015. The United States submitted its rebuttal on March 16, 2015. Guatemala made its rebuttal submission on April 27, 2015. Eight non-governmental entities made written submissions on April 27, 2015. Guatemala and the United States submitted comments on the written submissions of the non-governmental entities on May 11, 2015. The arbitral panel held hearings on June 2, 2015 in Guatemala City. The proceedings were suspended on November 4, 2015, when one of the members of the panel resigned. Proceedings resumed on November 27, 2015, after the appointment of a replacement. The panel’s final report remains pending as of the end of 2016. Information about the dispute is available at

<https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr#>.

## E. TAXATION

### 1. Tax Treaties

On February 17, 2016, the U.S. Treasury Department issued a new U.S. Model Income Tax Convention (the “2016 Model”), to be used as a starting point in negotiating tax treaties. The previous model dates back to 2006. The text of the 2016 Model and its preamble are available at [https://www.treasury.gov/resource-center/tax-](https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx)

[policy/treaties/Pages/treaties.aspx](https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx). The Treasury Department issued a press release announcing the 2016 Model, available at [https://www.treasury.gov/press-center/press-](https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx)  
[releases/Pages/jl0356.aspx](https://www.treasury.gov/press-center/press-releases/Pages/jl0356.aspx), and excerpted below.

Many of the 2016 Model updates reflect technical improvements developed in the context of bilateral tax treaty negotiations and do not represent substantive changes to the prior model. The 2016 Model also includes a number of new provisions intended to more effectively implement the Treasury Department’s longstanding policy that tax treaties should eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. For example, the 2016 Model does not reduce withholding taxes on payments of highly mobile income—income that taxpayers can easily shift around the globe through deductible payments such as royalties and interest—that are made to related persons that enjoy low or no taxation with respect to that income under a preferential tax regime. In addition, a new article obligates the treaty partners to consult with a view to amending the treaty as necessary when changes in the domestic law of a treaty partner draw into question the treaty’s original balance of negotiated benefits and the need for the treaty to reduce double taxation. The 2016 Model also includes measures to reduce the tax benefits of corporate inversions. Specifically, it denies reduced withholding taxes on U.S. source payments made by companies that engage in inversions to related foreign persons.

The Treasury Department has been a strong proponent of facilitating the resolution of disputes between tax authorities regarding the application of tax treaties. Accordingly, the 2016 Model contains rules requiring that such disputes be resolved through mandatory binding arbitration. The “last best offer” approach to arbitration in the 2016 Model is substantively the same as the arbitration provision in four U.S. tax treaties in force and three U.S. tax treaties that are awaiting the advice and consent of the Senate.

## 2. FATCA

The United States continued in 2016 to engage with jurisdictions around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act (“FATCA”). For background on FATCA, see *Digest 2012* at 413, *Digest 2013* at 358, and *Digest 2014* at 489. In 2016, the United States concluded a new FATCA intergovernmental agreements (“IGAs”) with Vietnam, bringing the total number of concluded agreements to 113, of which 74 were in force by the end of 2016. A table listing the jurisdictions that are treated as if they have IGAs in effect, with links to the texts of the agreements, is available at <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

As discussed in *Digest 2015* at 487-88, the court in *Crawford et al. v. U.S. Dept. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio 2015), held that nearly all of the plaintiffs lacked standing to challenge the FATCA IGAs. On April 26, 2016, the court dismissed all claims, denied a request for further leave to amend the complaint, and terminated the case. The court summarized its reasoning as follows:

Here, analyzing each Plaintiff individually, the Court finds that none of the Plaintiffs has standing to sue Defendants. No individual Plaintiff has suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Moreover, no alleged injury is fairly traceable to the actions of the Defendants, but rather, the actions of an independent third party. Finally, there are no allegations that it is likely that the alleged injury will be redressed by a favorable decision. See *Lujan*, 504 U.S. at 560–61. In reaching these holdings, the Court analyzed the proposed Amended Verified Complaint, (doc. 32–1), which could not withstand Defendants' Motion to Dismiss, (doc. 26); therefore, the proposed amendments are futile.

## **F. LOAN GUARANTEES**

On June 3, 2016, Tunisia signed a \$500 million loan guarantee agreement with the United States. See June 3, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258033.htm>. Provisions in the agreement are aimed at encouraging Tunisia to make economic reforms in order to access the affordable financing from international capital markets. The United States provided earlier loan guarantees to Tunisia for \$485 million in 2012 and \$500 million in 2014.

Also on June 3, 2016, Ukraine signed an additional one billion dollar loan guarantee agreement with the United States. The purpose of the agreement is to reinforce Ukraine's economic reform program. Ukraine previously received loan guarantees from the United States in 2015 and 2014. See *Digest 2015* at 494.

## **G. TELECOMMUNICATIONS, DATA PRIVACY, and CYBER ISSUES**

### **1. Transatlantic Commercial Data Transfers**

The EU-U.S. and Swiss-U.S. Privacy Shield Frameworks were designed by the U.S. Department of Commerce, and the European Commission and Swiss Administration, respectively, to provide companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the European Union and Switzerland to the United States in support of transatlantic commerce. On July 12, 2016, the European Commission deemed the EU-U.S. Privacy Shield Framework adequate to enable data transfers under EU law. On January 12, 2017, the Swiss Government announced the approval of the Swiss-U.S. Privacy Shield Framework as a valid legal mechanism to comply with Swiss requirements when transferring personal data from Switzerland to the United States.

The Under Secretary of State for Economic Growth, Energy, and the Environment serves as the Privacy Shield Ombudsperson, a position dedicated to facilitating the processing of requests from EU and Swiss individuals relating to national security access to data transmitted from the European Union or Switzerland to the United States. Applicable data transfers include those conducted pursuant to the Privacy Shield

Frameworks, standard contractual clauses (“SCCs”), binding corporate rules (“BCRs”), and “Derogations” or “Possible Future Derogations.” This role builds on the Under Secretary’s position under Presidential Policy Directive 28 as the Senior Coordinator for International Information Technology Diplomacy, which includes serving as a point of contact for foreign governments to raise concerns regarding signals intelligence activities conducted by the United States.

The Under Secretary reports directly to the Secretary of State and is independent from the Intelligence Community. To carry out the Ombudsperson duties, the Under Secretary works closely with other United States government officials, including independent oversight bodies such as inspectors general and the Privacy and Civil Liberties Oversight Board, as appropriate, to ensure that completed requests are processed and resolved in accordance with applicable laws and policies.

## 2. **Weinstein v. Iran: Attempt to attach Internet names and addresses**

As explained in *Digest 2015* at 497-502, the United States filed an amicus brief in the D.C. Circuit in *Weinstein v. Iran*, No. 14-7193, opposing attachment under the Foreign Sovereign Immunities Act (“FSIA”) of property interests in the Internet’s global name and address system via the Internet Corporation for Assigned Names and Numbers (“ICANN”), asserting that the country-code top-level domains (known as “ccTLDs”) associated with geographic regions are not “property of” or “assets of” a foreign state within the meaning of those terms in the FSIA or the Terrorism Risk Insurance Act (“TRIA”). The D.C. Circuit issued its opinion on August 2, 2016, affirming the district court’s dismissal of the attachment claim. 831 F.3d 470 (D.C. Cir. 2016). Excerpts from the court’s opinion pertaining to the issue of whether country code top-level domains constitute property appear below (with footnotes omitted). Other excerpts from the court’s opinion appear in Chapter 10.

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\* \* \* \*

To this point we have assumed *arguendo* that D.C. law does not impede the plaintiffs’ pursuit of the defendant sovereigns’ ccTLDs. . . . Ordinarily, remand would be in order to allow the plaintiffs to continue discovery in an effort to establish whether the ccTLDs can properly be considered “property of” the defendants under the FSIA. *See* 28 U.S.C. § 1610(g)(1); *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). Many critical issues remain disputed.

We assume without deciding that the ccTLDs the plaintiffs seek constitute “property” under the FSIA and, further, that the defendant sovereigns have some attachable ownership interest in them. Nonetheless, pursuant to the terrorist activity exception, the court has the “authority” to “prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment”—*i.e.*, we are expressly authorized to protect the interests of ICANN and other entities. 28 U.S.C. § 1610(g)(3). Because of the enormous third-party interests at stake—and because there is *no* way to execute on the plaintiffs’ judgments without impairing those interests—we cannot permit attachment.

The plaintiffs demand, in effect, that ICANN delegate management of the “.ir” ccTLD so that they can “sell or license the operation of the ccTLD [ ] to a third party.” ...As explained, the power to operate a ccTLD includes the power to register (or remove) domain names from that registry. Thus, an entity seeking a “.ir” domain name will have to register through the plaintiffs or their designee—a process in which the ccTLD manager can extract a fee. The plaintiffs' plan plainly impairs the interests of “person[s] who [are] not liable in the action giving rise to [the] judgment” in myriad ways. 18 U.S.C. § 1610(g).

First, requiring ICANN to delegate “.ir” to the plaintiffs would bypass ICANN’s process for ccTLD delegation, which includes ensuring that the incoming manager has technical competence and a commitment to serving the Iranian Internet community’s interests. The plaintiffs and, more importantly, their prospective designee may not possess that technical competence or commitment. Granted, the plaintiffs are “aware that the ... court can—and should—protect the interests of third parties” and they “welcome the opportunity to work together with the district court and ICANN to ensure a smooth transition.” ... But even if the plaintiffs are able to show adequate competence and commitment, the act of forced delegation *itself* impairs ICANN’s interest in “protect[ing] the stability ... [and] interoperability ... of the DNS.” Decl. of John O. Jeffrey, App'x 24.2 ¶ 5.

Recall that a change in the root zone file will only affect the routing of a search for “.ir.” But a change in the root zone file does not also transfer the information stored on the ccTLD server. To ensure that any delegation occurs seamlessly, ICANN requires that the incoming manager provide a plan to preserve the stability of the ccTLD, which plan explains how existing registrants will be affected. According to ICANN, the current ccTLD managers in the defendant countries will not voluntarily transfer information regarding their registrants and, because the relevant servers are located abroad, we are powerless to so require them. If ICANN is required to direct an end-user looking for “.ir” web pages to the plaintiffs’ server but the plaintiffs are unable to direct them to the requested SLD, the Internet’s stability and interoperability are undermined.

The impairment does not end there. As the plaintiffs recognize, ICANN occupies its position only because “the global community *allows it* to play that role.” Appellants’ Br. at 34 (emphasis added). “[T]he operators of ... top level domains” can “form a competitor to ICANN and agree to refer all DNS traffic to a new root zone directory.” *Id.*; *see also* Br. for United States as *Amicus Curiae* at 13 (“As a technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet’s name servers to treat that version as authoritative instead.”). This result, known as “splitting the root,” is widely viewed as a potentially disastrous development; indeed, some regard it as the beginning of “ultimate collapse of Internet stability”—a “doomsday scenario for the globally accessible” network and, thus, for ICANN. Harold Feld, *Structured to Fail: ICANN and the ‘Privatization’ Experiment*, in WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION 351 (Cato Inst. 2003). Whether that description of a split root is accurate need not concern us; ICANN’s interests, as a third party “not liable in the action giving rise to [the] judgment,” 18 U.S.C. § 1610(g)(3), are sufficient for us to protect them pursuant to section 1610(g)(3) of the FSIA. *See* Appellee’s Br. at 34 (“[F]orced re-delegation of the Subject ccTLDs would ... wreak havoc on the domain name system.”); *see also* Br. for United States as *Amicus Curiae* at 13 (“[T]he result would be devastating for ICANN, for the [current] model of Internet governance, and for the freedom and stability of the Internet as a whole.”).

But given that the ICANN-administered DNS is the beneficiary of substantial network effects, how could such a doomsday scenario arise? And why would forced delegation hasten its arrival? In light of the plaintiffs' recognition that ICANN's control "stems only from the fact that the global community allows it to play that role," ... and considering that the delegation of the three defendant sovereigns' ccTLDs could likely antagonize the global community, *see* Br. for United States as *Amicus Curiae* at 13 ("It is not difficult to imagine that a court-ordered change to the authoritative root zone file at the behest of private plaintiffs would prompt members of the global Internet community to turn their backs on ICANN for good."), we believe the doomsday scenario is not beyond imagining.

For the foregoing reasons, the judgment of the district court is affirmed.

\* \* \* \*

## H. INTELLECTUAL PROPERTY

### 1. Transmittal of Treaties

The President transmitted two IP-related treaties to the Senate on February 10, 2016. The President's message conveying the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done at Marrakesh on June 27, 2013 ("Marrakesh Treaty") includes the following:

This copyright treaty, concluded under the auspices of the World Intellectual Property Organization (WIPO), advances the national interest of the United States in promoting the protection and enjoyment of creative works. The Marrakesh Treaty lays a foundation, in a manner consistent with existing international copyright standards, for further opening up a world of knowledge for persons with print disabilities by improving their access to published works.

The United States played a leadership role in the negotiation of the treaty, and its provisions are broadly consistent with the approach and structure of existing U.S. law. Narrow changes in U.S. law will be needed for the United States to implement certain provisions of the treaty. Proposed legislation is being submitted to both houses of the Congress in conjunction with this transmittal.

Information on the Marrakesh Treaty as received by the U.S. Senate is available at <https://www.congress.gov/treaty-document/114th-congress/6/document-text>.

The President's message conveying the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012 ("Beijing Treaty"), includes the following:

This copyright treaty, concluded under the auspices of the World Intellectual Property Organization (WIPO), advances the national interest of the United States in promoting the protection and enjoyment of creative works. The Beijing

Treaty provides a modern international framework for the rights of performers in motion pictures, television programs, and other audiovisual works, similar to that already in place for producers of such works, for authors, and for performers and producers of sound recordings, pursuant to other WIPO copyright treaties the United States has joined.

The United States played a leadership role in the negotiation of the treaty, and its provisions are broadly consistent with the approach and structure of existing U.S. law. Narrow changes in U.S. law will be needed for the United States to implement certain provisions of the treaty. Proposed legislation is being submitted to both houses of the Congress in conjunction with this transmittal.

The transmittal package for the Beijing Treaty is available at

<https://www.congress.gov/114/cdoc/tdoc8/CDOC-114tdoc8.pdf>

## 2. Intellectual Property: Special 301 Report

The "Special 301" Report is an annual review of 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-](https://ustr.gov/issue-areas/intellectual-property/Special-301)

[301](https://ustr.gov/issue-areas/intellectual-property/Special-301).

USTR issued the 2016 Special 301 Report in April 2016. The Report is available at <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>. The 2016 Report lists the following countries on the Priority Watch List: Algeria; Argentina; Chile; China; Ecuador; India; Indonesia; Kuwait; Pakistan; Russia; Thailand; Ukraine; and Venezuela. Ecuador, Kuwait, and Ukraine were added in 2015. It lists the following on the Watch List: Barbados; Belarus; Bolivia; Brazil; Bulgaria; Canada; Colombia; Costa Rica; Dominican Republic; Egypt; Greece; Guatemala; Jamaica; Lebanon; Mexico; Paraguay; Peru; Romania; Tajikistan; Trinidad and Tobago; Turkey; Turkmenistan; Uzbekistan; and Vietnam. See *Digest 2007* at 605–7 for additional background on the watch lists.

## 3. U.S. Joint Strategic Plan on IP Enforcement

On December 12, 2016, the State Department announced the release by the Office of the U.S. Intellectual Property Enforcement Coordinator ("IPEC") of the 2017-2019 U.S. Joint Strategic Plan on Intellectual Property Enforcement. The December 12, 2016 State Department media note on the subject is available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265173.htm)

[2017.state.gov/r/pa/prs/ps/2016/12/265173.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265173.htm). The media note describes the plan as providing opportunities for "state and local governments, foreign governments, and the private sector" to support the federal government's policy of IP enforcement. The State Department collaborated with the IPEC and other government departments in arriving at the plan, which is available at

<https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>. As explained in the media note:

The State Department’s Office of International Intellectual Property Enforcement promotes American and global innovation by advocating for the protection and enforcement of intellectual property rights (IPR) around the world. The office works with economic officers at the State Department’s embassies, consulates, and missions to ensure that the interests of U.S. rights holders are represented overseas, and to highlight the vital role of IPR protection in the global economy.

## I. OTHER ISSUES

### 1. Presidential Permits: Keystone XL Pipeline

As discussed in *Digest 2015* at 502, the Secretary of State denied the application for a permit for the proposed Keystone XL pipeline in November 2015. In 2016, that denial was the subject of litigation in federal court and an arbitration claim under the NAFTA.

On April 1, 2016, the United States filed a motion to dismiss or for summary judgment in *TransCanada Keystone XL Pipeline LP, et al. v. Kerry, et al.*, No. 16-0036 (S.D. Tex.). The introduction and summary from the U.S. brief appear below. The United States filed a further reply brief in support of its motion on June 2, 2016. Both U.S. briefs are available at <https://www.state.gov/s/l/c8183.htm>\*\*\*

\* \* \* \*

TransCanada brings this suit to challenge the decision of the Secretary of State, with the concurrence of the President of the United States, to deny TransCanada’s application to construct and operate oil pipeline facilities to cross the border from Canada into the United States for the transport of up to 830,000 barrels per day of crude oil through the proposed Keystone XL pipeline. Despite having vigorously defended the President’s constitutional authority over cross-border oil pipeline facilities in previous litigation, TransCanada now remarkably asserts that the President has no authority to deny the permit. According to TransCanada, this Court should invalidate the Executive’s decision because it differs from prior decisions and because it conflicts with congressional bills that never became law. TransCanada essentially seeks to construct and operate a facility that will pump millions of gallons of oil across the United States’ international border with no Government authorization—*i.e.*, without Executive approval and under no statutory authority otherwise governing cross-border oil pipelines.

TransCanada’s extraordinary request has no basis in law, is inconsistent with historical practice, and is contrary to the allocation of authority in this area between the two political branches. The Supreme Court has recognized that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President” by Article II, Section 1 of the

\*\*\* Editor’s note: On March 31, 2017, TransCanada filed a notice of voluntary dismissal of the federal action.

Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see also Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). It is well established that the President's Article II power encompasses the authority to control border crossings into the United States. For close to 150 years, Presidents have exercised authority over a wide range of physical connections between the United States and foreign countries pursuant to the President's powers over foreign affairs and as Commander in Chief. Congress has affirmed or accepted this authority by legislating to require Presidential approval for certain types of border crossings and by leaving undisturbed the Presidential permitting requirement for others. Indeed, Congress has enacted no law to question the President's permitting authority in the close to one and a half centuries of the Executive's exercise of such authority. As the Supreme Court has said, "[g]iven the President's independent authority 'in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval.'" *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003) (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

In 1968, after nearly 100 years of Executive exercise of authority over border-crossing facilities, President Lyndon Johnson reaffirmed this authority over oil pipeline border crossings in an Executive Order, and President George W. Bush did so again in 2004, *see* Executive Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) (Ex. 1). Those Executive Orders govern a complex policy inquiry to determine whether, in the judgment of the Secretary of State, issuance of any particular permit would "serve the national interest." In the decades that followed President Johnson's order, Congress has enacted no law to displace the President's authority or alter the applicable standard that governs the Executive's decision. On the contrary, the only law that Congress enacted regarding any oil pipeline border crossing—section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1280 (2011)—expressly affirmed the President's constitutional authority to grant the Keystone XL permit "under Executive Order No. 13337" unless the "President determine[d] that the Keystone XL pipeline would not serve the national interest," which the President did both at that time and upon TransCanada's reapplication. Even the bill vetoed by the President that sought to approve the application, the Keystone XL Pipeline Approval Act, S.1, 114th Cong. (2015), did not question the President's constitutional authority in the absence of contrary law; indeed, it was premised on the existence of that authority. The President's authority to deny the permit is indisputable, therefore, both as a matter of law and as a matter of practice.

Specifically, the Executive appropriately exercised its Article II authority in determining that denying the Keystone XL permit was, among other concerns, important to avoid adversely impacting our ability to encourage other countries to take ambitious action to combat an urgent global environmental threat—climate change—that has serious implications for national and international security, in light of the impending December 2015 climate change negotiations among more than 190 nations. Despite TransCanada's attempt to question the Executive's reasons for the decision, this type of foreign policy and national security assessment belongs to the Executive and is beyond the purview of this Court.

TransCanada invokes the tripartite framework first articulated by Justice Robert Jackson in *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring), for evaluating the scope of Executive authority. But unlike the circumstances that led to the outcome in *Youngstown*, this case does not present a conflict between the political branches of the type calling for the Court to determine whether the President's power is "so conclusive and preclusive" as to "disabl[e] Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). President Harry

Truman's power to seize the nation's steel mills in order to avert a strike was at its lowest ebb in *Youngstown* because it conflicted with statutes governing precisely when seizure could be used to remedy labor disputes. Here, in contrast, the President's action is not in conflict with any enacted statute. TransCanada tries to manufacture a conflict by pointing to unenacted bills that sought to approve the Keystone XL project or otherwise restrict Presidential authority in this area. But bills that did not become law cannot restrict the President's exercise of long-standing Article II authority without violating the constitutional structure of checks and balances. This Court accordingly cannot invalidate the denial of a Presidential permit to TransCanada on the basis of action that Congress did not take.

\* \* \* \*

On June 24, 2016, TransCanada Corporation and TransCanada Pipelines Limited filed claims under the NAFTA for alleged injuries arising out of the denial of the permit. TransCanada sought more than \$15 billion in damages for alleged violations of NAFTA Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation). The notice of arbitration is available at <https://www.state.gov/s/l/c71937.htm>.\*\*\*\*

## 2. Corporate Responsibility Regimes

### a. Voluntary Principles on Security and Human Rights

See Chapter 6 for discussion of U.S. actions on the VPs Initiative in 2016.

### b. 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, or rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. See State Department Conflict Diamonds webpage, <https://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm>. For background on U.S. participation in the KP, see *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

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\*\*\*\* Editor's note: On January 24, 2017, the President issued a Memorandum inviting TransCanada to resubmit its application to the State Department for a permit for the construction of the Keystone XL Pipeline and directing the Secretary of State to make a national interest determination and reach a final permitting decision with respect to the application within 60 days of its submission. On January 26, 2017, TransCanada resubmitted its permit application. On February 27, 2017, the ICSID Secretary-General suspended the arbitration proceeding for one month upon the request of the parties. Acting on behalf of the President under delegated authorities in accordance with Executive Order 13337 and the January 24 Presidential Memorandum, the Under Secretary of State for Political Affairs issued TransCanada a permit for the construction and operation of the Keystone XL pipeline on March 23, 2017. The next day, at the request of the parties, the ICSID Secretary-General issued a procedural order, taking note of the discontinuance of the proceeding.

In 2016, the United States government formalized as a public-private partnership its relationship with the U.S. Kimberley Process Authority (“USKPA”), a not-for-profit organization that supports U.S. implementation of the responsibility to issue certificates accompanying shipments of diamonds to indicate compliance with the Kimberley Process Certification Scheme. The memorandum of understanding, formalizing the public-private partnership, was signed by: U.S. Assistant Secretary of State Charles H. Rivkin on May 5, 2016; USKPA Director Cecilia L. Gardner on April 14, 2016, and U.S. Census Bureau Associate Director for Economic Programs William G. Bostic, Jr. on May 26, 2016.

### **3. Fiscal Transparency Report**

The Department of State issued its 2016 Fiscal Transparency Report pursuant to section 7031(b)(3) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, P.L.114-113) (“the Act”). The report, available at <https://www.state.gov/e/eb/ifa/oma/fiscaltransparency/260301.htm>, reviews governments that receive U.S. government assistance for their compliance with defined minimum requirements of fiscal transparency and their progress toward meeting the requirements during the period of January 1 – December 31, 2015. Of the 64 governments identified as not meeting the minimum requirements of fiscal transparency, Azerbaijan, Central African Republic, Iraq, Mali, Nigeria, Somalia, Tanzania, and Ukraine were found to have made significant progress in 2015 toward meeting those requirements. The report provides government-by-government assessments of all 64 governments that were reviewed.

### **4. International Financial Institutions**

#### **a. Global Concessional Financing Facility**

In 2016, the United States welcomed the launch by the World Bank of a Global Crisis Response Platform (“GCRP”), intended to assist low and middle-income countries in coping with the refugee crisis. For middle-income countries, the World Bank established the Global Concessional Financing Facility (“GCFF”) to provide concessional financing for projects to benefit refugees and host communities. The GCFF seeks to incentivize countries to align refugee policies with international law and best practices and facilitate access to employment, education, and health services. The United States pledged to contribute at least \$50 million over five years to the GCFF in addition to \$25 million that the United States had pledged previously for programs in Jordan. A July 28, 2016 World Bank press release, available at <http://www.worldbank.org/en/news/press-release/2016/07/28/concessional-financing-facility-funds-projects-to-support-refugees>, announced that the first financing in support of refugees and host communities pursuant to the GCFF had been provided in Jordan and Lebanon. In April, the World Bank convened a pledging session in Washington, DC where eight nations and the European Commission pledged a package of more than US\$1 billion, comprising US\$141

million in grants, US\$1 billion in soft loans, and US\$500 million in guarantees. See April 15, 2016 World Bank press release, available at

<http://www.worldbank.org/en/news/press-release/2016/04/15/international-community-endorses-new-initiative-to-support-refugees-host-communities-and-recovery-in-mena>

**b. IMF Reform**

In 2016, the United States government accepted an amendment of the International Monetary Fund (“IMF”) Articles of Agreement to reform its Executive Board and changes to the New Arrangements to Borrow (“NAB”), and also provided U.S. consent to the increase in the U.S. quota at the IMF. The measures were part of a package of IMF reforms recommended by the Obama Administration and the G20 in 2010 in order to modernize IMF governance to better reflect countries’ economic weight in the global economy. Excerpts follow (with footnotes omitted) from the memorandum of law prepared by the Office of the Legal Adviser regarding the proposed reform package.

\* \* \* \*

The Proposed Amendment ... and the increase in quota reform are both set forth in IMF Resolution No. 66-2... which was submitted to the IMF Governors on November 10, 2010, for a vote without a meeting. The time period by which a member can consent to the increase in the member’s quota has been extended multiple times, most recently to June 30, 2016. The increase in quota for all members does not become effective until certain conditions are met, including that the Proposed Amendment has entered into force, which (given the United States’ significant voting share) cannot occur without United States’ acceptance.

The Proposed Amendment reforms the IMF Executive Board as follows: instead of a Board consisting of five appointed and nineteen elected Executive Directors, it provides for a Board consisting of twenty elected Executive Directors. It also makes fourteen related changes to the IMF Articles of Agreement to update relevant provisions to reflect the all-elected Board, including with regard to election regulations, vacancies, voting, and representation. As described by Treasury, the quota reforms double the IMF’s quotas, which are its core resources, thereby putting the IMF’s finances on more stable footing, while at the same time reducing U.S. participation in the NAB by a corresponding amount so that the United States’ overall financial commitment to the IMF quota and NAB will remain the same. The quota reform package entails changes to the New Arrangements to Borrow ... that are discussed below.

As a general matter, the United States participates in the IMF pursuant to the Bretton Woods Agreements Act (BWAA). 22 U.S.C. § 296 et seq. The President has appointed the Secretary of the Treasury as United States Governor to the IMF under the BWAA. See 22 U.S.C. § 286a(a).

Authorities Concerning the Amendment to the Articles of Agreement and Consent to Quota Increase

Acceptance of the Proposed Amendment and consent to the quota increase is authorized under section 9002 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Division K, P.L. 114-113) (SFOAA) which provides:

“The Bretton Woods Agreements Act (22 U.S.C. 286 et seq.) is amended by adding at the end of the following:

‘SEC. 71. ACCEPTANCE OF AMENDMENTS TO THE ARTICLES OF AGREEMENT OF THE FUND.

The United States Governor of the Fund may accept the amendments to the Articles of Agreement of the Fund as proposed in resolution 66-2 of the Board of Governors of the Fund.

SEC. 72. QUOTA INCREASE.

(a) IN GENERAL. - The United States Governor of the Fund may consent to an increase in the quota of the United States in the Fund equivalent to 40,871,800,000 Special Drawing Rights.

(b) SUBJECT TO APPROPRIATIONS. - The authority provided by subsection (a) shall be effective only to such extent or in such amounts as are provided in advance in appropriations Acts.”

The first paragraph under the Direct Loan Program Account subheading in title IX of the SFOAA also appropriates the dollar equivalent of the U.S. quota increase, to remain available until expended, provided that the President designates such amount, and an equivalent amount to be rescinded per the next paragraph of title IX, as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. The President made this designation on December 18, 2015. ...

Authorities Concerning the Changes to the New Arrangements to Borrow

Executive Board Decision No. 15073-(12/1), adopted December 21, 2011 (Decision), changes the amounts of the credit arrangement of participants set forth in Annex I of the NAB decision, effective when certain conditions are met. With regard to the United States, the Decision decreases the U.S. amount by 40,871.8 million Special Drawing Rights. The Decision also amends the NAB decision to require the Fund, at the request of a NAB participant, to effect an early repayment for any outstanding NAB claims that would exceed its new (reduced) credit arrangement.

... Two provisions of the SFOAA are particularly relevant. First, the second paragraph under the Loans to the International Monetary Fund, Direct Loan Program Account (Including Rescission of Funds) subheading in title IX of the SFOAA provides that the dollar equivalent to 40,871.8 Million Special Drawing Rights is permanently rescinded as of the date when the United States rollback of the U.S. credit arrangement in the NAB is effective. Second, section 9001 of the SFOAA amends the provision of the Bretton Woods Agreement Act that authorized the appropriations of the amounts for U.S. participation in the NAB by adding “, only to the extent that amounts available for such loans are not rescinded by an Act of Congress.”

Additionally, Section 17(d) of the Bretton Woods Act, codified at 22 U.S.C. 286e-2(d), provides that absent Congressional authorization no person acting on behalf of the United States may instruct the United States Executive Director of the IMF to consent to amendments to the NAB decision that would “significantly alter the amount, terms, or conditions of participation by the United States” in the NAB. ... Congressional authorization for IMF quota reform contained in the SFOAA should constitute sufficient authorization to accept the changes to NAB credit arrangements and amendments to the NAB decision.

\* \* \* \*

## 5. Committee on Foreign Investments in the United States

On December 2, 2016, the President issued an order regarding the proposed acquisition of a controlling interest in Aixtron SE by Grand Chip Investment GmbH. The President's determination that the acquisition would not be in the U.S national interest was based on section 721 of the Defense Production Act of 1950, as amended ("section 721"), 50 U.S.C. § 4565. 81 Fed. Reg. 88,607 (Dec. 7, 2016). The order includes the following findings and actions:

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\* \* \* \*

**Section 1. Findings.** I hereby make the following findings:

(a) There is credible evidence that leads me to believe that: (1) Grand Chip Investment GmbH, a limited liability company organized under the laws of the Federal Republic of Germany (Grand Chip); (2) Grand Chip's parent companies Grand Chip Investment S.a.r.l., a company organized under the laws of the Grand Duchy of Luxembourg (GC Investment), and Fujian Grand Chip Investment Fund LP, a limited partnership organized under the laws of the People's Republic of China (Fujian Grand); and (3) Fujian Grand's partners, Mr. Zhendong Liu, a citizen of the People's Republic of China (Mr. Liu), and Xiamen Bohao Investment Co. Ltd., a company organized under the laws of the People's Republic of China (Xiamen Bohao and, together with Grand Chip, GC Investment, Fujian Grand, and Mr. Liu, the Purchasers), through exercising control of the U.S. business of AIXTRON SE., a company organized under the laws of the Federal Republic of Germany (Aixtron), might take action that threatens to impair the national security of the United States. The U.S. business of Aixtron consists of AIXTRON, Inc., a California corporation, the equity interests of AIXTRON, Inc., and any asset of Aixtron or AIXTRON, Inc. used in, or owned for the use in or benefit of, the activities in interstate commerce in the United States of AIXTRON, Inc., including without limitation any interest in any patents issued by, and any interest in any patent applications pending with, the United States Patent and Trademark Office (collectively, Aixtron US); and

(b) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter.

**Sec. 2. Actions Ordered and Authorized.** On the basis of the findings set forth in section 1 of this order, considering the factors described in subsection 721(f), as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The proposed acquisition of Aixtron US by the Purchasers is hereby prohibited, and any substantially equivalent transaction, whether effected directly or indirectly through the Purchasers' shareholders, partners, subsidiaries, or affiliates is prohibited.

(b) In order to effectuate this order, the Purchasers and Aixtron shall take all steps necessary to fully and permanently abandon the proposed acquisition of Aixtron US not later than 30 days after the date of this order, unless such date is extended by the Committee on Foreign Investment in the United States (CFIUS) for a period not to exceed 90 days, on such

written conditions as CFIUS may require. Immediately upon completion of all steps necessary to terminate the proposed acquisition of Aixtron US, the Purchasers and Aixtron shall certify in writing to CFIUS that such termination has been effected in accordance with this order and that all steps necessary to fully and permanently abandon the proposed acquisition of Aixtron US have been completed.

(c) From the date of this order until the Purchasers and Aixtron provide a certification of termination of the proposed acquisition to CFIUS pursuant to subsection (b) of this section, the Purchasers and Aixtron shall certify to CFIUS on a weekly basis that they are in compliance with this order and include a description of efforts to permanently abandon the proposed acquisition of Aixtron US and a timeline for projected completion of remaining actions.

(d) Any transaction or other device entered into or employed for the purpose of, or with the effect of, avoiding or circumventing this order is prohibited.

(e) The Attorney General is authorized to take any steps necessary to enforce this order.

\* \* \* \*

**Cross References**

*Treaties generally*, **Chapter 4.A.1.**

*Marrakesh and Beijing treaties transmitted to Senate*, **Chapter 4.A.2.**

*Right to food (WTO ministerial in Nairobi)*, **Chapter 6.E.1.**

*Responsible business conduct*, **Chapter 6.F.**

*Relations with Cuba*, **Chapter 9.A.3.**

*Application of FSIA in enforcement of arbitral award*, **Chapter 10.B.1.**

*Weinstein v. Iran*, **Chapter 10.B.6.a.(5)**

*Private international law*, **Chapter 15**

*Transmittal of treaties on arbitration and international trade*, **Chapter 15.A.3.**

*Applicability of international law in cyberspace*, **Chapter 18.A.3.d.**

## 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

###### *Meeting of States Parties to the Law of the Sea Convention*

The United States participated as an observer to the 26th meeting of States Parties to the Law of the Sea Convention (“SPLOS”) at the United Nations. Dr. Elizabeth Kim of the Department of State, Office of Ocean and Polar Affairs, delivered the U.S. statement at the 26<sup>th</sup> meeting of SPLOS on June 23, 2016. Her statement follows.

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\* \* \* \*

Thank you, Madam President. At the outset, my delegation would like to congratulate you and the bureau on your elections and on your conduct of this meeting, and to thank the Secretariat for their outstanding service, as always.

The delegation of the United States would like to thank the Secretary-General for his report on oceans and the law of the sea. We would also like to take this opportunity to thank the Secretary-General of the International Seabed Authority, the President of the International Tribunal for the Law of the Sea, and the Chair of the Commission on the Limits of the Continental Shelf for the reports and information provided by them to this meeting. And we would like to express our appreciation to DOALOS for supporting the important work of the Commission on the Limits of the Continental Shelf, including its consistent efforts to help address the challenges facing the Commission and to assist coastal States in making their submissions to the Commission.

As we and others have stated in this and previous Meetings of States Parties, the role of the Meeting is not as if it were a Conference of Parties with broader authority. Article 319 is not intended to, and does not, empower the Meeting of States Parties to perform general or broad reviews of general topics of interest, or to engage in interpretation of the provisions of the Law

of the Sea Convention. Proposals to that effect did not garner sufficient support during the Third Conference, and there is no supporting text to that effect in the Convention. Rather, the role of the Meetings of States Parties is prescribed in the Convention: to conduct elections for the Tribunal and the Commission, and to determine the Tribunal's budget. In addition, the Meeting receives the report of the Secretary-General on oceans and the law of the sea, reports from the Commission and the Tribunal, and information from the International Seabed Authority. Members have the opportunity to comment on these reports and the reports are then simply noted.

In that connection, we would like to comment briefly on the report from the President of the Tribunal with respect to the advisory opinion in case number 21.

As we have stated previously, the United States is of the view that the Law of the Sea Convention, including its Annex VI setting forth the Statute of the Tribunal, does not provide for advisory opinion jurisdiction beyond the authority of the Seabed Disputes Chamber of ITLOS to issue advisory opinions as set forth in paragraph 10 of Article 159 and Article 191. The Tribunal's exercise of jurisdiction in contentious cases is clearly set out in the Convention, but this is quite different from asserting that the full Tribunal can or should exercise advisory jurisdiction as well.

While the Tribunal's statute does recognize that agreements other than the Law of the Sea Convention may confer certain jurisdiction upon ITLOS to render decisions relevant to those other agreements, that jurisdiction should not extend to general matters beyond the scope of those other agreements. Case number 21 concerned broad fisheries-related rights and obligations of coastal States and flag States under the Law of the Sea Convention more than it concerned the provisions of the underlying regional fisheries agreement. We were disappointed with the Tribunal's decision that as a full body it has advisory jurisdiction, and that it would exercise such advisory jurisdiction in that case.

The United States wishes to commend the States that are members of the SRFC, and the SRFC itself, for their efforts to combat illegal, unreported and unregulated (IUU) fishing and acknowledges the scope of this challenge, particularly in the face of limited resources. IUU fishing undermines the goal of sustainable fisheries and deprives legitimate fishers and coastal States of the full benefits of their resources. Like many other States, the United States actively supports efforts to address problems of IUU fishing, including through the implementation of the numerous international instruments that have been negotiated and adopted in recent years for this purpose.

Finally, Madam President, the United States does not believe that the "State of Palestine" qualifies as a sovereign State and does not recognize it as such. The United States believes that the "State of Palestine" is not qualified to accede to the Law of the Sea Convention, or to serve as a Party to the Convention on any bodies of this SPLOS meeting.

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## **2. South China Sea and East China Sea**

### ***a. U.S. statement on arbitration between the Philippines and China***

On July 12, 2016, the State Department issued a press statement regarding the decision in the arbitration between the Philippines and China over disputed claims in the South

China Sea. The press statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm>.

\* \* \* \*

The decision today by the Tribunal in the Philippines-China arbitration is an important contribution to the shared goal of a peaceful resolution to disputes in the South China Sea. We are still studying the decision and have no comment on the merits of the case, but some important principles have been clear from the beginning of this case and are worth restating.

The United States strongly supports the rule of law. We support efforts to resolve territorial and maritime disputes in the South China Sea peacefully, including through arbitration.

When joining the Law of the Sea Convention, parties agree to the Convention's compulsory dispute settlement process to resolve disputes. In today's decision and in its decision from October of last year, the Tribunal unanimously found that the Philippines was acting within its rights under the Convention in initiating this arbitration.

As provided in the Convention, the Tribunal's decision is final and legally binding on both China and the Philippines. The United States expresses its hope and expectation that both parties will comply with their obligations.

In the aftermath of this important decision, we urge all claimants to avoid provocative statements or actions. This decision can and should serve as a new opportunity to renew efforts to address maritime disputes peacefully.

We encourage claimants to clarify their maritime claims in accordance with international law—as reflected in the Law of the Sea Convention—and to work together to manage and resolve their disputes. Such steps could provide the basis for further discussions aimed at narrowing the geographic scope of their maritime disputes, setting standards for behavior in disputed areas, and ultimately resolving their underlying disputes free from coercion or the use or threat of force.

\* \* \* \*

**b. December Diplomatic Note to China**

Following the July 12, 2016 decision in the arbitration between the Philippines and China, China circulated three papers regarding its claims in the South China Sea. In the papers, China expressly claimed for the first time “historic rights in the South China Sea.” China also claimed internal waters and other maritime entitlements “based on” the islands in the South China Sea, seemingly in reference to claims based on unlawful collective treatment of groups of islands, for example by unlawful use of straight baselines. In keeping with its global policy of formally protesting foreign government maritime claims that are inconsistent with the international law of the sea, the United States responded to these papers with a demarche and a diplomatic note on December 28, 2016, identifying contradictions between China's claims and the international law of the sea. The text of the note appears below. The note references previous published assessments by the United States of China's claims in the South China Sea. See *Digest*

2014 at 521-29 for discussion of *Limits of the Seas # 143*, which is available at <https://www.state.gov/documents/organization/234936.pdf> *Limits of the Seas #117* is available at <https://www.state.gov/documents/organization/57692.pdf>

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[The United States] has the honor to refer to the following three documents circulated by China on July 12-13, 2016: the “Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea” (hereinafter the “PRC Government Statement”); the “Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines”; and the paper entitled “China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea” (hereinafter the “PRC White Paper”).

The United States welcomes efforts by China to adjust or clarify its maritime claims in accordance with international law as reflected in the 1982 Law of the Sea Convention, but has a number of concerns with China’s articulation in these three documents of its South China Sea maritime claims. In this regard, the United States takes particular note of paragraph III of the PRC Government Statement, which reads:

“Based on the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and in accordance with national law and international law, including the United Nations Convention on the Law of the Sea, China has territorial sovereignty and maritime rights and interests in the South China Sea, including, inter alia:

- i. China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
- ii. China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao;
- iii. China has exclusive economic zone and continental shelf, based on Nanhai Zhudao;
- iv. China has historic rights in the South China Sea.

The above positions are consistent with relevant international law and practice.”

The United States further notes paragraph 70 of the PRC White Paper, which appears under the heading “[t]he development of the international law of the sea gave rise to the dispute between China and the Philippines over maritime delimitation,” and which reads:

“Based on the practice of the Chinese people and the Chinese government in the long course of history and the position consistently upheld by successive Chinese governments, and pursuant to China’s national law and under international law, including the 1958 *Declaration of the Government of the People’s Republic of China on China’s Territorial Sea*, the 1992

*Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, the 1996 *Decision of the Standing Committee of the National People's Congress of the People's Republic of China on the Ratification of the United Nations Convention on the Law of the Sea*, the 1998 *Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf*, and the 1982 *United Nations Convention on the Law of the Sea*, China has, based on Nanhai Zhudao, internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf. In addition, China has historic rights in the South China Sea.”

These statements appear to assert expressly, for the first time, a Chinese maritime claim in the South China Sea that would include “historic rights.”<sup>1</sup> For a number of reasons, including those set forth in the Department of State publication *Limits in the Seas #143—China: Maritime Claims in the South China Sea* (which is appended to this note), the United States objects to such a claim as unlawful, insofar as it would be inconsistent with international law as reflected in the Law of the Sea Convention.

Furthermore, to the extent China's claim to “internal waters” contemplates waters within straight baselines around any South China Sea islands, the United States objects for reasons including but not limited to those set forth in the Department of State publication *Limits in the Seas #117—Straight Baseline Claim: China* (which is also appended to this note). Consistent with international law as reflected in the Law of the Sea Convention, including Articles 5, 7, 46, and 47, China cannot claim straight or archipelagic baselines in the Paracel Islands, Pratas Island, Macclesfield Bank, Scarborough Reef, or the Spratly Islands. Similarly, China's claims related to what it calls “Nanhai Zhudao (the South China Sea Islands),” and to “Dongsha Qundao (the Dongsha Islands), Xisha Qundao (the Xisha Islands), Zhongsha Qundao (the Zhongsha Islands) and Nansha Qundao (the Nansha Islands)” would be unlawful to the extent they are intended to include any maritime claim based on grouping multiple islands together as a single unit for purposes of establishing internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf or any other maritime claim. Moreover, Macclesfield Bank is an entirely submerged feature; it and other features in the South China Sea that are not “islands” under international law as reflected in Article 121(1) of the Law of the Sea Convention are not subject to appropriation and do not generate any entitlement to a territorial sea, contiguous zone, exclusive economic zone or continental shelf under the international law of the sea.

These objections are without prejudice to the views of the United States concerning other aspects of the three above-referenced documents or concerning other Chinese maritime claims and activities. The United States reiterates that it takes no position on competing sovereignty claims to naturally formed land features in the South China Sea, or on maritime boundary delimitation in the South China Sea. The United States respectfully reiterates its longstanding request, however, that the People's Republic of China adjust or clarify its maritime claims in the South China Sea to be consistent with the international law of the sea as reflected in the Law of the Sea Convention, in particular its provisions pertaining to baselines and maritime zones. The United States is ready to discuss this and other related issues with China in order to maintain consistent dialogue on law of the sea issues.

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<sup>1</sup> As discussed in *Limits in the Seas #143—China: Maritime Claims in the South China Sea*, pages 17-19, previous Chinese assertions, such as those in the 1998 Exclusive Economic Zone and Continental Shelf Act, have not claimed “historic rights” in the South China Sea.

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### 3. Freedoms of Navigation and Overflight

#### a. *Indonesia Maritime Law*

In a diplomatic note delivered to the United States and during the first Indonesia-United States Maritime Law and Oceans Policy Dialogue in Washington, D.C. in March 2016, the Government of Indonesia objected to being listed in the 2015 Freedom of Navigation report as having excessive maritime claims. In October 2016, the United States delivered a diplomatic note identifying issues that must be resolved with regard to Indonesia's maritime laws, regulations, and claims. The text of the U.S. diplomatic note is excerpted below.

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Based on discussions with Indonesian officials during the Dialogue held in Washington, D.C., the United States understands that Indonesian Government Regulation No. 8 of 1962 is no longer in effect, and has been superseded by Indonesian Act No. 6 of 1996 and Indonesian Government Regulation No. 37 of 2002 in order to implement international law as reflected in the Law of the Sea Convention. In particular, the United States understands that Indonesia does not require foreign warships to provide notice prior to exercising the rights of innocent passage or archipelagic sea lanes passage, nor does Indonesia apply the restriction in Regulation No. 8 of 1962 on "stopping, dropping anchor, and cruising about without legitimate reason" in waters adjoining Indonesian territorial waters.

The United States would appreciate a note in reply affirming these understandings.

With respect to the exercise of the right of archipelagic sea lanes passage, recalling the exchange of notes in 2002 between our two governments regarding the international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law, the government of the United States continues to consider for the most part regulation No. 37 of 2002 as publicized by International Maritime Organization (IMO) circular SN/CIRC.200/ADD.1 of July 3, 2003 faithfully follows the provisions of Part IV of the 1982 Law of the Sea Convention and guidance on the partial proposal of sea lanes adopted by the IMO in 1998. The United States understanding of regulation No. 37 and its annexes includes the following:

-- as the archipelagic sea lanes designation in regulation No. 37 and its annexes are a partial designation of archipelagic sea lanes through the Indonesian archipelago, the right of all ships and aircraft to exercise archipelagic sea lanes passage continues on all normal routes used for international navigation through other parts of the Indonesian archipelago, as reflected in article 53 of the Law of the Sea Convention. Paragraph 6.7 of Part H of the IMO publication *Ships' Routing* provides additional guidance in this regard.

-- the right of innocent passage exists for ships of all states in all of Indonesia's archipelagic waters and territorial sea, as reflected in article 52(1) of the Law of the Sea Convention and as described in paragraph 6.5 of Part H of Ships' Routing.

The United States would appreciate a note in reply affirming these understandings.

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**b. Iran's detention of U.S. vessels and sailors**

In January 2016, Iran detained two U.S. Navy Riverine Command Boats ("RCBs") and detained and searched the U.S. personnel on board. The United States publicly protested Iran's actions, including that they violated international law regarding the RCBs' exercise of the right of innocent passage through Iran's territorial sea, and regarding the sovereign immunity of the RCBs. The U.S. Navy produced an investigation report of the incident and released a redacted version in its Freedom of Information Act ("FOIA") reading room, available at

<http://www.secnav.navy.mil/foia/readingroom/SitePages/Home.aspx> The following is excerpted from the Executive Summary of that investigation report

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On 12 January 2016, Iranian Revolutionary Guard Corps Navy (IRGCN) forces breached long-standing tenets of international law when IRGCN vessels intercepted two U.S. Riverine Command Boats (RCBs) in Iran's territorial sea. During their forcible interdiction and subsequent boarding of the RCBs, the IRGCN vessels violated both the RCBs' right to exercise innocent passage and the principle of sovereign immunity.

First, the RCBs were entitled to transit through territorial seas continuously and expeditiously as an exercise of the right of innocent passage... The IRGCN vessels obstructed innocent passage by maneuvering in front of one of the RCBs with weapons trained on the crew, forcing it to stop.

Second, the immunity of one State from the jurisdiction of another State is an undisputed principle of international law. Iran disregarded this well-established norm when its agents boarded, searched, and seized the RCBs, and replaced the colors of the United States with the IRGCN's standard. Sovereign immunity also protects personnel onboard a State vessel from search and seizure by foreign authorities. ...

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**c. Venezuela**

The Venezuelan government alleged "air safety violations and unauthorized military maneuvers" as well as violations of Venezuela's territorial airspace by U.S. military aircraft on May 11 or on May 13, 2016. The United States responded to the Venezuelan

allegations, via a May 20, 2016 diplomatic note to the Ministry of Foreign Affairs (“MFA”) of Venezuela. The text of the diplomatic note follows.

\* \* \* \*

The United States finds no basis for the Venezuelan allegation of air safety violations and unauthorized military maneuvers. On May 11 and May 13, 2016, a U.S. Air Force E-3 Sentry aircraft was operating in international airspace within the Maiquetia Flight Information Region (FIR). The United States has reviewed all available data and has determined that the aircraft did not enter Venezuelan territorial airspace. Instead, the aircraft operated in international airspace, and exercised “due regard for the safety of navigation of civil aircraft,” consistent with Article 3(d) of the 1944 Convention on International Civil Aviation (the “Chicago Convention”).

Customary international law, as reflected in the 1982 UN Law of the Sea Convention, permits a coastal State to claim a territorial sea with a maximum breadth of 12 nautical miles (nm) as measured from baselines drawn consistent with international law. The coastal State’s sovereignty extends through its territorial sea, including to the airspace over its territorial sea. Territorial airspace does not extend over areas beyond the limits of the territorial sea in accordance with international law. The United States understands that Venezuela claims a 12 nm territorial sea. The United States recognizes the sovereignty of Venezuela in its national airspace, including above its territorial sea in places where the territorial sea claim is consistent with international law. The United States also recognizes Venezuela’s right to require military and other state aircraft to obtain diplomatic clearance prior to entry into its territorial airspace. The United States does not, however, recognize assertions of Venezuelan airspace beyond where it claims a 12 nm territorial sea consistent with international law.

The International Civil Aviation Organization (ICAO) may allocate through regional agreements approved by the ICAO Council, responsibility for civil air traffic management in international airspace to a coastal State in a FIR encompassing airspace beyond its territorial airspace, consistent with the requirements of the Chicago Convention, to which the United States and Venezuela are party. According to Annex 11 to the Convention, a FIR is “airspace of defined dimensions within which flight information service and alerting service are provided.” Nothing in this definition serves to extend a State’s territorial jurisdiction. Moreover, the Convention by its terms is applicable to civil aircraft, not state aircraft such as the U.S. military aircraft referred to above. Further, all aircraft, including military and other state aircraft, enjoy freedoms of navigation and overflight in international airspace. This means that military aircraft, and other state aircraft, operating in airspace beyond territorial airspace, whether within or outside of a FIR, are free to operate without the consent of or notice to coastal States, and are not subject to the jurisdiction or control of the air traffic authorities of those States. U.S. military and other state aircraft communicate with air traffic control when operating in such airspace only as a matter of policy and based on a concern for flight safety.

The United States trusts that this explanation clarifies any concerns regarding the operation of U.S. military and other state aircraft in international airspace that falls within the Maiquetia FIR.

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#### 4. Other Boundary or Territorial Issues

##### a. *Transmittal of Maritime Boundary Treaties*

On December 9, 2016, the President transmitted to the Senate the Treaty between the Government of the United States of America and the Government of the Republic of Kiribati on the Delimitation of Maritime Boundaries and the Treaty between the Government of the United States of America and the Government of the Federated States of Micronesia on the Delimitation of a Maritime Boundary. The transmittal package is available at [https://www.congress.gov/treaty-document/114th-](https://www.congress.gov/treaty-document/114th-congress/13/document-text)

[congress/13/document-text](https://www.congress.gov/treaty-document/114th-congress/13/document-text). The President's letter of transmittal states:

The purpose of the treaties is to establish our maritime boundaries in the South Pacific Ocean with two neighboring countries. The treaty with Kiribati establishes three maritime boundaries totaling approximately 1,260 nautical miles in length between Kiribati and the United States islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. The treaty with the Federated States of Micronesia establishes a single maritime boundary of approximately 447 nautical miles in length between the Micronesian islands and the United States territory of Guam. The boundaries define the limit within which each country may exercise maritime jurisdiction with respect to its exclusive economic zone and continental shelf.

The Secretary of State's letter of submittal for the two treaties is excerpted below.

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\* \* \* \*

The Treaty with Kiribati establishes three maritime boundaries in the Pacific with respect to the exclusive economic zone (EEZ) and continental shelf generated by various Kiribati islands and by each of the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. The treaty with FSM establishes a single maritime boundary between Guam and several FSM islands.

\* \* \* \*

The form and content of the two treaties are very similar to each other, and to previous maritime boundary treaties between the United States and other Pacific island countries that have entered into force after receiving the Senate's advice and consent. Each of the two treaties consists of seven articles. Article I states that the purpose of each treaty is to establish the maritime boundary between the two countries. The treaty with Kiribati identifies the relevant United States territory as Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island; the treaty with FSM identifies the relevant United States territory as Guam.

Article II of each treaty sets out its technical parameters, stating that for the purpose of the treaty the North American Datum 1983 and the World Geodetic Datum 1984 (“WGS 84”) are considered identical. Further, the article states that, for the purpose of illustration only, the boundary lines have been drawn on maps annexed to the treaties.

Article III lists the turning and terminal points of defining the maritime boundaries. In the treaty with Kiribati, this article defines three distinct boundary lines: for the boundary line between the United States’ Baker Island and the Kiribati Phoenix Islands group, six points are connected by geodesic lines that measure 332 nautical miles in total; for the boundary line between the United States’ Jarvis Island and the Kiribati Line Islands group, ten points are connected by geodesic lines that measure 548 nautical miles in total; and for the boundary line between the U.S. islands of Palmyra Atoll and Kingman Reef and the Kiribati Line Islands group, five points are connected by geodesic lines that measure 383 nautical miles in total. In the treaty with FSM, this article defines the single maritime boundary of approximately 447 nautical miles with 16 turning and terminal points.

As has become standard in these agreements, Article IV sets forth the agreement of the Parties that, on the opposite side of each maritime boundary, each Party will not “claim or exercise for any purpose sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil.”

Article V provides that the establishment of the boundaries will not affect or prejudice either side’s position “with respect to the rules of international law relating to the law of the sea, including those concerned with the exercise of sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil.”

Article VI sets forth the agreement of the Parties that any dispute arising from the interpretation or application of the treaty will be resolved by negotiation or other peaceful means agreed upon by the Parties. Finally, Article VII provides that each treaty will enter into force after the Parties have exchanged notes indicating that each has completed its internal procedures to bring the treaty into force.

The treaties are self-executing. They do not require implementing legislation.

\* \* \* \*

**b. *Republic of the Marshall Islands and Wake Island***

On August 2, 2016, the U.S. Embassy in the Marshall Islands delivered a diplomatic note to the Ministry of Foreign Affairs of the Republic of the Marshall Islands (“RMI”) regarding U.S. sovereignty over Wake Island. The RMI submitted documents describing its maritime limits and boundaries to the UN in April 2016, including claimed RMI maritime limits around Wake Island. The RMI first made its claim to Wake Island in 1980, although the RMI claims it did so nearly a decade earlier. The text of the August 2, 2016 U.S. diplomatic note follows.

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The United States notes the Republic of the Marshall Islands' (RMI) "Baselines and Maritime Zones Outer Limits Declaration" of April 18, 2016 (hereinafter the "Declaration"), pursuant to the RMI Maritime Zone Declaration Act of 2016, which describes the purported outer limits of the RMI's maritime zones. The United States generally supports efforts by countries to clarify and publish the limits of their maritime entitlements in accordance with international law as reflected in the 1982 Law of the Sea Convention. The United States has serious concerns and objections, however, with respect to the Declaration and the maritime zones declared in it.

The Declaration appears to claim maritime entitlements that, under the international law of the sea, could only be derived from a claim of sovereignty over Wake Island. Wake Island is U.S. territory and, as such, subject solely to the sovereignty of the United States. Any assertion of maritime entitlements generated by Wake Island by an entity other than the United States would therefore be inconsistent with international law. Accordingly, the United States objects to the assertion by RMI of maritime zones around Wake Island.

To the extent that the Declaration signals a claim of RMI sovereignty over Wake Island, the United States further objects. Wake Island is U.S. territory, over which U.S. sovereignty is based, in part, on nearly uninterrupted possession and administration since 1898, when the United States first claimed possession of the uninhabited atoll, formalizing its claim in 1899. The United States has engaged in extensive military and commercial activities on Wake Island since at least 1935, maintains absolute administrative control of Wake Island, has continued to occupy and use Wake Island, and strictly regulates access to Wake Island.

In contrast, Wake Island is not historically part of Marshallese territory. The Marshallese have never inhabited, occupied, or administered Wake Island, nor did they make commercial use of its lands and resources. Wake Island is neither part of nor continuous to the natural archipelago of the RMI chains. When the RMI was successively administered by Spain, Germany, and Japan, Wake Island was never treated nor considered by these nations as subject to their administration. United States sovereignty over Wake Island has been historically undisputed by other nations until the RMI raised a claim in a 1980 session of the U.N. Trusteeship Council and has not been otherwise disputed by other nations since then. Moreover, the position of the RMI with respect to Wake Island has not been consistent since 1980. Most recently, in January 2015, then-Foreign Minister of the RMI proposed to the U.S. Ambassador that the two countries resolve the U.S.-RMI maritime boundary, and the United States has been preparing accordingly to commence negotiations on a maritime boundary agreement.

The United States reserves its position at this time with respect to whether other provisions of the Declaration are consistent with international law, including, for example, whether the declared archipelagic baselines comply with customary international law as reflected in the 1982 Law of the Sea Convention. The United States notes, for example, that RMI's archipelagic baselines are not consistent with international law if within such baselines the ratio of the area of the water to the area of the land, including atolls, is greater than nine to one.

Separately, the United States also has the honor to refer to the Constitutional Convention (Amendment) (1) Act of 2016 pending in the Nitijela, which proposes to amend the Constitution of the RMI to include Wake Island as part of the existing RMI "electoral district with which it is most closely associated, pursuant to the customary law or any traditional practice." The United States objects to the proposed legislation for the same reason provided above: Wake Island is solely U.S. territory; it has never been and is not now RMI territory. Accordingly, the RMI has no authority to include Wake Island in an existing Marshallese electoral district, and the United States urges RMI not to enact this Act or any similar legislation with respect to Wake Island.

With the shared goal of delimiting the relevant maritime zones of the United States and the RMI with certainty and finality, the United States would welcome the negotiation of a maritime boundary agreement with the Government of the RMI to delimit the maritime boundary between the U.S. territory of Wake Island and the RMI, as proposed by the RMI to the United States in 2015, and would welcome the opportunity for U.S. Government experts to discuss this matter further with relevant experts in the Government of the RMI.

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**c. *Canada and U.S. Claims in Beaufort Sea***

The Canadian Embassy informed the U.S. Department of State on August 9, 2016 that the Department of the Interior's proposed program for gas and oil lease blocks includes an area of the Beaufort Sea subject to Canada's claims. The Canadian Embassy had previously advised the Department of State in 2014 that similar programs under Department of Interior and State of Alaska authorities for offshore lease blocks included areas of the Beaufort Sea subject to Canada's claims. The United States responded to Canada's assertions with a diplomatic note in December 2016, which stated, in part:

The United States Government does not accept that areas referred to in the Proposed Program, lease sales, and related activities (collectively hereinafter the "programs") are within Canadian waters or that the programs in any way infringe upon Canadian sovereignty, sovereign rights, or jurisdiction. The United States does not share the Canadian view that the location of the maritime boundary in this area follows the 141st meridian of longitude. The United States on many occasions has informed Canada of the proper location of the maritime boundary in this area, which has been followed in the case of the programs referred to above. The United States rejects any purported exercise of jurisdiction or sovereignty by the Government of Canada, or any of its provinces or territories, in the United States part of the Beaufort Sea east of the 141st meridian.

**5. Maritime Security and Law Enforcement**

**a. *Vanuatu***

On October 31, 2016, U.S. Ambassador Ebert-Gray and Vanuatu Minister of Internal Affairs Alfred Moah signed the Agreement between the Government of the United States of America and the Government of the Republic of Vanuatu Concerning Counter Illicit Transnational Maritime Activity Operations. The full text of the signed agreement is available at <https://www.state.gov/s/l/c8183.htm>

**b. *Ghana***

The United States and Ghana concluded another short-term maritime law enforcement arrangement setting forth operational procedures for the conduct of a combined

operation conducted in January and February 2016. See *Digest 2015* at 529 and *Digest 2014* at 546 for discussions of prior temporary agreements. The arrangement for the 2016 operation was concluded via an exchange of diplomatic notes with the Ministry of Foreign Affairs of the Republic of Ghana. The United States and the government of Ghana have cooperated in efforts to respond to illicit transnational maritime activity, and to further the objectives of the U.S.-Ghana Security Governance Initiative and the United States West Africa Cooperative Security Initiative. The arrangement allows officers of Ghana's Navy to embark on U.S. Coast Guard or Naval vessels or aircraft and the craft on which they embark may enter Ghana's territorial sea to perform surveillance and law enforcement activities.

## **B. OUTER SPACE**

### **1. The Outer Space Treaty**

State Department Legal Adviser Brian J. Egan delivered remarks entitled "The Next Fifty Years of the Outer Space Treaty," at the Galloway Symposium on Critical Issues in Space Law on December 7, 2016. Mr. Egan's remarks are excerpted below and available at

<http://2009-2017.state.gov/s/l/releases/remarks/264963.htm>

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Good afternoon. I am delighted to take part in this year's Galloway Symposium commemorating the fiftieth anniversary of the Outer Space Treaty. There is much to commemorate. The Treaty is the cornerstone of an international legal framework for outer space that has enabled the exploration and use of space by an increasingly diverse range of actors, serving a growing set of vital needs on Earth. ...

This is a fitting juncture to offer some observations on how the Outer Space Treaty is guiding the United States' planning and preparation for the future. As we speak, the public and private sectors are making investments in capabilities to advance our understanding of our solar system and unlock new space applications. I am confident that as the world grows increasingly reliant upon space, as more States and actors within States become active in space, the Outer Space Treaty and the fundamental legal principles it embodies will be even more vital in 2067 than they were 1967.

Let me begin briefly by looking back six decades or so, before the international law of outer space had really emerged. In 1958, less than a year after Sputnik's launch, Professors Myers McDougal and Leon Lipson published *Perspectives for a Law of Outer Space* in the *American Journal of International Law*. These scholars did not attempt to predict the precise space capabilities or activities of the coming decades, and they viewed attempts to regulate such unknowns as not being either politically possible or desirable. In their view, the establishment of legal standards for outer space would be a slow and deliberative process, guided by time, experience, and repeated interactions among nation states.

Yet Professors McDougal and Lipson and their peers also understood that certain fundamental legal questions about this new domain would need to be answered on the front end. For example, does territorial sovereignty extend into outer space? May States assert sovereign rights in celestial bodies? Which States are legally responsible for the conduct and consequences of objects placed in outer space?

These basic questions about the legal character of this new domain were addressed by the entire international community of States in the United Nations General Assembly's 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. The basic principles from that Declaration were embodied in the Outer Space Treaty, and they were further elaborated in the Rescue and Return Agreement, the Liability Convention, and the Registration Convention. That these instruments do not speak to any particular space activity in detail is key to their continued relevance today, and will be key to their enduring importance fifty years from now.

Today it may be easy to take the ubiquity and vibrancy of non-governmental space activities for granted. But as the international legal framework for space took shape, this future was far from certain. In the negotiations leading to the General Assembly Declaration, the Soviet Union pressed to restrict space activities to governments. In the United States, the private sector already had plans for privately operated telecom satellites. Our government thus advocated for a formulation that would preserve the possibility of non-governmental space activities. Under Article VI of the resulting Outer Space Treaty, non-governmental activities are permitted, but States Parties are responsible for such activities and have an affirmative legal obligation to supervise them and ensure their conformity with the Treaty. Thus, under the Treaty, States Parties ensure that all actors in space, governmental and non-governmental, operate according to a common legal framework.

The steady growth in commercial activities in outer space is one of the major success stories of the Outer Space Treaty's first half century. Today, roughly half of all satellites in outer space are private. Commercial activities account for a considerable share of the space applications on which we rely. There is every indication that this trend will continue into the future.

Among newly contemplated commercial space activities, none have captured the interest of the legal community more than the prospect of utilizing space resources. As humans press deeper into space and explore the habitability of other planets in our solar system, missions will be less reliant upon support from Earth and increasingly reliant on resources in outer space. Government space agencies are not alone in contemplating the utilization of resources found in celestial bodies to support deep space missions. Private firms have announced ambitious plans to develop parts of a deep space infrastructure to utilize space resources—water and minerals, for example—by converting them into fuel, and even manufacturing spacecraft in space.

Whether in the press, academic literature, or the United Nations, legal discussions about space resource utilization are often accompanied by spirited debate about the consistency of these activities with the Outer Space Treaty. In an effort to offer legal certainty to U.S. firms that may invest in space resource utilization activities, Congress enacted the Space Resource Exploration and Utilization Act of 2015. This law seems to have generated some confusion and controversy, and I would like to clarify what it does and does not do.

We have heard concerns from some foreign partners, for example, that the law attempts to abrogate the United States' obligations under the Outer Space Treaty. In fact, it is just the opposite. Rather than abrogating the United States' international obligations, the Space Resource

Utilization Act affirms that space resource utilization activities are subject to the United States' international obligations. By its terms, the Act sanctions space resource utilization only "in manners consistent with the international obligations of the United States." Similarly, the Act only recognizes rights in resources "obtained in accordance with applicable law, including the international obligations of the United States." The Act also recognizes that non-governmental space resource utilization activities are "subject to authorization and continuing supervision by the Federal Government."

The Act is also consistent with the United States' longstanding position that the Outer Space Treaty shapes the manner in which space resource utilization activities may be carried out, but does not broadly preclude such activities.

The United States' position on the issue of space resource utilization dates back several decades. For example, in 1979, Secretary of State Cyrus Vance articulated what was already at that point a longstanding U.S. interpretation of Articles I and II of the Treaty. Secretary Vance told members of the Senate Foreign Relations Committee that, under Article II of the Treaty, "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." He went on to explain that "this 'non-appropriation' principle applies to the natural resources of celestial bodies only when such resources are 'in place.'" The prohibition on national appropriation does not, however, limit "ownership to be exercised by States or private entities over those natural resources which have been removed from their 'place' on or below the surface of the moon or other celestial bodies." Such removal, Secretary Vance further explained, is permitted by Article I of the Outer Space Treaty, which provides that "outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States..."

In 1980 testimony before the Senate, State Department Legal Adviser Roberts Owen reiterated that "the United States has long taken the position that Article I of the Treaty... recognizes the right of exploitation." He acknowledged that this view is not shared by all States or commentators, and this remains true today. Notwithstanding the variety of States' political positions on space resource utilization, the United States remains confident that its interpretation of Articles I and II over many decades and many administrations represents the better reading of the Treaty.

The Outer Space Treaty does shape the manner in which space utilization activities may be conducted. For example, space resource utilization activities may not be structured around rights in celestial bodies or their resources in place, since Article II of the Treaty prohibits the creation of any such rights. On the other hand, Article VIII clarifies that launching an object into outer space, including to the Moon and other celestial bodies, does not affect that object's ownership. Entities engaged in space resource utilization activities will therefore retain ownership interests in their equipment, including whatever non-interference rights flow from those ownership interests, even though they will not acquire ownership interests in the ground beneath their equipment.

To say that the Treaty does not preclude private ownership of resources extracted from a celestial body is not to suggest that the Treaty provides a comprehensive international regime for space resource utilization activities. At this stage, we see neither a need nor a practical basis to create such a regime. For one thing, initial technology demonstration missions will be required long before widespread space resource utilization activities occur. The four core space treaties provide a basic legal framework within which interested States can assure their interests are protected for such initial missions.

In sum, passage of the Space Resource Utilization Act has not altered the United States' consistent approach to the Outer Space Treaty for the past half-century. That said, as the Statement of Administration Policy observed, more remains to be done. Notably, the Act does not provide a means for the U.S. Government to implement Article VI of the Outer Space Treaty in relation to commercial space resource utilization and other newly contemplated commercial space activities. In the next few minutes, I'll tell you a bit more about the current status of our efforts to fill this gap.

Article VI is at the center of an active dialog here in Washington about the optimal approach to authorizing and supervising future ground-breaking commercial space activities. The conversation about what Article VI requires can be heard within the Executive Branch, on Capitol Hill, and in meetings of commercial space industry groups and among other interested lawyers.

As I mentioned earlier, Article VI provides that States "shall bear international responsibility for national activities in outer space" carried on by both governmental and non-governmental entities, and shall "assur[e] that national activities are carried out in conformity with the provisions" of the Treaty. Importantly, under Article VI, "[t]he activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty."

In recent years, it has become apparent that the United States' existing licensing frameworks for non-governmental space activities would not, by themselves, enable the United States to fulfill its Article VI obligations in relation to the full spectrum of the newly contemplated commercial space activities. This revelation became most concrete in 2014, when a U.S. company requested a Payload Review of a proposed manned lunar habitat that, once viable, would serve a wide range of functions over a projected twenty-year lifespan. In accordance with the Federal regulations currently governing the Payload Review process, the State Department was asked to advise whether the launch of the proposed payload would present any issues affecting U.S. foreign policy or our international obligations. The State Department ultimately advised that the United States could not, at that time, authorize the launch of the proposed payload consistent with our Article VI obligations. This was not because the Outer Space Treaty categorically prohibits any of the proposed activities; the consistency of those activities with the Treaty depends on the manner in which they are carried out. The problem was the absence of a mechanism for the U.S. Government to ensure that the proposed activities would be carried out in conformity with the Treaty. At that time, the State Department indicated that we would work with other Executive agencies, with industry, and with Congress to find a solution.

Following two years of work and productive dialog with interested parties, the Administration transmitted a report to Congress in April 2016 outlining the need for a new authorization framework and proposing legislation to address this need. The proposed legislation would establish a "Mission Authorization" framework for those non-governmental space activities for which the existing licensing frameworks for launch, communications, and remote sensing are not sufficient for full implementation of our Article VI obligations.

At its most recent meeting, the Commercial Space Transportation Advisory Committee adopted a finding that the absence of a clear mechanism for implementing the United States' Article VI obligations "has resulted in a lack of stability, predictability, transparency and efficiency, which has and will continue to hinder the development of U.S. commercial space activities." The Administration's proposal for a Mission Authorization framework to provide such a mechanism has been generally well received by industry stakeholders as an efficient,

narrowly tailored solution that provides the necessary predictability for investments in path-breaking space activities.

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One basic question that has arisen in discussions of these legislative proposals is the meaning of the term “continuing supervision” in Article VI. What does it mean for a State to supervise non-governmental activities in outer space? What space activities must States supervise?

The answer, in the United States’ view, is in fact fairly straightforward. The meaning of the term “continuing supervision” in the second sentence of Article VI can be found in the first sentence, which creates the obligation to ensure conformity of all national activities, whether governmental or non-governmental, with the Treaty. The supervision required for any given activity will depend on the provisions of the Treaty it implicates. “Continuing supervision” means a legal link between government and operator sufficient to ensure the activity is carried out in conformity with the Treaty.

In reviewing proposals to date, the State Department has applied a fact-specific, two-part inquiry to ascertain whether existing U.S. Government oversight mechanisms are sufficient for compliance with the United States’ Article VI obligations. First, we examine which provisions of the Outer Space Treaty are potentially implicated by the proposed activity. Second, we work with other parts of our government to analyze whether the applicable governmental oversight arrangements are sufficient to ensure conformity with these provisions.

Our handling of a more recent Payload Review request illustrates this approach. The request involved a proposed technology demonstration of a small, commercial lunar lander. Compared to the proposed lunar habitat that was the subject of the 2014 Payload Review request, this proposed mission was relatively limited in scope and short in duration—under the best of circumstances, the lander’s batteries were not expected to survive the lunar night, or two weeks in Earth time.

On these facts, the State Department concluded that the limited scope of the proposed activities and their short duration did not implicate some provisions of the Outer Space Treaty that might be implicated by more extensive lunar activities. The proposal would, however, implicate the harmful contamination obligation contained in Article IX. This provision requires that States Parties “conduct exploration” of the Moon and other celestial bodies “so as to avoid their harmful contamination” and also requires States “where necessary... [to] adopt appropriate measures for this purpose.”

This raises an obvious question: What are “appropriate measures” to avoid the “harmful contamination” of celestial bodies? Over the Outer Space Treaty’s first fifty years, national space agencies—the only entities to visit other planets to date—have generally planned and executed planetary missions in accordance with planetary protection guidelines adopted by COSPAR—the Committee on Space Research, part of the International Council of Science. To simplify greatly, the COSPAR guidelines are designed to avoid introducing biological material from Earth that could contaminate the search for life forms on other planets. The guidelines vary by planet, and even by regions of a planet, as in the case of Mars.

In the case of the lunar lander Payload Review, the company voluntarily committed, in writing, to comply with applicable COSPAR planetary protection guidelines for lunar missions. Though voluntary, these planetary protection representations by the company are enforceable by the Federal Aviation Administration. In analyzing this particular proposal, the State Department

determined that the company's enforceable commitment to comply with the applicable COSPAR planetary protection guidelines would ensure U.S. compliance with Article IX, and that the enforceability of the commitment constitutes a sufficient legal link, on these unique facts, to meet the United States' Article VI obligations. The State Department was thus able to advise in this situation that launch of this proposed payload would not contravene the United States' obligations under the Outer Space Treaty. At the same time, even this relatively limited proposed lunar mission stretched the existing Payload Review process close to its limit. Our ability to authorize more extensive missions will depend on a more robust authorization framework—such as those proposed by the Administration and by Representative Bridenstine—to enable conditional approval where necessary.

I will conclude with one forward-looking observation about Article IX's obligation to avoid "harmful contamination." The international community's approach to "harmful contamination" of celestial bodies may not be the same in the second 50 years of the Treaty's existence as its first. In other words, as our relationship with celestial bodies evolves—from sampling scientific specimens to building habitats that sustain human life—our approach to "harmful contamination" under Article IX may shift as well. The open-textured formulation of the Treaty's basic principles accommodates such developments, and will allow the legal framework to evolve over time in light of changing circumstances and capabilities. Had the Treaty's negotiators attempted to codify a precise definition of "harmful contamination" in 1966, we might now be faced with a treaty obligation that is unworkable in view of the global community's needs and capabilities. The same would be true if we attempted to articulate a precise definition of this concept today.

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...[T]he Outer Space Treaty serves a constitutional role in the international legal framework for outer space. It does not attempt to answer every legal question directly, or speak to any activity specifically. Instead it has served, for half a century, as the framework within which States have cooperated to address new capabilities and activities in outer space, and the legal questions such activities inevitably generate. If the preparations for future space activities underway in the United States and other nations are any indication, the Treaty will serve this function well into its second half century and beyond.

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## 2. UN General Assembly First and Fourth Committees

On October 28, 2016, Ambassador Robert Wood, U.S. Permanent Representative to the Conference on Disarmament, delivered the U.S. explanation of vote at the 71st Session of the First Committee of the UN General Assembly on a draft resolution on "no first placement of weapons in outer space." The explanation of vote is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7522>.

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Mr. Chairman, my delegation will vote “No” on draft resolution L.18, “No first placement of weapons in outer space,” “NFP.” In considering the Russian Federation’s NFP initiative, the United States took seriously the criteria for evaluating space-related transparency and confidence-building measures, TCBMs, that were established in the 2013 consensus report of the UN Group of Governmental Experts study of outer space TCBMs. That study was later endorsed by the full General Assembly in Resolutions 68/50, 69/38, and 70/53, which the United States co-sponsored with Russia and China, as well as a resolution that is being considered this year in the First Committee. As the GGE report stated, non-legally binding TCBMs for outer space activities should: 1, be clear, practical, and proven, meaning that both the application and the efficacy of the proposed measure must be demonstrated by one or more actors; 2, be able to be effectively confirmed by other parties in their application, either independently or collectively; and finally, 3, reduce or even eliminate the causes of mistrust, misunderstanding, and miscalculation with regard to the activities and intentions of States.

In applying the GGE’s consensus criteria, the United States finds that Russia’s NFP initiative contains a number of significant problems. First, the NFP initiative does not adequately define what constitutes a “weapon in outer space.” As a result, States will not have any shared understanding of the operative terminology. Second, it would not be possible to effectively confirm a State’s political commitment “not to be the first to place weapons in outer space.” Thus, the application and efficacy of the proposed measure could not be demonstrated. Third, the NFP initiative focuses exclusively on space-based weapons. It is silent with regard to terrestrially-based anti-satellite weapons, and thus does not contribute to increasing stability in outer space.

Given these problems, the United States has determined that the NFP initiative continues to fail to satisfy the GGE’s consensus criteria for a valid TCBM. Thus, the NFP initiative is problematic and unlikely to be equitable or effective in addressing the challenges we face in sustaining the outer space environment for future generations.

Therefore, as we have done for the past two years, the United States will again vote “No” on this First Committee resolution and intends to vote “No” again in the full General Assembly.

Mr. Chairman, the U.S. goal is to ensure the long-term sustainability, stability, safety, and security of the outer space environment. Preventing the extension of conflict into space is a major part of this goal. Furthermore, the United States continues to believe that the TCBMs recommended by the 2013 GGE report offer pragmatic, near-term solutions to the challenges associated with orbital congestion, collision avoidance, and responsible and peaceful behavior in space.

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### **3. Sustainability and Security of Outer Space Environment**

On September 22, 2016, Frank A. Rose, Assistant Secretary of State for Arms Control, Verification and Compliance, addressed the topic of strengthening international cooperation in space situational awareness. His remarks are excerpted below and available at <http://2009-2017.state.gov/t/avc/rls/262502.htm>

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### Threats to the Space Environment

So let me start with the outer space environment. As this audience well knows, the outer space environment is very complex and is changing very rapidly. ...

Advances in the use of outer space also present challenges the space environment, including increased congestion both in terms of the number of systems on orbit or related to spectrum allocation. And added to that is the growth in threats to our use of military, civil, and commercial space systems. The Cold War restraint on the development of anti-satellite weapons is eroding. The U.S. Director of National Intelligence James Clapper testified to this fact last February stating, "Russia and China continue to pursue weapons systems capable of destroying satellites on orbit, placing U.S. satellites at greater risk in the next few years." These systems will present a threat, not just to the United States, but to the safe operation of satellites by all countries.

### Strengthening Cooperation with Allies and Partners

In order to ensure the free access to outer space that is the legal right of all mankind, we must work together to respond to these threats. And when I say we, that encompasses everyone in this audience. The U.S. Government certainly can't do it alone. We need to work with our allies and partners, with industry, and with non-governmental organizations.

That is why the United States has increased our diplomatic engagement around the world. Our goal is to ensure the long-term sustainability, stability, safety, and security of the outer space environment. One important part of our comprehensive strategy seeks to strengthen our cooperation with allies and partners to respond to these threats, including through improving our ability to share space situational awareness information and to promote rules for responsible behavior in outer space.

The United States has a tremendous advantage in its strong alliance partnerships, and one we need to continue to leverage when working to ensure that potential adversaries cannot achieve their goals when it comes to a conflict in outer space.

Strengthening our space cooperation begins with bilateral diplomatic, civil, and military-to-military dialogues. To date, the State Department has established formal space security dialogues with 15 countries such as traditional allies like the United Kingdom, Japan and the Republic of Korea, and also with other space-faring nations like India and the United Arab Emirates.

These dialogues are an important opportunity to have a productive exchange of ideas on way to work more closely together. They allow us to have a common understanding regarding threats and ways to address them. We are able to talk about changes in national policies, legislation, and regulations. This is also where we expand our bilateral cooperation in space situational awareness or maritime domain awareness or global navigation satellite systems. And we also use it to review efforts to create guidelines on norms in fora such as the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS).

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### Developments in Improving Space Situational Awareness (SSA) Information Sharing

Turning now to improving space situational awareness sharing, ... transparency and situational awareness, or knowing who is doing what, will only help us if we develop norms and guidelines (so we know when someone is acting irresponsibly or even maliciously and even deter bad behavior from happening in the first place). If there is attributable, irresponsible behavior, we will better know whom to address with our concerns, and even how to hold that space actor accountable.

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To date, the United States has signed 13 SSA sharing agreements and arrangements with national governments and international intergovernmental organizations, and over 50 with commercial entities. The United States is also collaborating with our partners and allies in Europe as they continue developing their own SSA capabilities. The Department of State, in collaboration with the Department of Defense, has engaged in technical exchanges with experts from the European Space Agency, the European Union, and individual Member States to ensure that our existing and planned SSA systems contribute to a more comprehensive situational awareness picture.

Additionally, we continue to engage in the Working Group on the Long-term Sustainability of Outer Space Activities (LTS) of the UN COPUOS. In this venue we are working on SSA-related guidelines that call for promoting techniques, and investigation of new methods, to improve the accuracy of orbital data for spaceflight safety; performing conjunction assessment during orbital phases of controlled flight; and promoting the use of common, internationally recognized standards when sharing orbital information on space objects.

#### Conclusion

So let me conclude by making the following points. If conflict extends into space, the right to explore and use space for peaceful purposes would be threatened.

The goal of our diplomatic efforts is to prevent conflict from extending into space in the first place. Working with our allies, industry partners and non-governmental experts is essential to our diplomatic goals. Moreover, space situational awareness is a critical foundational capability to help us achieve this goal and we need to do more of it.

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#### 4. U.S. Report to Conference on Disarmament on GGE Recommendations

On August 29, 2016 the Delegation of the United States provided a note verbale to the Secretary-General of the Conference on Disarmament conveying the U.S. submission on implementation of the recommendations of the Report of the Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities to Enhance Stability in Outer Space (U.N. Doc. A/68/189\*). For background on the 2013 consensus of the GGE on TCBMS, see *Digest 2013* at 377-78. Excerpts follow from the U.S. submission, U.N. Doc. CD/2078, available in full at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/206/16/PDF/G1620616.pdf?OpenElement>.

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1. The United States is committed to ensuring the long-term sustainability, stability, safety, and security of the outer space environment. Addressing the issues associated with orbital congestion, collision avoidance, and responsible and peaceful behaviour in space is the responsibility of all who are engaged in space activities. In considering options for international cooperation to ensure space security and sustainability, some nations would advocate for new, legally binding arms control agreement with a view to prevent the placement of weapons in outer space and to prevent the use of force against space objects. The United States has commented in detail on the challenges of such an approach.

2. In contrast, the United States is convinced that outer space challenges confronting the international community can be addressed through practical, near-term initiatives. Outer space transparency and confidence-building measures (TCBMs) offer a pragmatic, voluntary approach to addressing near-term concerns for outer space security and sustainability. Accordingly, the United States is pleased to provide its views on how to make practical use of the recommendations contained in the 2013 consensus report of the United Nations Group of Governmental Experts (GGE) on Transparency and Confidence-Building Measures in Outer Space Activities, in the context of the ongoing work of the Conference on Disarmament (CD).

3. The United States welcomes the achievement of landmark consensus by the GGE. The GGE study was a unique opportunity to establish consensus on the importance and priority of voluntary and pragmatic TCBMs seeking to ensure the sustainability and safety of the space environment, as well as to strengthen stability and security in outer space for all nations. The recommendations offered by the GGE study provide an effective starting point for discussions on addressing challenges to space security and sustainability.

4. The United States is pleased that the United Nations General Assembly, in 2013, at its sixty-eighth session, welcomed the note by the Secretary-General transmitting the report of the GGE and encouraged Member States to review and implement, to the greatest extent practicable, the proposed transparency and confidence-building measures contained in the report, through relevant national mechanisms, on a voluntary basis and in a manner consistent with the national interests of Member States. Furthermore, the United Nations General Assembly requested that the Secretary-General circulate the report to all other relevant entities and organizations of the United Nations system (including the Conference on Disarmament) to facilitate the effective implementation of the conclusions and recommendations contained therein, as appropriate.<sup>1</sup>

5. The United States is also pleased to note its co-sponsorship, with the Russian Federation and China, of three resolutions (A/RES/68/50, A/RES/69/38, and A/RES/70/53) that were adopted by the United Nations General Assembly in 2013, 2014, and 2015, respectively. These resolutions encouraged Member States to review and implement, to the greatest extent practicable, on a voluntary basis, and through relevant national mechanisms, the proposed TCBMs contained in the GGE report. In particular, Resolution 70/53 encourages Member States to hold regular discussions in the Committee on the Peaceful Uses of Outer Space (UNCOPUOS), the United Nations Disarmament Commission (UNDC), and the Conference on Disarmament on the prospects for their implementation. The United States also notes that the UNDC recently considered adopting an agenda item on outer space TCBMs in response to a proposal that the United States was pleased to co-sponsor with Russia and China. We hope that this new agenda item will be added to the Commission's agenda by the start of its 2017 session. Resolution 70/53 further requested the Secretary-General to submit to the General Assembly at

its seventy-second session a report on the coordination of TCBMs in outer space activities in the United Nations system, with an annex containing Member States' submissions of views on TCBMs in outer space activities.

6. In this context, the United States welcomes the opportunity to share its views on: TCBMs identified by the GGE that are relevant to the work of the CD; US implementation of certain TCBMs recommended by the GGE; and considerations for the CD on how to leverage the work of the GGE.

7. It also should be noted that the United States has considered the recommendations of the GGE report as applicable to the work of UNCOPUOS, particularly the ongoing work of the Scientific and Technical Subcommittee (STSC) Working Group on the Long-Term Sustainability of Outer Space Activities (LTS). The United States submitted its views to UNCOPUOS in October 2014 (A/AC.105/1080). In addition, in 2016, the United States supported the development of thematic priorities within the STSC in anticipation of the fiftieth anniversary of the United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE+50). These thematic priorities include: (1) global partnership in space exploration and innovation; (2) international framework for space weather services; (3) strengthened space cooperation for global health; (4) international cooperation toward low-emission and resilient societies; (5) enhanced information exchange on space objects and events; and (6) capacity-building for the twenty-first century (A/AC.105/C.1/WGW/2016/L.1). The United States notes that, thematic priorities 5 and 6 are consistent with the GGE report's recommendations.

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**Cross References**

*Piracy*, **Chapter 3.B.4.**

*Treaties generally*, **Chapter 4.A.1.**

*Maritime boundary treaties transmitted to Senate*, **Chapter 4.A.2.**

*Schermerhorn v. Israel (claim regarding tort on U.S.-flagged vessel)*, **Chapter 10.B.4.**

*Biodiversity beyond national jurisdiction*, **Chapter 13.B.3.**

## CHAPTER 13

### Environment and Other Transnational Scientific Issues

#### A. LAND AND AIR POLLUTION AND RELATED ISSUES

##### 1. Climate Change

###### a. *UN Framework Convention on Climate Change*

As discussed in *Digest 2015* at 553-60, the Paris Agreement was adopted at the 21st Conference of the Parties (“COP-21”) of the United Nations Framework Convention on Climate Change (“UNFCCC”) in 2015. On April 22, 2016, the Paris Agreement was opened for signature. As the State Department explained in an April 20, 2016 briefing, each signatory must complete its own domestic procedures in order to join the Paris Agreement, and those procedures vary by country in terms of complexity and time. See April 20, 2016 special briefing by a senior State Department official on the Paris Agreement signing ceremony, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256415.htm)

[2017.state.gov/r/pa/prs/ps/2016/04/256415.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256415.htm). At a high-level event at the UN on the day of the signing ceremony, Secretary Kerry recognized that “countries representing nearly 50 percent of global emissions are prepared to announce they will join this year” and that the United States was among them. See April 22, 2016 remarks, available at <http://2009-2017.state.gov/secretary/remarks/2016/04/256525.htm>.

Secretary Kerry also delivered remarks at the signing ceremony at the UN on April 22, excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/04/256497.htm)

[2017.state.gov/secretary/remarks/2016/04/256497.htm](http://2009-2017.state.gov/secretary/remarks/2016/04/256497.htm).

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It’s an enormous privilege to be here on Earth Day to join in signing this historic agreement.

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Paris was a turning point in the fight against climate change.

Paris marked the moment when the world finally decided to heed the ever-rising mountain of evidence that had been piling up for years...and began ...to galvanize our focus on how, as a global community, we are going to address the irrefutable reality that nature is changing at an increasingly rapid pace due to our own choices.

For sure, the agreement that we reached in Paris is the strongest, most ambitious global climate pact ever negotiated. But the power of this agreement is not that it, in and of itself, guarantees that we will actually hold the increase of temperature to the target of 1.5 degrees or 2 degrees centigrade. In fact, it does not and we know that, we acknowledge it. The power of this agreement is the opportunity that it creates. The power is the message that it sends to the marketplace. It is the unmistakable signal that innovation, entrepreneurial activity, the allocation of capital, the decisions that governments make, all of this is what we now know definitively is what is going to define the new energy future—a future that is already being defined but even yet to be discovered. The power of this agreement is what it is going to do to unleash the private sector, and it is already doing to set in pace the global economy on a new path for smart, responsible, sustainable development.

Already last year, my friends, renewable energy investment was at an all-time high—nearly \$330 billion. And it is predicted that we will invest tens of trillions of dollars by the middle of this century.

For the first time in history—despite the low prices of oil, coal, and gas—more of the world’s money was spent fostering renewable energy technologies than on new fossil fuel plants.

Today we know: The new energy future, the efficiencies, the alternative resources, the clean options—none of what we have to achieve is beyond our capacity technologically. The only question is whether it is beyond our collective resolve.

Indeed, even in the time since we convened in Paris, we have seen new evidence of the danger that the climate change pace poses to our planet. We learned that 2015 was the hottest year in recorded history—by far—and we learned that after knowing that the past decade was the hottest on record, and the one before that was the hottest on record, and the one before that the third hottest on record. And now we know that this year is already on track to be the warmest of all, and last month, March, was the hottest recorded March in all of history. This past winter, the maximum extent of Arctic sea ice was the lowest ever reported—breaking the record that was set just one year ago.

So the urgency of this challenge is only becoming more pronounced. And that is why our gathering today is, in fact, historic. The United States looks forward to formally joining this agreement this year, and we call on all of our international partners to do so.

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Parties to the UNFCCC met in Bonn from May 16-26, 2016 for the first intersessional meeting since the adoption of the Paris Agreement. The Agreement left several issues open for future development, including the adoption of various modalities, procedures, and guidelines related to the implementation of the Agreement. The task to develop drafts of these modalities, procedures, and guidelines was divided among a new group, the Ad-Hoc Working Group on the Paris Agreement (“APA”), and existing subsidiary bodies under the Framework Convention.

On September 3, 2016, President Obama and Chinese President Xi deposited their country's official instruments to join the Paris Agreement for the United States and China on the margins of the G-20 Leaders' Summit in Hangzhou, China. See September 3, 2016 press statement by Secretary Kerry, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/09/261567.htm)

[2017.state.gov/secretary/remarks/2016/09/261567.htm](http://2009-2017.state.gov/secretary/remarks/2016/09/261567.htm) In his statement, Secretary Kerry emphasized the importance of bringing the Paris Agreement into force as quickly as possible, urging others to join as the United States and China had. Secretary Kerry's press statement also highlighted other key steps the United States had on its climate change agenda for 2016:

The United States and China also committed today to working together and with other countries to achieve successful climate outcomes this year by adopting an amendment to the Montreal Protocol to phase down hydrofluorocarbons, and approving a global market-based measure for addressing carbon emissions from international aviation. Achieving these important actions this year will help the world reach the ambitious goals we set in Paris. And it would send a clear signal to all sectors that the global momentum to tackle climate change is only building.

On September 21, 2016, Secretary Kerry offered remarks at an event at the UN marking the first step toward entry into force of the Paris Agreement: 55 countries joining the agreement. Entry into force also requires countries accounting for at least 55 percent of global greenhouse gas emissions to have joined. Secretary Kerry's remarks are excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/09/262237.htm)

[2017.state.gov/secretary/remarks/2016/09/262237.htm](http://2009-2017.state.gov/secretary/remarks/2016/09/262237.htm)

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The Paris Agreement was an extraordinary milestone. It was one that, for so many of you here, took decades to achieve. But the feeling of satisfaction that comes with that milestone is tempered by the knowledge that those of us who have worked in this vineyard for a long time know that even as we mobilized on this issue, even as we advocated over so many years, even as we pointed to the science that motivated us and spurred our efforts, even as we negotiated in Paris, we were aware that with each passing day the problem that we confronted and continue to confront was growing worse.

Each day, the course that our planet is on has become more dangerous, and the alarming findings have only continued since the agreement was gaveled in. Recently, we learned that the last two months, July and August, were the hottest ever recorded on the planet, but they were the 14th and 15th consecutive record-setting months in a row. And we know now that last year contributed to the last decade that was the hottest decade in recorded history, and the decade before that was the second-hottest decade in recorded history, and the decade before that the third-hottest decade in recorded history.

So if ever anybody doubted science, all they have to do is watch, feel, sense what is happening in the world today. And make no mistake, anybody, these high temperatures are already having consequences, already people dying in the heat, already people moving because of lack of water, already we have climate refugees on this planet, already we see more powerful storm surges, already we see lower productivity in many industries, and serious impacts on public health and well-being. We know there are diseases that used to die because it got cold and it doesn't get cold. We know that species are moving and that the ecosystem of the planet, including the oceans, is changing.

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Earlier this month the United States and China—the two largest emitters in the world, I regret to say—formally joined the agreement. And now with the people who have joined here today, virtually every small island in the Pacific, every island state whose very existence depends on our success, has now joined this agreement. That tells you something. And we are extremely grateful to the 31 others who marched up here and presented today, which now brings us over the 55 countries necessary, and all that is left now to do is get the 55 percent of emissions. But this is a great accomplishment today, and everybody should be proud of what has happened.

Now, I know ... from conversations that President Obama and I have had with leaders in certain key countries, I am absolutely confident that this agreement will come into force this year before we convene again for COP22 in Marrakech.

Now, the global community's path to limit the warming of our planet and stave off the impacts of climate change, as all of you know, has been long and it has been frustrating. Until last December, it was a pretty grim story. With many of you, I remember being in Rio 1992. And between Rio and today, so many meetings—Durban, Cancun, Doha, Warsaw, Buenos Aires, Poznan, Kyoto, Copenhagen, Lima. And I remember China managed the legislation that would have brought Kyoto into force on the floor of the United States Senate and running into a buzz saw of opposition from the coal industry in our country.

So we have shared our part of the blame for what has been a difficult road, and we accept that. And it's one of the reasons why President Obama and I have been so focused and so committed to try to make up that difference and help us to get where we are today. But in Paris, my friends, in Paris, a remarkable thing happened. More than 185 countries came together; more than 175 signed on. In Paris, we began to rewrite the ending of this story. And provided that we implement the agreement that we reached last year, provided that we make progress on other important climate efforts in the market-based measure that we are seeking to address in international aviation emissions and the HFC amendment, the Montreal Protocol that we're hoping to pass later this fall, provided we take all these steps, we will continue writing this new ending, and it will finally become a story that we will be proud to tell our grandchildren and future generations. It will be a story of how the world came together in the greatest aspirations of United Nations, of this institution, to embrace this moment and to safeguard the future of this planet for generations to come. That is this mission, nothing less, and we intend to get the job done.

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On October 5, 2016, Secretary Kerry announced that enough countries, accounting for more than 55 percent of the world’s greenhouse gas emissions, had submitted their instruments to formally join the Paris Agreement to allow it to enter into force in 30 days, in accordance with its terms. See October 5, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/10/262822.htm>. Secretary Kerry continued:

The rapid entry into force timeline underscores the widespread recognition of the urgency at hand. It is a testament to the continued determination of states large and small, rich and poor, to act on the moral, social, and economic imperative to address the dangerous impacts of climate change. Together, the world’s largest emitters have worked to overcome the divides that have led to the demise of past attempts, and are instead leading the way together. The reason we were able to pass the required threshold so early is that many of the largest emitters in the world—including the United States, China, India, the EU and a number of its member states—recognized the need to continue the momentum from Paris and joined swiftly to bring this Agreement into force as quickly as possible.

Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, also issued a statement on October 5, 2016 heralding the crossing of the threshold for entry into force of the Paris Agreement. See statement available at <http://2009-2017-usun.state.gov/remarks/7465>. Ambassador Power’s statement includes the following:

The United States is proud to have been a vocal proponent of speedy entry into force for the Paris Agreement, and to have worked closely with our partners and allies so as to be able to cross this threshold today. When President Obama announced his Climate Action Plan in 2013, he asked if the nation and the world had the courage to act on climate before it was too late. Today, almost two decades after governments met in Kyoto, Japan to negotiate the first international treaty aimed at slowing climate change, the global community has answered the call.

On November 3, 2016, Dr. Jonathan Pershing, U.S. Deputy Special Envoy for Climate Change, and John Morton, Director for Energy and Climate Change for the U.S. National Security Council, held a special briefing to preview the 22nd Conference of the Parties (“COP-22”) of the UNFCCC, which convened in Marrakech, Morocco. See special briefing, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264077.htm> and excerpted below.

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MR MORTON: ... [B]y all measures, this year, 2016, has been a truly historic year for international climate action. We have seen in the last two months alone the rapid entry into force of the Paris Agreement, much, much faster, years faster, than most people expected. And with that entry into force, that puts us on a much accelerated path toward implementation of the goals that we laid out in Paris a year ago.

We have secured an ambitious amendment, as you know, to the Montreal Protocol to phase down the production and use of HFCs, or hydrofluorocarbons, a group of the extremely potent greenhouse gases, which by some accounts, that agreement ... puts us on a path to avoiding up to a full half a degree centigrade of warming. And subsequently to that, we achieved adoption of a global market-based measure to set international aviation on a path to sustainable and carbon-neutral growth. And international aviation, as you may know, is one of the fastest growing segments of greenhouse gas emissions.

So in the last couple months alone, due to the really kind of concerted work of this Administration and the president himself and many others throughout the international community, we've set the tone for ... coming into Marrakesh... in a very, very positive light.

So as we look forward to the two weeks ahead, we see COP22 is really a COP of implementation and action. So the Paris Agreement was a turning point in terms of setting in place a framework, an international framework for action. And in the COP that is approaching, we intend to really intensify our work in turning toward implementation.

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MR PERSHING: ... The Moroccans themselves are calling this a COP of action. An action agenda is therefore one of the big things that they've got. That's going to feature work by businesses, by cities, by states and civil society, either themselves or in partnership with others on a variety of topics. So they've got an energy discussion, an agriculture discussion, an oceans discussion, a cities discussion, a whole variety of these, that really begin to elevate the implementation side.

The second is there's going to be a series of discussions around the details and the negotiation of specific advancing [the] ... framework ... in Paris in some components. This is the start now of the detailed implementation agenda. Guidelines for transparency, the rules for what countries have to report on, discussions further about how to implement the various adaptation provisions—all of this will take place in the round of negotiations coming forward.

The third thing that I note is that the political dynamics here are quite significant. We take advantage, and John's mentioned the things that have happened—entry into force has occurred. That's a big political signal of intent and focus. The Montreal Protocol on HFCs, the amendment there has occurred. That's a huge win. Civil aviation has occurred. But we've also had resources being put forward on the private sector side. This is a year of the first time we've seen more investment in renewables than investment in fossil fuels. Those kinds of things are a clear mark of progress, and this COP will kind of reflect those and advance those.

I don't expect the consequence of this negotiation will resolve all of these technical issues. We're on a very rapid timetable. We thought we had until 2020 to finish one of these negotiations. We're going to try to work now to accelerate it and make 2018 the year—so a two-year advancing of the schedule. It will take a lot of that time. There's going to be a great deal of intense work that has to happen to deliver this, and that detailed part of Morocco is a part of the deal coming forward here.

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MR PERSHING: Thanks. Let me just turn to the second question, which is on loss and damage. The issue, for those of you who are not following this in detail, is a question of damages that countries are unable to cope with. So if you imagine some rise in sea level and you can move or you can elevate your buildings, that's an adaptive strategy. But if at the other end your island gets washed away and you can't live there anymore, that's a loss and damage problem. And that distinction is real, and we're beginning to see countries increasingly concerned about this agenda.

But while it's real, it's some ways off in the future, and the focus on the financing side here has been on an adaptation agenda, not the financing on loss and damage. So while I expect it to be a conversation coming forward over the years, I don't really anticipate that this will be the focus of the conversation in Morocco.

On the finance side, we certainly do see enormous efforts being made by countries around the world to increase their resources for adaptation, and many of the things that you're looking to do to prevent risks, to manage this tropical storms intensity, to manage increasing sea level rise, to manage drought—those are things that are actually being funded with resilience programs through the multilateral development banks, through bilateral lending from countries around the world. And I would note that this is going to be increasingly something that countries themselves start to pay attention to.

And this is not just a developing country issue. This is something we do in United States; it's something we see in Europe, as they manage their floods; it's something we see in Japan, as they manage constraints around increasing typhoons. All of this is coming, and it's a global issue, and we're seeing increasing attention to the problem. The negotiations will emphasize this probably significantly in Morocco.

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On November 7, 2016, the 22<sup>nd</sup> Conference of the Parties to the UN Framework Convention on Climate Change and the 1<sup>st</sup> session of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement commenced in Marrakech. The State Department released a fact sheet on November 16, recounting the launch of new adaptation partnerships since COP-21. That fact sheet is excerpted below, and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264363.htm>

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Between 2010 and 2015, the United States committed over \$2.5 billion to support for adaptation to climate change in developing countries. These funds helped to advance national adaptation planning through the National Adaptation Plans (NAP) Global Network, to promote access to and use of satellite climate data through SERVIR, and to fund multilateral adaptation funds, such as the Least Developed Countries Fund and the Special Climate Change Fund.

The Paris Agreement charges all countries to engage in adaptation planning processes and to implement adaptation actions. The Agreement also instructed Parties to strengthen their cooperation on adaptation, and highlights the importance of continued and enhanced support to developing countries for adaptation.

Earlier this year, developed countries, including the United States, released a climate finance roadmap establishing that they are collectively on track to double public finance for adaptation by 2020.

The United States has launched several new adaptation programs this year to enhance resilience to climate change and, thereby, promote implementation of the Paris Agreement.

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Secretary Kerry addressed COP-22 on November 16, 2016. His remarks are excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/11/264366.htm)

[2017.state.gov/secretary/remarks/2016/11/264366.htm](http://2009-2017.state.gov/secretary/remarks/2016/11/264366.htm).

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... [H]ere at the 22nd COP, no one can deny the remarkable progress that we have made—progress that actually was pretty hard to imagine even a few years ago. The global community is more united than ever not just in accepting the challenge, but in confronting it with real action, in making a difference. And no one should doubt the overwhelming majority of the citizens of the United States who know climate change is happening and who are determined to keep our commitments that were made in Paris.

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And when we left Paris, no one rested on their laurels. Instead, the world—unified—moved expeditiously ... to pull the agreement permanently into force, crossing the thresholds of 55 countries representing 55 percent of global emissions, and doing so far faster than even the most optimistic among us might have predicted. In a powerful statement of the whole world's broad commitment to this agreement, in less than a year, 109 countries representing nearly 75 percent of the world's emissions have now formally committed to bold, decisive action—and we are determined to affirm that action and to stick with it out of Marrakech.

Now, we have in place ... a foundation, based on national climate goals—109 nations, each of them have come up with their own plan, each of us setting goals that are based on our own abilities and our own circumstances. This agreement is, in fact, the essence of common but differentiated responsibilities. It provides support to countries that need help meeting the targets. It leaves no country to weather the storm of climate change alone. It marshals an array of tools in order to help developing nations to invest in infrastructure, technology, and the science to get the job done. It supports the most vulnerable countries, so they can better adapt to the climate impacts that many of those countries are already confronting.

And finally, it enables us to ratchet up ambition over time as technology develops and as the price of clean energy comes down. This is critical: the agreement calls on the parties to revisit their national pledges every five years, in order to ensure that we keep pace with the technology and that we accelerate the global transition to a clean energy economy.

This process—a cornerstone of our agreement—gives us a framework that is built to last, and a degree of global accountability that has never before existed. But I want to share with you that the progress that we've made this year goes well beyond Paris.

In early October, the International Civil Aviation Organization established a sector-wide agreement for carbon-neutral growth. Why is this so important? Because international aviation wasn't covered by what we did in Paris, and if that aviation was a country, it would rank among the top dozen greenhouse gas emitters in the world.

A few weeks later, I was pleased to be in Kigali, Rwanda, when representatives from again nearly 200 countries came together to phase down the global use and production of hydrofluorocarbons—which has been expected to increase very rapidly with a danger that is multiple of times more damaging than carbon dioxide. The Kigali agreement could singlehandedly help us to avoid an entire half a degree centigrade of warming by the end of the century—while at the same time opening up new opportunities for growth in a range of industries.

All of these steps combine to move the needle in the direction that we need to. And in large part because global leaders have woken up to the enormity of this challenge, the world is now beginning to move forward together towards a clean energy future.

Over the past decade, the global renewable energy market has expanded more than six-fold. Last year, investment in renewable energy was at an all-time high—nearly \$350 billion. But that only tells you part of the story. ...[T]hat 350 billion is the first time that we've been able to see that money outpacing what is being put into fossil fuels. An average of half a million new solar panels were installed every single day last year. And for the first time since the Pre-Industrial Era, despite the fact that you have global prices of oil and gas and coal that are lower than ever, still more of the world's money was invested in renewable energy technologies than in new fossil fuel plants.

And like many of you, I've seen this transformation take hold in my own country. That's why I'm confident about the future, regardless of what policy might be chosen, because of the marketplace. I've met with leaders and innovators in the energy industry all across our nation, and I am excited about the path that they are on. America's wind generation has tripled since 2008 and that will continue, and solar generation has increased 30 times over. And the reason both of those will continue is that the marketplace will dictate that, not the government. I can tell you with confidence that the United States is right now, today, on our way to meeting all of the international targets that we've set, and because of the market decisions that are being made, I do not believe that that can or will be reversed.

Now, much of this is due to President Obama's leadership, and our Congress also moving in a bipartisan fashion on things like tax credits for renewable energy. This leadership has helped to inspire targeted investment from the private sector. Today our emissions are being driven down because market-based forces are taking hold all over the world. And that's what we said we would do in Paris. None of us pretended that in Paris, the agreement itself was going to achieve two degrees. What we knew is we were sending that critical message to the marketplace, and businesses have responded, as I just described. Most businesspeople have come to

understand: investing in clean energy simply makes good economic sense. You can make money. You can do good and do well at the same time.

Now, significantly, the renewable energy boom isn't limited to industrialized countries, and that's important to note. In fact, emerging economies like China, India, and Brazil invested even more in renewable technologies last year than the developed world.

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One of the strongest signals that government can send, one of the most powerful ways to reduce emissions at the lowest possible ...cost ...is to move toward carbon pricing that puts basic, free-market economics to work in addressing this challenge.

Now obviously, this is not a new idea. Many have come to this conclusion already. The share of global emissions that are covered by a carbon price has tripled over the last decade. Last year, more than 1,000 businesses and investors—including sectors that might be surprising to some of you—all came together to voice their support for carbon pricing. ...These companies all believe that carbon pricing will establish the necessary certainty in the marketplace that helps the private sector to move the capital that helps to solve the problem.

Carbon pricing allows citizens, innovators, and companies—it allows the market to make independent decisions free from the government to be able to best drive their emission reductions. And this is also, by the way, the chief reason that carbon pricing has received support from leaders and economists on both sides of the aisle in the United States of America. A price on carbon, coupled with government support for innovation in key sectors, is easily one of the most compelling tools for the world to accelerate the clean energy transformation that we are working to achieve. Now, while it may be some time before we see this ideal outcome, the effort to improve carbon markets ought to be a priority going forward.

The bottom line is that there are many tools at the world's disposal. The COP itself is an important tool, in a sense. It has become ... much more than just a gathering of government officials. It's really a yearly summit, 25,000 people strong this year from all over the world, for all sectors to showcase their commitment to climate action and to discuss ways to expand shared efforts. It's a regular reminder of exactly how much this movement has grown—and how many people, in how many countries, are committed to action.

Walking around the conference here before I was coming in here and seeing this site in Marrakech, and seeing the delegations and the business leaders, the entrepreneurs and the activists who have traveled from near and far to be here, it's abundantly clear we have the ability to prevent the worst impacts of climate change.

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**b. Joint Action with Other Countries**

As discussed in *Digest 2015* at 560-61 and *Digest 2014* at 560-62, the United States and China have maintained an ongoing dialogue regarding cooperation to reduce pollution jointly. On June 6, 2016 U.S. Secretary of State John Kerry, U.S. Treasury Secretary Jacob J. Lew, Chinese State Councilor Yang Jiechi and Chinese Vice Premier Wang Yang chaired the high-level U.S.-China Joint Session on Climate Change. See June 8, 2016 State Department media note, available at <http://2009->

[2017.state.gov/r/pa/prs/ps/2016/06/258179.htm](https://2017.state.gov/r/pa/prs/ps/2016/06/258179.htm). Excerpts follow from the media note describing the 2016 joint session.

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The Joint Session offered a chance to review climate progress and achievements over the past year. Chief among them was the historic Paris Agreement, which would not have been possible without the leadership of the United States and China. Both countries reaffirmed their plans to join the Agreement as early as possible this year, and agreed to work together to urge others to do so.

In the high level discussion, the United States and China committed to continue working together to achieve successful climate outcomes in other key multilateral fora. These include: reaffirming their support for adopting an ambitious hydrofluorocarbon (HFC) phasedown amendment to the Montreal Protocol this year that could prevent up to half a degree Celsius of warming (nearly one degree Fahrenheit); supporting the adoption of an International Civil Aviation Organization (ICAO) Assembly Resolution this fall for a market based measure to address CO<sub>2</sub> emissions from international aviation; and agreeing to work together to drive strong G-20 outcomes on climate change and clean energy, including on heavy-duty vehicles. Both Secretaries Kerry and Lew highlighted the need to address the climate impacts of overseas investments.

The Strategic & Economic Dialogue was hosted concurrently with the second U.S.-China Climate-Smart / Low-Carbon Cities Summit to showcase the expansion of sub-national climate cooperation and leadership. Attended by leaders from 47 Chinese cities and provinces and 17 U.S. cities, counties, and states, the event saw 66 cities from both countries endorse the U.S.-China Climate Leaders Declaration, bringing the total number of endorsements to [75]. The cities declared their intention to establish ambitious climate targets, regularly report on greenhouse gas emissions, establish climate action plans, and expand bilateral cooperation.

Additionally, the United States and China demonstrated progress by releasing dozens of outcomes with results from concrete cooperation on climate change and clean energy, a number of them developed through the U.S.-China Climate Change Working Group (CCWG). The CCWG was launched by Secretary Kerry and State Councilor Yang in 2013 and is the premier mechanism for U.S.-China cooperation and dialogue on climate change.

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The United States also cooperated with Canada and Mexico on climate and environment issues. Prime Minister Justin Trudeau of Canada, President Barack Obama of the United States, and President Enrique Peña Nieto of Mexico announced the North American Climate, Energy, and Environment Partnership on June 29, 2016, at the North American Leaders Summit in Ottawa, Canada. The Action Plan for the North American Partnership is available at [https://obamawhitehouse.archives.gov/the-press-](https://obamawhitehouse.archives.gov/the-press-office/2016/06/29/north-american-climate-clean-energy-and-environment-partnership-action)

[office/2016/06/29/north-american-climate-clean-energy-and-environment-partnership-action](https://obamawhitehouse.archives.gov/the-press-office/2016/06/29/north-american-climate-clean-energy-and-environment-partnership-action)

## 2. Sustainable Development

### a. *U.S. Support for UN Sustainable Development Goals*

See Chapter 19 for discussion of the ways the U.S. is supporting the UN Sustainable Development Goals through the IAEA Peaceful Uses Initiative.

### b. *2030 Agenda for Sustainable Development*

On July 19, 2016, Ambassador Power delivered remarks at a UN high-level political forum on the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (“SDGs”). Her remarks are excerpted below and available at

<http://2009-2017-usun.state.gov/remarks/7378>

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It’s been 10 months since 193 Member States came together to make these collective commitments—a real achievement. But the real test is, of course, what each of our nations will do to meet those commitments, within our own countries and around the world.

President Obama committed the United States to achieve the SDGs, and since September, we’ve made significant efforts, both within our own country and abroad, to do our part. Today, I’d like to focus on three key areas where all our countries, including the United States, can and must do better.

First, we must make the data tracking our relative progress toward reaching these goals more transparent and more accessible, and use it to adapt and improve public policies. We have never had so much capacity to measure—in real time—our efforts; yet our findings are too rarely made public, or rendered in a way that’s useful to policymakers and potential problem solvers. For example, data shows us that approximately one-third of food in the United States is wasted each year at the consumer and retail level. One-third. If we can use data to pinpoint sources of food loss and waste, we can improve our chances of reducing it—which is target 12.3. The United States is committed to establishing a transparent, publicly accessible online platform tracking our progress on the SDGs, and we urge other countries to do the same.

Second, where such analysis identifies areas where we need to improve, we have to speak openly to them. Too often, we governments try to hide these shortfalls, rather than shine a light on them. But acknowledging where we are coming short is an essential first step toward remedying chronic deficiencies and gaps in opportunity. ...

Third, and finally, we must draw upon the ideas, innovation, and resources beyond government—including civil society groups, the private sector, faith-based institutions, academia, and individual citizens. We all witnessed how the Agenda’s drafting was enriched by incorporating a diverse range of stakeholders; we would be foolish not to do everything we can to involve the same partners—and others—in working to implement the SDGs. To give just one quick example of how this can work, the Open Government Partnership brings together governments and civil societies from 70 countries around the world—including the U.S.—to share innovative strategies in tackling many of the key drivers of poverty and inequality, such as

corruption. We welcome Nigeria, OGP's newest member, and encourage other countries that are eligible to join as well.

Despite the essential role of civil society, many UN Member States continue to view civil society groups as adversaries in this and other efforts, rather than partners, and are taking steps to suppress them, rather than to empower them. ...

As many of you know, as the SDGs were being negotiated, the UN made an effort to reach out directly to individuals who are often excluded from designing such development efforts. A person from the Philippines spoke of wanting, as she put it, "a whole world without discrimination," saying that, too often, "being different means being hurt." A mother in Kosovo spoke of the need for a reliable source of water. A disabled man in Thailand said greater support was needed for people who are unable to work. And one Rwandan farmer said it was meaningful just to be consulted. She said, "I used to think of the United Nations as a high-level body that is not close to people. But now, we are sitting together and the UN is hearing my ideas on how I see the future."

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### 3. Ozone Depletion

As discussed in *Digest 2015* at 570, the United States is part of a coalition that has been pursuing an amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer to phase down the production and consumption of hydrofluorocarbons ("HFCs"). Secretary Kerry advocated for the amendment throughout 2016. See July 22, 2016 remarks at the Montreal Protocol high-level segment, available at <http://2009-2017.state.gov/secretary/remarks/2016/07/260401.htm>. On September 22, 2016, Secretary Kerry delivered remarks at a Montreal Protocol donor declaration event in New York. His remarks are excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/09/262293.htm>.

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... We know that the Paris Agreement itself won't, in and of itself, get the job done. So we need to do more. And one the single-most important actions that the global community can take is to amend the Montreal Protocol to include an ambitious amendment that phases down the use of hydrofluorocarbons, HFCs.

Now, the Montreal Protocol, designed in 1987, which I had the privilege of working on and helping to get through the United States Senate, was passed in order to address the deeply troubling hole that existed in the ozone layer. And it actually has become one of the most successful environmental agreements in history. Virtually all parties met their obligations under the accord. And nearly 100 of the most ozone-depleting substances have been completely phased out. As a result, the hole in the ozone layer is shrinking and on its way to full repair.

And we can all recall how we kept talking about the growing hole in the ozone, the dangers that it presented to us, and many people doubted whether or not we'd have the capacity to be able to do something about it. Well, we did do something about it. We proved that human

beings have the ability to be able to make a difference on the environment, if we, when we, make the choices that are available to us. ...[T]hat's the good news.

The bad news is that the substances banned by the Montreal Protocol have been replaced by substances that cause a different kind of danger. HFCs may be safer for the ozone, but they are exceptionally potent drivers of climate change itself, often thousands of times more potent than, for example, carbon dioxide. So today, the growing use of HFCs in everyday items, like refrigerators or air conditioners, in inhalers, is responsible for an entire gigaton of CO<sub>2</sub>-equivalent pollution annually. It's extraordinary.

... These substances, HFCs, already emit almost as much pollution as 300 coal-fired power plants. And that is only going to get worse if we don't act soon.

That is why a phasedown is so important. But it's also important if I translate that into impact. In Paris, we set the goal of eliminating the Earth's rising temperature because of global climate change to 1.5 degrees centigrade, or 2 degrees centigrade with an aspiration for the 1.5. But amending the Montreal Protocol to phase down HFC use would actually help us to avoid a full one half degree centigrade of increase. So just in this HFC effort, we have the ability to have a profound impact on reaching our goal of the Paris Agreement.

And if we take advantage of this transition and move to appliances that are not only ozone friendly and climate friendly but also more energy efficient, then we can potentially double the climate benefits and save consumers, tax payers, billions of dollars on their power bills. So, this is what we all call win-win-win in terms of public policy. And when the parties to the Montreal Protocol come together next month in Kigali, it is essential not just that an HFC amendment pass, but that an ambitious HFC amendment be adopted.

Now, I'm very proud to stand here today with representatives from many of the more than 100 countries that have formed a coalition committed to a strong amendment, an amendment that would do three key things. One, it would require the United States and other donor countries to take the first reduction steps. Second, soon thereafter it would freeze HFC consumption and production in countries that need more assistance—the so-called “Article III countries,” as they're known in the lingo of the Montreal Protocol talks. And third, it would include ambitious phasedown schedules for all parties everywhere.

Now, I want to underscore that we understand that while the phasedown amendment is a critical piece of the climate puzzle, it doesn't mean it's going to be easy to implement. It's going to require a concerted effort and everybody knows that. But as I said during the last round of negotiations in Vienna, the reason the Montreal Protocol has been so successful is because cooperation is at its core. Under its provisions, no country is or has ever been expected to go it alone. That is why the multilateral fund exists; to assist countries in implementing their obligations. And today, I am pleased to announce that if an ambitious amendment is concluded in Kigali, the United States and other donor countries intend to contribute an additional \$27 million to the multilateral fund in 2017 alone as extra support for the amendment's implementation. And because we all recognize that governments alone will not solve this challenge, nearly 20 donors from the philanthropic community are today announcing that they will complement these funds to the tune of more than \$50 million. Now, this money will be targeted at helping countries that need assistance with the phasedown to be able to expand their energy efficiency and thus expand their economic savings.

And so, I just emphasize to everybody this is public-private partnership at its best. And this is also the developed countries, the larger nations, understanding the responsibility to help other countries be able to make it work.

So, that's the reason I'm confident that together we're going to achieve what this moment demands. And provided we do, if the nations of the world join together to fulfill the commitment that we've made, then we can leave Kigali with an ambitious amendment to phase down the use and production of HFCs and we will make a huge step, again, to move closer to the goal that we set in Paris, and most importantly, to honor our moral responsibility to protect the health and the livability of the planet that we share.

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The 28th Meeting of the Parties to the Montreal Protocol was held in October in Kigali, Rwanda. Secretary Kerry delivered remarks at the plenary on October 14, 2016, urging adoption of the amendment on HFCs. His remarks are excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/10/263133.htm>.

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Now, nearly 30 years ago, the countries that we represent came together in Montreal around an agreement that fundamentally shifted the path that our planet was on. It was one of the earliest efforts. ... 28 times we have come together since that time in order to nurture and advance this incredibly daring and effective protocol. And with success, we have the ability to be able now once again to prove the value of multilateral work, the value of diplomacy, and the value of patience.

So thanks to the cooperation and the courage that we summoned at that critical time almost 30 years ago, the hole in the ozone layer—which had been growing at an alarming rate, and which was the reason that we came together—that hole is now shrinking, and it's on its way to full repair.

So we proved that we can make a difference. We proved that science has a value. We proved that if we come together in a forum like this, we can actually do things that affect the entire planet.

Today, in Kigali, the parties to the Montreal Protocol are again called on to summon our shared commitment to the only planet that we have. And I can assure you, that in the 30 years' time from now, our successors will look back and scrutinize, make judgments about the steps that we take or don't take, fail to take at this time. The only question is whether or not they will be as proud of what we do now as we are of what our predecessors did three decades ago.

Now, everyone in this room is aware of how serious the stakes are. Everyone here knows about the reams of scientific evidence that is gathering by the day and by the week, all of it compounding to provide one of the most authoritative scientific cases we have ever seen with respect to things that happen on the planet, all of them detailing how catastrophic climate change could be for future generations. We all know that the window of time that we have to prevent the worst impacts from happening is in fact narrow, and it is closing fast. ... We all know that adopting an ambitious amendment to phase down the use and production of hydrofluorocarbons—or HFCs—is likely the single most important step that we could take at this moment to limit the warming of our planet and protect the planet for future generations to come.

It is not often you get a chance to have a .5-degree centigrade reduction by taking one single step together as countries—each doing different things perhaps at different times, but getting the job done.

All of us here know that HFCs, which was supposed to be the solution, turned out not to be the solution. We replaced the ozone depleting substances, but we came to understand the hard way that HFCs may be safe for the ozone layer but they are disastrous for our climate, in many cases thousands of times more damaging than carbon dioxide. So today, the use of HFCs in everyday items like refrigerators and air conditioners is responsible for an entire gigaton of carbon dioxide equivalent pollution every single year. Put another way, in a single year, these substances emit as much CO<sub>2</sub> equivalent as nearly 300 coal-fired power plants.

In Paris, the world set the goal of limiting the Earth's warming to well below 2 degrees Celsius. Everybody here understands, and we have heard again and again, an ambitious HFC amendment is the single biggest thing we can do in one giant swoop, in one moment. Kigali can become the pace setter for Marrakesh and the pace setter for next year. That is how much our work here in Kigali matters. That is the responsibility that we share.

Now, obviously, I recognize that although approving the amendment that we seek is an essential step forward, it's not an easy solution for some countries to decide to make. I understand that. Not easy for anybody to make fundamentally. Implementing it is a different process for each of our countries, and we need to respect that and we are. Some nations, including the United States, have already begun to phase down the use of HFCs, but others have not. And therefore, some of those countries have real concerns about the potential costs.

I believe that what we have done here in the workup to this amendment recognizes those differences, understands the differences, makes genuine efforts in order to try to deal with them by putting money on the table, by stretching out certain kinds of schedules, by dealing with baselines responsibly, and ultimately by having different freeze years that recognize what is genuinely possible.

But it is important for everybody here to remember that one of the reasons that the Montreal Protocol has worked so well is because it accounts for these differences. Cooperation is written right into the text of the agreement. No country has ever been expected to go it alone, and that is absolutely true under the HFC amendment of the type that we have proposed. No country is expected to go it alone. In fact, the multilateral fund exists with the sole purpose of assisting countries in implementing their obligations.

Last month I announced in New York that in order to help with the early stages of an ambitious HFC amendment, the United States and other donor countries intended to contribute an additional \$27 million now, and I am confident as we go forward that more money will be produced, but that is the amount that we will produce immediately into the fund in 2017. And because we all recognize that governments aren't going to do this all by themselves, a dozen donors from philanthropic and private sector community announced that they, too, are going to contribute, and they pledged at least another \$50 million if we are successful.

Now, I remember a very late night in Paris when people were agitating and some people were worried that somehow the differentiation because of common and differentiated wasn't being acknowledged enough. Well remember, that has never been part of the Montreal Protocol discussion. Never. That is not the standard we have ever applied. But nevertheless, in Paris we passed the most differentiated agreement ever in history. How can I say that? Because it's true. Every single country came to Paris with its own plan designed by itself with a review process that is not accountable under the law, so it's open to everybody's application.

Well, here it's the same thing. We have countries coming in that are prepared to start in 2021. We are and we will, but we know we can't hold everybody to that. So other countries will start at a later time with a different baseline, and other countries perhaps even different from that. We understand that. That's why we have a group 1 and a group 2, and we're working through these things. But no country has a right to turn its back on this effort and to forget about the meaning of a multilateral effort where the world is looking to us to try to literally save this planet from what we ourselves have chosen to do with respect to how we power our energy and what we have done for more than 150 years or more.

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This is a time for leadership. And everybody here is a leader in this effort.

Again and again, we have gone beyond the targets that we set for ourselves in the Montreal Protocol. Remember that. We've consistently beaten the targets and we'll beat these targets. If we're going to adopt an amendment this year, we need to conclude negotiations on a level of ambition in the coming hours. And if we're going to give this amendment the teeth that it needs to prevent as much as half a degree of warming, then we need to make sure that we are pushing the most far-reaching amendment that we can adopt. Every week, every day that we are able to move up the freeze dates, or every hour we're able to accelerate our phasedown schedules—every bit of HFC production and consumption that we can reduce all makes a difference.

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So if we can adopt an ambitious HFC amendment here in Kigali, the message is going to be underscored the same way that it was in Paris, and it will demonstrate to the private sector just how serious we are, and that will immediately move capital into finding the solutions to this problem. Why? Because people will make money, because there are revenue streams for energy, for refrigerators, for air conditioning.

In the end, what we do here today is actually about much more than just one amendment. It's about much more than the Montreal Protocol. It's about whether we have actually woken up as a world in a meaningful way to the harsh reality of climate change.

We've known about this threat for decades now. But for a long time, we have allowed countries to be divided into certain kinds of fault lines – rich and poor, north and south, industrialized and developing. And those divisions prevented us for years from achieving any meaningful progress. And so I can remember from the day I went to Rio in 1992 to the follow-on conferences in Buenos Aires, the Kyoto efforts we made, all the way to Copenhagen and that failure, and then the passage in Paris. We lost years in this effort. We delayed action and the challenge grew and it became harder and harder to overcome. And every year that we wait here, it will become more expensive and it will become more demanding.

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So I say to everybody here, let's get this job done, just as we did in Paris. Let's do it the way we did, let's get it done in the next few hours, let's move forward, and together, I think we can leave here with pride in the foundation we have laid for the greatest change our planet has ever seen in how we energize and service our marketplaces, and most importantly, live up to our obligation to protect the future for the future.

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On October 15, 2016, Secretary Kerry announced in a press statement that the parties to the Montreal Protocol meeting in Kigali had agreed to the amendment to phase down the use and production of HFCs. See October 15, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/10/263170.htm> and excerpted below.

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The world came together today in yet another milestone on the path toward a safer, more sustainable future. In Kigali, Rwanda, I was proud to help represent the United States as the nearly 200 Parties to the Montreal Protocol agreed to an amendment to phase down the use and production of potent greenhouse gases known as hydrofluorocarbons (HFCs). The Kigali Amendment we adopted could avoid up to half a degree Celsius of warming by the end of the century.

The amendment also amplifies the important message we've been sending to industry and the private sector: Entrepreneurs and innovators everywhere can continue to invest in climate solutions with confidence. Nations in every part of the world are committed to changing the course our planet has been on. We are moving toward a more sustainable world—and our pace is quickening.

The Kigali Amendment is just the latest example of the tangible progress the world is making to address climate change. Just last week, the Paris Agreement reached the thresholds to enter into force... and we also adopted a measure aimed at carbon neutral growth in the international aviation sector.

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## **B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION**

### **1. Fishing Regulation and Agreements**

#### ***a. South Pacific Tuna Treaty***

See Chapter 4 for a discussion of the process by which, during 2016, the United States notified the depositary to the South Pacific Tuna Treaty of U.S. withdrawal and subsequently rescinded that notification after amendments to the 27-year-old treaty were agreed to and adopted by the United States and the Pacific Island governments which are parties to the Treaty.

**b. Port State Measures Agreement**

As discussed in *Digest 2015* at 586-88, the United States enacted the Illegal, Unreported, and Unregulated (“IUU”) Fishing Enforcement Act of 2015, paving the way for the United States to take steps to address IUU fishing, including by ratifying the 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU Fishing. On February 11, 2016, Secretary Kerry announced that President Obama had signed the instrument of ratification for the United States to join the Port State Measures Agreement. The United States was the 20<sup>th</sup> party to ratify the Agreement. See February 11, 2016 press statement, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/02/252366.htm)

[2017.state.gov/secretary/remarks/2016/02/252366.htm](http://2009-2017.state.gov/secretary/remarks/2016/02/252366.htm). As explained by Secretary Kerry in his statement:

By joining the Port State Measures Agreement, the United States commits to work together with other nations to prevent illegally caught fish from entering into commerce worldwide by reducing the number of ports where these fishing products can be unloaded and making it harder for bad actors to do business. I hope other countries around the world will work urgently to ratify this vital Agreement as well.

In May 2016, the UN Food and Agriculture Organization (“FAO”) announced that, with 30 parties, the Port State Measures Agreement had reached the threshold for entry into force. See Secretary Kerry’s May 17, 2016 press statement, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/05/257297.htm)

[2017.state.gov/secretary/remarks/2016/05/257297.htm](http://2009-2017.state.gov/secretary/remarks/2016/05/257297.htm). The Agreement entered into force on June 5, 2016. As Secretary Kerry pointed out in his statement welcoming the FAO’s announcement of the Agreement’s prospective entry into force, only 10 parties had joined the Agreement by 2014 when the United States decided to make it a priority.

**2. Marine Pollution**

The United States hosted the third “Our Ocean” conference, September 15-16, 2016, at which participants announced new initiatives on marine conservation and protection and made new commitments on the protection of the ocean. The State Department issued a fact sheet summarizing commitments made at the 2016 conference, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262042.htm>. Indonesia announced that it would host the 2018 Our Ocean conference and Norway announced it would host in 2019.

**3. Biodiversity Beyond National Jurisdiction**

In 2015, the UN General Assembly decided to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea (“UNCLOS”) on

the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. For a discussion of past U.S. views regarding such an instrument, see *Digest 2011* at 438-39. Views expressed by the United States at the Second Session of the Preparatory Committee on the Development of an International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity are summarized in a September 9, 2016 document, excerpted below and available on the website of the Division of Ocean Affairs and the Law of the Sea,

<http://www.un.org/depts/los/biodiversity/prepcom.htm>

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### Marine Genetic Resources

#### Marine Genetic Resources: Common Heritage of Mankind

There is no legal gap in regard to marine genetic resources in areas beyond national jurisdiction. Rather, these resources fall under the high seas regime of international law as reflected in the Law of the Sea Convention (LOSC). Marine genetic resources (MGR) in areas beyond national jurisdiction are not covered by the provisions pertaining to the International Seabed Authority or the Area (Part XI), except as part of the marine environment that must be protected in connection with “activities in the Area” (which are defined as activities of exploration for and exploitation of the resources of the Area; in the context of the Area, “resources” are expressly defined to include only mineral resources).

We support application of the concept of the common heritage of mankind to mineral resources in the Area, as is clearly articulated in the Law of the Sea Convention. However, we do not support the application of this concept beyond that, and in particular, we oppose any application of the concept of “common heritage of mankind” to marine genetic resources in areas beyond national jurisdiction.

#### Marine Genetic Resources: Definitions

We recommend that we first consider definitions of genetic material and genetic resources that appear in other contexts, including the Convention on Biodiversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) as the basis for this discussion. These definitions can be a good starting point for developing a definition for marine genetic material or marine genetic resources that provides for some consistency across fora yet is also tailored to suit our needs. We note that marine genetic resources should be limited to material from living organisms containing functional genetic units of heredity. The definition should not include material such as enzymes or other proteins or information generated from MGR such as genetic sequence data.

We have reviewed definitions of genetic material and genetic resources used in other contexts, including the Convention on Biodiversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). We have relied on language from those definitions to arrive at definitions of marine genetic material (MGM) and MGR that are inclusive enough to accomplish the ends that we are seeking, and sufficiently tailored to steer clear of unforeseen or unintended consequences. Specifically, this Prepcom may wish to consider the following definitions of MGM and MGR that include functional units of heredity (DNA) from a plant, animal, or microbe from the seabed beyond national jurisdiction, but not

from the water column:

“*Marine genetic material* means any material of plant, animal, or microbial origin containing functional units of heredity collected from the Area; it does not include material made from material, such as derivatives, or information describing material, such as genetic sequence data.”

“*Marine genetic resources* means any marine genetic material of plant, animal, or microbial origin of actual or potential value collected from the Area.”

Marine Genetic Resources: Fish

In our view, if marine genetic resources from a fish are used for their genetic properties, they should be treated as other MGR under any new instrument. There would be no reason to treat a gene from a fish differently than a gene from any other marine organism. If, however, fish are used as a commodity, then many would fall under existing regimes, including regional fisheries management organizations, and should not be addressed here.

Marine Genetic Resources: *In Situ, Ex Situ, In Silico*

It is essential to maintain a conceptual and definitional distinction between marine genetic resources themselves and information about those resources. Indeed, for purposes of clarity, we should refer to information taken from MGR by its proper name: genetic sequence data, or GSD, and not use the term *in silico*. GSD is information and its sharing can promote uses of GSD in research and development. If GSD is included, and a decision were made to attempt to trace the downloading and use of such information, how would that work? We struggle to envision a scenario that could be workable. How could we manage benefit-sharing (and promote compliance) if data, something that is freely and openly shared as part of research best-practices, were included in it?

It is best to limit the definition of MGR to *in situ* collection. Including *ex situ* samples and procedures in the definition of MGR would introduce a range of complex variables, such as how materials are collected, transported, and stored. These would dramatically complicate the operation of BBNJ benefit-sharing and move us farther away from achieving our objectives.

Marine Genetic Resources: Access

In the high seas regime under international law, no State nor any other entity has sovereign rights over MGR in areas beyond national jurisdiction. Anyone can freely access such MGR in accordance with international law. As we do not have to discuss issues of ownership of MGR, we are instead free to share ideas on how sharing benefits might allow us to best achieve our overarching conservation objectives, and how such benefit sharing arrangements might work.

Benefit sharing must be considered in the context of how any benefit sharing might allow us to achieve our conservation objectives. We do not want to advance any benefit sharing conditions that might create operational inefficiencies or otherwise obstruct beneficial research or development activities. In our view, especially given the difficulty for many to even access MGR, access to MGR in areas beyond national jurisdiction could itself be considered a benefit, and it is important for this group to discuss how we might be able to advance access as a benefit.

Marine Genetic Resources: Benefit Sharing

MGR in areas beyond national jurisdiction fall under the high seas regime of the law of the sea, and we do not want to see restrictions placed on those resources. If, however, a new instrument were to include a benefit-sharing regime, the benefits should focus on capacity building and conservation. At the last Prepcom session we heard compelling descriptions of the difficulties some scientists, particularly from developing countries, face in terms of having

access to BBNJ. Increased access to BBNJ, in ways acceptable to States, could be an example of positive benefit sharing.

Marine Genetic Resources: Water Column

We do not support including MGR found in the water column in any benefit sharing arrangements. There is precedent in LOSC Article 77 for treating species on the seabed floor differently from species in the water column. We support a distinction being made for MGR from the Area and MGR in the water column.

Area-based Management Tools (ABMTs), including Marine Protected Areas

ABMTs, including Marine Protected Areas: General

The United States strongly supports the protection of the marine environment, both within and beyond national jurisdiction, and believes the conservation aspects we are discussing in this Prepcom are critical elements of any potential instrument. We are committed to an ecosystem-based approach to the management of the ocean, using the precautionary approach, and the best available science. This includes using tools such as marine protected areas and coastal and marine planning, which consider all uses of the environment towards the goal of conservation and sustainable use.

As science and experience with existing marine protected areas have demonstrated, when marine protected areas are science-based, designed, implemented, and managed effectively, and used in concert with other appropriate conservation tools, they can contribute greatly to enhancing ecosystem resilience, sustainable use of marine resources, and protecting marine ecosystems and biodiversity. To this end, States could consider establishing as part of the BBNJ implementing agreement a process to identify and designate areas to be protected, for example marine protected areas (MPAs).

MPAs are not exclusively “no take” zones, but rather they are spatial management tools that can allow for varying levels of ecosystem management, conservation, and sustainable use to achieve specific management objectives based on the characteristics of specific areas. MPAs are most successful when they are supported by the best available science and involve relevant stakeholders in their development and implementation.

An MPA must have clear and specific objectives; defined, user-friendly and science-based boundaries; and a strong link between potential harms to the ecosystem and the management measures developed to address them. MPAs must also be consistent with customary international law as reflected in the Law of the Sea Convention, including but not limited to its sovereign immunity provision in Article 236. As new information becomes available or ecosystem conditions change, there must be flexibility to adapt and respond with new or revised management measure recommendations.

Whatever steps we take here must be based on the best available science, and one of our key tasks is to determine how we can obtain the information necessary to ensure science-based decision-making related to MPAs that is supportable by a wide variety of stakeholders. We must ensure that scientists associated with relevant management sectors, including shipping, fisheries, and mining activities, are fully and adequately engaged in this endeavor, as well as scientists that have expertise in the conservation and management of biodiversity.

ABMTs, including Marine Protected Areas: Scientific and Policy Process

A potential BBNJ implementing agreement could establish a two-step approach, including a scientific process and a policy process, that identifies areas for protection as well as conservation goals and objectives for those areas. The scientific process could identify the area to be protected based on the best available science, including consultation with scientists who

have expertise in the conservation and management of biodiversity as well as scientists associated with relevant management sectors (e.g., shipping, fisheries, oil and gas, undersea cable operations, and mining).

We see great value in the progress that continues to be made worldwide in developing and applying scientific and technical criteria to identify marine areas and ecosystems that are ecologically and biologically significant, vulnerable or particularly sensitive. Any BBNJ implementing agreement scientific process should build upon this body of work, and use agreed-upon criteria to identify areas to be protected. We could look to the Convention on Biological Diversity's Ecologically or Biologically Significant Marine Areas and/or the scientific criteria used to identify them as a starting point for developing these criteria. The scientific process must inform the policy process, ensuring that there is adequate scientific basis for the policy process's designation of areas to be protected.

If an institutional mechanism is needed, we should consider one that will allow key decisions to be taken. Decisions might involve, for example, the location of sensitive and/or significant areas to be considered for protection, as well as identification of conservation goals for those areas.

In considering what sort of process might be established, we have looked to the precedent found in Article 36 of the UN Fish Stocks Agreement. Under Article 36, which involves establishment of a Review Conference, the Secretary-General "shall invite to the conference all States Parties and those States and entities which are entitled to become parties" to the Agreement.

Applying the same logic to BBNJ, we could establish a process that is open to all parties and those States and entities that are entitled to become parties. The process could include a meeting among all such participants at regular intervals, for example every two years, or on an otherwise determined basis. Such an approach can ensure that all States and entities have the opportunity to be involved in decision-making related to designation of marine protected areas where they feel they have an interest. At such meetings the participants, based on advice that comes out of the scientific process, could approve the overall conservation objectives and designate areas for protection based on those objectives. They could then ask existing regional or sectoral bodies to take action within their mandates.

We recognize that the responsibility for managing fisheries activities on the high seas rests primarily with flag States and the relevant regional fisheries management organizations (RFMOs); likewise, shipping regulations and concerns rest primarily with the States and the IMO, while issues concerning the use and regulation of the seabed primarily reside with the States and the International Seabed Authority. We must ensure that we do not undermine or duplicate relevant instruments, frameworks, or bodies that already exist, including by allowing due time for such bodies to complete internal processes for addressing conservation objectives. These sector-specific bodies should develop and implement measures within their competency and mandates. We support the work of the existing regional and sectoral bodies and believe that we must endeavor to work through these organizations to successfully manage areas and activities within their mandates.

If no regional or sectoral body takes action recommended at a BBNJ meeting, for example because they do not have a mandate or competence to take protective action, the States and entities involved could establish a regional mechanism that would be open to all States and entities or could take actions "inter se" to address the issue on an inclusive and transparent basis, consistent with customary international law as reflected in the LOS Convention. We believe this

entire process should be inclusive, allowing for “Observer” status for existing regional and sectoral bodies as well as other non-State actors, such as non-governmental organizations, scientific organizations, and the private sector.

#### Environmental Impact Assessments

The United States agrees with others that any potential new agreement should provide for environmental impact assessments, consistent with and providing greater detail than Article 206 of the Law of the Sea Convention. Impacts statements would provide information to the decision maker and a role for public participation for any planned activities under a State’s jurisdiction or control that the State has reasonable grounds for believing may cause substantial pollution of or significant and harmful changes to the marine environment. In the system we have in mind, the process itself is triggered, as under Article 206 of the Law of the Sea Convention, by activities under a State’s “jurisdiction or control.”

In our view, this would mean that the process is triggered in cases where the State exercises effective control over a particular activity or the State exercises jurisdiction in the form of licensing or funding a particular activity. In the United States, this is framed as projects, plans, policies, and procedures. The basic idea is that the EIA process is triggered where the State interjects itself in a manner inviting public engagement and disclosure of likely environmental impacts of a proposed action that may have significant environmental impact. Outside of these areas, the State would identify the specific proposed actions that trigger the EIA process, and would then engage in the EIA process prior to licensing or funding those actions.

We would support having a tiered structure that is common to many domestic and international environmental impact assessment processes, including those used by the United States, the United Nations Environment Programme, the World Bank, and the Antarctic Treaty system.

The tiers correspond to the level of anticipated environmental impact. At the first tier are those actions that normally do not have a significant effect on the marine environment. Categories of such actions may be identified by States ahead of time so that a State can simply confirm that the action is not likely to have a significant impact and does not involve extraordinary circumstances that would make environmental review necessary.

The higher tier would provide for an environmental impact assessment that is proportional to the significance of a proposed action’s environmental impact, starting with those proposed actions that are likely to cause significant environmental effects. For proposed actions that are significant, the State prepares a concise “environmental analysis.” Such an environmental analysis does what the name suggests: assesses the likely environmental effects of the proposed action and alternatives, which may include alternatives that may mitigate effects of the proposed action. If the analysis finds that there will be no significant environmental effects, then the government produces a written record of this finding.

If the State finds that there will be a significant environmental impact then the proposed action will be reviewed at a greater level of detail in an environmental impact statement. This document, again as the name suggests, describes the anticipated environmental impacts of the proposed action. These statements tend to be detailed documents that include consideration of alternate plans of action and a “no action” alternative; consideration of direct, indirect and cumulative impacts; and any measures to mitigate and monitor environmental impacts.

The purpose of the review is to bring information about anticipated environmental impacts to light, not necessarily to prevent a particular action based on those anticipated impacts. In other words, the EIA process is procedural and does not prejudge the State’s decision.

Towards this goal, the environmental review features active engagement with the public, including a “scoping” exercise that takes place before the review in order to identify areas that warrant analysis. As a point of principle we believe that the process should include public involvement at the national or sub-national level. Consistent with Article 205, and the general purpose of the EIA process, a report of the results of the EIA process would be published.

In our view, the EIA should be an obligation of States Parties to any potential new agreement, and the procedures would be carried out within and by or under the direction of States. They could be carried out by the States themselves, or under State supervision and subject to State approval, but they would not be carried out by a BBNJ institution or process. Moreover, EIAs would not be subject to review internationally by any new BBNJ institution or process.

We believe that Strategic Impact Assessments for plans and programs can be useful tools in identifying broad areas of environmental concern along with ways to avoid or mitigate potential harmful effects of a particular policy involving systematic and connected decisions. Like others, we are interested in questions related to evaluating cumulative impacts, and this may be a tool in that regard.

In order to be effective, however, Strategic Impact Assessments should inform development and adoption of a specific policy or program that will be followed. With over 190 States potentially participating in activities beyond national jurisdiction, however, it may be hard to effectively reach agreement regarding a particular policy or program of action. Indeed, this challenge is only heightened by the fact that one of the key functions of a Strategic Impact Assessment is to identify environmentally desirable uses and limits on use of a particular resource in advance.

It is perhaps for reasons like this that the Law of the Sea Convention clearly does not require Strategic Impact Assessments, but rather focuses, in Article 206, on specific “planned activities” under a State’s “jurisdiction or control.”

This broadly accepted approach to Environmental Impact Assessment of activities rather than plans and programs is reflected in other international instruments such as the Espoo Convention. Notably, however, when the Espoo Parties sought to incorporate a Strategic Impact Assessment approach they negotiated a new protocol to the Espoo Convention.

The United States would be interested to hear proposals for how a Strategic Impact Assessment approach could work in the area beyond national jurisdiction, with the recognition, however, that this goes beyond the current scope of the Law of the Sea Convention.

#### Capacity Building and Technology Transfer

##### Capacity Building and Technology Transfer: General

The United States strongly supports including provisions regarding capacity building in any potential new instrument on the conservation and sustainable use of BBNJ in accordance with the existing provisions of the LOSC on capacity building and marine technology. We underscore the importance of fostering marine science and further investments in research and development, as well as international scientific collaboration, to improve sharing of knowledge and capacities. The best-available scientific information should form the basis for management decisions and conservation policies, and any potential new agreement on BBNJ.

In our view, a potential new instrument must ensure that capacity building and technology transfer are voluntary, respect intellectual property rights and foster marine science, innovation, research and development.

We fully support the need for meaningful capacity building, as others have persuasively stated. As we consider the scope of this undertaking, we do think it is important to take into account that we are not starting from scratch. We need to consider what is being done now, and in that context consider how we might go farther. We should consider where we have education programs, science training that includes developing country scientists, including early career scientists, programs that exist in the RFMOs, etc.

When it comes to capacity building and technology transfer for marine research and science, we have been supporting work in this regard through the Intergovernmental Oceanographic Commission (IOC), for example, through the IOC Criteria and Guidelines on the Transfer of Marine Technology<sup>15</sup> and in the implementation of data repositories. Furthermore, at the IOC, there is an ongoing effort to understand the capacity needs of developing countries and tailor IOC's capacity-building work to those needs.

We are also supporting capacity building and technology transfer through the Group on Earth Observations Marine Biodiversity Observation Network (global MBON), where there is an ongoing effort to understand needs of member countries with regard to establishment of marine biodiversity monitoring activities, technology applications, and data management. This work is being led by the Group on Earth Observations (GEO) in partnership with IOC.

We have also been participating in the Global Environment Facility (GEF) Areas Beyond National Jurisdiction project, which is exploring ways to better manage fisheries in an ecosystem manner, specifically working with developing nations to enhance their fisheries management sectors.

All of this work builds upon significant capacity building efforts around the globe to support work to preserve and conserve biodiversity.

Delegations have called for more effective and efficient capacity building and technology transfer. We agree with that. There is much more we can be doing to coordinate efforts and increase developing countries' capacities. At the same time, we should not lose sight of work that is already occurring, especially developing countries' efforts to improve absorptive capacity to integrate transferred technologies.

#### Capacity Building

The United States believes it is important to consider how to integrate practical steps for capacity building into a potential new implementing agreement, keeping in mind that the instrument will exist for a long time, perhaps longer than some of the programs we are talking about. In terms of how capacity and technology needs are to be identified, we believe that provisions in the implementing agreement on capacity and technology transfer should be compatible with, and responsive to, local, national, and regional realities and needs.

Regarding what specific measures might be included in a potential new agreement, we again note the ongoing work of various international organizations, such as the IOC. The IOC has recently agreed to a Capacity Building Strategy, and has also launched a Capacity Building website that acts as a gateway to the many capacity building activities around the world, and is aimed at improved coordination and cooperation.

Regarding a capacity building clearinghouse, or data clearinghouse that we have heard some delegations reference, we are supportive of establishing mechanisms that are not unduly burdensome, and that will improve the efficiency and effectiveness of existing international mechanisms already in place. In this respect, we note efforts under the IOC's International

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<sup>15</sup> <http://unesdoc.unesco.org/images/0013/001391/139193m.pdf>

Oceanographic Data and Information Exchange (IODE).

The IODE was established to enhance marine research, exploitation, and development, by facilitating the exchange of oceanographic data and information between participating IOC Member States, and by meeting the needs of users for data and information products.

A program under IODE, which we have heard about already during the Prepcom, is the Ocean Biogeographic Information System, or OBIS. OBIS serves as a global data sharing platform and clearinghouse for marine biodiversity (biogeographic and biometric) data in all ocean basins, including in areas beyond national jurisdiction (ABNJ). Any clearinghouse efforts under the IA should, we believe, begin with focusing on IODE and OBIS.

With respect to regional training centers, we note that Article 276 of part XIV of UNCLOS encourages the establishment of regional centers in order to stimulate and advance the conduct of marine scientific research, particularly by developing States, and to foster the transfer of marine technology. Again, we would point to ongoing efforts in this regard, such as the IODE's OceanTeacher Program, and the IOC's Regional Network of Training and Research Centres on Marine Science. IODE's OceanTeacher program was started in 2005 with an initial focus on oceanographic data and information management, and has gradually added courses on all IOC activities, such as operational oceanography, marine spatial planning, tsunami warning, taxonomy of harmful algal species, science and spatial data analysis. More than 1,000 graduate students and professionals from 120 countries have been trained so far.

IOC's Regional Network of Training and Research Centres on Marine Science aims to improve regional capability and capacity in marine science in a sustainable and systematic manner, through the establishment of IOC Regional Training and Research Centres in national oceanographic institutes or universities. The overall goal of this project is to help advance marine science capacity in Asia and the Pacific through the transfer of technology.

#### Transfer of Marine Technology

The United States is prepared to consider for inclusion in an implementing agreement provisions for the transfer of marine technology, provided such transfer is on a voluntary basis, based on mutually agreed terms and conditions, respects intellectual property rights, and fosters marine science, innovation, research and development.

We've already referenced the IOC Tech Transfer Guidelines as a guiding tool for building capacity in marine science and related activities, as have other delegations, and we note that the Guidelines recognize that marine technology includes more than physical infrastructure.

According to the IOC Guidelines, tech transfer includes both physical (infrastructure) as well as non-physical elements (data, knowledge), for example,

- *Information and data on marine sciences*
- *Manuals, guidelines, criteria, standards, reference materials*
- *Sampling and methodology equipment*
- *Observation facilities and equipment*
- *Equipment for in situ and laboratory observations, analysis and experimentation*
- *Computer and computer software, models and modeling techniques*
- *Expertise, knowledge, skills, know-how and analytical methods.*

We view this as a very useful guiding document upon which to build.

Regarding whether we should establish a funding mechanism for capacity building and technology transfer, we are open to discussions on this topic; however we believe that if any trust fund is to be established, it should be purely voluntary in nature.

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#### 4. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On May 3, 2016, the Department of State certified 40 nations and one economy as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing, permitting those countries to export wild-caught shrimp to the United States under Section 609 of Public Law 101-162 (Section 609). See June 9, 2016 media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258312.htm)

[2017.state.gov/r/pa/prs/ps/2016/06/258312.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258312.htm). As elaborated in the media note:

Section 609 prohibits the importation of wild-caught shrimp and products of shrimp harvested in ways that may adversely affect sea turtles unless the Department of State certifies to Congress that the government of the harvesting nation or economy has adopted a regulatory program comparable to that of the United States to reduce the incidental catch of sea turtles in its shrimp trawl fisheries, such as through the use of turtle excluder devices (TEDs), or that the particular fishing environment of the harvesting nation or economy does not threaten sea turtles. The Department makes certifications annually and bases them in part on the results of overseas verification visits by a team composed of State Department and National Marine Fisheries Service representatives.

See also 81 Fed. Reg. 33,575 (May 26, 2016); and information on United States government sea turtle conservation efforts, available at [http://2009-](http://2009-2017.state.gov/e/oes/ocns/fish/bycatch/turtles/index.htm)

[2017.state.gov/e/oes/ocns/fish/bycatch/turtles/index.htm](http://2009-2017.state.gov/e/oes/ocns/fish/bycatch/turtles/index.htm) or <http://www.nmfs.noaa.gov/pr/species/turtles/teds.html>.

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#### 5. Whaling

On January 11, 2016, the State Department issued as a media note the joint statement on whaling and safety at sea by the governments of Australia, the Netherlands, New Zealand, and the United States. The joint statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251100.htm>.

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The Governments of Australia, the Netherlands, New Zealand, and the United States jointly condemn any actions at sea that may cause injury, loss of human life or damage to property or the marine environment during Southern Ocean whaling operations in 2016.

The Southern Ocean can be a treacherous, remote, and unforgiving environment. Its isolation and extreme conditions mean that search and rescue capability is extremely limited. Dangerous, reckless, or unlawful behavior jeopardizes not only the safety of whaling and protest vessels and their crews but also anyone who comes to their assistance.

Incidents during previous whaling seasons clearly demonstrated the dangers involved. We reiterate our call to the masters of all vessels involved to uphold their responsibility to ensure safety at sea, including ensuring that international collision avoidance regulations are observed in order to avoid the risk of loss of life or injury and damage to property or the marine environment.

We draw the attention of the masters of the vessels involved to the International Maritime Organization's May 17, 2010 resolution on assuring safety during demonstrations, protests or confrontations on the high seas, and the International Whaling Commission's 2011 Resolution on Safety at Sea.

We also draw the attention of the masters of vessels involved to their duty to render assistance in the event of a collision and to render assistance to persons in distress. Providing assistance in these circumstances is critical in the remote areas of the Southern Ocean.

We respect the right to freedom of expression, including through peaceful protests on the high seas, when protests are conducted lawfully and without violence. However, we unreservedly condemn dangerous, reckless, or unlawful behavior by all participants on all sides, whether in the Southern Ocean or elsewhere. We are prepared to respond to unlawful activity in accordance with relevant international and domestic laws.

Our Governments remain resolutely opposed to commercial whaling, in particular in the Southern Ocean Whale Sanctuary established by the International Whaling Commission. We do not believe that Japan has sufficiently demonstrated that it has given due regard to the guidance found in the 2014 International Court of Justice judgment on ensuring that lethal research whaling is consistent with the obligations under the International Convention for the Regulation of Whaling. On December 7, 2015, our Governments joined 29 other nations to protest Japan's decision. We urged Japan to respect the International Whaling Commission's procedures and the advice of its Expert Review Panel and Scientific Committee. The science is clear: all information necessary for management and conservation of whales can be obtained through non-lethal methods.

We note that the final NEWREP-A research plan, circulated to the Scientific Committee members on November 27, 2015, has not proceeded through the International Whaling Commission's processes, set out in Resolution 2014-5, which requests that proponents allow the IWC to consider the Scientific Committee's review of special permit proposals prior to their commencement.

Australia, the Netherlands, New Zealand and the United States are committed to improving the conservation status of whales worldwide, maintaining the International Whaling Commission's global moratorium on commercial whaling, and implementing meaningful reform of the International Whaling Commission.

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## C. OTHER CONSERVATION ISSUES

### 1. Treaty on Plant Genetic Resources

On May 19, 2016, Acting Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs Judith G. Garber testified before the Senate Foreign Relations Committee in support of U.S. ratification of the International Treaty on Plant Genetic Resources for Food and Agriculture, adopted by the Food and Agriculture Organization of the UN on November 3, 2001. Ms. Garber's testimony is excerpted below and available at

[http://www.foreign.senate.gov/imo/media/doc/051916\\_Garber\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/051916_Garber_Testimony.pdf)

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U.S. agriculture depends on the stable high yields of U.S. crops, which, in turn, depend on the continual development of new crop varieties. The crops we grow are under constant threat from diseases and pests, droughts and floods. Our food security and the future of U.S. agriculture will depend upon our ability to breed new crops that require fewer inputs, such as water, fertilizers, and energy, to grow; new crops that are more resilient or resistant to pests and diseases; and new crops that still reliably produce high-quality yields. To develop these new crop varieties, breeders and researchers require access to a broad spectrum of plant germplasm. Plant germplasm includes the seeds, bulbs, roots, and other propagating raw materials from which plants can be reproduced. These materials for plant breeding contain key traits, such as immunity to virulent pests and diseases, or tolerance for drought. Because plant genetic diversity is spread around the world, the United States needs to have access to germplasm from other countries in order to be best equipped to develop the crops we need. This means that facilitating access to what is termed "plant genetic resources" is a critical priority for the United States. It is also a critical priority for the entire international community. This is exactly why the Treaty was created.

Technological advances have significantly improved our ability to identify, characterize, and utilize plant genetic materials, meaning that now more than ever it is important for us to be able to access the diversity of plant genetic resources outside our borders. However, U.S. researchers have found it increasingly difficult to gain access to plant genetic resources in other countries. This Treaty establishes a stable legal framework for international plant germplasm exchanges, benefitting both research and commercial interests in the United States, and promoting U.S. and global food security through the conservation and sustainable use of plant genetic resources for food and agriculture.

The centerpiece of the Treaty is the establishment of a "Multilateral System" for access to, and benefit-sharing regarding, certain plant genetic resources to be used for research, breeding, and training for food and agriculture. The Multilateral System currently applies to 64 food, feed and grazing crops that are maintained by International Agricultural Research Centers or that are under the management and control of national governments and in the public domain.

Access to germplasm in the multilateral system is granted through a Standard Material Transfer Agreement (SMTA), a contract that defines the terms of access and benefit-sharing.

As a global leader in agricultural production, research and breeding, the United States was intensively involved in negotiating the Treaty and the SMTA, which accompanies every transfer of materials under the multilateral system. President George W. Bush signed the Treaty in 2002. It entered into force in 2004 and now has 139 Parties including Australia, Brazil, Canada, Japan, and the EU. President Bush forwarded the Treaty to the Senate for consideration in July 2008, after negotiation of the SMTA was completed.

Throughout the Treaty negotiating process, the United States was firmly committed to creating a system that promotes U.S. and global food security, protects U.S. access to genetic resources held outside our borders, and supports research and breeding in both the public and private sectors. The United States also sought to protect the ability of the International Agricultural Research Centers—the institutions largely responsible for the “Green Revolution” which saved hundreds of millions of lives—to continue to breed crops that are the foundation for global food security. We were successful in achieving these objectives.

U.S. ratification of the Treaty enjoys broad stakeholder support, including support from major U.S. companies as well as prominent industry organizations such as the American Seed Trade Association, the American Farm Bureau Federation, the National Farmers Union, the National Association of Wheat Growers, the National Corn Growers Association, the Biotechnology Industry Organization, and the Intellectual Property Owners of America. In addition, the Association of Public Land-grant Universities also supports ratification.

U.S. stakeholders strongly support ratification because it would guarantee U.S. users what is known as “facilitated access,” that is, access on consistent terms for little or no cost, to plant genetic materials held by other Treaty Parties. Currently U.S. entities are at a disadvantage, as they are not assured access to these resources due to our non-party status. When they do gain access, they sometimes have to engage in lengthy ad hoc negotiations of terms of access, and those terms are not always as favorable as those in the SMTA. If the United States were a Party to the Treaty, U.S. users would have guaranteed access under the SMTA, and the United States could ensure that any revisions to the SMTA were consistent with U.S. interests.

The Treaty is consistent with existing U.S. practice and can be implemented under existing U.S. authorities. The United States is already in compliance with key provisions of the Treaty. The Agricultural Research Service, in its capacity as manager of the National Plant Germplasm System, would play a major role in domestic Treaty implementation. Ratification would not entail major policy or technical changes to current National Plant Germplasm System operations. For more than 60 years, the U.S. National Plant Germplasm System has distributed samples of germplasm to plant breeders and researchers worldwide and without restriction. One notable example of collaboration is the Agricultural Research Service-University of Georgia crop genebank in Griffin, Georgia, which is working to collect, characterize, conserve, and distribute plant genetic resources for sorghum, peanut, vegetables, cowpeas, and other crops and crop wild relatives.

The U.S. Department of Agriculture has long been recognized as the world leader in plant germplasm conservation and distribution. If the United States were to ratify the Treaty, U.S. entities would gain guaranteed access to plant genetic resources covered by the Treaty’s Multilateral System. This guaranteed access is critical to the efforts of researchers and plant breeders to develop new crop varieties that are more nutritious, that are resistant to pests and diseases, that show improved yields of high-quality products, and that are better able to tolerate

environmental stresses. The emergence of new plant breeding tools only heightens the importance of open access to plant genetic resources.

Ratification of the Treaty would not only underscore our continued leadership in agricultural research, breeding, and markets; it would also help U.S. farmers and researchers sustain and improve their crops and promote food security for future generations. Finally, it would enable the United States effectively to guide the trajectory of the Treaty and its Material Transfer Agreement as they evolve to meet future challenges and changing conditions.

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On September 28, 2016 the Senate provided its advice and consent to the ratification of the Treaty on Plant Genetic Resources. 162 Cong. Rec. S6195 (Sep. 28, 2016). The President transmitted the Treaty to the Senate in 2008. See *Digest 2008* at 725-27 for discussion of the transmittal package, including excerpts from the State Department’s article-by-article analysis. Senate advice and consent is subject to the understanding that, “Article 12.3d shall not be construed in a manner that diminishes the availability or exercise of intellectual property rights under national laws.” Advice and consent is also subject to one declaration: that the Treaty is not self-executing.

## 2. **Convention on International Trade in Endangered Species of Wild Fauna and Flora**

The 1983 Gabarone Amendment to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) entered into force in 2015, making the 17<sup>th</sup> Conference of the Parties (“CoP17”) the first CITES CoP in which a regional economic integration organization (“REIO”) participated as a Party. This triggered a need to amend the Rules of Procedure (“RoP”) to allow for REIO participation, including voting procedures. In preparation for CoP17, held in Johannesburg, South Africa from September 24 to October 5, 2016, the United States submitted its views on the RoP for CoP17. The U.S. views relate, in particular, to the participation of REIOs, such as the European Union. For discussion of U.S. views regarding the role of the EU with respect to other treaties and organizations, see *Digest 2000* at 296-308. Excerpts follow from the U.S. submission of its views for CoP17. CITES Doc. No. CoP17 Inf. 10 (available at

<https://cites.org/sites/default/files/eng/cop/17/InfDocs/E-CoP17-Inf-10.pdf>).

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3. Rules of Procedure (RoP) should provide clear guidance to all participants in a meeting and should explain how each Chair is to conduct business. In providing draft RoP (CoP17 Doc. 4.1 Annex 2) and “proposed practical arrangements for the participation of a regional economic integration organization” (CoP17 Doc. 4.1 Annex 3), the Secretariat suggests that the draft RoP

do not provide sufficient clarity and guidance to run the meeting in which a REIO will participate as a Party.

4. The United States believes the best way forward is to further revise the RoP relating to REIO participation so that additional guidance is not needed.

5. CITES Articles XXI(4) and XXI(5) contain two guiding principles for REIO participation in CITES. First, the participation rights of REIOs should not be “additional” to the aggregate rights of their Member States. That is, a REIO should be able to exercise the participation rights equivalent to the aggregate rights of its Member States, but should not exercise rights that are additional to those aggregate rights or provide Member States with additional rights that would not exist in the absence of the REIO. Second, REIOs may only participate on matters within their competence. These principles could be addressed directly in the RoP with additional revisions to the draft RoP in Document CoP17 Doc. 4.1 Annex 2 in three areas: Right to Vote (Rule 26, paragraph 3), Quorum (Rule 9), and Competence (Rule 26, paragraph 4), as follows:

6. Right to Vote (Rule 26, paragraph 3): Each State Party to CITES must be accredited and present in the meeting room to cast a vote. To avoid granting REIO Member States additional rights, a REIO should vote only on behalf of those Member States that are accredited and present in the meeting room at the time of the vote. Therefore, we recommend that the text in bold and underline be added such that draft Rule 26, paragraph 3 reads as follows:

26 (3). In the fields of their competence, regional economic integration organizations shall exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to the Convention. Such organizations shall not exercise their right to vote if any of their Member States exercises theirs, and vice versa. When regional economic integration organizations exercise their right to vote, they shall do so only with a number of votes equal to the number of their Member States that are present at the time of the vote, and eligible to vote.

7. Quorum (Rule 9): As stated in Document CoP17 Doc. 4.1 Annex 3, for purposes of a quorum, a REIO should not be counted, as its Member States will be counted. To ensure that the RoP provide clear guidance on this issue, we recommend that the text in bold and underline be added such that Rule 9 reads as follows:

A quorum for a plenary session of the meeting or for a session of Committee I or II shall consist of one-half the Parties having delegations at the meeting. No plenary session or session of Committee I or II shall take place in the absence of a quorum. For purposes of calculating a quorum, the Member States of regional economic integration organizations having delegations at the meeting shall count but the regional economic integration organizations shall not.

8. Competence (Rule 26, paragraph 4): To ensure that the CITES Parties understand and are aware of the areas of competence for a REIO, the RoP should require a REIO to specifically identify its fields of competence prior to each meeting, rather than in advance of each vote. Competence refers to the authority conferred upon the REIO by its Member States to act in certain areas. Therefore, we recommend the following revisions to draft Rule 26, paragraph 4, shown in strikethrough and bold underline as follows:

26 (4). In advance of each vote meeting, each regional economic integration organization that is a Party to the Convention shall ~~announce whether~~ indicate the matters on the agenda within its competence on which it will exercise its right to vote in accordance with paragraph 3 of this Rule ~~or~~ and matters on the agenda on which ~~whether~~ its Member States will exercise their right to vote. If during the course of the meeting there are changes to the announcement of competence, the regional economic integration organization should so announce as soon as possible and at least in advance any affected vote. The rights of the REIO extend to the limits of its competence.

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At the second plenary session of the CoP, on September 24, 2016, the Parties discussed the proposals for the new RoP. The summary record of the second plenary session is excerpted below and available at

<https://cites.org/eng/cop/17/sum/index.php>

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#### 4. Rules of Procedure

The Chair explained that there were three documents for consideration: CoP17 Doc. 4.1 (Rev. 1), Doc. 4.2 and Doc. 4.3 (Rev. 1). She indicated that the proposals contained in CoP17 Doc. 4.2 were addressed in Doc. 4.1 (Rev. 1); if the latter were adopted, there would be no need to consider the former any further. She also suggested that proposals in CoP17 Doc. 4.3 (Rev. 1) be considered intersessionally. She then asked the Secretariat to introduce CoP Doc. 4.1 (Rev. 1) noting that the meeting had a long agenda and imploring the Parties to use a pragmatic approach in adopting Rules of Procedure for the present meeting on the understanding that outstanding issues would be addressed intersessionally under the guidance of the Standing Committee. She drew attention to information documents submitted by the European Union and its member States (CoP17 Inf. 9, CoP17 Inf. 20 and CoP17 Inf. 29) and the United States of America (CoP17 Inf. 10).

##### 4.1 Report of the Secretariat and 4.2 Proposal of Botswana and South Africa

The Secretariat introduced CoP17 Doc. 4.1 (Rev. 1) indicating that the proposed new Rules of Procedure contained in Annex 2 of the document were the outcome of intersessional work and incorporated comments received from a number of Parties, the originals of which were contained in CoP17 Inf. 12. No consensus had been reached on some issues, reflected by the presence of text in square brackets in Annex 2. She suggested that the meeting concentrate on the Rules of Procedure for meetings of the Conference of the Parties at this time.

The United States of America summarized its views on CoP17 Doc. 4.1 (Rev. 1), particularly with regard to the participation of Regional Economic Integration Organizations (REIOs) in the Convention, drawing attention to guiding principles in paragraphs 4 and 5 of Article XXI of the Convention, which indicated that the participation rights of REIOs should not be additional to the aggregate rights of their Member States, and that REIOs should only participate on matters within their competence. They expressed their position that a REIO vote only with a number of votes equal to the number of its member States that are accredited and

present in the room at the time of the vote. They believed that these principles could be addressed through the adoption of the text in square brackets in proposed new Rule 9 (on quorum) and paragraph 3 of proposed new Rule 26 (on right to vote) and through the adoption of the complete text in paragraph 4 of proposed new Rule 26. They generally supported other proposed amendments to the Rules of Procedure but did not support new Rule 28 (on majority) or Rule 32 (on amendment). They agreed that the Standing Committee be mandated to look at the Rules of Procedure interessionally.

The Russian Federation, followed by China, Kuwait, speaking on behalf of the member States of the Gulf Cooperation Council, Uganda and the Bolivarian Republic of Venezuela supported the position of the United States. China also proposed deletion of the last line in paragraph 3 of proposed new Rule 4 (on observers). Brazil indicated that they were not yet in a position to adopt the proposed new Rules of Procedure and proposed the establishment of a working group to address outstanding issues.

The European Union (EU) indicated its pleasure at participating in a meeting of the Convention as a Party for the first time. They noted that all EU Member States were present and accredited at the meeting and intended to stay throughout. They drew attention to CoP17 Inf. 29 which set out information on the distribution of voting rights between the European Union and its members States. They stated that they could not accept the bracketed text in proposed new Rule 26 and proposed instead that text from Article XXI paragraph 5 be inserted directly into the Rules of Procedure, to ensure that the latter did not illegitimately limit the rights of Parties under the Convention. Under proposed new Rule 9, they believed that rules regarding quorum should relate to specific votes and did not consider this to be reflected accurately in the text in square brackets. Canada, Germany and Mexico supported the position of the European Union.

Noting that no consensus had been reached on adoption of the Rules of Procedure, the Chair established a working group, chaired by the Chair of the Standing Committee, to address outstanding issues and report back to the meeting on the following day. The group comprised: Australia, Brazil, Burkina Faso, Canada, China, the European Union, Germany, Israel, Japan, Kuwait, Mexico, the Russian Federation, South Africa, Switzerland, Uganda, the United States and the Bolivarian Republic of Venezuela.

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At the third plenary session of the CoP, on September 25, 2016, the Parties adopted rules for CoP 17 and instructed the Standing Committee to undertake further review and propose amendments, if needed, for consideration at CoP 18 in 2019. The final text of the rule on voting, Rule 26(1), stated: "Each Party shall have one vote, except as provided for in the Convention." Since the Rule did not speak to the specifics of EU voting, Parties also negotiated a statement by the EU that was included in the record of the meeting, which stated, *inter alia*, "The 28 EU Member States will remain present during the entire CoP 17 and it is understood that the EU Member States will attend each session of the CoP and it is understood that no Party will challenge the EU's exercise of its right to vote at CoP 17." The summary record of the third plenary session is available at <https://cites.org/eng/cop/17/sum/index.php>.

### 3. Wildlife Trafficking

On March 3, 2016, the Presidential Task Force on Wildlife Trafficking released its first annual progress report. See State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253942.htm>. The Task Force is charged with implementing the U.S. National Strategy for Combating Wildlife Trafficking, which was released in 2014. See *Digest 2014* at 570-72. As summarized in the media note, the progress report identifies how the Task Force “carried out the three main objectives of the National Strategy: strengthening enforcement, reducing demand, and expanding international cooperation.” The report is available at <https://2009-2017.state.gov/documents/organization/254013.pdf>. As discussed in *Digest 2015* at 603-04, the Implementation Plan for the National Strategy was rolled out in 2015.

**Cross references**

*Treaties generally*, **Chapter 4.A.1.**

*Senate advice and consent to ratification*, **Chapter 4.A.3.**

*Amendment to South Pacific Tuna Treaty*, **Chapter 4.B.**

*Center for Biodiversity v. Hagel*, **Chapter 5.C.2.**

*ILC's work protection of the atmosphere and the environment*, **Chapter 7.C.**

*Peaceful Uses Initiative and UN Sustainable Development Goals*, **Chapter 19.B.3.**

## CHAPTER 14

### Educational and Cultural Issues

#### A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2016, the United States extended four international agreements, signed one new international agreement, and imposed emergency import restrictions pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“Convention”), to which the United States became a State Party in 1983, in accordance with the Convention on Cultural Property Implementation Act (“CPIA”), which implements parts of the Convention. Pub. L. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq.*

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological and/or ethnological material of a nation, whose government has requested such protections and which has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2016 to protect the cultural property of Italy, Colombia, Greece, and Bolivia by extending existing memoranda of understanding (“MOUs”) with these countries, and corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material from these countries. The United States also entered into a new MOU with Egypt to protect the cultural property of Egypt by imposing import restrictions on certain Egyptian archaeological materials. With the Egypt MOU, the total number of U.S. bilateral agreements to protect cultural property pursuant to the Convention is 16.

Additionally, 19 U.S.C. § 2603(b) provides the President the authority to apply import restrictions on a temporary basis, under certain conditions, where an “emergency condition” pertains. Accordingly, the United States took steps to protect the cultural property of Syria pursuant to legislation adopted in 2016, which enabled the President to implement import restrictions on certain Syrian archaeological and

ethnological material on an emergency basis and without regard to certain limitations set forth in the CPIA.

### 1. Italy

Effective January 19, 2016, the United States and Italy extended for five years the Memorandum of Understanding (“MOU”) between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy. See January 15, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251323.htm)

[2017.state.gov/r/pa/prs/ps/2016/01/251323.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251323.htm) The United States and Italy entered into their first MOU to protect Italy’s archaeological heritage in 2001. See *Digest 2001* at 769-72. The MOU has been extended every five years. The text of the 2016 MOU is

available at [https://eca.state.gov/cultural-heritage-center/cultural-property-](https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy)

[protection/bilateral-agreements/italy](https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy) U.S. Customs and Border Protection (“CBP”) of the Department of Homeland Security and the Department of the Treasury further extended the import restrictions imposed previously with respect to certain archaeological materials from Italy. 81 Fed. Reg. 2086 (Jan. 15, 2016).

### 2. Colombia

Effective March 15, 2016, the United States and Colombia extended for five years their MOU Concerning the Imposition of Import Restrictions on Archaeological Materials from the Pre-Columbian Cultures and Certain Ecclesiastical Material from the Colonial Period of Colombia. See March 15, 2016 State Department media note, available at

<http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254744.htm> The United States and Colombia entered into their first MOU concerning import restrictions on these materials in 2006. See *Digest 2006* at 897-99. The MOU was amended and extended in 2011. See *Digest 2011* at 442. The text of the extension is available at

[https://eca.state.gov/files/bureau/combinedusandcodipnotes\\_2016extension.pdf](https://eca.state.gov/files/bureau/combinedusandcodipnotes_2016extension.pdf) CBP and the Department of the Treasury further extended the import restrictions imposed previously with respect to Colombia. 81 Fed. Reg. 13,721 (Mar. 15, 2016).

### 3. Greece

Effective November 21, 2016, the United States and Greece extended for five years their bilateral agreement, which entered into force on November 21, 2011, concerning the imposition of import restrictions on archaeological materials representing Greece’s cultural heritage from the Upper Paleolithic (beginning approximately 20,000 B.C.) through the 15th century A.D., and ecclesiastical ethnological material representing Greece’s Byzantine culture (approximately the 4th century through the 15th century A.D.). 81 Fed. Reg. 84,458 (Nov. 23, 2016). See *Digest 2011* at 442-43. CBP and the Department of the Treasury extended the import restrictions imposed previously with

respect to Greece for five years. *Id.* The governments of the United States and Greece exchanged diplomatic notes reflecting the extension of those restrictions for an additional five-year period.

#### 4. **Bolivia**

Effective December 4, 2016, the United States and Bolivia extended their bilateral agreement, originally entered into on December 4, 2001, concerning the imposition of import restrictions on certain archaeological objects and ethnological materials. 81 Fed. Reg. 87,804 (Dec. 6, 2016). The extension was effected via an exchange of diplomatic notes. *Id.* See *Digest 2001* at 772-74 regarding the original agreement; *Digest 2006* at 901 regarding the first extension; and *Digest 2011* at 443 regarding the second extension. CBP and the Department of the Treasury extended the import restrictions imposed previously with respect to Bolivia for five years.

#### 5. **Egypt**

On November 30, 2016 U.S. Secretary of State John Kerry and Egyptian Foreign Minister Sameh Shoukry signed a new MOU on cultural property protection at the U.S. Department of State. This was the first such MOU signed with any country in the Middle East and North Africa region. See November 29, 2016 State Department notice, available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/11/264632.htm>. The MOU provides for U.S. import restrictions on archaeological material representing Egypt's cultural heritage dating from 5200 B.C. through 1517 A.D. in order to reduce the incentive for pillage and trafficking. The text of the MOU is available at [https://eca.state.gov/files/bureau/egypt\\_cpia\\_mou\\_eng.pdf](https://eca.state.gov/files/bureau/egypt_cpia_mou_eng.pdf).

#### 6. **Syria**

On August 17, 2016, the State Department announced the imposition of import restrictions on certain archaeological and ethnological material of Syria. See August 17, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/261099.htm>. The restrictions were published by CBP and the Treasury in the Federal Register, and were effective immediately. 81 Fed. Reg. 53,916 (Aug. 15, 2016). As explained in the media note:

These import restrictions are intended to reduce the incentive for pillage to better preserve Syria's cultural heritage and to combat profiting from the sale of these artifacts by terrorists and criminal organizations. Syria's ancient and historic sites are the archive of a unique history, the study of which, despite generations of scholarship, has only just begun. Preserving the cultural heritage of Syria will be a vital component in shaping a future for the country based on reconstruction, reconciliation, and building civil society.

The emergency import restrictions were imposed pursuant to the Protect and Preserve International Cultural Property Act of 2016, which was passed by the U.S. Congress and signed by President Obama. The restrictions apply to any cultural property unlawfully removed from Syria on or after March 15, 2011, including objects of stone; metal; ceramic, clay, and faience; wood; glass; ivory, bone, and shell; plaster and stucco; textile; parchment, paper, and leather; painting and drawing; mosaic; and writing.

## **B. CULTURAL PROPERTY: LEGISLATION**

As mentioned above, the United States enacted new legislation in 2016 to protect and preserve international cultural property. The “Protect and Preserve International Cultural Property Act,” P.L. 114-151 (“Act”), recommends the establishment of an interagency committee to coordinate efforts to preserve and protect international cultural property at risk from political instability, armed conflict, natural or other disasters, or for other reasons. The Act specifically authorizes emergency measures to protect Syrian cultural property, which was accomplished by the issuance of import restrictions on August 15, 2016, discussed above. The Act also creates an annual reporting requirement for six years. On August 1, the President delegated the functions and authorities conferred upon the President under the Act to the Secretary of State, in consultation with the Secretaries of Homeland Security and the Treasury, 81 Fed. Reg. 55,105 (Aug. 18, 2016), and the Deputy Secretary of State for Management and Resources delegated these functions and authorities to the Assistant Secretary of State for Educational and Cultural Affairs, 81 Fed. Reg. 54,177 (Aug. 15, 2016).

## **C. EDUCATIONAL EXCHANGE**

On July 6, 2016, the United States and Georgia signed an MOU on the Fulbright Exchange Program. The MOU is available at <http://www.state.gov/s/l/c8183.htm>. On July 8, 2016, the United States and Kosovo signed an MOU on the Fulbright Exchange Program. The MOU is available at <http://www.state.gov/s/l/c8183.htm>. And on December 16, 2016, the United States and Latvia signed an MOU on the Fulbright Exchange Program. This MOU is also available at <http://www.state.gov/s/l/c8183.htm>.

## **D. EXCHANGE VISITOR PROGRAM**

### **1. ASSE Litigation**

As discussed in *Digest 2015* at 611 and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department’s J-1 Exchange Visitor Program (“EVP”) challenged in federal court the imposition of sanctions by the Department for ASSE’s violations of EVP regulations. On remand from the Ninth Circuit, the District Court granted the State Department’s motion for voluntary remand to the Department and vacated the lesser sanctions at issue. Following the State Department’s reconsideration

of its initial sanctions determination, the Department again imposed sanctions against ASSE, and ASSE filed an amended complaint on November 14, challenging those sanctions.

Relatedly, on July 21, 2016, ASSE filed for interim fees and costs under the Equal Access to Justice Act (“EAJA”). On November 4, ASSE’s motion was denied by the district court. The court found that the position of the United States was substantially justified and therefore denied ASSE’s motion without reaching other issues raised in the briefing. ASSE has filed a notice of appeal to the Ninth Circuit.

## **2. Ireland**

On December 5, 2016, Assistant Secretary of State for Educational and Cultural Affairs Evan Ryan and Irish Ambassador Anne Anderson signed diplomatic notes at the U.S. Department of State extending (through October 31, 2019) an exchange program between the United States and Ireland known as the “Twelve Month Intern Work and Travel Pilot Program.” This program was originally established by an MOU signed in 2008, and subsequently extended through exchanges of diplomatic notes. The notes signed by Assistant Secretary Ryan and Ambassador Anderson also remove the word “Pilot” from the name of the program, which is now known as the “Twelve Month Intern Work and Travel Program.”

## **E. GLOBAL ENGAGEMENT CENTER**

Section 1287 of the Fiscal Year 2017 National Defense Authorization Act (“NDAA”) directs the Secretary of State, in coordination with the Secretary of Defense and the heads of other relevant federal agencies, to establish a Global Engagement Center, with the purpose of leading, synchronizing, and coordinating “efforts of the Federal Government to recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining United States national security interests.” The Global Engagement Center had previously been established pursuant to Executive Order 13721 of March 14, 2016, but with a more limited mandate focused on countering the messaging and diminishing the influence of violent extremist groups. The 2017 NDAA also provides the Global Engagement Center with additional legal authorities, including the authority to provide financial support to “civil society groups, media content providers, nongovernmental organizations, federally funded research and development centers, private companies, or academic institutions” in support of its mission. The Act also authorizes the Secretary of Defense, subject to certain conditions, to transfer funds to the Secretary of State to support the Global Engagement Center in Fiscal Years 2017 and 2018.

**F. INTERNATIONAL EXPOSITIONS****1. 2017 World Expo in Astana, Kazakhstan**

On August 29, 2016, the authority under the Fulbright-Hays Act (22 U.S.C. § 2452(a)(3)) to provide for U.S. participation at international expositions was delegated from the Secretary of State to the South and Central Asian Affairs Bureau for the Astana Expo. 81 Fed. Reg. 66,321 (Sep. 27, 2016). On September 26, 2016, the Department published a request for proposals seeking an implementing partner for the expo. 81 Fed. Reg. 66,114 (Sep. 26, 2016). U.S. law necessitates an implementing partner due to a statutory funding restriction that prevents the Department from expending its appropriated funds on a U.S. pavilion, or other major exhibit, at an international expo unless expressly authorized and appropriated for such purpose (22 U.S.C. § 2452b). On December 10, 2016, the United States concluded a memorandum of agreement with an implementing partner (“USAP Expo 2017”) to provide for all aspects of the U.S. pavilion at the expo.

**2. Proposed Minnesota World Expo 2023**

The role of the Federal Government in the hosting of an international exposition in the United States is governed primarily by 22 U.S.C. § 2801 *et seq.* When a proposal to host an expo is submitted to the U.S. government, 22 U.S.C. § 2802(a) requires the Secretaries of State and Commerce to submit reports to the President on the proposed expo. The reports serve as a basis for the President to make a finding of whether federal recognition of the proposed expo is in the national interest.

In 2016, the Minnesota World’s Fair Bid Committee developed a proposal to host a world’s fair in Minneapolis in 2023. In November, the Secretary of Commerce submitted a report to the President pursuant to 22 U.S.C. § 2802(a)(1), indicating that the Minnesota proposal meets certain requirements, including that it has guaranteed financial support from state, local, private, and other sources sufficient to assure the successful development and progress of the expo. The Secretary of State subsequently submitted a report to the President pursuant to 22 U.S.C. § 2802(a)(2), indicating that the Minnesota proposal qualifies for recognition by the Bureau of International Expositions (“BIE”).

On December 9, the President made a finding that federal recognition of the Minnesota proposal was in the national interest and requested that the Secretary of State deliver a letter to the Secretary General of BIE. The Secretary of State then delivered that letter, formally initiating the process of BIE consideration of the Minnesota proposal. The Minnesota proposal will compete with two other bids to host the expo that follows the 2020 World Expo in Dubai. In November 2017, the BIE General Assembly will select one bid for BIE recognition.

**G. IMMUNITY OF ART AND OTHER CULTURAL OBJECTS**

Chapter 10 discusses the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, which was signed into law on December 16, 2016, and pertains to artwork in the United States for a temporary exhibit or display and protected under the immunity from seizure statute, 22 U.S.C. § 2459.

**Cross References**

*ICC prosecution regarding cultural sites in Mali*, **Chapter 3.C.1.d.**

*Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, **Chapter 10.A.2.**

*Chabad*, **Chapter 10.B.6.b.**

## CHAPTER 15

### Private International Law

#### A. COMMERCIAL LAW/UNCITRAL

##### 1. General

On September 22, 2016, State Department Legal Adviser Brian J. Egan delivered remarks to the International Bar Association on the subject of private international law. His remarks are excerpted below and available at <https://2009-2017.state.gov/s/l/releases/remarks/262459.htm>.

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At the State Department, we define “private international law” as the legal rules that apply to cross-border relations between private actors. Our goal is to establish international frameworks to help private parties figure out which law or set of rules applies to cross-border transactions. We aim to develop these global rules in a way that promotes U.S. interests and, whenever possible, is consistent with existing U.S. practices. Private international law covers a vast array of subject matter areas, from family law to international commercial law, property law, and laws on succession.

In an era of government logjam and, in some quarters, skepticism of international law in our country, I submit that U.S. practice in private international law reflects an oft-overlooked success story. It is an area of international law in which the Executive Branch, Congress, U.S. states, and private parties—including, historically, some of the key U.S. bar associations—have worked together on a non-partisan basis to develop and implement meaningful and useful legal instruments that make a positive difference in business relationships and human relationships that cross national boundaries.

## I. Background on Private International Law

First, I'll ask that you bear with me for a little bit of history of private international law.

Many legal professionals in the United States—including those working in the field of international law—would scratch their heads if asked to explain what is covered by “private international law.” It is rare to find U.S. law school courses on “private international law.” In the United States, private international law traditionally has been associated with the study of “conflict of laws.” U.S. practice under the conflict of laws rubric, however, historically has developed in a U.S. state-to-state context, rather than in an international context, with the development of most conflict of laws principles through common law.

Indeed, the United States is a relative newcomer to private international law initiatives that have been underway in Europe for well over a century. This is in part due to the historical development of nation states, and national laws, in Europe.

The modern-day Hague Conference on Private International Law began in 1893 with a meeting of European legal experts. Although the United States participated as an observer in a number of Hague conferences in the first part of the 20th century, we did not become a member of this organization until 1964. Our cautious approach to joining this organization reflected our desire to ensure that U.S. participation could be undertaken consistent with the constitutional division of powers between our federal and state governments. It was the American Bar Association and members of the private sector that successfully persuaded the Executive branch to take a more active role in the Hague Conference and other private international law initiatives. These efforts culminated in the U.S. Congress passing legislation in 1963 that allowed the United States to join the Hague Conference as well as the International Institute for the Unification of Private Law—or UNIDROIT—which is based in Rome and was originally established in 1926.

Today, most major initiatives in the area of private international law take place under the auspices of the Hague Conference, UNIDROIT, and a third entity—the UN Commission on International Trade Law, or UNCITRAL, which is an organ of the UN General Assembly and was established in 1966. The United States is now an active and leading player in these bodies, and many of the more recent legal instruments developed by these organizations were proposed or supported by the United States.

While the origins of private international law generally are rooted in European continental law, we recognize that the continued vitality of private international law depends on engagement throughout the world. To take just one example, we are increasingly promoting the consideration of existing private international law instruments—as well as suggesting new projects—in Asia and Latin America, at the Asia-Pacific Economic Cooperation forum and the Organization of American States.

## II. Recent U.S. practice in private international law

In the Office of the Legal Adviser, our work on private international law is the primary responsibility of the Office of the Assistant Legal Adviser for Private International Law. (It's a very creative title.) One of the unique and defining features of this office is in its outreach to other private international law stakeholders. The office works closely with a variety of other government agencies, foreign counterparts, academics, and a wide range of stakeholders in the private sector, including business-related organizations and organizations interested in family law. The goal of this outreach is threefold: First, to identify areas where new private law instruments would be helpful. Second, to appropriately calibrate our work in the process of developing and negotiating private international law instruments, whether they be multilateral

conventions, model laws, or other soft law instruments, such as guides to help legislatures as they consider law-making on particular topics. Third, to help ensure implementation of these instruments domestically and in concert with other nations.

Simply put, this complex work cannot be done by the State Department alone, or even the Executive Branch alone. Engagement with the private sector helps ensure that our work is timely and addresses the needs of private entities operating in the real world. Engagement with U.S. states and state-law experts helps ensure that we develop and implement conventions consistent with U.S. law. Consultations with Congress help ensure that, once we negotiate a legal instrument, the Senate will provide its advice and consent or the Congress will pass implementing legislation, if either is needed. And even after U.S. adoption of a convention, we work with other countries on best practices in implementing the convention so that the rules established in the convention remain current and relevant.

I would like to say a few words about each of these aspects of our work. U.S. efforts in this area are not just an achievement of the Office of the Legal Adviser and the State Department, but an achievement of the whole of government as well as the private sector in the United States.

#### A. Private sector outreach

...[W]e tend to focus our efforts on areas that have been identified for further work by the U.S. private sector. The Secretary of State's Advisory Committee on Private International Law, which holds periodic meetings to which all members of the public are invited, is one key vehicle that we use to solicit input from interested members of the public. Established in 1972, the Advisory Committee has 40 members, including legal practitioners, academics, and representatives of trade associations in various fields. We also send out e-mail notices to others who have expressed an interest, and we solicit input from the general public. We additionally have a number of legal experts who assist us on specific projects.

I'd like to give you an example of how the private sector helps prioritize our work. One area of focus in recent years has been to promote responsible and reliable dispute resolution, which of course is essential to the conduct of cross-border business. Following consultations with private sector and academic experts, we heard significant support for a convention on the recognition and enforcement of foreign judgments. The wider circulation of judgments would assist U.S. citizens and businesses by enhancing legal certainty and reducing costs associated with the resolution of cross-border disputes. U.S. courts are already among the most receptive in the world to the recognition and enforcement of judgments from foreign countries. Other countries are not always so ready to recognize and enforce foreign judgments (including judgments from U.S. courts), and many countries will only recognize and enforce foreign judgments if a certain treaty is in place between the countries.

The development of a broad convention on matters of jurisdiction and foreign judgments, sometimes called the Hague Judgments Project, was originally proposed by the United States decades ago. After years of effort, the plans for such a broad convention were dropped and a narrower convention regarding choice of court agreements emerged in 2005. More recently, in 2014, the United States formally agreed to support a relaunching of the Judgments Project, but only if the work was focused narrowly on a convention on the recognition and enforcement of foreign judgments. Negotiation of this convention is now underway at the Hague Conference, with the first meeting held in June 2016, and the next meeting scheduled for February 2017. Initial reports suggest that there is substantial support for such a treaty among Hague Conference member states.

Another important project in the area of dispute resolution is a proposal at UNCITRAL for an instrument on the recognition and enforcement of conciliated, or mediated, settlement agreements. This is a U.S. initiative. My office held a series of public meetings on this topic, including an initial meeting to solicit ideas for useful projects for UNCITRAL, and then sought input on this initiative through subsequent meetings with academics, private sector mediators, mediation groups, and trade associations. Based on these consultations, the United States proposed this project two years ago in the hope that such a legal framework would provide a boost for the use of mediation internationally—just as the New York Convention provided a boost for international arbitration over the past few decades. In many legal cultures, mediation is not a dispute resolution option that is as widely accepted as it is in the United States. We hope that an international framework will help make businesses in those jurisdictions more willing to engage in mediation.

In the area of family law, our agenda is driven in large part by the interests or concerns of families and family law practitioners in the United States and abroad. A wide range of family law topics have been addressed, or are being addressed, through private international law—from the enrichment of families through international adoption, to the return of children who have been abducted to other countries, to the recognition and enforcement of foreign child support orders and child custody determinations. Again, the Department has utilized our Advisory Committee on Private International Law when we are preparing for meetings on these and related topics at the Hague Conference. We fully recognize the importance of hearing from private citizens, practitioners, academics, and other government officials as we develop frameworks in this area.

#### B. Coordination with U.S. state law

Of course, it does no one any good if we negotiate private international law conventions that cannot be properly implemented in the United States. So our office considers issues of domestic implementation before, during, and after the negotiation of treaties. We often consult with stakeholders, including representatives of U.S. state law interests, throughout this process to obtain views as to how a treaty might best be incorporated into law in the United States. This is particularly important because many private international law instruments set forth rules in areas traditionally governed by U.S. state law.

It is no surprise then that we work so closely with the Uniform Law Commission, or ULC. The ULC is a non-profit and state-supported organization, based in Chicago, which helps develop uniform state laws, perhaps most prominently the Uniform Commercial Code. The development of relevant uniform state laws under the ULC's leadership is often a critical component of our ability to become party to private international law treaties. We have been able to forge a constructive and supportive relationship with the ULC, with whom we meet regularly. Its input is important both on the “front end”—as new instruments are conceived and negotiated—and on the “back end”—after an instrument is negotiated, but before it is approved and implemented.

One area in which our work with state law interests is ongoing is the Convention on Choice of Court Agreements (also known as COCA). This Convention was concluded in 2005 at the Hague Conference and aimed at ensuring the effectiveness of choice of court agreements (also known as “forum selection clauses”) between parties to international commercial transactions. The Convention provides greater certainty to businesses engaging in cross-border activities and therefore creates a legal environment more amenable to international trade and investment. The COCA entered into force in October 2015 for the EU and Mexico, and

Singapore ratified it in June of this year. The United States has signed the treaty but it has not yet been transmitted to the Senate for advice and consent to ratification.

As with many other private international law treaties, “federalism”—the balance of federal and state interests—presents the primary challenge in figuring out how best to implement the COCA domestically. For example, there are many who believe that the COCA should be implemented in the United States through federal legislation only. There are others who believe that, in view of the longstanding role of U.S. state law in the recognition and enforcement of judgments, the COCA should be implemented through a combination of federal and uniform state legislation. We are continuing to work on a way forward that will allow us to submit the COCA to the Senate.

Issues of federalism are also very important in the area of family law. Several family law conventions have been negotiated at the Hague Conference. The United States is party to the 1980 Convention on the Civil Aspects of International Child Abduction, as well as the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.

Our work on the Child Support Convention—or the Convention on International Recovery of Child Support and Other Forms of Family Maintenance—is another example of how we have worked through U.S. state law issues in a manner that enables us to promote private international law. The Child Support Convention contains groundbreaking provisions that, for the first time, on a worldwide scale, will establish uniform, simple, and inexpensive procedures for the processing of international child support cases.

The United States signed the Convention in 2007. As the Convention was negotiated, we worked closely with the ULC to ensure that the international instrument would hew as closely as possible to the applicable U.S. state law—the Uniform Interstate Family Support Act. Subsequent to the negotiation of the Convention, the ULC drafted amendments to this uniform state law so that, among other things, state child support agencies would be able to act in a manner consistent with the Convention.

In 2010, the Senate approved ratification of the treaty subject to the passage of appropriate federal and state implementing legislation. In 2014, Congress enacted implementing legislation. Over the past 18 months, all U.S. states have enacted the amended version of the Uniform Interstate Family Support Act. And the ULC has worked with U.S. state legislatures to assist them as they have enacted the revised uniform act. Just a few weeks ago, the President signed the instrument of ratification of the Child Support Convention. The instrument has been deposited with the depositary in the Netherlands, and the treaty will enter into force for the United States in January.

I cite this Convention as an example of how federalism issues can be addressed when governmental bodies at all levels—the national government that negotiated the Convention, the U.S. Congress that passed implementing legislation, the ULC as a coordinating body, and the legislatures of all 50 states, as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands—work in concert to address an important family law issue for the benefit of children and families around the world.

### C. Working with Congress

I will now turn to the importance of our work with the U.S. Congress on issues of private international law. Some who follow the field of private international law have commented critically on the fact that the United States has become a party to only a small handful of the international instruments that have been negotiated at the Hague Conference, UNIDROIT, and UNCITRAL.

There is some truth to these comments, and that is why our office launched an effort three years ago to dedicate greater resources and efforts to facilitating the domestic implementation and approval of private international law treaties. Becoming a party to more of these treaties will enhance our credibility and leadership at the three private international law organizations. Our recent work with the Senate on issues of private international law has been constructive and productive, and I expect that we will continue to find ways to work with Congress to advance U.S. interests in private international law.

I'd like to highlight some of our recent work with the Senate on private international treaties. Currently, four private international law treaties are pending with the Senate for advice and consent to ratification:

- \* The Hague Convention on the Law Applicable to Securities Held by an Intermediary, or Hague Securities Convention;
- \* The UN Convention on the Use of Electronic Communications in International Contracts;
- \* The UN Convention on the Assignment of Receivables in International Trade; and
- \* The UN Convention on Independent Guarantees and Stand-by Letters of Credit.

The Senate recently has demonstrated an interest in moving forward with private international law treaties, and we hope to continue working with the Senate in this respect. On May 29, the Senate Foreign Relations Committee held a hearing on the Hague Securities Convention, a private international law treaty that was transmitted to the Senate in 2012. The treaty would clarify the choice of law rules for securities transactions to which the law of several countries could apply, thereby strengthening the integrity of, and reducing the risks associated with, global financial markets. One of our lawyers was the only U.S. government witness who testified on the Hague Securities Convention before the Committee at the hearing. The Committee recommended ratification of the treaty in June, and we are hoping for action by the full Senate shortly.

Also, while it took some time, our work on the Child Support Convention further demonstrates that cooperation is possible between the Administration, Congress, and the states in implementing private international law treaties.

#### D. International implementation

Finally, it is essential that private international law conventions, once concluded, remain relevant and address the issues that led to their adoption. In the context of the Hague Conference, this implementation work is undertaken through periodic expert-level meetings of contracting states, also known as Special Commissions.

For example, the Hague Evidence Convention allows transmission of letters rogatory—without recourse to consular and diplomatic channels—from the contracting state where the evidence is sought to a contracting state where the evidence is located. But this Convention dates from the late 1960s and early 1970s, long before the advent of the internet.

So the Special Commission on the Hague Evidence Convention recently discussed application of the Convention to video, Skype, and other, more recent methods of undertaking discovery. These methods of discovery are increasing in use due to their lower costs and greater flexibility, but they were, of course, not contemplated by the original treaty. In an effort to keep the Convention up-to-date, the Hague Conference established an Experts Group to consider this matter, which could lead to a protocol to amend the Convention or a guide to good practice under the Convention that discusses ways to address these new means of discovery.

Implementation of the Hague Evidence Convention also illustrates how different countries may interpret a private international law treaty differently. The United States takes the view that the Convention provides one avenue for obtaining evidence internationally, but not the only avenue. This position was adopted by the U.S. Supreme Court in its *Aerospatiale* decision. Other contracting states, however, assert that the Convention is the exclusive means for obtaining evidence across national borders. This highlights another role played by our office: U.S. federal courts often seek the views of the U.S. government as they consider whether to rely on their rules of procedure or instead utilize the procedures established by the Hague Evidence Convention. Similarly, we are sometimes contacted by foreign governments when U.S. courts choose their own rules rather than the Convention rules.

#### Conclusion

In closing, I recognize that the work of the International Bar Association includes many committees that focus on issues related to private international law, and I commend you for your work on these initiatives. As I hope that my comments here today have demonstrated, our office has a strong interest in promoting the development of private international law, and we expect to continue our efforts to develop and implement international instruments in this area. We welcome your participation in that process, by engaging with your home countries as they work with us in international bodies, or by consulting with us through our Advisory Committee process. I firmly believe that this is an area where countries can work together to our mutual benefit to bring stability and predictability to cross-border relationships between business entities and private individuals. Thank you.

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## 2. UNCITRAL

Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks on October 11, 2016 at the 71st Session of the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 49th session. Ms. Pierce’s comments are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7486>.

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The United States welcomes the Report of the 49th 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.

First, we are pleased that, after years of work, UNCITRAL adopted a Model Law on Secured Transactions. Lack of access to credit is the main obstacle to growth for micro, small and medium enterprises. In our view, secured transaction reform is one of the most crucial steps that governments can take to help small businesses prosper.

Second, we welcome the adoption of the Technical Notes on Online Dispute Resolution. We are pleased that this longstanding project also came to a successful conclusion this year. On

line dispute resolution, or ODR, is essential to enhancing access to justice and promoting cross-border commerce. ODR could be particularly helpful to small businesses that do not have access to cost-effective dispute resolution remedies.

Third, with respect to its ongoing efforts related to the recognition and enforcement of conciliated settlement agreements, we hope that UNCITRAL's consideration of this topic will soon result in a convention that could help to promote the use of conciliation internationally in the same way that the New York Convention has helped to promote the use of arbitration in recent decades.

Fourth, we are pleased that UNCITRAL is completing work on the model law enabling the use of electronic transferable records. Also, in the area of electronic commerce, UNCITRAL is considering work on identity management and cloud computing. These are all timely and important topics in international commerce.

On other topics, UNCITRAL is continuing its efforts to develop legal instruments that will help states encourage the growth of micro, small, and medium enterprises, MSMEs, starting with the issue of simplified registration and incorporation. As the UNCITRAL Secretariat has pointed out, 90% of MSMEs in developing countries operate in the informal sector, despite the need for a formal legal status to operate and enter into contracts, as well as obtain broader access to credit. UNCITRAL is also continuing its work on enterprise group insolvency issues and a model law on the recognition and enforcement of insolvency-related judgments.

The United States believes that all of these projects have the potential to result in instruments that significantly advance the development of international commercial law. However, for these efforts to have their greatest effect, UNCITRAL needs broad participation in all of its working groups, so that the resulting instruments will meet the needs of countries from all regions and legal cultures. We encourage states to participate in as many of the working group sessions as possible, and we look forward to continued collaboration on all of these projects.

Finally, we are pleased to inform this body that the United States has taken steps toward becoming party to three conventions negotiated at UNCITRAL. In February, the President transmitted to the Senate for its approval the following conventions: the United Nations Convention on the Assignment of Receivables in International Trade, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and the United Nations Convention on the Use of Electronic Communications in International Contracts.

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### 3. UNCITRAL Treaty Transmittals

As Mr. Egan and Ms. Pierce mentioned in their remarks *supra*, the Executive Branch transmitted to the Senate several private international law conventions in 2016. On February 10, 2016, President Obama delivered a message to the Senate, transmitting the UN Convention on the Use of Electronic Communications in International Contracts. The President's message is excerpted below and available at

<https://www.congress.gov/114/cdoc/tdoc5/CDOC-114tdoc5.pdf>

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With a view to receiving the advice and consent of the Senate to ratification, subject to certain declarations and understandings, I transmit herewith the United Nations Convention on the Use of Electronic Communications in International Contracts (Convention), done at New York on November 23, 2005, and entered into force on March 1, 2013. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention sets forth modern rules validating and facilitating the use of electronic communications in international business transactions. The Convention will promote legal uniformity and predictability, and thereby lower costs, for U.S. businesses engaged in electronic commerce.

The Convention's provisions are substantively similar to State law enactments in the United States of the 1999 Uniform Electronic Transactions Act (UETA), and to the governing Federal law, the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (June 30, 2000). Consistent with the Federal law, all States have enacted laws containing the same basic rules on electronic commerce, whether based on UETA or on functionally equivalent provisions. The Federal statute allows States that enact UETA, or equivalent standards, to be subject to their State law, and not the corresponding provisions of the Federal law.

The United States proposed and actively participated in the negotiation of the Convention at the United Nations Commission on International Trade Law. Accession by the United States can be expected to encourage other countries to become parties to the Convention, and having a greater number of parties to the Convention should facilitate electronic commerce across borders.

The Convention would be implemented through Federal legislation to be proposed separately to the Congress by my Administration.

The Convention has been endorsed by leading associations and organizations in this area, including the American Bar Association and the United States Council on International Business. The United States Government worked closely with the Uniform Law Commission regarding the negotiation and domestic implementation of the Convention.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification, subject to certain understandings and declarations.

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Also on February 10, 2016, President Obama delivered a message to the Senate, transmitting the UN Convention on Independent Guarantees and Stand-by Letters of Credit. The President's message is excerpted below and available at <https://www.congress.gov/114/cdoc/tdoc9/CDOC-114tdoc9.pdf>.

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With a view to receiving the advice and consent of the Senate to ratification, subject to certain understandings set forth in the enclosed report, I transmit herewith the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (Convention), done at New York on December 11, 1995, and signed by the United States on December 11, 1997. The report of the Secretary of State, which includes an overview of the proposed Convention, is enclosed for the information of the Senate.

As a leader in transactional finance, the United States participated in the negotiation of this Convention at the United Nations Commission on International Trade Law with the support of U.S. commercial and financial interests. The Convention establishes common rules on stand-by letters of credit and other independent guarantees, instruments that are essential to international commerce, and thereby reduces the uncertainty and risk that may be associated with cross-border transactions. With two minor exceptions, the Convention's provisions are substantively similar to the uniform State law provisions in the Uniform Commercial Code Article 5 (Letters of Credit), which all States and the District of Columbia, Puerto Rico, and the Virgin Islands have enacted.

Ratification by the United States of this Convention can be expected to encourage other countries to become parties to the Convention. While eight countries currently are parties to the Convention, having a greater number of parties to the Convention would promote the stability and efficiency of international commerce.

The Convention has been endorsed by leading banking and business associations in the United States.

The Convention would be implemented through Federal legislation to be separately transmitted by my Administration to the Congress.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to its ratification, subject to certain understandings set forth in the enclosed report.

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And, the third UNCITRAL convention submitted on February 10, 2016 was the UN Convention on the Assignment of Receivables in International Trade. The President's transmittal message is excerpted below and available at

<https://www.congress.gov/114/cdoc/tdoc7/CDOC-114tdoc7.pdf>

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With a view to receiving the advice and consent of the Senate to ratification, subject to certain declarations and understandings set forth in the enclosed report, I transmit herewith the United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed by the United States on December 30, 2003. The report of the Secretary of State, which includes an overview of the proposed Convention, is enclosed for the information of the Senate.

The Convention sets forth modern uniform rules governing the assignment of receivables for use in international financing transactions. In particular, the Convention facilitates the use of cross-border receivables financing by: (a) recognizing the legal effectiveness of a wide variety of

modern receivables financing practices; (b) overriding certain contractual obstacles to receivables financing; and (c) providing clear, uniform conflict-of-laws rules to determine which country's domestic law governs priority as between the assignee of a receivable and competing claimants.

As a global leader in receivables financing, the United States actively participated in the negotiation of this Convention at the United Nations Commission on International Trade Law with the support of U.S. business interests. Drawing on laws and best practices prevalent in the United States and other countries where receivables financing flourishes, the Convention would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international commerce. Widespread ratification of the Convention would help U.S. companies, especially small- and medium-sized enterprises, obtain much-needed working capital financing from U.S. banks and other lenders to export goods, and thereby help create more jobs in the United States.

The rules set forth in the Convention do not differ in any significant respect from those contained in existing U.S. law. In particular, in virtually all cases application of the Convention will produce the same results as those under the Uniform Commercial Code Article 9, which all States and the District of Columbia, Puerto Rico, and the Virgin Islands have enacted.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification, subject to certain declarations and undertakings set forth in the enclosed report.

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On December 9, 2016, the President transmitted the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), Done at New York on December 10, 2014. The President's transmittal letter follows. Daily Comp. Pres. Docs. 2016 DCPD No. 00841.

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With a view to receiving the advice and consent of the Senate to ratification, subject to certain reservations, I transmit herewith the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), done at New York on December 10, 2014. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention requires the application of the modern transparency measures contained in the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules to certain investor-state arbitrations occurring under international investment agreements concluded before April 2014, including under the investment chapters of U.S. free trade agreements and U.S. bilateral investment treaties. These transparency measures include publication of various key documents from the arbitration proceeding, opening of hearings to the public, and permitting non-disputing parties and other interested third persons to make submissions to the tribunal. As the UNCITRAL Transparency Rules by their terms automatically apply to arbitrations commenced under international investment agreements concluded on or after April 1, 2014, and that use the UNCITRAL Arbitration Rules (unless the parties to such

agreements agree otherwise), there is no need for the Convention to apply to international investment agreements concluded after that date.

Transparency in investor-state arbitration is vital, given that governmental measures of interest to the broader public can be the subject matter of the proceedings. The United States has long been a leader in promoting transparency in investor-state arbitration, and the 11 most recently concluded U.S. international investment agreements that contain investor-state arbitration already provide for modern transparency measures similar to those made applicable by the Convention. However, 41 older U.S. international investment agreements lack all or some of the transparency measures. Should the United States become a party, the Convention would require the transparency measures to apply to arbitrations under U.S. international investment agreements concluded before April 2014, to the extent that other parties to those agreements also join the Convention and to the extent the United States and such other parties do not take reservations regarding such arbitrations. The Convention would also require the transparency measures to apply in investor-state arbitrations under those agreements when the United States is the respondent and the claimants consent to their application, even if the claimants are not from a party to the Convention.

The United States was a central participant in the negotiation of the Convention in the UNCITRAL. Ratification by the United States can be expected to encourage other countries to become parties to the Convention. The Convention would not require any implementing legislation.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification by the United States, subject to certain reservations.

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#### 4. Hague Securities Convention

On May 19, 2016, Assistant Legal Adviser John Kim testified at a hearing before the Senate Foreign Relations Committee in support of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (“the Convention”). Mr. Kim’s testimony is excerpted below and available at [http://www.foreign.senate.gov/imo/media/doc/051916\\_Kim\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/051916_Kim_Testimony.pdf). On September 28, 2016, the Senate gave its advice and consent to ratification. 162 Cong. Rec. S6195 (Sep. 28, 2016). The Senate’s consent to ratification is subject to one declaration: that the Convention is self-executing. And on November 30, 2016, President Obama signed the instrument of ratification. On December 15, 2016, the United States deposited its instrument of ratification of the Convention, an action which triggers the Convention’s entry into force, on April 1, 2017. The United States, Switzerland, and Mauritius will then be bound by the Convention.

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The Convention was adopted by the Hague Conference on Private International Law on July 5, 2006, and it was signed by the United States and Switzerland that same day. The Convention will enter into force after the deposit of the third instrument of ratification. Switzerland and Mauritius have ratified the Convention. Many countries are looking to the United States, upon whose law the Convention largely was based, to become a party before they take action.

In brief, the rules in the Convention provide a narrow, technical fix to a serious problem in cross-border securities markets that has already been fixed domestically through adoption by all U.S. states of Articles 8 and 9 of the Uniform Commercial Code (UCC). The Convention, if widely adopted, would basically extend current U.S. law and practice to the global financial markets.

In particular, the rules in the Convention solve the current quandary of determining which country's law applies to certain aspects of a cross-border transaction in which the investor or owner, the issuer, the clearing corporation, and the owner's bank or broker may be located in different countries. As a result, the Convention (1) reduces the legal and systemic risks in cross-border investment securities transactions; (2) reduces costs; and (3) facilitates capital flows.

My statement will consist of three parts. First, I will provide some background on the Convention explaining the nature of the problem that the Convention was designed to address. Second, I will explain how the Convention addresses the problem and briefly run through its basic provisions. Third, I will indicate the Convention's relation to domestic law and its importance to U.S. banks, brokers and others.

#### I. Background—the Nature of the Problem

Historically, owners of securities had a direct relationship with the issuer. Investors or owners would either have physical possession of the securities certificates, or be recorded on the issuer's share registry. The location of the certificate or registry was readily identifiable.

Over time, however, financial markets have expanded and moved to a system of securities clearance, settlement, and ownership where the ownership information is held electronically and indirectly as a book entry. This so-called "indirect system" consists of one or more tiers of intermediaries between the issuer and the owner. These so-called "intermediated" securities are maintained through clearing corporations (or central securities depositories) for the accounts of banks, brokers, and other financial institutions, which in turn maintain accounts for their customers (the beneficial owners of the securities). The owners do not appear on any registry maintained by the issuer, nor do they have actual possession of certificates.

In the movement towards book-entry systems, it has become increasingly difficult for financial market participants to determine which country's law would apply to transactions involving securities held through these systems that involve different countries. (For example, suppose that a New York broker holds stock issued by Japanese and Singapore companies for a South American customer.) Also, these cross-border transactions take place very quickly and in huge volumes.

Many countries' legal systems have not kept up with the book-entry system, and their rules remain different than those in the United States. This problem affects U.S. financial institutions every day, and increases legal uncertainty and raises costs associated with the often-complicated determination of which country's law may apply.

That is why the Uniform Law Commission (ULC) and the American Law Institute in 1994 addressed this problem domestically in revising the UCC. The rules in the Convention reflect the modern finance law of the United States in Articles 8 and 9 of the UCC, adopted by

all U.S. states and the District of Columbia. The Convention would bring this modern approach to the global markets.

## II. The Proposed Solution

I turn now to the solution to this problem that is provided by the Convention.

The Convention's focus is important but narrow. It deals with intermediated securities but not securities directly held by the investor from the issuer. The Convention does not prescribe substantive law for securities intermediaries, and it has no effect on regulatory law. The Convention simply selects a governing law for certain issues related to an intermediated securities transaction, thereby providing legal certainty on the law applicable to those issues, and avoiding the need to comply with the laws of multiple jurisdictions for the same transaction.

The issues covered by the Convention include the legal rights and obligations of the intermediary; the legal nature and effect of a disposition of the investor's interest in the securities by the investor's bank or broker, to a buyer or a secured lender; and how priority conflicts among the buyer, the secured party and a judgment lien creditor are resolved if there are conflicting claims to the securities.

The primary rule of the Convention for determining the applicable law is to look to the law of the jurisdiction whose law governs the account agreement between the customer and the intermediary. Virtually all book-entry systems are covered by an account agreement, and the very large majority of those agreements specify a governing law.

Under the Convention, some minimal nexus must be established for the choice of that law, such as an office (a place of business) of the intermediary that performs certain functions in the chosen jurisdiction dealing with securities, even if those functions are unrelated to any particular securities account. This is generally not an issue for U.S. banks or brokers. They would normally require that the governing law of the account agreement be that of a jurisdiction in which they maintain an office.

If the applicable law cannot be determined pursuant to an agreement between the customer and the intermediary, certain fallback provisions in the Convention would ultimately apply the law of the jurisdiction in which the intermediary is organized.

## III. Relation to U.S. Domestic Law

Turning now to the third part of my presentation, the Convention is consistent with, and was largely based on, U.S. law.

The Convention generally follows the approach to choice of law for the indirect holding system contained in Article 8 of the UCC. Article 8 was specifically revised in 1994 to reflect the increasing use of securities accounts without physically identifiable securities or issuer share registries. In particular, UCC Article 8 permits the intermediary and the customer to determine the law that governs the transaction by express agreement.

As previously noted, the Convention has no effect on regulatory law or the jurisdictional scope or mandate of any banking, securities, or other regulators. Federal law does not cover these types of commercial transactional matters, so there is no federal law that would be displaced. In addition, the Convention would not affect any other legal rules or contractual provisions that are not specified in the Convention.

UCC Articles 8 and 9 will continue to cover any issues not covered by the Convention and issues related to securities held directly by the investor or owner.

There are some minor differences between the Convention and UCC Articles 8 and 9... None of these differences are significant, and none of the interested U.S. industry associations or the ULC has indicated any difficulty with these differences. These minor differences are not expected to create any difficulties for U.S. practices under UCC Articles 8 and 9.

The Administration has proposed that the Convention be self-executing. No federal or state legislation would be required to implement the Convention. This method of domestic implementation was supported by the ULC. There is no need to craft federal legislation that would intersect with Articles 8 and 9 of the UCC since the terms of the Convention itself would do that adequately.

Finally, the Convention does not permit reservations, and the Administration has not proposed any understandings or declarations.

#### IV. Benefits of U.S. Ratification

My last and perhaps most important point is that I hope the Senate will appreciate the many benefits of U.S. ratification of the Convention.

The Convention would contribute to the practical need in the large and growing global financial markets for greater legal certainty as to the laws applicable to interests in securities held through indirect holding systems, and would reduce the costs of cross-border securities transactions for securities investors, market actors, and custodians. As a result, the Convention would facilitate the flow of capital to both developed and emerging markets.

In addition to the aforementioned benefits to the United States, U.S. banks and brokers would benefit in particular because the Convention sets forth modern rules with which U.S. intermediaries already are familiar and are generally applying. Further, U.S. investors would benefit. For example, many Americans have pension funds or 401(k) accounts, and these pension funds have large holdings in securities that are managed under the book-entry systems I have described. Widespread adoption of the Convention would enhance harmonization and lower the costs of cross-border transactions involving these funds.

It is therefore not surprising that industry trade associations such as the International Swaps and Derivatives Association, the Securities Industry and Financial Markets Association, the Association of Global Custodians, and the Trade Association for the Emerging Markets (EMTA) have written to this Committee indicating their support for U.S. ratification. Also, notably, the President of the ULC sent a letter to this Committee supporting U.S. ratification of the Convention.

In view of the successful development of UCC Articles 8 and 9 in the United States, and given this country's significant role in cross-border securities transactions, other countries are looking to U.S. leadership on the Convention.

If the United States becomes a party, we expect that many other countries, including Canada, as well as countries in Asia, South America, and Africa, will be encouraged to join the Convention and adopt the same rules on choice of law for cross-border securities transactions. As other countries proceed to adopt the Convention, legal certainty will continue to increase for all securities transactions, including those carried out by banks, brokers and other market participants in the United States.

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**B. FAMILY LAW****Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance**

The United States signed the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in 2007. In 2010, the Senate approved ratification of the treaty subject to the passage of appropriate federal and state implementing legislation. As discussed in *Digest 2015* at 616, the U.S. Congress passed implementing legislation and U.S. states amended their laws to comport with the obligations of the Convention (by adopting an amended version of the Uniform Interstate Family Support Act), paving the way for U.S. ratification.

On August 30, 2016, the President signed the instrument of ratification of the Child Support Convention. On September 7, 2016, the United States deposited its instrument of ratification to the Convention in The Hague. See Secretary Kerry's September 7 press statement, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/09/261631.htm)

[2017.state.gov/secretary/remarks/2016/09/261631.htm](http://2009-2017.state.gov/secretary/remarks/2016/09/261631.htm). As explained in the press statement:

The Convention will enter into force for the United States on January 1, 2017.

This Convention will help families through numerous groundbreaking provisions that, for the first time on a worldwide scale, will establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases. The United States already has a comprehensive system to establish, recognize, and enforce domestic and international child support obligations. The Convention requires that all treaty partners have similar systems in place. As a result, more children in the United States and abroad should receive more support, more expeditiously than ever before.

On December 8, 2016, President Obama issued Executive Order 13752, "Relating to the Implementation of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance." Daily Comp. Pres. Docs. 2017 DCPD No. 00829 (Dec. 8, 2016). The E.O. designates the Department of Health and Human Services as the "Central Authority," in accordance with Article 4 of the Convention, for purposes of discharging certain functions under the Convention. Section 2 of E.O. 13752 provides that the Central Authority may designate State agencies as authorized to perform specific functions under the Convention.

## C. INTERNATIONAL CIVIL LITIGATION

### 1. *COMMISA v. PEP*

As discussed in *Digest 2015* at 616-20, the United States submitted a brief as *amicus curiae* in *Corporación Mexicana de Mantenimiento Intergral, S. de R.L. de C.V. (“COMMISA”) v. Pemex-Exploración y Producción (“PEP”)*, No. 13-4022 (2d. Cir.), asserting that the district court had erred in declining to recognize the nullification of an arbitral award and in increasing the amount of the award. The Court of Appeals issued its decision on August 2, 2016, affirming the district court’s confirmation and enhancement of the arbitral award. Excerpts follow from the decision.

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The domestic enforcement of foreign arbitral awards is governed by two international Conventions: the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). There is no substantive difference between the two: both evince a “pro-enforcement bias.” ...

Article V of the Panama Convention sets out—and limits—the discretion of courts in enforcing foreign arbitral awards: “The recognition and execution of the decision *may* be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested” one of seven defenses. Panama Convention art. V(1), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (emphasis added). “Article V provides the exclusive grounds for refusing confirmation under the Convention, [and] one of those exclusive grounds is where ‘t[he] award . . . has been [annulled] or suspended by a competent authority of the country in which, or under the law of which, that award was made.’” *Yusuf*, 126 F.3d at 20 (quoting Panama Convention art. V(1)(e), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245); see also 9 U.S.C. § 207 (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”). In sum, a district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award.

At first look, the plain text of the Panama Convention seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction. However, discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention. See *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (“Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of ‘practice, convenience, and expediency,’ rather than of law.”(quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)));

*In re Maxwell Comm'n Corp. plc*, 93 F.3d 1036, 1047 (2d Cir. 1996) (“When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations.”).

Accordingly, “a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . *unless* . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought.” *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986) (emphasis in original). “A judgment is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’” *Id.* at 841 (quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)); see also *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) (“Nevertheless, ‘courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.’” (quoting *Pravin*, 109 F.3d at 854)).

The public policy exception does not swallow the rule: “[t]he standard is high, and infrequently met”; “a judgment that ‘tends clearly’ to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.” *Ackermann*, 788 F.2d at 841 (quoting *Somportex*, 453 F.2d at 443). The exception accommodates uneasily two competing (and equally important) principles: [i] “the goals of comity and *res judicata* that underlie the doctrine of recognition and enforcement of foreign judgments” and [ii] “fairness to litigants.” *Id.* at 842.

Precedent is sparse; but the few cases that are factually analogous have endorsed this approach. See *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 n.3 (2d Cir. 1999) (“Recognition of the Nigerian [annulment of the arbitral award] in this case does not conflict with United States public policy.”); see also *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (“*Baker Marine* is consistent with the view that when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case. . . . Therefore, it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy. A judgment is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’” (citation omitted) (quoting *Ackermann*, 788 F.2d at 841)).

Consequently, although the Panama Convention affords discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention’s pro-enforcement aim, the exercise of that discretion here is appropriate only to vindicate “fundamental notions of what is decent and just” in the United States. *Id.* (quoting *Ackermann*, 788 F.2d at 841).

#### IV

Applying this standard, we conclude that the Southern District did not abuse its discretion in confirming the arbitral award notwithstanding invalidation of the award in the Mexican courts. The high hurdle of the public policy exception is surmounted here by four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.

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## 2. *DA Terra Siderurgica LTDA v. American Metals International*

On September 12, 2016, the United States submitted an *amicus* brief in *DA Terra Siderurgica LTDA v. American Metals International*, No. 15-1133, 15-1146 (2d. Cir.). The appeal was brought after plaintiff's attempts to confirm and enforce an arbitral award were dismissed in district court, based on the reasoning that the award was not "enforceable" against alleged alter egos or successors in interest without first being "confirmed." The Court of Appeals asked for U.S. views on two questions. The U.S. brief answers those by explaining that: (1) an arbitral award-creditor need not "confirm" a foreign arbitral award governed by the New York Convention before seeking to "enforce" that award against an award-debtor in U.S. courts but may pursue a single-step process of reducing an arbitral award to a court judgment; and (2) an award-creditor may seek, in appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors. The U.S. brief argues that the Court of Appeals should vacate the judgments of the district court and remand for further proceedings. Excerpts follow (with footnotes omitted) from the brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>.\*

\* \* \* \*

The United States has a strong interest in ensuring the proper interpretation and implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). Because the United States is a party to the Convention and participated in its negotiation, the government's interpretation of the treaty is "entitled to great weight." *Medellín v. Texas*, 552 U.S. 491, 513 (2008) (quotation marks omitted). The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce.

\* \* \* \*

The New York Convention is a multilateral treaty that establishes a regime for enforcement in Contracting States of international commercial arbitration agreements and awards. *See* The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518. The United States acceded to the Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970.

In the United States, the Convention is implemented through Chapter Two of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201-208. Chapter Two provides subject matter jurisdiction in federal district courts for any "action or proceeding falling under the Convention .

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\* Editor's note: On March 2, 2017, the court of appeals amended the opinion it had issued in January in response to a motion for rehearing. The Court held that the district court erred in determining that the Convention and the FAA required confirmation prior to enforcement and erred in dismissing the fraud claims. The appeals court remanded to the district court.

. . .” 9 U.S.C. § 203. The scope of “falling under the Convention” is in turn defined by 9 U.S.C. § 202 to include international commercial arbitral agreements and awards.

Consistent with the Convention, the FAA permits a party that has prevailed in international commercial arbitration to seek recognition and enforcement of that award against an award-debtor. *See* 9 U.S.C. § 207; Convention, arts. III, IV. In actions to recognize and enforce an award, the Convention distinguishes between courts of “primary” and “secondary” jurisdiction. Primary jurisdiction lies in the courts of the country in which, or under the arbitration law of which, an award was made (often referred to as the “seat” of the arbitration); secondary jurisdiction lies in the courts of all other Contracting States. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007). Courts of primary jurisdiction are “free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief,” while courts of secondary jurisdiction “may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.” *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

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#### I. Neither the New York Convention nor the FAA Requires an Award-Creditor to First “Confirm” an Award Before Seeking to “Enforce” It

The first of the Court’s post-argument questions asks whether the winner of a foreign arbitration governed by the New York Convention must first “confirm” the award before seeking to “enforce” it in U.S. courts. The answer is no: both the Convention and the FAA envision a single-step process for reducing a foreign arbitral award to a domestic judgment.

##### A. The terms employed by the Convention and the FAA

The FAA and the Convention use different terms for two distinct legal processes: (1) the process of reducing an arbitral award to judgment, and (2) the process of executing on that judgment in order to obtain an award-debtor’s assets.

*Reducing an award to judgment.* The term “confirmation” under the FAA and the term “recognition and enforcement” under the Convention both mean the process of applying to a court to enter judgment based on an arbitral award.

In domestic arbitration governed by Chapter 1 of the FAA, the process of reducing an arbitral award to a court judgment is referred to as “confirmation.” *See* 9 U.S.C. § 9 (“If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . any party to the arbitration may apply to the court . . . for an order confirming the award . . .”). Chapter 2 of the FAA also uses the term “confirm,” with the same meaning. *See* 9 U.S.C. § 207 (“[A]ny party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.”). The New York Convention does not employ the term “confirmation.” Instead, it refers to “recognition” and “enforcement” of arbitral awards, almost always as part of the single phrase “recognition and enforcement.” *See* Convention, arts. III, IV, V. Under the Convention, “recognition” of an award means giving it preclusive legal effect, while “enforcement” means reducing that award to a domestic judgment (which entails “recognition” of the award). *See* Restatement (Third) U.S. Law of Int’l Comm. Arb. (Tentative Draft No. 2) § 1-1(z), (l); *id.* cmts. z, l.2

The text of section 207 of the FAA demonstrates that the terms “confirmation” and “recognition and enforcement” are synonymous: “The court shall *confirm* the award unless it finds one of the grounds for refusal or deferral of *recognition or enforcement* of the award specified in the said Convention.” 9 U.S.C. § 207 (emphases added). Thus, by providing a procedure to reduce arbitral awards to judgment, the “confirmation” proceeding under Chapter Two of the FAA fulfills the United States’ obligation under the Convention to provide procedures for “recognition and enforcement” of Convention arbitral awards.

*Executing on a judgment.* Chapter 2 of the FAA does not specify what further steps may be necessary for an arbitration-creditor to obtain an arbitration-debtor’s assets following the entry of judgment. In the United States, however, this latter process is variously referred to as “enforcement of” or “execution on” a judgment, and trial courts have typically applied state-law procedures under Federal Rule of Civil Procedure 69 to order payment or execution against particular assets. *See, e.g., Daum Glob. Holdings Corp. v. Ybrant Digital Ltd.*, No. 13 Civ. 3135, 2015 WL 5853783, at \*2 (S.D.N.Y. Oct. 6, 2015). This latter meaning of “enforcement” is distinct from the meaning of the term “recognition and enforcement” in the Convention.

The New York Convention is silent as to execution on judgments arising out of arbitral awards. However, the Convention does require that each Contracting State must “enforce [awards] in accordance with the rules of procedure of the territory where the award is relied upon,” and forbids the imposition of “substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Convention, art. III.

#### B. The New York Convention was designed to avoid a two-step process for confirmation

Thus, the New York Convention does not require an award-creditor to first “confirm” an award before seeking to “enforce” that award through conversion of the award into a court judgment. Rather, “confirmation” and “enforcement” are synonyms in this context. The former is the domestic statutory term, and the latter is the Convention term, but both mean reducing an award to judgment. In addition, regardless of terminology, requiring an award-creditor to proceed through two separate steps before obtaining a judgment would run contrary to one of the purposes of the Convention.

The New York Convention was specifically designed to provide a simple, single-step judicial process for recognizing and enforcing arbitral awards. The New York Convention “succeeded and replaced the Geneva Convention of 1927,” whose “primary defect . . . was that it required an award first to be recognized in the rendering state before it could be enforced abroad.” *Yusuf Ahmed Alghanim*, 126 F.3d at 22. The two-step Geneva Convention procedure, referred to as “double exequatur,” proved cumbersome, and the New York Convention was designed to eliminate it. *See id.* In transmitting the New York Convention to the Senate for advice and consent in 1968, the executive branch specifically noted that the new regime was intended to permit an arbitral award holder “to request recognition and enforcement of his foreign award without having to prove that the award was binding in the country in which it was made.” *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Message from the President of the U.S., Exec. E, 90th Cong., 2nd Sess., at 20 (1968), reproduced 7 I.L.M. 1042, 1058 (1968).

Accordingly, all an award-creditor must generally do prior to initiating execution, under the Convention and section 207 of the FAA, is apply to a court of competent jurisdiction for the single-step process of reducing its award to a judgment.

II. An Award-Creditor May Also Seek to Confirm a Foreign Arbitral Award Against an Award-Debtor's Alleged Alter Ego or Successor in Interest

The Court's second question asks whether, even if in general there is no requirement of "confirmation" that precedes "enforcement" of a Convention award, the situation is different where an award-creditor seeks to enforce directly against an award-debtor's alleged alter ego or successor, rather than against the award-debtor itself. The New York Convention neither prohibits a Contracting State from allowing an award-creditor to seek enforcement of an award directly against an alter ego or successor, nor obliges a Contracting State to permit such an action. In the view of the United States, however, allowing such an action is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA.

The United States takes no position on whether, and how, alter ego, successorship, or similar doctrines of agency or vicarious liability might apply in this or any other individual case. As an initial matter, even understanding which theories might be available in a specific case would require resolving threshold choice-of-law questions, which might vary depending on the specific theory or the point during the arbitral process at which it is invoked. Even after the applicable substantive law is identified, alter ego and successor theories of liability are different doctrines, which would require consideration of different threshold legal and factual questions. Determining whether an entity could be liable as a successor to an arbitral party, for example, might turn on an interpretation of the parties' agreement and its terms under the law governing the agreement. Determining whether an entity could be liable as an alter ego based on a theory of fraudulent conveyance of assets could require a determination as to whether the applicable law would be the law of the place where the assertedly fraudulent conveyance took place, or the law governing the parties' contract, or some other body of law. The United States also takes no position on whether, and if so under what circumstances, an alleged alter ego or successor would have a valid defense to confirmation of an arbitral award under Article V of the Convention.

A. The courts are empowered to decide who is bound by an arbitral agreement in the single-step confirmation proceeding

A court may decide whether a non-signatory to an arbitral agreement is bound by that agreement during the course of the single-step process for confirming a Convention award, just as it may in other arbitral contexts.

An arbitration agreement is a contract. Thus, the question of whether a specific entity has agreed to arbitrate a claim or is otherwise bound by an arbitration agreement is generally governed by ordinary principles of contract law. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (FAA Chapter 1 case). Under *First Options* and related cases, questions of arbitrability—including questions about whether a non-signatory to an arbitration agreement is bound by that agreement—are for courts to decide, unless the parties have agreed otherwise. *Id.* at 943; *accord Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

The question of whether an entity is bound by an arbitration agreement may be raised at various stages in the dispute resolution process.

Prior to arbitration, a party may bring an action to compel arbitration against a party that was not a signatory to the arbitration agreement. *See* 9 U.S.C. § 4 (domestic arbitration); 9 U.S.C. § 206 (New York Convention). In such a case, the district court must decide in the first instance whether the non-signatory will be bound by the agreement, and may need to take evidence and resolve disputed facts in order to reach a conclusion. As this Court has held, non-signatories may be bound by an agreement to arbitrate under “ordinary principles of contract and agency,” including “(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.” *Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 95-97 (2d Cir. 1999) (quotation marks omitted; citing *Thomson-CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995)).

A party to an arbitration agreement may also raise the question of alter ego status (or other agency principles) for the first time in arbitral proceedings by asking the arbitral panel to enter an award against a non-signatory to the arbitral agreement. In a subsequent action to confirm an arbitral award against an alter ego, the district court would review de novo the arbitral panel’s decisions as to alter ego status—unless the court first determined that the parties clearly and unmistakably intended that arbitrators should decide that question. *See First Options*, 514 U.S. at 943-46 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (applying *First Options/Howsam* rule to arbitral award governed by the New York Convention); *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003).

To decide whether (and which) non-signatories are bound by an arbitral agreement in the course of confirming an award against the non-signatory, the district court would need to resolve any factual disputes, conducting evidentiary hearings if necessary. *See, e.g., China Minmetals*, 334 F.3d at 281, 284, 289-90; *Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004). Several foreign courts have taken a similar approach, conducting an independent review of an arbitral panel’s rulings on alter ego or other agency theories. *See, e.g., IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC*, [2011] VSCA 248 (Australia, Sup. Ct. Victoria); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Sup. Ct. United Kingdom).

Alternatively, an arbitral award-creditor may bring an action to confirm an award against the award-debtor, and then bring a claim (either by a second action, or as a separate claim in the original action) to execute on the resulting judgment against the assets of an alleged alter ego or successor who was not a party to the original arbitration. *See, e.g., JSC Foreign Econ. Ass’n Technostroyexport v. Int’l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (following confirmation of a foreign arbitral award, subsequent action by judgment-creditor against alleged alter egos of judgment-debtor). In such an action, the district court will rule on the alter ego question even though that issue was not reached or passed upon by the arbitral panel.

In short, a party to an arbitral agreement can assert that an alleged alter ego or successor should be held liable for its damages in each of these circumstances, with initial or de novo review by a district court of the issue. There is no evident reason that that answer should change because the award-debtor can no longer be sued because it has no legal status following the completion of foreign bankruptcy proceedings.

**B. The text of the FAA supports the conclusion that a confirmation action directly against an alleged alter ego or successor is permissible**

The text of Chapter 2 further suggests that an award-creditor may seek to confirm an award directly against a non-signatory to the arbitration agreement under legal doctrines such as alter ego or successor liability. Whether in an action to confirm an award (under section 207) or to compel arbitration (under section 206), the courts' authority includes the power to determine whether a non-signatory to the arbitral agreement is bound by that agreement—and (under section 207) is bound by the arbitral award—and, if so, to confirm an award against such a non-signatory.

Judicial authority to decide which entities are bound by an arbitration agreement or an arbitral award derives ultimately from sections 202 and 203 of the FAA. Section 203 grants “original jurisdiction” to federal district courts for an “action or proceeding falling under the Convention.” Section 202 states that a matter falls under the Convention when it is “[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title.” Thus, when a district court is asked to exercise jurisdiction against a non-signatory to an agreement, it must analyze the “legal relationship” between the parties to the suit, “whether contractual or not.”

Federal courts have exercised that jurisdiction under section 206 of the FAA to compel arbitration by non-signatories to the agreement. Section 206 provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement.” Courts interpret the scope of “the agreement” under section 206 in accordance with the common law principles (such as assumption, alter ego, and estoppel) described in *Thomson-CSF*. *See* 64 F.3d at 776. Courts therefore compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason. *See, e.g., Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1065 (2d Cir. 1993).

Federal courts should similarly be understood to have authority under section 207 of the FAA to determine in confirmation actions which entities are bound by an arbitral award. Section 207 of the FAA provides that “any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.” Given that the scope of the “legal relationship” under section 202 and the scope of the “agreement” under section 206 are defined in part by reference to common law or comparable principles such as agency and alter ego, it would be anomalous if the analysis of which entities are “party to the arbitration” under section 207 categorically excluded those theories.

Of course, application of such doctrines in an individual case would require a threshold determination as to the substantive body of law that would apply to govern that determination. In addition, a determination that an entity is an alter ego of the arbitral award-debtor would be distinct from, and not necessarily conclusive of, the separate determination of whether that entity had a valid defense to confirmation under Article V of the Convention. An alleged alter ego might argue, for example, that the award should not be confirmed against it because it “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” Convention, art. V(1)(b). The United States takes no view on how these or similar questions should be answered in these proceedings.

### C. Permitting confirmation directly against non-signatories is consistent with the Convention

The Convention does not address explicitly whether a court may directly confirm an award against an entity not specifically named as the award-debtor. Article III provides that each Contracting State must “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,” and that there “shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” Allowing confirmation against a non-signatory does not subject Convention awards to different or more onerous procedures than would be available for confirmation of domestic awards.

The defendants raise arguments to the effect that no other country would countenance an action to enforce the award at issue here against the defendants. (Appellees’ Br. 84-85, 88-89). Even assuming that is true, it is not inconsistent with the Convention. The Convention places a floor on the situations in which awards may be recognized and enforced; it does not bar Contracting States from permitting more liberal enforcement. *See* Convention, art. VII (“The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”); *see also* Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) (the “Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon”).

### D. This Court’s *Orion* decision does not limit the authority to confirm a Convention award against alter egos

Nor does this Court’s decision in *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2d Cir. 1963), limit U.S. courts’ authority to entertain an action for confirmation against alleged alter egos or successors. While the district court relied on that decision for its holding to the contrary, *Orion* predates Chapter 2 of the FAA; it has been limited in important ways by subsequent decisions of this Court; and its conception of which parties are bound by an arbitration agreement or arbitral award is more limited than that reflected in more recent decisions of this Court and the Supreme Court.

The *Orion* decision rejected an argument by the award-creditor that the district court, in an action seeking confirmation of a domestic arbitral award, could properly determine that a parent corporation was an “alter ego” of the award-debtor that could also be held liable for the award. The *Orion* court held that “an action for confirmation is not the proper time for a District Court to ‘pierce the corporate veil.’ ” 312 F.2d at 301. The Court reasoned that a confirmation action under 9 U.S.C. § 9 “is one where the judge’s powers are narrowly circumscribed and best exercised with expedition,” and the factually intense veil-piercing analysis would “unduly complicate and protract” that proceeding. *Id.* The Court distinguished cases seeking to compel arbitration, seemingly agreeing that in that context it would be appropriate for a district court to engage in a plenary analysis of veil-piercing under 9 U.S.C. § 4. *Id.* Finally, the Court noted that alternatives—such as a suit against the entity that is claimed to be the guarantor or the alter ego of the award-debtor—remained available to the plaintiffs, but that “an action to confirm the

arbitrator's award cannot be employed as a substitute for either of these two quite distinct causes of action." 312 F.2d at 301.

As an initial matter, *Orion*—decided more than fifty years ago under Chapter 1 of the FAA, before the United States became a party to the New York Convention—should not govern actions under Chapter 2 of the FAA. Indeed, this Court has already suggested, in dicta, that the traditional principles of contract and agency law identified in *Thomson-CSF* might permit an award holder to bring a Convention action to confirm an arbitral award against an alleged alter ego, though it ultimately decided the case on other grounds. See *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495 (2d Cir. 2002).

Furthermore, *Orion*'s holding has been narrowed in important ways. First, this Court has rejected the proposition that *Orion* categorically bars consideration of all common law or agency theories of liability at the confirmation stage. In *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46-47 (2d Cir. 1994), the Court ruled that the district court should consider the question of successorship in interest in a confirmation proceeding because, in that case, successorship was factually straightforward. Second, the Court has already distinguished *Orion* as inapplicable to labor, as opposed to commercial, arbitration, because in labor arbitration, the intent to bind non-signatories is exceptionally clear. See *Gvozdencovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991). In addition, *Orion* did not consider whether its general rule should apply even when the original award-debtor itself can no longer be sued directly, making the two-step process urged by the Court unavailable.

More fundamentally, the basic approach of *Orion*—as well as the distinction drawn in *Productos Mercantiles* between “complex” veil-piercing cases and cases in which the application of common law or similar principles of agency, alter ego, or successorship is more straightforward—is inconsistent with the judicial role described by more recent cases such as *First Options* and *Howsam*. Under *First Options*, unless the parties have contracted otherwise, courts are empowered to decide questions of arbitrability de novo, including which parties are bound to an arbitral agreement. 514 U.S. at 943-45; see *Howsam*, 537 U.S. at 84. By contrast, *Orion*, despite reciting a legal rule similar to *First Options*, went on to hold that a district court's powers in confirmation actions pursuant to 9 U.S.C. § 9 “are narrowly circumscribed and best exercised with expedition.” 312 F.2d at 301. But the *First Options* line of cases does not hold that courts' powers to evaluate who is bound to an agreement are “narrowly circumscribed”—to the contrary, those cases stand for the proposition that these matters lie within the courts' power (unless agreed otherwise by the parties), and nothing in those cases suggests that courts should circumscribe that power or conduct only a narrow inquiry in order to adjudicate those matters. See, e.g., *First Options*, 514 U.S. at 944 (holding that, in a Chapter 1 FAA case, a court should undertake ordinary analysis of state-law contract principles to decide whether parties had agreed to arbitrate); *China Minmetals*, 334 F.3d at 289-90 (in Convention case, remanding for the district court to decide a dispute of fact about whether parties had agreed to arbitrate). Indeed, in *First Options* itself—a post-arbitration confirmation action—the Supreme Court upheld the Third Circuit's lengthy, fact-intensive exploration of whether individuals were bound by an arbitral agreement on the basis of veil-piercing and alter ego theories. See 514 U.S. at 946-47.

For all these reasons, *Orion* should not be read to extinguish an award-creditor's right to pursue confirmation against an alleged alter ego, successor, or agent of the award-debtor when the award-debtor itself is defunct.

### E. Permitting direct confirmation against third parties prevents award-debtors from avoiding enforcement

Finally, leaving open the possibility in appropriate circumstances of confirmation directly against entities that are not named as award-debtors furthers the policy goal of preventing award-debtors from avoiding legitimate enforcement and collection. In a case where (as alleged here) an award-debtor is defunct and thus immune from suit, but fraudulently transferred its assets to another entity to avoid liability on the arbitral award, it makes little sense to reward that misconduct by requiring the creditor to engage in additional litigation to first confirm its award against the now-nonexistent award-debtor, and only then proceed to suing the award-debtor's alleged alter egos or successor or its transferees. Indeed, that first step may be impossible, given the award-debtor's unavailability for suit; the requirement to sue it then may frustrate the creditor's legitimate ability to collect. Whether, on the merits, the transferee of the defunct entity's assets would be liable for payment of the arbitral award would of course have to be resolved by the court in such a proceeding. But permitting a confirmation action directly against the transferee—in which the transferee can raise the typical defenses to confirmation of the award and can also challenge its alter ego or successor status—minimizes the chance that the arbitral award will be defeated by the debtor's manipulation or concealment. Although, as noted, the United States takes no position on whether and how any common law or comparable theory of liability may apply in this case, there is no reason to categorically bar an arbitral award-creditor from seeking confirmation of an award against a non-party where applicable law provides for a valid claim and other defenses to enforcement do not apply.

\* \* \* \*

### 3. *Belize v. Belize Social Development Ltd.*

On December 7, 2016, the United States filed an amicus brief in the U.S. Supreme Court, opposing the petition for certiorari in *Government of Belize v. Belize Social Development Ltd.*, No. 15-830. The Government of Belize petitioned for certiorari after the Court of Appeals affirmed the district court's confirmation of an arbitral award against it secured by a telecommunications company that had entered into an agreement to provide services in Belize with its former government (led by Prime Minister Musa). The successor as prime minister (Dean Barrow) refused to honor the agreement, prompting the telecom company to pursue arbitration. The Government of Belize pursued actions in domestic courts to invalidate actions of the former prime minister, including the telecom agreement at issue in this case. In one such action, the Belize Supreme Court enforced an arbitral award; the Belize Court of Appeals reversed; and the Caribbean Court of Justice ("CCJ") affirmed the decision not to enforce the award, concluding that Prime Minister Musa lacked authority to enter into such agreements and that enforcement of the award would violate the public policy of Belize. The petition for certiorari was denied on January 9, 2017. Excerpts follow from the U.S. amicus brief (with footnotes omitted).

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1. Petitioner first contends (Pet. 16-22) that this Court should grant certiorari to decide whether a court may decline to confirm an arbitral award on *forum non conveniens* grounds when the party petitioning for confirmation seeks to attach the assets of a foreign state that are located in the United States. This case would be a poor vehicle for considering that question for two reasons. First, the *forum non conveniens* argument was not the focus of the briefing below, and the court of appeals addressed it only in summary fashion. Second, resolution of that question would not matter in this case, because there is another reason why there is no adequate alternative forum abroad: in light of the Caribbean Court of Justice’s decision, the arbitral award cannot be enforced in Belize. Further review is therefore unwarranted.

a. A *forum non conveniens* analysis consists of two questions: whether there is an alternative forum abroad, and if so, whether a balancing of private and public interest factors favors dismissal so the case may be heard in the alternative forum. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (*Sinochem*); *American Dredging Co. v. Miller*, 510 U.S. 443, 447-449 & n.2 (1994); see also Pet. App. 26. Where the alternative forum abroad is inadequate, however, the case may not be dismissed on *forum non conveniens* grounds. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-255 & n.22 (1981). An alternative forum is not inadequate merely because its substantive law would be “less favorable to the plaintiffs than that of the present forum.” *Id.* at 247. Rather, the forum may be considered inadequate when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Id.* at 254; see *id.* at 254 n.22. The defendant has the burden of establishing that there is another adequate forum to hear the case. See *Sinochem*, 549 U.S. at 430; 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3828.2 & n.1 (4th ed. 2013 & Supp. 2016) (“Federal courts unanimously conclude that the defendant bears the burden of persuasion on all elements of the forum non conveniens analysis.”).

b. In this case, the D.C. Circuit affirmed the district court’s ruling declining to dismiss this case on *forum non conveniens* grounds, which relied on *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (2005) (*TMR*). See Pet. App. 14, 26-27. In *TMR*, the D.C. Circuit held that, because the party petitioning to enforce the arbitration award sought to attach assets of a foreign state in the United States, no other adequate forum existed because “only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.” 411 F.3d at 303 (citing 28 U.S.C. 1609, 1610).

Petitioner contends (Pet. 17-21) that review is warranted because the Second Circuit disagrees with the D.C. Circuit about whether a court may dismiss a petition to confirm an arbitral award on *forum non conveniens* grounds when the party petitioning for enforcement seeks to attach assets of a foreign state in the United States. Petitioner relies on *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (*Figueiredo*). In that case, Peru sought dismissal on *forum non conveniens* grounds of an action to enforce an arbitration award against it under the Inter-American Convention on International Commercial Arbitration (Panama Convention), Jan. 30, 1975, 1438 U.N.T.S. 245, arguing that enforcement in U.S. courts could undermine a Peruvian statute that placed an annual cap on payment of adverse judgments. 665 F.3d at 391-392.

Invoking *TMR*, the plaintiffs in *Figueiredo* argued that dismissal on *forum non conveniens* grounds was inappropriate because they sought to attach Peruvian assets in the United States. The Second Circuit rejected that argument, explaining that, in an action to enforce

an arbitral award where the plaintiff seeks “to obtain a judgment and ultimately execution on a defendant’s assets,” “the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there.” *Figueiredo*, 665 F.3d at 391. The Second Circuit stated that, to the extent that the D.C. Circuit established a categorical rule that “a foreign forum [is] inadequate because the foreign defendant’s precise asset in this country can be attached only here,” it disagreed with that rule. *Ibid.* The Second Circuit then ordered dismissal of the action on *forum non conveniens* grounds.

In its amicus brief in *Figueiredo* (at 21-27), the United States argued that the district court properly declined to dismiss the action on *forum non conveniens* grounds. The United States did not, however, specifically address whether an enforcement proceeding in Peru would furnish an adequate alternative forum. It instead assumed the availability of another adequate forum (*id.* at 23), but argued that the balance of public policy and private interests weighed against dismissal. Specifically, the United States pointed to the policy embodied in the Panama Convention of enforcing arbitral awards and the presence of assets of Peru in the United States as strong reasons not to dismiss (*id.* at 23-25).

c. It is not clear whether the D.C. Circuit in *TMR* intended to establish a categorical rule that a foreign forum is always inadequate when the plaintiff seeks to attach assets in the United States, although the district court in this case read *TMR* to do so, and the court of appeals affirmed for the reasons stated by the district court. Pet. App. 14, 26-27. But the D.C. Circuit in *TMR* and this case was not faced with the sort of public policy factor (such as the state-imposed cap on annual payments of judgments) that the Second Circuit in *Figueiredo* found to weigh in favor of dismissal notwithstanding the presence of assets of Peru in the United States. 665 F.3d at 391-392.

Moreover, because the D.C. Circuit in *TMR* held that there was no adequate forum abroad, it expressly did not consider the further argument, rejected by the Second Circuit in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2002), that *forum non conveniens* is altogether unavailable as a basis for dismissal in an action to confirm an arbitral award under the New York Convention. See *TMR*, 411 F.3d at 304 n.\*

The district court and the D.C. Circuit in this case likewise did not consider that issue, and the parties refer to it only in footnotes in their filings in this Court, see Br. in Opp. 11 n.8; Reply Br. 6 n.5, focusing instead on the D.C. Circuit’s application of the doctrine in this case. This case therefore presents no occasion to consider the availability of the doctrine of *forum non conveniens* in an action under the New York Convention.

In any event, this case would be a poor vehicle for resolving any conflict between the decisions of the D.C. Circuit and the Second Circuit’s decision in *Figueiredo*. First, the *forum non conveniens* issue was not petitioner’s primary issue on appeal, and the court of appeals addressed it only in passing. Petitioner’s primary argument was that the case must be dismissed on foreign sovereign immunity grounds. . . . Accordingly, the court of appeals spent most of its opinion addressing petitioner’s various arguments in favor of sovereign immunity. See Pet. App. 5-14. With respect to petitioner’s *forum non conveniens* argument, the court of appeals simply relied on the district court’s analysis and provided no “further exposition.” *Id.* at 14.

Second, resolution of the first question presented would not matter to the ultimate outcome of this case, because there is a different reason why no adequate alternative forum exists. In both the Second Circuit and D.C. Circuit, an alternative forum must afford the plaintiff

some meaningful possibility of relief to be adequate for purposes of the *forum non conveniens* doctrine. See *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 157-159 (2d Cir. 2005), cert. denied, 547 U.S. 1175 (2006); *Nemariam v. Federal Democratic Republic of Eth.*, 315 F.3d 390, 394 (D.C. Cir.), cert. denied, 540 U.S. 877 (2003); see also *Piper Aircraft Co.*, 454 U.S. at 254 & n.22 (alternative forum is inadequate when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all”). Here, petitioner itself has explained that respondent has no meaningful possibility of enforcing the arbitral award in Belize courts in light of the CCJ’s recent decision.

Specifically, as petitioner notes (Pet. 8-12, 24-27, 39), the CCJ has held that enforcement of BCB Holdings’ arbitral award against petitioner would violate the public policy of Belize because the arbitral award enforces an agreement for preferential tax treatment that was not approved by Belize’s Parliament. See Pet. App. 123-124 (CCJ’s analysis). Although that decision concerns a different agreement between different parties, petitioner represents that the CCJ’s holding makes similar contracts conferring preferential tax treatment without Parliament’s consent unenforceable in Belize’s courts. Petitioner has not identified any claim that respondent could present to the Belizean courts that would not be foreclosed by the CCJ decision. Petitioner therefore has not carried its burden of establishing that the courts in Belize provide an adequate alternative forum for this dispute. Accordingly, even if this Court were to grant review on the first question presented and decide the issue favorably to petitioner, it would not ultimately change the result, because the lack of an adequate alternative forum would make *forum non conveniens* dismissal inappropriate.

2. Petitioner also contends (Pet. 23-33) that review is warranted to address the court of appeals’ conclusion that the New York Convention’s public policy exception is inapplicable in this case. The court of appeals’ holding is correct, and it does not conflict with any decision of another court of appeals or of this Court. Rather, petitioner’s argument is simply a disagreement with the application of settled law to the facts of this particular case.

a. Under Article V(2)(b) of the New York Convention, a U.S. court may refuse to recognize or enforce an arbitral award if doing so “would be contrary to the public policy of” the United States. 21 U.S.T. 2520, 330 U.N.T.S. 42. The test is not simply “whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction”; rather, the party seeking dismissal has a heavy burden to establish that enforcement would “violate the forum state’s most basic notions of morality and justice.” *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir.) (citation omitted), cert. denied, 552 U.S. 1038 (2007); see Pet. App. 46.

In the courts below, petitioner contended that confirmation of the arbitral award would be contrary to U.S. public policy against foreign corruption, because (in its view) the agreement was the product of corruption. See Pet. C.A. Br. 33-36; Pet. C.A. Reply Br. 27- 29. The district court concluded that petitioner failed to demonstrate that the arbitral award would “offend the United States’ most basic notions of morality and justice,” and therefore declined to refuse enforcement under Article V(2)(b). Pet. App. 47 (internal quotation marks omitted). The court of appeals agreed with that reasoning without “further exposition.” *Id.* at 14.

That fact-bound holding does not warrant this Court’s review, and this case would be a poor vehicle for addressing it in any event. As with the *forum non conveniens* issue, the public policy defense was not the focus of the briefing in the court of appeals, and the court addressed it only in summary fashion. Review would involve the application of settled law to the facts of this case, yet the court of appeals did not discuss those facts or assess their legal significance in any

detail. Indeed, although petitioner invokes three public policies before this Court (combatting corruption, international comity, and respecting separation of powers), petitioner focused its Article V(2)(b) argument below on only one of them (combatting corruption).

Further, the court of appeals' decision is correct. The United States has an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (citing the New York Convention and the FAA). Based on the record in this case, petitioner has not met its burden of establishing that a public policy of the United States precludes enforcement of the arbitral award.

Petitioner first contends (Pet. 23, 27-28, 32-33) that the district court erred by failing to give sufficient weight to the U.S. policy against public corruption. The United States does have a substantial interest in combatting foreign corruption. The United States is a party to several treaties aimed at preventing and prosecuting corruption. See Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39 (1998) (to which Belize also is a party); see also United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41; Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1. Further, the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*, governs certain corrupt practices abroad that have a nexus to the United States. But the well-established U.S. policy against suborning corruption abroad does not render an arbitral award unenforceable based on a bare allegation of corruption.

At the very least, petitioner would have to demonstrate that the agreement was procured by corruption, but it has not done so. Petitioner chose not to present this argument in the arbitration proceeding—where it would have been proper to do so—and the arbitral tribunal concluded that the agreement was neither secret nor corrupt. C.A. J.A. 64-66. The CCJ decision also did not address that issue with respect to the similar BCB Holdings agreement: the court concluded that Prime Minister Musa lacked the authority to approve the BCB Holdings agreement without Parliament's consent, but it did not hold that that agreement was obtained by corruption. See generally Pet. App. 88-125. Petitioner's reliance on a general State Department finding that there were "public indications of government corruption" in Prime Minister Musa's administration, Pet. 28 (citation omitted), is insufficient to conclude that the specific contract at issue here was procured by corruption.

Second, invoking considerations of international comity, petitioner contends (Pet. 23, 28, 31, 33), that the district court should have declined to enforce respondent's arbitral award under the public policy exception because the CCJ declined to enforce the arbitral award that BCB Holdings (not a party here) obtained against petitioner. The CCJ's decision did not require dismissal of this action on public policy grounds. Petitioner was required to demonstrate that enforcement of respondent's arbitral award would violate the United States' "most basic notions of morality and justice," *TermoRio S.A. E.S.P.*, 487 F.3d at 938, and petitioner has not shown that enforcing the arbitral award, which was entered in a valid, agreed-upon foreign tribunal, meets that demanding standard. Indeed, to the extent international comity concerns are relevant here, they favor enforcing the award, because the award was entered by a foreign tribunal and has not been vacated by that tribunal or the courts of the foreign state chosen as the seat of arbitration. See Pet. App. 27-28 & n.11. The courts below found that the arbitration clause was valid, *id.* at 7-8, 37-39, as did the CCJ in its decision regarding the similar agreement with BCB Holdings, *id.* at 121. That arbitration clause memorializes petitioner's consent to arbitrate before

the LCIA. Petitioner could have participated in the arbitration or challenged the tribunal's award in the courts of England, but it did neither. Under these circumstances, it would not further respect for foreign judgments and awards for U.S. courts to refuse enforcement of the arbitral award.

Finally, petitioner contends (Pet. 27-28, 31) that the public policy exception applies because the agreement violates the separation of powers under the Constitution of Belize, in that Prime Minister Musa attempted to exercise powers of the Parliament. Although the United States has a public policy interest in enforcing *its own* constitutional strictures, including the separation of powers among the Branches of the United States Government, there is no comparable public policy of the United States in favor of enforcing the separation of powers in a *foreign state's* government. In particular, the United States does not have an overarching public policy interest in attempting to determine which powers reside in different branches of foreign governments. Moreover, petitioner's argument that the agreement violates the separation of powers under the Constitution of Belize because the Prime Minister attempted to execute the powers of the Parliament is an argument that the agreement was unlawful. As explained above, that is an argument petitioner could have made to the arbitral tribunal if it had participated in those proceedings, and the tribunal in any event concluded that the agreement was valid. See p. 4, *supra*. This consideration, too, counsels against petitioner's public policy argument as a basis for refusing enforcement of the arbitral award.

b. Contrary to petitioner's contention (Pet. 29-31), there is no disagreement in the circuits about the standard for evaluating assertions of the public policy defense under Article V(2)(b) of the New York Convention. The courts of appeals generally agree that the public policy defense should be read narrowly in light of the Convention's general rule requiring enforcement of arbitral awards. See, *e.g.*, *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1016 (5th Cir. 2015), cert. denied, 136 S. Ct. 795 (2016); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-1097 (9th Cir. 2011); *TermoRio S.A. E.S.P.*, 487 F.3d at 938; *Slaney v. International Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir.), cert. denied, 534 U.S. 828 (2001); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 n.2 (6th Cir. 1996); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). That is in accord with this Court's recognition that the Contracting States "should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The courts of appeals also generally agree that, to justify dismissal under Article V(2)(b), enforcement of the arbitral award must violate the "most basic notions of morality and justice." *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974; see *Asignacion*, 783 F.3d at 1016; *Cubic Def. Sys.*, 665 F.3d at 1097; *TermoRio*, 487 F.3d at 938; *Slaney*, 244 F.3d at 593; *M & C Corp.*, 87 F.3d at 851 n.2.

Petitioner contends (Pet. 29-31) that courts of appeals disagree on how to assess competing public policies under Article V(2)(b). That is incorrect. In each of the cited cases, the court started with the general rules set out above, then applied those rules to assess the policy or policies asserted in the particular case. Any differences in outcome are attributable to the different circumstances, not a difference in legal rules.

\* \* \* \*

There is therefore no conflict among the courts of appeals regarding how to evaluate competing public policies under the New York Convention. And even if there were, adopting petitioner's proposed test— which involves looking for a “dominant public policy” (Pet. 31)— would not change the outcome here, because petitioner has not established that any of the three policies that it invokes is a public policy of the United States that would justify a departure from the Convention's general rule of enforcement. For that reason as well, further review is unwarranted.

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**Cross References**

*Treaties generally*, **Chapter 4.A.1.**

*Treaties transmitted to Senate*, **Chapter 4.A.2.**

*Senate advice and consent to treaties*, **Chapter 4.A.3.**

*Comity (Cooper v. TEPCO)*, **Chapter 5.C.5.**

*Application of FSIA to ICSID arbitral award*, **Chapter 10.B.1.**

*Service of process*, **Chapter 10.B.5.**

## CHAPTER 16

### Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2016 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. Detailed information on the Commerce Department's activities relating to export controls is provided in the U.S. Department of Commerce, Bureau of Industry and Security's Annual Report to the Congress for Fiscal Year 2016, available at <http://www.bis.doc.gov/index.php/about-bis/newsroom/publications>. Details on the State Department's defense trade control programs are available at <http://www.pmdtcc.state.gov>.

#### **A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS**

##### **1. Iran**

##### ***a. The Joint Comprehensive Plan of Action ("JCPOA")***

As discussed in *Digest 2015*, the P5+1 and Iran concluded the Joint Comprehensive Plan of Action ("JCPOA") to address the international community's concerns with Iran's nuclear program on July 14, 2015. Under the JCPOA, the U.S. committed to lift nuclear-related secondary sanctions, which are generally directed toward non-U.S. persons for specified conduct involving Iran that occurs entirely outside of U.S. jurisdiction and does not involve U.S. persons. Specifically, the United States committed to lift the following secondary sanctions: financial and banking-related sanctions; sanctions on the provision of underwriting services, insurance, or reinsurance in connection with JCPOA-consistent

activities; sanctions on Iran's energy and petrochemical sectors; sanctions on Iran's shipping and shipbuilding sectors and port operators; sanctions on Iran's trade in gold and other precious metals; sanctions on certain trade with Iran in graphite, raw or semi-finished metals such as aluminum and steel, coal and software for integrating industrial processes in connection with JCPOA-consistent activities; sanctions on the sale, supply, or transfer of goods and services used in connection with Iran's automotive sector; and sanctions on associated services for each of these categories. In addition, the United States committed to license on a case-by-case basis the export, reexport, sale, lease, or transfer to Iran of commercial passenger aircraft and related parts and services, to license the importation into the United States of Iranian-origin foodstuffs and carpets, and to license U.S.-owned or -controlled foreign entities to engage in certain activities involving Iran. Finally, the United States committed to remove the individuals and entities specified in Attachment 3 to Annex II of the JCPOA from the List of Specially Designated Nationals and Blocked Persons ("SDN List"), the Foreign Sanctions Evaders List ("FSE List"), and/or the Non-SDN Iran Sanctions Act List ("Non-SDN ISA List").

On January 16, 2016, Implementation Day under the JCPOA, the Secretary of State confirmed that Iran had implemented its nuclear-related commitments, as verified by the International Atomic Energy Agency, making the U.S. sanctions-related commitments described in Sections 17.1-17.5 of Annex V of the JCPOA effective. See the Secretary's confirmation of IAEA verification, available at <https://www.state.gov/e/eb/rls/othr/2016/251284.htm>. At this time, the contingent waivers and findings issued under the Iran Freedom and Counter-Proliferation Act of 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012, the National Defense Authorization Act for Fiscal Year 2012, and the Iran Sanctions Act of 1996 discussed in *Digest 2015* became effective. In addition, to give effect to the U.S. commitments under section 4.8.1 of Annex II and section 17.3 of Annex V of the JCPOA to remove the individuals and entities specified in Attachment 3 to Annex II of the JCPOA from the relevant sanctions lists, the Secretary took action to discontinue the imposition of sanctions under section 5(a) of the Iran Sanctions Act of 1996, as amended; under section 212 of the Iran Threat Reduction and Syria Human Rights Act of 2012; under E.O. 13622 (July 30, 2012), as amended; and to waive the imposition of sanctions under Section 1244(c)(1) of the Iran Freedom and Counter-Proliferation Act of 2012 with respect to the individuals and entities identified in the Federal Register notice. 81 Fed. Reg. 4082 (Jan. 25, 2016).

Also on Implementation Day, the President issued E.O. 13716. 81 Fed. Reg. 3693 (Jan. 21, 2016). The E.O. states:

In order to give effect to the United States commitments with respect to sanctions described in section 4 of Annex II and section 17.4 of Annex V of the JCPOA, I am revoking Executive Orders 13574 of May 23, 2011, 13590 of November 20, 2011, 13622 of July 30, 2012, and 13645 of June 3, 2013, and amending Executive Order 13628 of October 9, 2012, by revoking sections 5 through 7 and section 15. In addition, in section 3 of this order, I am taking steps

with respect to the national emergency declared in Executive Order 12957 of March 15, 1995, to provide implementation authorities for aspects of certain statutory sanctions that are outside the scope of the U.S. commitment to lift nuclear-related sanctions under the JCPOA.

On January 21, 2016, the Department of Treasury's Office of Foreign Assets Control ("OFAC") amended the Iranian Transactions and Sanctions Regulations ("ITSR") to implement U.S. commitments under the JCPOA. 81 Fed. Reg. 3330 (Jan. 21, 2016). The amendments add the general licenses to authorize the importation of, and dealings in, Iranian-origin carpets and foodstuffs and related transactions to implement the U.S. commitment specified in section 5.1.3 of Annex II and section 17.5 of Annex V of the JCPOA. *Id.* In addition, in accordance with the U.S. commitment in section 4 of Annex II and section 17.4 of Annex V of the JCPOA to terminate Executive Order 13622 of July 30, 2012, the amendments remove provisions that implemented the blocking sanctions in sections 5 and 6 of E.O. 13622. *Id.* OFAC also made certain technical and conforming changes to its regulations to reflect the implementation of the U.S. commitment in section 4.8.1 of Annex II and section 17.3 of Annex V of the JCPOA to remove individuals and entities from the SDN List, the FSE List, and/or the non-SDN ISA List if they were listed in Attachment 3 to Annex II of the JCPOA. *Id.*

In March, OFAC published the names of 59 individuals, 385 entities, 76 aircraft, and 227 vessels that were removed from the SDN list, the FSE List, or the Non-SDN ISA List on Implementation Day. 81 Fed. Reg. 13,561 (Mar. 14, 2016). In addition, OFAC issued amended SDN List entries for 14 persons previously blocked pursuant to E.O. 13224, E.O. 13382, E.O. 13438, and/or the Foreign Narcotics Kingpin Designation Act. *Id.* In addition, OFAC published the names of individuals, entities, and vessels that OFAC previously identified as meeting the definition of the term Government of Iran or the term Iranian financial institution and whose property and interests in property continue to be blocked following Implementation Day solely pursuant to E.O. 13599 and Section 560.211 of the Iranian Transactions and Sanctions Regulations, 31 CFR part 560.

**b. *Implementation of UN Security Council resolutions***

As discussed in Digest 2015 at 636, the UN Security Council endorsed the JCPOA via Resolution 2231. Resolution 2231 terminated prior UN Security Council Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1929 (2010), and 2224 (2015) based on receipt by the Security Council of the report from the IAEA verifying that Iran has taken the actions specified in paragraphs 15.1-15.11 of Annex V of the JCPOA.

On March 14, 2016, Ambassador Power delivered remarks after Security Council consultations that were called for by the United States to discuss recent ballistic missile launches by Iran. Ambassador Power's remarks are available at <http://2009-2017-usun.state.gov/remarks/7187>. She condemned the launches as defying Resolution 2231, which called upon Iran not to undertake any activity "related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology."

**c. U.S. sanctions and other controls**

Sanctions relating to Iran that are outside the scope of the JCPOA have remained in place and are being enforced following Implementation Day. Further information on Iran sanctions is available at <https://www.state.gov/e/eb/tfs/spi/iran/index.htm> and <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>. On January 17, 2016, OFAC designated eight individuals and three entities pursuant to E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”). 81 Fed. Reg. 4365 (Jan. 26, 2016). The individuals are: Sayyed Javad MUSAVI, Sayyad Medhi FARAHI, Seyed Mohammad HASHEMI, Seyed Mirahmad NOOSHIN, Mingfu CHEN, Rahimreza FARGHADANI, Hossein POURNAGHSHBAND, and Mehrdada Akhlaghi KETABACHI. The entities are ANHUI LAND GROUP CO., LIMITED, CANDID GENERAL TRADING LLC, and MABROOKA TRADING CO L.L.C.

**(1) Iran Sanctions Act, as amended**

The Iran Sanctions Act (“ISA”), as amended, was scheduled to expire, absent reauthorization, on December 31, 2016. Congress ultimately reauthorized ISA through December 31, 2026 by passing the Iran Sanctions Extension Act, P.L. 114-277. On December 15, 2016, Secretary Kerry issued a statement on renewing waivers related to the proposed extension of the ISA. See December 15, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/12/265652.htm>. Excerpts follow from that statement, clarifying the status of ISA in light of the JCPOA.

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This administration has made it clear that an extension of the Iran Sanctions Act is not necessary either to address activity outside the scope of the JCPOA or to snap back sanctions in the event Iran should significantly fail to perform its nuclear commitments. Even if ISA were to have lapsed, we would continue to have all the authorities we need in place to address those issues. At the same time, we have also been clear that the extension of this law is entirely consistent with our commitments in the JCPOA. Extension of the Iran Sanctions Act does not affect in any way the scope of the sanctions relief Iran is receiving under the deal or the ability of companies to do business in Iran consistent with the JCPOA. The Iran Sanctions Act was in place at the time the JCPOA was negotiated and has remained so throughout the deal’s implementation.

The administration continues to have all of the necessary authorities to waive the relevant sanctions, with or without the extension of ISA. I will continue to exercise those authorities, as we committed to do in the JCPOA and have done since Implementation Day almost one year ago. I have communicated to Iranian Foreign Minister Zarif and to our P5+1 counterparts that while the existing waivers are unaffected by the extension of ISA's sunset and do not need to be renewed at this time, I have done so today to ensure maximum clarity and convey to all stakeholders that the United States will continue to uphold our commitments under the JCPOA.

As I have said before, we are committed to doing our part to ensure that the JCPOA is working for all participants and that the Iranian people feel the appropriate benefits of the deal in order to enhance its long-term viability. As long as Iran adheres to its commitments under the JCPOA, we remain steadfastly committed to maintaining ours as well.

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(2) *Section 1245 of the 2012 National Defense Authorization Act*

Section 1245(d) of the NDAA requires the U.S. Government to report to Congress on the availability of petroleum and petroleum products in countries other than Iran and determine whether price and supply permit purchasers of petroleum and petroleum products from Iran to “reduce significantly in volume their purchases from Iran.” If there is an affirmative determination in this regard, the statute requires the imposition of sanctions on foreign financial institutions that conduct or facilitate significant financial transactions with the Central Bank of Iran or other designated Iranian banks. Sanctions do not apply to countries that have made significant reductions in purchases of Iranian oil. See *Digest 2012* at 506-7. Effective January 20, 2014, President Obama delegated to the Secretary of State, in consultation with the Secretary of the Treasury, the authority conferred upon the President by section 1245(d)(5) of the NDAA. 79 Fed. Reg. 6453 (Feb. 4, 2014).

In Presidential Determination No. 2016-06 of May 19, 2016, the President determined that the availability of petroleum and petroleum products was sufficient to permit purchasers to reduce their purchases from Iran. 81 Fed. Reg. 37,481 (June 9, 2016). The Presidential Determination includes this addition:

However, consistent with U.S. commitments specified in the Joint Comprehensive Plan of Action (JCPOA), the United States is no longer pursuing efforts to reduce Iran’s sales of crude oil. The United States action to fulfill these commitments became effective upon reaching Implementation Day under the JCPOA, which occurred once the International Atomic Energy Agency verified that Iran had implemented key nuclear-related steps specified in the JCPOA to ensure that its nuclear program is and will remain exclusively peaceful

**2. Syria**

On July 21, 2016, OFAC blocked the property and interests in property of twelve persons (seven individuals and five entities) pursuant to E.O. 13582, “Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria.” 81 Fed. Reg. 48,887 (July 26, 2016). The seven individuals (Salah HABIB, LJonha ANG, Yusuf ARBASH, Nabil TIZINI, Aous ALI, Atiya KHOURI, and Imad Mtanyus KHURI) and five entities (T-RUBBER CO., LTD, YONA STAR INTERNATIONAL, MONETA TRANSFER AND EXCHANGE, E.K.-ULTRA FINANCIAL GROUP LIMITED, and ARGUS CONSTRUCTION) are listed in the Federal Register notice with known aliases and identifying information. *Id.*

Also on July 21, 2016, OFAC blocked the property and interests in property of three persons pursuant to E.O. 13572, “Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria.” *Id.* The two individuals (Aous ALI and Atiya KHOURI) and one entity (MONETA TRANSFER AND EXCHANGE) are listed in the Federal Register notice with known aliases and identifying information. *Id.* OFAC also designated at the same time one individual (Atiya KHOURI) and one entity (MONETA TRANSFER AND EXCHANGE) pursuant to E.O. 13573, “Blocking Property of Senior Officials of the Government of Syria.” And on July 21, 2016, OFAC designated three persons pursuant to E.O. 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”: Iyad Mohammad Esam MAHROUS, the MAHROUS GROUP, and MAHROUS TRADING FZE. *Id.*

On August 30, 2016, OFAC removed one entity (DK GROUP SARL) and one individual (Jad DAGHER) from the SDN list where they had been designated pursuant to E.O. 13582 (“Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria”). 81 Fed. Reg. 62,799 (Sep. 12, 2016).

On December 23, 2016, OFAC designated one individual (Adib Muhanna) and two entities (AL-HISN and AL-QASIUN) pursuant to E.O. 13572. Also on December 23, 2017, OFAC designated seven individuals as senior government officials under E.O. 13573: Ahmad AL-HAMO, Minister of Industry; Ali AL-ZAFIR, Minister of Communications and Technology; Dureid DURGHAM, Governor of the Central Bank; Ali GHANEM, Minister of Oil, Petroleum and Mineral Wealth and Mineral Resources; Mamun HAMDAN, Minister of Finance; Ali HAMMUD, Minister of Transport; and Muhammad Ramiz TURJUMAN, Minister of Information. 82 Fed. Reg. 8261 (Jan. 24, 2017). And on December 23, 2016, OFAC designated nine individuals and two entities under E.O. 13582: Nikolay AKHLOMOV, Elena APANASENKO, Andrey DUBINYAK, Vladimir GAGLOEV, Irina KOZHENKOVA, Dmitriy MITYAEV, Leonid RESHETNIKOV, Arkadiy VAINSHTEIN, Elena ZHIROVA; CHAM WINGS AIRLINES, and SYRISS. 82 Fed. Reg. 8261 (Jan. 24, 2017).

### 3. Cuba

#### ***Amendments to the Cuban Assets Control Regulations***

On January 27, 2016, OFAC amended the Cuban Assets Control Regulations (“CACR”) to further implement elements of the new policy on Cuba announced by the President on December 17, 2014. 81 Fed. Reg. 4583 (Jan. 27, 2016). See *Digest 2015* at 639-40 regarding previous amendments to the CACR in 2015. The 2016 amendments relate to several areas, including lifting payment and financing restrictions for authorized exports and reexports to Cuba of items other than agricultural items or commodities; facilitating travel to Cuba; allowing transactions related to professional meetings and other events; disaster preparedness and response projects; and information and informational materials, including transactions incident to professional media or artistic productions in Cuba. See *Digest 2014* at 336 regarding the new Cuba policy.

On September 13, 2016, the President determined that the continuation of the exercise of certain authorities under the Trading with the Enemy Act for one year beyond the scheduled expiration was in the U.S. national interest. Presidential Determination No. 2016-11, 81 Fed. Reg. 64,047 (Sep. 16, 2016).

#### 4. Sudan

On February 10, 2016, Ambassador Power provided the U.S. explanation of vote at the UN Security Council's adoption of Resolution 2265 on Sudan sanctions. Ambassador Power's statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7131>

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... We welcome today's resolution to extend the mandate of the UN's Sudan sanctions Panel of Experts. Following a brief period of relative calm, the past few weeks have been marked by aerial bombardments and ground offensives carried out by the Government of Sudan in Jebel Mara. The United Nations has reported tens of thousands of civilians displaced and dire humanitarian conditions. Yet, the Security Council has been silent.

We have had a sanctions regime in place for 12 years—and yet we have not been able to muster consensus on a single designation since 2006.

We've had an arms embargo in place for 11 years, and year after year we receive report after report of arms flowing, illegally, into Darfur.

We have created a Panel of Experts to provide this kind of reporting. And, yet, when they do, a member of this Council blocks the report from being published because its findings are so disturbing.

Today's resolution is a technical rollover, not because the Panel of Experts did not provide findings on how to respond better to the situation. Indeed, this Panel has provided a critical flow of information on the implementation of sanctions in Darfur. Its report provided information that could have better informed our decision-making. For example, this report catalogued numerous violations of the sanctions regime, underscoring the need for greater enforcement by all Member States. It also took note of recurring violations of humanitarian and human rights law. Yes, today's resolution is a technical rollover because this Council could not agree on even modest attempts to address in this resolution this information on worrying developments in the Darfur region.

We are particularly concerned that the Council was unable to address the role of illicit trafficking in natural resources in fueling conflict. The nexus between gold trafficking and armed groups—as outlined by the Panel of Experts—is very well known. This Council has addressed, without controversy, the role of gold and natural resources in other conflicts, such as the Central African Republic, the Democratic Republic of Congo, and even terrorism by ISIL. Today, the Council should have built upon the excellent international and regional initiatives underway in this field to tackle this problem in the Sudan context.

But because of the Panel's reporting on this issue, a Panel's report may never become public. And that is extremely concerning. We urge this Council, and those who value the integrity and transparency of the work of the Security Council and its committees, to allow for this report to be published as soon as possible. Some of the same Council members who speak in certain contexts of the need for transparency in sanctions regimes in theory—including in a forthcoming meeting of this Council—now seek to block publication of information related to a real sanctions regime in practice because they do not like its findings. We cannot make judgments about what should be transparent and what shouldn't be on the basis of whether the information is convenient or inconvenient.

Finally, please let me reiterate that as penholder of this annual renewal, we take seriously our responsibility to consider the Panel's findings and recommendations, and also the views of all of the members of this Council. Some of those views could not be reconciled with the facts, including the facts presented in the Panel of Experts report that is being blocked from publication. We look forward to continuing our discussion with colleagues on how best to increase transparency, reinforce compliance with Security Council resolutions, and respond to the findings of the Panel. Truly addressing the issues facing Darfur will require this Council to speak with one voice and to take meaningful steps to help advance peace. ...

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On March 9, 2016, OFAC removed ATBARA CEMENT COMPANY LIMITED from the SDN list where it had been listed pursuant to E.O. 13067. 81 Fed. Reg. 13,449 (Mar. 14, 2016).

## **5. Democratic People's Republic of Korea**

### ***a. Human rights***

On July 6, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered a statement on behalf of the United States regarding U.S. sanctions on North Korean officials for human rights abuses. Ambassador Power's statement is excerpted below and available at <http://2009-2017->

[usun.state.gov/remarks/7368](http://usun.state.gov/remarks/7368).

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The human rights situation in North Korea is one the UN's Commission of Inquiry has said "does not have any parallel in the contemporary world." The DPRK continues to commit extrajudicial killings, enforced disappearances, arbitrary arrests, beatings, forced starvation, sexual assault, forced labor, and torture. Many of these abuses are committed in the country's political prison camps, where an estimated 80,000 to 120,000 men, women and children are held. At the UN, where the United States has worked with the Republic of Korea and other Member States to expose horrors that for decades got too little attention, we have heard the testimonies of

incredibly brave survivors of the North Korean regime... In 2014 the UN Security Council for the first time took up the cause of human rights in North Korea, recognizing the repressive rule of the DPRK regime as the threat to international peace and security it is.

Today the United States took an important step for these and other victims of DPRK abuses, by sanctioning for the first time top leaders and entities associated with human rights abuses or censorship by the regime in North Korea. These efforts represent the start of what will be an ongoing process to identify and name persons responsible for serious human rights abuses.

Our actions are consistent with the North Korea Sanctions and Policy Enhancement Act of 2016 and are taken in the context of ongoing global efforts—including by the UN Commission of Inquiry, the UN High Commissioner for Human Rights, nongovernmental organizations, and individual states—to document the abuses by the DPRK regime. These efforts send a clear message—not just to the senior leaders, but also prison camp managers and guards, censors, secret police, interrogators, and persecutors of defectors—the world is documenting your abuses, and they will not be forgotten.

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**b. Nonproliferation**

*(1) UN sanctions*

On February 25, 2016, Ambassador Power delivered remarks at the Security Council after consultations in response to the DPRK's latest nuclear test and ballistic missile launch, in violation of past Security Council resolutions. Ambassador Power's remarks describe the draft UN Security Council resolution proposed by the United States that would impose new sanctions. Her remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7154>.

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Let me explain some of the resolution's major provisions. For the first time in history, all cargo going in and out of the DPRK would be subjected to mandatory inspection. For the first time, all small arms and other conventional weapons would be prohibited from being sold to the DPRK. In addition, this resolution would impose financial sanctions targeting DPRK banks and assets, and ban all dual-use nuclear and missile-related items.

Also for the first time, the Security Council would impose sectoral sanctions on the DPRK—limiting, and in some instances banning outright, exports from the DPRK of coal, iron, gold, titanium, and rare earth minerals, and banning the supply to the DPRK of aviation fuel, including—notably—rocket fuel. These measures would also ground DPRK flights suspected of carrying contraband. Suspicious vessels carrying illicit items would be denied access to ports.

These sanctions—if adopted—would send an unambiguous and unyielding message to the DPRK regime: the world will not accept your proliferation; there will be consequences for your actions, and we will work relentlessly and collectively to stop your nuclear program.

If adopted and implemented fully, these sanctions would constitute a major increase in pressure compared to the Council's previous actions on DPRK. They have broader scope and target more of the DPRK's pressure points. They also have unprecedented interdiction provisions to make sure that the other provisions get enforced—most notable among them, this mandatory inspection of cargo to and from the DPRK.

In addition, these sanctions would make it much harder for the DPRK to raise the funds, import the technology, and acquire the know-how to advance its illicit nuclear and ballistic missile programs.

For more than a decade, in spite of the international community's efforts, DPRK has taken progressive steps toward its declared goal of developing nuclear-tipped intercontinental ballistic missiles. The international community cannot allow the DPRK regime to achieve that goal. The United States will not allow this to happen.

I want to be clear: this resolution is careful not to punish the North Korean people—the North Korean people have suffered so much already under one of the most brutal regimes the world has ever known. Rather this resolution focuses on a ruling elite that have inflicted so much of that suffering, always privileging the nuclear and ballistic missiles programs over the welfare of the North Korean people.

So long as North Korea continues to undermine international security through its dangerous pursuit of nuclear weapons, the United States and our partners will pursue rigorous and unyielding sanctions to impede their ability to endanger our shared security and to hold them accountable for their actions. We remain clear-eyed about the prospects of an immediate change in DPRK's behavior, but we have seen how robust sanctions can alter a government's dangerous nuclear ambitions in other contexts. The time to use this tool with the DPRK is now, and we look forward to working with the Council to put in place comprehensive, robust, and unprecedented sanctions against the DPRK regime.

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On March 2, 2016, the UN Security Council unanimously adopted the resolution on the DPRK sponsored by the United States, Resolution 2270. Ambassador Power, Ambassador Motohide Yoshikawa of Japan, and Ambassador Oh Joon of South Korea delivered remarks following the adoption of Resolution 2270. Their remarks are available at <http://2009-2017-usun.state.gov/remarks/7164> and Ambassador Power's comments are excerpted below.

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... Today, as you know, the UN Security Council unanimously adopted a new resolution establishing the strongest sanctions the Security Council has imposed in more than two decades—including a variety of sanctions never applied before in the history of the United Nations.

This resolution represents a seismic shift in the way the Council approaches DPRK proliferation concerns. It recognizes, at its core, that in order to prevent the DPRK from continuing to advance its nuclear weapons program, the international community has to be

prepared to sanction sectors beyond those directly related to the nuclear weapons program, or their ballistic missile program.

Let me be clear, though, as you all know, the true measure of Resolution 2270 will be whether the rigor with which states implement these sanctions matches the rigor we can anticipate the DPRK will apply to attempting to evade them—that’s what they do. While this resolution adopted today is robust, comprehensive, and unyielding, to be effective it must be followed with robust, comprehensive, and unyielding enforcement. It will be up to all Member States—including my colleagues here, Japan and South Korea, but also importantly China and Russia, who agreed to the measures imposed today—to implement fully the provisions of this groundbreaking resolution.

I would note also the record number of cosponsors of today’s resolution—50. That is more than three times more than any other resolution in response to DPRK’s nuclear tests. This is a strong indicator of the international support for action of this robust kind, the action that the Council has taken today.

...[T]his resolution recognizes the chronic suffering of the North Korean people, and they recognize that that suffering is a direct result of the DPRK’s prioritization of its nuclear weapons and ballistic missile programs over providing for the most basic needs of the North Korean people. And I credit Ambassador Oh for speaking so movingly to that in the end of his statement in the Council. It is noteworthy that the Council took in this resolution the unprecedented step of expressing deep concern at the “grave hardship that the DPRK people are subjected to.” So this is the Council taking note of what the DPRK people are going through, in an unprecedented way. At the same time, in closing, this resolution is a powerful demonstration of the international community’s commitment to end North Korea’s nuclear program and advance our shared and fundamental objective of complete, verifiable, and irreversible denuclearization once and for all.

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... [We] fully anticipate that they will try to drive a truck through any loophole that they can find. But this resolution is so comprehensive, there are so many provisions that leave no gap, no window. The ban on aviation fuel is a ban on aviation fuel, which includes rocket fuel. The prevention of DPRK from setting up financial institutions and banks and other things in other countries and shutting down their banking operations, you can see whether it’s done or it isn’t done. The requirement that all cargo be inspected going in and out, there’s no loophole in that, that’s a requirement—land, sea, air.

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On March 2, 2016, Ambassador Power provided the U.S. explanation of vote at the adoption of UN Security Council Resolution 2270 on the DPRK. That explanation is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7160>.

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...The chronic suffering of the people of North Korea is the direct result of the choices made by the DPRK government, a government that has consistently prioritized its nuclear weapons and ballistic missile programs over providing for the most basic needs of its own people. As the resolution that we have adopted today underscores, virtually all of the DPRK's resources are channeled into its reckless and relentless pursuit of weapons of mass destruction. The North Korean government would rather grow its nuclear weapons program than grow its own children. That is the reality that we are facing.

Of course, the DPRK's obsessive pursuit of weapons of mass destruction not only causes profound suffering for the people of North Korea, but also poses an extraordinary and growing threat to peace and security in the peninsula, the region, and the world. With each nuclear test and launch using ballistic missile technology, the DPRK improves its capability to carry out a nuclear missile attack not only in the region, but also a continent away. That means having the ability to strike most of the countries sitting on this Council. Think about that. North Korea is the only country in the entire world that has conducted a nuclear test in the 21st century. In fact, it has conducted not one nuclear test, but four—in 2006, 2009, 2013, and now, 2016. It is also the only UN Member State that routinely threatens other countries with nuclear annihilation, including multiple members of this Council on different occasions.

Our collective security demands that we stop North Korea from continuing along this destructive and destabilizing course. Yet we've got to be honest that, while previous multilateral efforts, including the four previous sanctions resolutions adopted by this Council, have undoubtedly made it more difficult for North Korea to advance its weapons programs, the regime continues to plow ahead, as it demonstrated the last two months. That is why the resolution we have just adopted is so much tougher than any prior North Korea resolution, and why it goes further than any sanctions regime in two decades. We have studied the ways the DPRK has been able to exploit gaps and evade measures aimed at impeding its nuclear weapons and ballistic missile programs, and we've put in place new measures to fill those gaps, one by one. Let me give just a few of many examples of how the resolution adopted today does this.

North Korea generates a significant share of the money it uses to fuel its nuclear and ballistic missile programs by mining natural resources—often exploiting workers in slave-like conditions—and selling those resources abroad. For example, it is estimated that the DPRK brings in approximately a billion dollars a year in coal exports, roughly a third of the revenue it earns from exports, and it brings in at least 200 million dollars a year in iron ore exports. That is why the resolution we have adopted today limits, and in some instances bans outright, North Korea's exports of specific natural resources, making it tougher for the government to get the money it needs to keep funding its illicit weapons programs.

Until today, in many countries around the world, inspectors required information providing reasonable grounds to inspect cargo coming into and going out of North Korea. So the DPRK and its suppliers took the ballistic missile parts, nuclear technology, and other illicit items they needed to build weapons of mass destruction, and they buried them deep in otherwise unsuspecting loads on airplanes, ships, and trucks coming into the country. The DPRK used similar tactics to hide the illegal items it was exporting—such as weapons, drugs, and counterfeit goods—which it used to generate a significant amount of additional income. That is why, under this resolution, cargo going into and coming out of North Korea will be treated as suspicious, and countries will be required to inspect it, whether it goes by air, land, or sea. This is hugely significant.

North Korea used to be able to import aviation fuel, which included rocket fuel used to launch proscribed ballistic missiles. Not anymore. The resolution adopted today bans all imports of aviation fuel, including rocket fuel.

For years, the DPRK deployed arms dealers, smugglers, financiers, and other enablers of its illicit weapons programs and claimed that they were diplomats and government representatives around the world. Abusing diplomatic protections, these individuals cut illicit deals, set up shell companies, and procured banned items to aid North Korea's weapons program. The resolution adopted today obligates countries to expel any North Korean who carries out these acts, including DPRK diplomats.

Despite previous financial sanctions that constrained North Korea's access to the international financial system, North Korean banks were still able to do business on foreign territory, allowing the government to fund its illicit programs. Under the resolution adopted today, states around the world will have to shut down DPRK financial institutions in their territory.

North Korean scientists have used specialized trainings at academic institutions and international research centers to obtain technical expertise that they then put to use to advance the DPRK government's nuclear weapons and ballistic missile programs. The resolution adopted today prohibits specialized training of any DPRK national in fields that could be used to advance these programs, including nuclear and space-related technical exchanges.

Now, as these measures make abundantly clear, the purpose of this resolution is not to inflict greater hardship on the people of North Korea, who endure immeasurable suffering under one of the most repressive governments the modern world has ever seen. The United States has repeatedly urged this Council to address the human rights violations committed by the DPRK, which the UN Commission of Inquiry concluded in its comprehensive 2014 report were widespread and systematic, and "have been committed...pursuant to policies established at the highest level of the State." These violations include detaining between 80 and 120 thousand people in prison camps where, according to the commission's report, they have for generations been "gradually eliminated through deliberate starvation, forced labor, executions, torture, rape, and the denial of reproductive rights"; and the government has carried out enforced disappearances for decades with no accountability, including of citizens from neighboring countries, whose families continue to suffer from not knowing the fate of their loved ones.

The scale and gravity of such abuses is what led us to push, along with our partners, to make the human rights situation in North Korea a permanent item on the Security Council's agenda, as it now is. North Korea continues to show what we have repeatedly said in the Council—that governments that flagrantly violate the human rights in their own people almost always show similar disdain for the international norms that help ensure our shared security. The DPRK's abysmal human rights record is another reason we have taken steps to ensure the sanctions contained in this resolution specifically target the government, which carries out these grave abuses with impunity.

It is deeply important that today's resolution, and all the tough measures it includes, has been adopted with the support of all 15 members of the Security Council. In particular, the United States would like to recognize the leadership of China, which has worked closely with us in negotiating this extremely rigorous resolution. Beyond the Council, it is worth noting the unanimity among, and leadership by, the countries in the region—China, Japan, and the Republic of Korea—who understand so clearly the threat to our shared security posed by the DPRK's actions. The fact that this resolution has been co-sponsored by 50 Member States drawn from

every region in the world, demonstrates both the recognition of the global threat posed by North Korea, and the international community's commitment to working together to address that threat.

We are clear-eyed about the nature of this regime. We are under no illusions that, following the adoption of this resolution, the DPRK government will abruptly abandon its prohibited weapons programs due to a sudden realization that the international community is united in its determination to stop North Korea's dangerous pursuit of nuclear weapons. Were that to be the case, North Korea would have given up their nuclear weapons and ballistic missile programs long ago. On the contrary, the North Korean government has shown that it is determined to evade every obstacle put in the way of its singular pursuit of weapons of mass destruction—no matter the consequences for its people.

Yet at the same time, we have seen how the strategy of increasing multilateral pressure can be effective. And that is what we are doing here. Even as we find new ways to impede North Korea's efforts to advance its nuclear weapons and ballistic missile programs—as our collective security and the DPRK's track record demand that we do—we must not lose sight of the ultimate goal of bringing North Korea back to the table for serious and credible diplomatic negotiations on denuclearization. Achieving that goal will require sustained unity on the part of this Council, and an unwavering commitment by all Members States to implement—in full—the comprehensive, robust, and unprecedented sanctions that we have put in place today.

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Also on March 2, 2016, Secretary Kerry issued a press statement welcoming the adoption of Resolution 2270, and echoing the characterization by the United States at the UN of the sanctions as the toughest to date. Secretary Kerry's press statement is available at <http://2009-2017.state.gov/secretary/remarks/2016/03/253877.htm>.

And on March 2, 2016, the U.S. Mission to the UN provided a fact sheet on Resolution 2270, available at <http://2009-2017-usun.state.gov/remarks/7161>, and excerpted below.

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The UN Security Council unanimously adopted Resolution 2270 (2016) to impose additional legally binding sanctions on North Korea (DPRK) in response to its fourth prohibited nuclear test on January 6, 2016, and its prohibited launch, using ballistic missile technology, on February 7, 2016. The goal of these groundbreaking sanctions is to convince Pyongyang to return to the negotiating table and agree to complete, verifiable, and irreversible denuclearization. Today's unanimous adoption shows that the Security Council—and the entire international community—is united against the threat posed by the DPRK's nuclear and ballistic missile programs.

These sanctions significantly build on the Council's previous actions aimed at the DPRK's illicit programs. They have broader scope, target more DPRK pressure points, and have unprecedented inspection and financial provisions, including mandatory inspections of cargo to and from the DPRK and a requirement to terminate banking relationships with DPRK financial institutions.

These sanctions make it much harder for the DPRK to raise funds, import technology, and acquire the know-how to continue its illicit nuclear and ballistic missile programs.

Resolution 2270 (2016):

- Condemns the DPRK's January 6 nuclear test and February 7 launch;
- Reaffirms the DPRK's obligations not to conduct any further launches using ballistic missile technology or nuclear tests, and abandon all nuclear weapons, suspend all activities related to its ballistic missile program, and abandon all other WMD programs;
- Clarifies a ban on technical cooperation with the DPRK on launches using ballistic missile technology, even if characterized as a satellite or space launch;
- Imposes measures to constrain the DPRK's conventional arms capabilities;
- Tightens the arms embargo to prohibit the transfer of small arms and light weapons to the DPRK;
- Closes a loophole that could have allowed the temporary transfer of arms for "repair";
- Creates a new conventional arms "catch-all" provision to ban the transfer of *any item*—even if not covered by the arms embargo—except food or medicine that could directly contribute to the operational capabilities of the DPRK's armed forces or the transfer by the DPRK of *any item* that directly contributes to operational capabilities of the armed forces of another Member State outside the DPRK;
- Clarifies that existing UN Security Council resolutions ban hosting of DPRK trainers or advisors, or other officials for military, paramilitary, or police training;
- Affirms that existing UN asset freezes apply to vessels;
- Targets the DPRK's proliferation networks to limit the DPRK's ability to smuggle and evade sanctions:
  - Requires states to expel DPRK diplomats engaged in activities prohibited by UN Security Council resolutions;
  - Requires states to expel foreign nationals involved in DPRK-related, UN-prohibited activities;
  - Requires states to close offices of designated entities and expel their representatives;
  - Highlights for states the risk of DPRK front companies;
- Bans specialized teaching or training for DPRK nationals in fields, such as advanced physics, aerospace engineering, and advanced computer simulation, that could contribute to the DPRK's proliferation-sensitive activities;
- Imposes new cargo inspection and maritime procedures to limit the DPRK's ability to transfer UN-prohibited items:

Requires States to inspect cargo to/from the DPRK or brokered by the DPRK that is within or transiting their territories (i.e., a mandatory cargo inspection regime);

Requires States to ban DPRK chartering of vessels or aircraft (with an exemption if States notify the DPRK Sanctions Committee in advance that such activities are exclusively for livelihood purposes that will not generate revenue for DPRK individuals or entities);

Requires States to prohibit their nationals from operating DPRK vessels or using DPRK flags (with an exemption if States notify the DPRK Sanctions Committee in advance that such activities are for exclusively for livelihood purposes that will not generate revenue for DPRK individuals or entities);

Bans flights of any plane suspected of carrying prohibited items;

Prohibits port calls by any vessel controlled by a designated entity or suspected of engaging in activity prohibited by UN Security Council resolutions on the DPRK;

- Obligates the DPRK to act in accordance with its obligations as a State Party to the Convention on Biological Weapons and calls upon the DPRK to accede to the Chemical Weapons Convention;
- Updates the current list of chemical- and biological-warfare items banned for transfer to/from the DPRK (with annual updates) and calls for the list to be further updated annually;
- Directs the Security Council's DPRK Sanctions Committee to update within fifteen days an additional list of prohibited nuclear/missile/chem-bio items banned for transfer to/from the DPRK;
- Prohibits the transfer of dual-use nuclear/missile items through a binding Weapons of Mass Destruction "catch-all" provision and updates previous "seize and dispose" obligations;
- Imposes sectoral sanctions targeting the DPRK's trade in resources:
  - Bans exports from the DPRK of coal, iron, and iron ore, unless such transactions are determined to be exclusively for livelihood purposes and unrelated to generating revenue for the DPRK's nuclear/missile programs or other activities that constitute UN Security Council resolution violations;
  - Bans exports from the DPRK of gold, titanium ore, vanadium ore, and rare earth minerals;
  - Bans transfers of aviation fuel, including rocket fuel, to the DPRK;
- Imposes new financial sanctions targeting DPRK banks and assets.
  - Requires States to freeze the assets of entities of the Government of the DPRK or Worker's Party of Korea determined to be associated with the DPRK's nuclear or missile programs or other activities that constitute violations of UN Security Council resolutions;
  - Requires States to prohibit DPRK banks from opening branches in their territory or engaging in certain correspondent relationships with these banks;
  - Requires States to prohibit their financial institutions from opening new representative offices or subsidiaries, branches, or banking accounts in the DPRK;
  - Requires States to close existing representative offices or subsidiaries, branches, or banking accounts in the DPRK if reasonable grounds exist to believe such financial services could contribute to the DPRK's nuclear or missile programs or UNSCR violations;
  - Prohibits all public or private financial support for trade with the DPRK, including export credits, guarantees, and insurance, if such support could contribute reasonable grounds to believe there is a link to the DPRK's nuclear or ballistic missile programs or other activities that constitute UNSCR violations;
  - Highlights the risk that the DPRK can use gold to evade sanctions;
  - Urges states to apply Financial Action Task Force (FATF) recommendations to effectively implement targeted financial sanctions related to proliferation;
- Provides an illustrative list of specific luxury goods that are banned for transfer to the DPRK.

- . Provides new **sanctions implementation tools**, including new requirements for the DPRK Sanctions Committee to improve enforcement, such as regularly updating the names of front companies and aliases on the Committee's sanctions list.
- . Underlines that these measures are not intended to have adverse humanitarian consequences;
- . Reiterates the importance of peace and stability on the Korean Peninsula and in Northeast Asia; reaffirms support to the Six-Party Talks and calls for their resumption; and reiterates support for the 2005 Joint- Statement commitments; and
- . Expresses the Council's determination to take further significant measures in the event of further DPRK nuclear tests or launches.

The UNSCR also includes sanctions annexes that:

1. Identify 16 individuals designated for targeted sanctions (asset freeze/travel ban);
2. Identify 12 entities (including government agencies and banks) designated for an asset freeze;
3. Specify 31 vessels controlled by UN-designated Ocean Maritime Management (i.e., vessels that must be impounded); and
4. Provide 4 illustrative categories of luxury goods for the purposes of implementing the UNSCR 1718 luxury goods ban.

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On June 30, 2016, Ambassador Power delivered remarks at a UN briefing on implementing Resolution 2270. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7362>.

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Just last week, the DPRK launched two more of its new, mobile, intermediate-range ballistic missiles and flaunted the rapid progress it has made in recent months. As to what this capability means for our planet? You do not need to take my word for it. You can hear it directly from North Korean leader Kim Jong-un, who said last week that the DPRK has “the sure capability to attack . . . the Americans in the Pacific operation theater.” And we know his nuclear and ballistic missile ambitions do not stop there.

North Korea is the only country that has conducted a nuclear test in the 21st century. In fact, it has conducted not one nuclear test, but four—as we saw in 2006, 2009, 2013, and earlier this year. The latest of these tests did lead the Security Council to adopt Resolution 2270, which we are here to discuss.

The true measure of Resolution 2270 will be whether the rigor with which Member States implement these sanctions matches or exceeds the rigor that the DPRK will apply in attempting to evade these sanctions. We studied the ways the DPRK has exploited gaps and evaded sanctions over the years, and we drafted Resolution 2270 to seal those cracks.

We also know that a multilateral sanctions regime in today's globalized world is only as strong as its weakest link. Resolution 2270 can only succeed if all of us fully implement its

measures in a sustained and comprehensive manner, leaving no safe havens or gaps in regulation across jurisdictions that the DPRK could exploit to proliferate. And so it's great to see so many countries represented here because each of us has to invest in this enforcement, or all of us will suffer the consequences, in terms of the development of this program.

I'm going to focus on four of the most important measures that all of us must take to fully implement Resolution 2270. ...

So, first, we all ... must put in place catch-all export controls for any item destined for a proscribed purpose or entity so that the DPRK cannot continue to procure the items it needs to develop nuclear weapons and ballistic missiles. Despite the fact that many states have strengthened their export control systems, we discovered that the DPRK began hiring middlemen and establishing front companies in third countries to procure goods, thus masking the transactions and hiding their ultimate destination. The DPRK has also developed ways to use commercially available technology to build specialized and threatening military systems, such as ballistic missiles and unmanned aerial vehicles, or UAVs.

Resolution 2270 requires states to institute catch-all export controls. Simple controls—which only restrict items on sanctions lists—do not satisfy the resolution's requirements and will not be sufficient to halt the DPRK's illicit programs. Catch-all controls, by contrast, apply to any item destined for a proscribed purpose. And these broader controls are essential because unlisted items that appear benign, such as industrial-grade machinery and materials, may in fact be destined for the DPRK's prohibited nuclear or ballistic missiles program, or for its military. In practice, this means that if any of us know that any item in our territory is destined—directly or indirectly—for the regime's proscribed programs or its military, Resolution 2270 requires us to stop it and to seize it.

Now, it is also the case that, even with strong, catch-all export controls along the lines I've described, it will not be enough to curb the regime's nuclear efforts. Member States need to make sure that unreported or illicit transfers to the DPRK do not actually occur. And this requires the second key action I'd like to touch upon, which is inspection of all cargo going in or out of the DPRK. This is an extremely significant innovation and requirement in Resolution 2270. Before 2270, the Security Council only called for inspections of DPRK-related cargo if a state had "reasonable grounds" to believe the cargo contained prohibited items. But the DPRK and its suppliers were one step ahead: they would conceal the ballistic missile parts, nuclear technology, and other illicit items by burying them deep ... in otherwise unsuspecting loads on planes, ships, and trucks coming into the country. We all saw a vivid example of this back in 2013, when Panama inspected a ship named the *Chong Chon Gang* en route from Cuba to the DPRK and discovered fighter jet and anti-aircraft missile parts buried beneath thousands of tons of sugar. The DPRK has used similar tactics to hide the illegal items it exports—such as weapons, drugs, and counterfeit goods—to generate revenue.

For this reason, critically, under Resolution 2270, any cargo that has a link to the DPRK now must be inspected—that means cargo going into and/or out of North Korea by air, land, or sea; cargo brokered or facilitated by DPRK nationals; and cargo being transported on DPRK-flagged aircraft or maritime vessels. But the obligation goes further than cargo in state airports, seaports, and free trade zones; it applies to cargo being transported by rail or by road, including by individuals. So, if a lone traveler is heading to, or leaving from, the DPRK, his or her baggage must be inspected, consistent with the privileges and immunities accorded under international law, which, unfortunately, DPRK—as a general rule—continues to flout. These checks are

hugely significant and critically needed to protect against the DPRK's record of sanctions evasions.

Unfortunately, we know the DPRK generates a significant share of the money it uses to fuel its nefarious programs by mining natural resources—often exploiting workers in slave-like conditions—and selling those resources abroad. For example, it is estimated that the DPRK brings in around \$1 billion a year in coal exports, roughly a third of the revenue it earns from exports. It also brings in at least \$200 million a year in iron ore exports. That is why Resolution 2270 limits, and in some cases bans outright, the DPRK's exports of specific natural resources, particularly coal, iron ore, and iron, making it tougher for the government to get the money it needs to keep funding its illicit weapons programs. Member States, therefore, must take a third critical step, faithfully and fully implementing sectoral sanctions on the DPRK's export of coal, iron ore, and iron.

Now, let me be clear that these sectoral sanctions, and Resolution 2270 more generally, are not targeted at the long-suffering North Korean people, who are enduring immeasurable harms at the hands of one of the modern era's most repressive regimes. To the contrary, these sanctions are directed at North Korea's prohibited programs and the revenue necessary to pursue those programs. For that reason, multiple provisions of the resolution allow otherwise prohibited transactions when a state determines, *ex ante*, that those transactions are conducted for "livelihood purposes," and that the transaction will not be used to generate revenue for banned regime activities. These exemptions exist to ensure that these efforts do not inadvertently target the very people that they are meant to help.

This leads me to my fourth and final point: all Member States must sever banking ties with the DPRK's financial institutions unless they have express approval from the DPRK sanctions committee. In order to truly curtail the DPRK's illicit activities, states need to shut down the regime's ability to move funds freely around the world through the international financial system. Despite previous financial sanctions that constrained North Korea's access to the international financial system, North Korean banks were still able to do business on foreign territory. This allowed the government to launder proceeds from illicit transactions and generate hard currency, which it has used—and continues to use—to support its nuclear and ballistic missile programs. Resolution 2270 aims to close this gap by requiring states to shut down all DPRK financial institutions in their territory, cease their financial activities in the DPRK, and cut off all correspondent banking accounts between their banks and DPRK banks unless approved by the DPRK sanctions committee.

This means that the only correspondent banking account relationships allowed between DPRK banks and outside banks are those expressly approved by the sanctions committee on a case-by-case basis. But I want to stress something very important here. ...[C]orrespondent account relationships may be established or maintained—but to be clear, only if they are reviewed and approved by the committee. ...

In imposing these and other sanctions measures on the DPRK, the intention is not to create adverse humanitarian consequences for the North Korean people. In fact, these financial sanctions explicitly contain exemptions that permit the sanctions committee to allow humanitarian aid agencies to continue operating in the DPRK. And we have been working tirelessly to assist the United Nations in securing a reliable banking channel to transfer vitally needed funds to deliver aid. Resolution 2270 calls on all of us to implement these robust sanctions in an unyielding manner, which requires actively sharing information and coordinating

with neighbors and the committee while also making sure to avoid and mitigate any humanitarian ramifications for the people of DPRK. They have endured, again, so much already.

In sum, it is these four key actions—implementing catch-all export controls, inspecting all cargo going in and out of the DPRK, enforcing sectoral sanctions, and severing banking ties with DPRK financial institutions unless approved by the sanctions committee—that are the backbone of Resolution 2270. We adopted these sweeping sanctions with unanimity, and now we urge all Member States to implement the resolution with the same unity of purpose and commitment. That’s the only way to truly ensure the DPRK’s sophisticated and global procurement supply chain is disrupted, and ultimately, eliminated. It’s also our best chance of achieving our ultimate goal of bringing North Korea back to the table for serious and credible diplomatic negotiations on denuclearization, and to ending the heart-wrenching suffering of the people of North Korea.

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On November 30, 2016, the UN Security Council unanimously adopted another resolution imposing new sanctions on the DPRK in response to its ongoing flagrant violations of past resolutions, including by conducting a second nuclear test in 2016, continuing production of fissile material, and conducting ballistic missile launches. At the adoption of Resolution 2321, Ambassador Power delivered the U.S. explanation of vote, which is excerpted below and available at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7575)

[usun.state.gov/remarks/7575](https://2009-2017-usun.state.gov/remarks/7575)

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... The DPRK is determined to refine its nuclear and ballistic missile technology to pose an even more potent threat to UN Member States, and—more broadly—to international peace and security.

Consider what DPRK leader Kim Jong-Un said after testing an engine for a long-range missile in April, that North Korea “can tip new-type intercontinental ballistic rockets with more powerful nuclear warheads and keep any cesspool of evils in the earth, including the U.S. mainland, within our striking range.”

The United States recognizes China for working closely with us in negotiating this extremely rigorous and important resolution. We are also grateful for the critically important contributions made by Japan and the Republic of Korea, who face a grave threat that one Korean official likened to “living with the Cuban missile crisis every day.”

Lately, this Council has been divided on many issues. But the unanimous adoption of new sanctions shows that as long as the DPRK pursues this dangerous and destabilizing path, this Council will impose ever harsher consequences on those responsible. In March, this Council passed what were then the toughest sanctions to date on the DPRK. But the DPRK remained as determined as ever to continue advancing its nuclear technology. The DPRK found ways to continue diverting revenue from exports to fund its research, it tried to cover up its business dealings abroad, and it looked for openings to smuggle illicit materials by land, sea, and air.

Today’s resolution systematically goes after each of these illicit schemes.

Let me highlight three ways that this resolution breaks new and important ground. First, the resolution imposes major new restrictions on the sources of hard currency—in particular coal exports—that the DPRK is using to pay for its nuclear weapons and its ballistic missiles. Of course, Resolution 2270 banned coal exports not exclusively used for what this Council called “livelihood purposes.” But the DPRK’s coal revenues have remained high—about one third of the DPRK’s entire export revenue. And, contrary to the letter and spirit of Resolution 2270, this coal export revenue has not been used to help the people of North Korea; it has been used to further build up the regime’s illegal weapons programs. So this resolution imposes a new binding cap on how much coal the DPRK can ship out of the country, cutting what the DPRK earns by approximately \$700 million per year from its 2015 total, or more than 60 percent of its coal export revenue. Much of this coal trade involves DPRK companies with links to the regime and its prohibited nuclear and ballistic missiles programs.

In addition, this resolution imposes a new ban on the export of copper, nickel, silver, and zinc, which will eliminate another \$100 million or more in annual hard currency revenue for the regime. So, in total, this resolution will slash by at least \$800 million per year the hard currency that the DPRK has to fund its prohibited weapons programs, which constitutes a full 25 percent of the DPRK’s entire export revenues.

But we knew going into this negotiation that the DPRK has found itself masterful at using non-traditional means to stash currency. And the resolution goes after some of the less obvious ways that the DPRK makes money. We have banned the export of monuments. Now, you might ask why on earth would we ban the export of monuments. Well it turns out that such exports—like a statue of Laurent Kabila standing in Kinshasa today, two statues that Robert Mugabe paid \$5 million to be stood up in Zimbabwe upon his passing, or countless others found around the world—generate tens of millions of dollars for the regime. And we have called out countries that host DPRK laborers by urging these countries to take steps to ensure that wages are not supporting the DPRK regime’s prohibited programs.

Second, the resolution makes it much harder for the DPRK to use diplomats to advance its prohibited programs. In the past, the DPRK has tried to enable nuclear and ballistic missile officials to travel by giving them phony diplomatic titles. Meanwhile DPRK officials posted in embassies abroad have spent their time running businesses and brokering arms sales to fund the regime’s military. But an arms dealer with a diplomatic passport is still an arms dealer. So from now on, states must restrict the travel of those affiliated with the DPRK’s nuclear and ballistic missile programs or other prohibited activities, diplomatic passports or not.

Third, the resolution imposes unprecedented measures to restrict the flow of illicit materials into the DPRK. On land, the resolution emphasizes that cargo heading into and out of the DPRK by road or rail must be inspected. At sea, the DPRK will no longer be allowed to mask its ships and evade scrutiny by flying the flags of other countries or controlling other vessels with their crews. And by air, Member States should inspect the baggage of anyone flying into and out of the DPRK.

In the next 15 days, this Council’s DPRK Sanctions Committee will make another important determination—publishing for the first time a list of “conventional arms dual use” items that will no longer be allowed to enter the DPRK. These are commercially available components that have civilian uses, like sophisticated electronic sensors, but that the DPRK can use to build advanced military equipment like radar systems, night vision, and stealth technology.

I began by talking about the fact that DPRK made the choice to pursue nuclear weapons. But I want to, before closing, discuss another choice the DPRK regime has made—the choice to systematically violate the human rights of its people. As the UN Commission of Inquiry found in its 2014 report, the DPRK arbitrarily detains between 80,000 and 120,000 political prisoners in its gulags, where they are subjected to deliberate starvation, forced labor, executions, torture, and rape, among other abuses. The DPRK seeks nothing less than, as it was put into the report, “total control of organized social life,” through tactics ranging from summary executions, to forced indoctrination, to the methodical repression of freedom of expression. Even though we have heard it before—and many of us have repeated it—it is worth underscoring the Commission’s finding that “the gravity, scale, and nature of these violations reveal a State that does not have any parallel in the contemporary world.” The situation in the DPRK reaffirms what we have said elsewhere—that when governments flagrantly violate the human rights of their own people, they almost always show similar disdain for the international norms that help ensure our shared security.

So this resolution enshrines for the first time that the DPRK must respect and ensure the “welfare and inherent dignity” of people in its territory. That includes the North Korean people, of course, but also those of other nationalities in its territory, including unjustly detained Americans and those abducted from countries like Japan and the Republic of Korea, whose families in some cases have endured decades of suffering from not knowing the fate of their loved ones. The defense of human dignity is a basic demand, and it is long overdue coming from this Council. The same clique of leaders responsible for the DPRK’s pursuit of nuclear weapons is the one responsible for systematically abusing their people at home. This resolution also recalls for the first time that, in keeping with Article 5 of the UN Charter, if DPRK continues on its current path, systematically and flagrantly violating its Charter obligations, it could see some or all of its rights and privileges here at the UN suspended.

The United States is realistic about what this resolution will achieve. No resolution in New York will likely, tomorrow, persuade Pyongyang to cease its relentless pursuit of nuclear weapons.

But this resolution imposes unprecedented costs on the DPRK regime for defying this Council’s demands. The door remains open for the DPRK to choose a different path. To choose the path of negotiations toward complete, verifiable, and irreversible denuclearization. When the DPRK makes this choice, the United States, and I know this Council, will be ready to engage. And with sustained international pressure, it is possible to change the DPRK’s calculus. To do that, the members of this Council and all Member States of this United Nations must fully implement the sanctions that we have adopted today. The strength of this resolution—and our ability to change the DPRK’s threatening, belligerent behavior—depends on Member States exercising maximum vigilance to enforce each and every one of the provisions in today’s resolution. We call on all Member States to remain united in imposing consequences on the DPRK for its many dangerous choices. ...

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On November 30, 2016, the U.S. Mission to the United Nation issued a fact sheet on Resolution 2321, available at <https://2009-2017-usun.state.gov/remarks/7578>, and excerpted below.

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Resolution 2321 (2016), adopted unanimously by the UN Security Council on November 30, 2016, strengthens the binding UN sanctions on North Korea (DPRK) in response to its fifth nuclear test conducted on September 9, 2016. This resolution sends a clear message to North Korea that the Security Council is united in imposing stronger sanctions on North Korea's international trade, financial transactions, and weapons-related programs in response to the DPRK continuing its nuclear- and ballistic missile-related programs in violation of multiple Security Council resolutions. In particular, this resolution imposes a hard, binding cap on the DPRK's coal exports—the DPRK's largest source of external revenue.

Resolution 2321 (2016):

- Condemns the DPRK's September 9 nuclear test, and reaffirms the DPRK's obligations not to conduct any further nuclear tests or launches that use ballistic missile technology, to abandon all nuclear weapons and existing nuclear programs in a complete, verifiable and irreversible manner, to suspend all activities related to its ballistic missile program, and to abandon all other WMD programs.
- Strengthens and expands **sectoral sanctions** on exports the DPRK can use to raise hard currency that can be used to fund its nuclear and ballistic missile programs. The resolution slashes the DPRK's exports by:
  - Imposing a binding cap cutting the DPRK's largest export, coal, by approximately \$700 million per year from 2015 (more than 60%);
  - Tightening the conditions on coal exports under that cap, including by establishing that coal exports may not involve any individuals or entities associated with the DPRK's nuclear, ballistic missile, or other prohibited programs and activities;
  - Banning the DPRK's export of monuments, which the DPRK has used to generate tens of millions of dollars through contracts around the world; and
  - Banning the DPRK's exports of non-ferrous metals—copper, nickel, silver, and zinc—that provide approximately \$100 million in hard currency to the regime annually.
- Imposes additional **restrictions on the DPRK's ability to generate revenue and access the international financial system**, by:
  - Banning the DPRK from generating revenue by using its property abroad;
  - Prohibiting public and private support for trade with the DPRK, such as export credits, guarantees and insurance;
  - Requiring the closure of foreign bank offices, accounts, and subsidiaries in the DPRK within 90 days, except as approved by the sanctions committee;
  - Requiring the expulsion of DPRK banking and financial officials located outside the DPRK; and
  - Calling out countries hosting DPRK laborers, and urging those countries to take steps to ensure that their wages are not supporting the regime's prohibited programs.
- **Counters the DPRK's proliferation activities**, by:
  - Designating for targeted sanctions 11 DPRK officials and 10 entities involved in the development, production, and financing of the DPRK's nuclear weapons and ballistic missile programs, as well as the DPRK coal and conventional arms trade;
  - Expanding the list of prohibited dual-use items that have WMD-related applications; to include an additional 18 items;

- Creating a list of additional dual-use items that have conventional arms-related applications, to be prohibited for transfer to the DPRK;
- Expanding the number of advanced proliferation-sensitive disciplines in which specialized teaching and training of DPRK citizens is prohibited; and
- Restricting scientific and technical cooperation involving the DPRK in certain sensitive fields: nuclear science and technology, aerospace and aeronautical engineering and technology, and advanced manufacturing and production techniques and methods.
- Imposes strict new sanctions on the DPRK's illicit transportation activities, including:
  - Prohibiting the sale of new vessels and helicopters to the DPRK;
  - Authorizing the sanctions committee to designate vessels of DPRK proliferation concern for de-flagging, direction to a specific port for inspection, a port entry ban, and/or impoundment;
  - Requiring States to prohibit the flagging of vessels in the DPRK, as well as owning, operating, insuring, or providing any services to DPRK-flagged vessels;
  - Prohibiting the provision of insurance services to any vessels owned, controlled, or operated, including through illicit means, by the DPRK;
  - Prohibiting the procurement of vessel or aircraft crewing services from the DPRK; and
  - Requiring all states to de-flag any vessel that is owned, controlled, or operated by the DPRK, and requiring other states not to re-flag any such vessel.
- Strengthens expansive cargo inspection obligations imposed in resolution 2270 (2016), by:
  - Requiring that personal luggage and checked baggage going to and coming from the DPRK must be inspected;
  - Reminding states of their obligation to inspect all DPRK-flagged aircraft when they land in or take off from their territory, and calling on states to exercise vigilance to ensure that no more fuel is provided to DPRK-flagged aircraft than is necessary for the relevant flight;
  - Underscoring the need for all states to inspect cargo transiting to and from the DPRK by rail and road; and
  - Applying travel-related restrictions even when individuals are transiting through an international airport terminal en route to another destination.
- Targets the DPRK's use of its diplomats and diplomatic missions to smuggle illicit items, sell arms, and raise revenues for the DPRK regime, by:
  - Restricting DPRK government and military officials from entering or transiting other states if they are determined to be associated with the DPRK's nuclear or ballistic missile programs or other prohibited activities;
  - Limiting all DPRK diplomatic missions and consular posts, as well as all accredited DPRK diplomats and consular officers, to one bank account each;
  - Calling upon all states to reduce the number of staff at DPRK diplomatic missions and consular posts; and
  - Emphasizing that DPRK diplomats are prohibited from engaging in commercial or other professional activities and roles outside of their diplomatic responsibilities.
- Includes new tools to improve sanctions enforcement, including moving its Panel of Experts to a six-month reporting cycle from the current annual cycle to more quickly address violations and evasions by identifying sanctions gaps and loopholes.

- Recalls that states subject to UN sanctions, like the DPRK, may be suspended from their UN rights and privileges.
- Condemns the DPRK regime's pursuit of nuclear weapons and ballistic missiles while people in the DPRK have great unmet needs.
- Emphasizes, for the first time, the need for the DPRK to respect and ensure the inherent dignity of people in its territory. The reference to the dignity of "people in the DPRK" implicitly recognizes that the DPRK is responsible for respecting the human rights not only of its own citizens but also of people of other nationalities in its territory—such as unjustly detained citizens of various nationalities, including Americans, and those it has abducted from other countries, including Japan.
- Reaffirms the Council's support for the Six Party Talks, calls for their resumption, reiterates its support for commitments made by the Six Parties, and reiterates the importance of maintaining peace and stability on the Korean Peninsula and in Northeast Asia.
- Expresses the Council's determination to take further significant measures if the DPRK conducts another nuclear test or ballistic missile launch.

This resolution has several annexes. These are:

1. An annex of 11 DPRK individuals designated for targeted sanctions (asset freeze and travel ban);
2. Another annex of 10 DPRK entities designated for an asset freeze;
3. 18 dual-use items that have WMD-related applications that are now banned for transfer to the DPRK; and
4. 2 additional types of luxury goods banned for transfer to the DPRK.
5. Standard form for monthly coal import reporting to the sanctions committee to be used by all states importing DPRK coal.

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Ambassador Power also discussed Resolution 2321 alongside her counterparts, Ambassador Koro Bessho, Permanent Representative of Japan to the United Nations, and Ambassador Oh Joon, Permanent Representative of the Republic of Korea to the United Nations, on November 30, 2016. Those remarks are available at [https://2009-](https://2009-2017-usun.state.gov/remarks/7580)

[2017-usun.state.gov/remarks/7580](https://2009-2017-usun.state.gov/remarks/7580).

(2) *U.S. sanctions*

(a) *E.O. 13687*

As discussed in *Digest 2015* President Obama issued Executive Order 13687, "Imposing Additional Sanctions With Respect To North Korea." On December 2, 2016, OFAC blocked the property and interests in property of four individuals and one entity pursuant to E.O. 13687. 81 Fed. Reg. 88,323 (Dec. 7, 2016).

(b) *E.O. 13722*

On March 15, 2016, the President issued Executive Order 13722, “Blocking Property of the Government of North Korea and the Workers’ Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea.” 81 Fed. Reg. 14,943 (Mar. 18, 2016). E.O. 13722 was issued in accordance with IEEPA, the NEA, the UN Participation Act, the INA, the North Korea Sanctions and Policy Enhancement Act of 2016 (Public Law 114–122), and UN Security Council Resolution 2270 (2016). The introductory paragraph of the E.O. explains that it was prompted by the DPRK’s January 6, 2016 nuclear test and February 7, 2016 missile launch, which violated UN Security Council resolutions and the DPRK’s commitments in the Six-Party Talks. Section 1 of E.O. 13722 blocks property and interests in property of the Government of North Korea and the Workers’ Party of Korea. Section 2 authorizes the Secretary of the Treasury, in consultation with the Secretary of State to designate any other person to be subject to blocking based on a determination that the person (i) operates in transportation, mining, energy, or financial services; (ii) has engaged in certain transactions with the Government of North Korea or the Workers’ Party of Korea; (iii) has engaged in human rights abuses by the Government or Workers’ Party; (iv) has exported workers from North Korea; (v) has engaged in undermining cybersecurity on behalf of the Government or Workers’ Party; (vi) has engaged in censorship by the Government or Workers’ Party; (vii) has provided material assistance or support for others blocked pursuant to the order; (viii) is owned or controlled by others blocked pursuant to the order; (ix) has attempted to engage in the activities described in (i)-(viii). Section 3 prohibits new investment or financing in North Korea by U.S. persons. And Section 4 suspends entry into the United States of designated persons.

On December 2, 2016, OFAC blocked the property and interests in property of 14 entities pursuant to E.O. 13722. 81 Fed. Reg. 88,323 (Dec. 7, 2016). OFAC also identified 16 aircraft as blocked pursuant to E.O. 13722. *Id.*

(c) *E.O. 12938, E.O. 13382, and Missile Proliferation Sanctions*

On the same day the UN Security Council adopted Resolution 2270 on the DPRK, the United States announced new designations pursuant to E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”) of entities and individuals linked to North Korean WMD programs that would help implement the resolution. See March 2, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253882.htm)

[2017.state.gov/r/pa/prs/ps/2016/03/253882.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253882.htm). The State Department designated North Korea’s Ministry of Atomic Energy Industry (“MAEI”), the Academy of National Defense Science (“ANDS”), and the National Aerospace Development Administration (“NADA”), and two individuals, Choe Chun Sik and Kang Mun-Kil, for their contribution to North Korea’s WMD-related activities. The Department also designating the Namhung Trading Corporation as an alias of the UN- and U.S.-designated Namchongang

Trading Corporation (“NCG”). As summarized in the media note, these entities and individuals are tied to North Korea’s nuclear and WMD delivery programs:

MAEI oversees North Korea’s nuclear program. MAEI consists of a number of nuclear-related organizations and research centers and committees, and directs a nuclear research center at Yongbyon, the site of North Korea’s known plutonium facilities. ANDS contributes to the further development of North Korea’s ballistic and nuclear programs. NADA oversees the development of North Korea’s space science and technology, including satellite launches and carrier rockets.

Choe Chun Sik was the president of the UN- and U.S.-designated Second Academy of Natural Sciences, and played a prominent role in the launch of the Unha-3 rocket in December 2012.

Namhung Trading Corporation is an alias of NCG. NCG is a North Korean nuclear-related company in Pyongyang that has been involved in the purchase of aluminum tubes and other equipment specifically suitable for a uranium enrichment program since the late 1990s. Namhung Trading Corporation has conducted procurement activities associated with North Korea’s nuclear program. Kang Mun-Kil has conducted nuclear procurement activities as a representative of Namhung Trading Corporation.

See also 81 Fed. Reg. 13,872 (Mar. 15, 2016).

Also on March 2, 2016, OFAC designated three additional individuals pursuant to E.O. 13382 and seven individuals and two entities pursuant to E.O. 13687, “Imposing Additional Sanctions With Respect To North Korea.” 81 Fed. Reg. 15,607 (Mar. 23, 2016). The three individuals designated pursuant to E.O. 13382 are Gwang Il HYON, Song Chol KIM, and Jong Hyok SON. The sanctions pursuant to E.O. 13687 were imposed on individuals Man Gon RI, Chol U YU, Pyong So HWANG, Kuk Ryol O, Yong Sik PAK, Yong Mu RI, and Chun Il PAK, and entities NATIONAL DEFENSE COMMISSION, and WORKERS’ PARTY OF KOREA CENTRAL MILITARY COMMISSION.

On December 2, 2016, OFAC blocked the property and interests in property of three individuals and one entity pursuant to E.O. 13382: Chol Nam KIM, Han Se PAK, Se Gon KIM, and KOREA KUMSAN TRADING CORPORATION. 81 Fed. Reg. 88,323 (Dec. 7, 2016). On December 23, 2016, OFAC identified one individual and one entity pursuant to E.O. 13382: Aziz ALLOUCH and TECHNOLAB. 82 Fed. Reg. 8261 (Jan. 24, 2017).

**c. *Iran, North Korea, and Syria Nonproliferation Act***

The Department of State imposed sanctions pursuant to the Iran, North Korea, and Syria Nonproliferation Act (“INKSNA”) on June 28, 2016 based on a determination on June 22, 2016 that Rosoboronexport (“ROE”) of Russia had engaged in transfers or acquisitions to or from Iran, North Korea, or Syria 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. 81 Fed. Reg. 43,696 (July 5, 2016). The measures imposed on ROE include a procurement ban,<sup>\*</sup> a ban on government assistance, a prohibition on government sales of U.S. munitions list items and the termination of sales of defense items under the AECA, and a ban on licenses for items under the Export Administration Act or Export Administration Regulations. Also on June 28, 2016, INKSNA sanctions were imposed on 37 other persons based on a determination on June 22, 2016 that they had engaged in sanctionable activities. 81 Fed. Reg. 43,694 (July 5, 2016). The 37 individuals and entities listed in the Federal Register notice are subject to the same measures imposed on ROE, listed above.

## **6. Terrorism**

### ***a. UN and other coordinated multilateral action***

In large part, the United States implements its counterterrorism obligations under UN Security Council resolutions concerning ISIL, al-Qaida and Afghanistan sanctions, as well as its obligations under UN Security Council resolutions concerning counterterrorism, through Executive Order 13224 of September 24, 2001. Among the resolutions with which the United States has addressed domestic compliance through E.O. 13224 designations are Resolutions 1267 (1999), 1373 (2001), 1988 (2011), 1989 (2011), 2253 (2015), and 2255 (2015). Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for working for or on behalf of, providing support to, or having other links to, persons designated under the order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

### ***b. U.S. targeted financial sanctions***

#### ***(1) Department of State***

In 2016, the Department of State announced the Secretary of State’s designation of numerous entities and individuals (including their known aliases) pursuant to E.O. 13224.

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<sup>\*</sup> Editor’s note: An exception on the procurement ban for ROE was provided for goods, technology, and services for the maintenance, repair, overhaul, or sustainment of Mi-17 helicopters for the purpose of providing assistance to the security forces of Afghanistan, as well as for the purpose of combating terrorism and violent extremism globally.

On March 4, 2016, the State Department designated Abdullah Nowbahar pursuant to E.O. 13224. 81 Fed. Reg. 13,443 (Mar. 14, 2016). Also on March 4, Abdul Saboor was designated. 81 Fed. Reg. 13,441 (Mar. 14, 2016). A March 10, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254146.htm> describes Nowbahar and Saboor's activities:

Abdullah Nowbahar and Abdul Saboor are explosive experts for Hezb-e-Islami Gulbuddin (HIG). Both Nowbahar and Saboor participated in the September 18, 2012 attack on a bus carrying foreign employees of Kabul International Airport that killed 12 people. Saboor is also responsible for a May 2013 suicide attack in Kabul that destroyed a U.S. armored vehicle, killing two soldiers and four U.S. civilian contractors; eight Afghans—including two children—were also killed and another 37 were wounded.

On March 22, 2016, the Department of State announced the March 7 designation under E.O. 13224 of Indonesian citizen Santoso, leader of the Mujahidin Indonesia Timur ("MIT"). 81 Fed. Reg. 15,776 (Mar. 24, 2016); see also March 22, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254921.htm>. In addition to overseeing attacks carried out by MIT, Santoso also proclaimed allegiance to ISIL/Daesh in 2014. On March 24, 2016, ISIL-Yemen was designated. 81 Fed. Reg. 32,001 (May 20, 2016). ISIL-Saudi Arabia was also designated. 81 Fed. Reg. 32,002 (May 20, 2016).

On April 5, 2016, the State Department announced the designation of Salah Abdeslam under E.O. 13224. 81 Fed. Reg. 19,700 (Apr. 5, 2016); see also April 5, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255500.htm>. The media note explains:

Belgian-born French citizen Salah Abdeslam is an operative for the Islamic State of Iraq and the Levant (ISIL), a U.S. Department of State designated Foreign Terrorist Organization (FTO) and SDGT. Abdeslam was captured on March 18, 2016 in a police raid in Molenbeek, Belgium, and charged with 'terrorist murder' for his role in the November 13, 2015 Paris attacks that killed 130 people, including an American college student, and injured over 350. Witnesses identified Abdeslam as the driver of a car full of gunmen that killed patrons at numerous restaurants in Paris. Authorities found his DNA both on a discarded suicide belt and along with traces of explosives in a Brussels apartment. Abdeslam stated after his arrest that he planned on conducting a suicide bombing outside of the Paris soccer stadium, but had 'backed out.'

On May 19, 2016, the Department of State announced that it had designated ISIL branches in Libya, Yemen, and Saudi Arabia pursuant to E.O. 13224. 81 Fed. Reg. 32,002, 32,003 (May 20, 2016); see also May 19, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257388.htm>. The media note

explains:

ISIL-Yemen, ISIL-Saudi Arabia, and ISIL-Libya all emerged as official ISIL branches in November 2014 when ... ISIL leader Abu Bakr al-Baghdadi announced that he had accepted the oaths of allegiance from fighters in Yemen, Saudi Arabia, and Libya, and was thereby creating ISIL “branches” in those countries.

While ISIL’s presence is limited to specific geographic locations in each country, all three ISIL branches have carried out numerous deadly attacks since their formation. Among ISIL-Yemen’s attacks, the group claimed responsibility for a pair of March 2015 suicide bombings targeting two separate mosques in Sana’a, Yemen, that killed more than 120 and wounded over 300. Separately, ISIL-Saudi Arabia has carried out numerous attacks targeting Shia mosques in both Saudi Arabia and Kuwait, leaving over 50 people dead. Finally, ISIL-Libya’s attacks have included the kidnapping and execution of 21 Egyptian Coptic Christians, as well as numerous attacks targeting both government and civilian targets that have killed scores of people.

After today’s action, the U.S. Department of State has now sanctioned eight ISIL branches, having previously designated ISIL-Khorasan, ISIL-Sinai, Jund al-Khilafah in Algeria, Boko Haram, and ISIL-North Caucasus.

On April 27, 2016, the Department designated Samir Kuntar. 81 Fed. Reg. 32,004 (May 20, 2016).

On May 9, 2016, the Secretary of State’s determination that Moussa Abu Dawud meets the criteria for designation under E.O. 13224 was published in the Federal Register. 81 Fed. Reg. 28,113 (May 9, 2016). The Department released a media note on May 5, 2016 announcing the designation of Dawud, which is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/256921.htm>. The media note elaborates on the designation as follows:

Musa Abu Dawud began engaging in terrorist activity as early as 1992. He was a senior member of the Algerian Salafist Group for Call and Combat (GSPC), now known as al-Qaida in the Islamic Maghreb (AQIM), a designated Foreign Terrorist Organization, and participated in multiple terrorist attacks in that capacity. In 2012, Dawud was appointed commander of the southern zone for AQIM. As a senior leader for AQIM, Dawud is responsible for multiple terrorist attacks, including the February 4–5, 2013, attack on the military barracks in Khenchela, Algeria, that injured multiple soldiers and a July 2013 attack on a Tunisian military patrol in the Mount Chaambi area that killed nine soldiers. Dawud is also in charge of the training and recruitment of new members for AQIM. In February 2013, he was put in charge of a mission in Tunisia tasked with recruiting and training new members from across North Africa on the use of weapons.

On May 6, 2016, the State Department designated Jama'at ul Dawa al-Qu'ran ("JDQ") pursuant to E.O. 13224. 81 Fed. Reg. 35,435 (June 2, 2016). On May 10, 2016, the Department designated the Tariq Gidar Group ("TGG"). 81 Fed. Reg. 35,436 (June 2, 2016). A May 25, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257712.htm)

[2017.state.gov/r/pa/prs/ps/2016/05/257712.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257712.htm) describes the two groups as follows:

The TGG is a Pakistani Taliban (TTP) linked group based in Darra Adam Khel, Pakistan. The TGG is responsible for multiple large-scale, fatal attacks, including the December 16, 2014, massacre at the Army Public School in Peshawar, Pakistan, that left 132 schoolchildren and nine staffers dead—the deadliest terrorist attack in Pakistan's history. The group's leader, Umar Mansoor, is also known as the mastermind of the January 2016 attack on Bacha Khan University in Charsadda, Pakistan, that killed 20 and wounded between 50 and 60 others. In addition to these devastating attacks, the TGG is responsible for the 2010 kidnapping of a British journalist traveling to North Waziristan, Pakistan, and the 2008 kidnapping and beheading of Polish geologist Piotr Stanczak in Attock, Pakistan.

JDQ is a terrorist group, based in Peshawar, Pakistan, and eastern Afghanistan, which pledged allegiance in 2010 to now-deceased Taliban emir Mullah Omar, and has long-standing ties to al-Qaida and Lashkar e-Tayyiba. JDQ has been responsible for various attacks, including the infamous 2010 kidnapping and death of British aid worker Linda Norgrove in Kunar Province, Afghanistan.

On May 16, Aslan Avgazarovich Byutukaev was designated. 81 Fed. Reg. 45,593 (July 14, 2016). The Yarmouk Martyrs Brigade was designated on May 31, 2016. 81 Fed. Reg. 37,660 (June 10, 2016).

On June 10, 2016, the State Department designated al-Qa'ida in the Indian Subcontinent ("AQIS") pursuant to E.O. 13224. 81 Fed. Reg. 43,334 (July 1, 2016). On June 24, 2016, the entity known as Asim Umar was designated. 81 Fed. Reg. 43,693 (July 5, 2016). The State Department issued a media note on June 30, 2016, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259219.htm> describing the designations of AQIS and Umar:

Al-Qa'ida leader Ayman al-Zawahiri announced the formation of AQIS in a video address in September 2014. The group is led by Asim Umar, a former member of U.S. designated Foreign Terrorist Organization Harakat ul-Mujahidin. AQIS claimed responsibility for the September 6, 2014 attack on a naval dockyard in Karachi, in which militants attempted to hijack a Pakistani Navy frigate. AQIS has also claimed responsibility for the murders of activists and writers in Bangladesh, including that of U.S. citizen Avijit Roy, U.S. Embassy local employee Xulhaz Mannan, and of Bangladeshi nationals Oyasiqur Rahman Babu, Ahmed Rajib Haideer, and A.K.M. Shafiul Islam.

On June 29, 2016, the Department designated Ayrat Nasimovich Vakhitov. 81 Fed. Reg. 45,594 (July 14, 2016).

On July 12, 2016, the Department designated Mohamed Abrini pursuant to E.O. 13224. 81 Fed. Reg. 51,959 (Aug. 5, 2016). On July 14, 2016, Jamaat-ul-Ahrar was designated. 81 Fed. Reg. 51,958 (Aug. 5, 2016).

On August 3, 2016, the State Department announced the designations of Jamaat-ul-Ahrar and Mohamed Abrini under E.O. 13224. 81 Fed. Reg. 51,958-59 (Aug. 5, 2016); see also August 3, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/260790.htm>. The media note provides background on the designees:

Jamaat-ul-Ahrar (JuA) is a splinter group of the Tehrik-e Taliban Pakistan (TTP) based in the Afghanistan-Pakistan border region. The group, founded by a former TTP leader in August 2014, has staged multiple attacks in the region targeting civilians, religious minorities, military personnel, and law enforcement, and was responsible for the killing of two Pakistani employees of the U.S. Consulate in Peshawar in early March 2016. In late March 2016, JuA carried out the suicide assault at the Gulshan-e-Iqbal amusement park in Lahore, Pakistan that killed more than 70 people—nearly half of them women and children—and injured hundreds more. The Easter Sunday attack was the deadliest terror attack in Pakistan since December 2014.

Mohamed Abrini is a member of the Europe-based Islamic State of Iraq and the Levant (ISIL) cell responsible for the November 2015 Paris attacks and March 2016 Brussels attacks. Since his arrest on April 8, 2016 by Belgian authorities, Abrini has been identified as being “the man in white”—also known as “the man in the hat”—seen with two identified suicide bombers at Brussel’s Zaventem airport on March 22, just minutes before the attack that killed 16 people. Abrini is also believed to have taken part in the pre-attack surveillance for the November 2015 Paris attacks and to have assisted in planning attacks in the UK and Germany.

On August 12, 2016, the Department designated Fathi Ahmad Mohammad Hammad pursuant to E.O. 13224. 81 Fed. Reg. 64,256 (Sep. 19, 2016). Hammad is a senior official of Hamas, serving as its interior minister and coordinating terrorist cells. He also founded Al-Aqsa TV, primary media outlet for Hamas, used in recruiting. See September 16, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262004.htm>. On August 31, 2016, the State Department issued a media note announcing the designation of Abdiqadir Mumin under E.O. 13224. 81 Fed. Reg. 69,400 (Sep. 1, 2016). The media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/261409.htm>, summarizes the basis for the designation:

Abdiqadir Mumin is the head of a group of ISIL-linked individuals in East Africa. Mumin, a former al-Shabaab recruiter and spokesman, pledged allegiance to ISIL, along with around 20 of his followers, in October 2015, and has set up a base in Puntland, Somalia. Since then, Mumin has expanded his cell of ISIL supporters by kidnapping young boys aged 10 to 15, indoctrinating them, and forcing them to take up militant activity.

On September 8, 2016, the Department designated Omar Diaby pursuant to E.O. 13224. 81 Fed. Reg. 64,256 (Sep. 19, 2016). A September 16, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262006.htm> sets forth the basis for the designation:

Omar Diaby leads a group of French foreign terrorist fighters in Syria. The group of approximately 50 fighters has participated in terrorist operations alongside the ... al-Nusrah Front. Although assumed killed in August 2015, Diaby re-emerged in May 2016, claiming his death was a ploy to allow him to travel to Turkey for an operation. Diaby came to the attention of French intelligence due to his involvement with a French extremist group and his online propaganda video series. Diaby's videos have been credited as the chief reason behind why so many French nationals have joined militant groups in Syria and Iraq.

Anas El Abboubi (an individual) was also designated on September 8, 2016. 81 Fed. Reg. 67,415 (Sep. 30, 2016). Abboubi's designation was announced and explained in a September 28, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262527.htm> which includes the following:

Anas El Abboubi has been fighting in Syria for ...ISIL since September 2013. He is one of approximately 50 foreign terrorist fighters of Italian origins fighting in Syria. Abboubi began to radicalize in 2012 after being relatively well known on the Italian hip hop scene as rapper McKhalif. In August 2012, he established the Italian branch of an extremist organization. In June 2013, Abboubi was arrested by the Brescia Police General Investigations and Special Operations Division and anti-terrorism forces for plotting a terrorist attack in Northern Italy and recruiting individuals for militant activity in Syria. He was released after two weeks in custody and fled to Syria shortly after.

The State Department designated Abu Ali Tabatabai on September 12, 2016. 81 Fed. Reg. 76,685 (Nov. 3, 2016). The entity known as Jund al-Aqsa ("JAA") was designated on September 16, 2016. 81 Fed. Reg. 66,118 (Sep. 26, 2016).

On October 20, 2016, the Department of State announced it had designated Haytham 'Ali Tabataba'i also known as Abu 'Ali Al-Tabataba'i, under E.O. 13224 in a media note available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263346.htm>. The media note provides the following information regarding the designated individual:

Haytham 'Ali Tabataba'i aka Abu 'Ali Al-Tabataba'i is a Hizballah commander from Beirut, Lebanon who has commanded Hizballah's special forces, has operated in Syria, and has been reported to be in Yemen. Tabataba'i's actions in Syria and Yemen are part of a larger Hizballah effort to provide training, materiel, and personnel in support of its destabilizing regional activities. In addition to the sanctions issued against Tabataba'i, today the Treasury Department designated four individuals and one entity working on behalf of or supporting Hizballah.

On October 6, 2016, the Department designated Basil Hassan pursuant to E.O. 13224. 81 Fed. Reg. 85,302 (Nov. 25, 2016). On October 21, 2016, Abdullah Ahmed al-Meshedani was designated. 81 Fed. Reg. 85,667 (Nov. 28, 2016). On October 31, 2016, Victor Quispe Palomino was designated. 81 Fed. Reg. 85,303 (Nov. 25, 2016). Jorge Quispe Palomino and Tarcela Loya Vilchez were also designated on October 31, 2016. 81 Fed. Reg. 85,668 (Nov. 28, 2016). On November 22, 2016, a State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264500.htm>, announced the designations of Victor Quispe Palomino, Jorge Quispe Palomino and Tarcela Loya Vilchez under E.O. 13224. Victor Quispe Palomino leads the Shining Path with his brother Jorge Quispe Palomino. Tarcela Loya Vilchez is "a Shining Path leader in charge of the military and ideological training of children." *Id.*

Abdelilah Himich was designated on November 4, 2016. 81 Fed. Reg. 85,302 (Nov. 25, 2016).

On December 8, 2016, the State Department designated Hamza bin Laden under E.O. 13224. 82 Fed. Reg. 3070 (Jan. 10, 2017). Also on December 8, 2016, Jamaah Ansharut Daulah was designated. 82 Fed. Reg. 4449 (Jan. 13, 2017). On December 15, 2016, Ibrahim al-Banna was designated pursuant to E.O. 13224. *Id.* Ali Damush was designated on December 20, 2016. 82 Fed. Reg. 3382 (Jan. 11, 2017). And Mustafa Mughniyeh was also designated on December 20, 2016. 82 Fed. Reg. 3840 (Jan. 12, 2017). On December 21, 2016 the Department of State announced the designation of Saleck Ould Cheikh Mohamedou under E.O. 13224. 81 Fed. Reg. 95,264 (Dec. 27, 2016); see also December 21, 2016 State Department media note, available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/265897.htm>, which includes the following about Mohamedou:

Mohamedou, an al-Qa'ida in the Islamic Maghreb (AQIM) operative, was sentenced to death in Mauritania in 2011 after his conviction for attempting to assassinate the Mauritanian head-of-state Mohamed Ould Abdel Aziz. The plot, which was foiled by the Mauritanian Army, included attacks on the French Embassy and the Mauritanian Ministry of National Defense. Mohamedou is also regarded as the mastermind of the terrorist attack that resulted in the killing of four French tourists in Mauritania in 2007. Mohamedou escaped from prison in 2015, but was captured in January 2016 and is currently incarcerated in Mauritania.

On December 27, 2016, the State Department made the determination pursuant to E.O. 13224 to designate Alexanda Amon Kotey. 82 Fed. Reg. 3841 (Jan. 12, 2017).

The State Department also continued to amend and review designations under E.O. 13224. On October 19, 2016, the Department amended the designation of Al-Nusrah Front (and other aliases), to add the alias Jabhat Fath al Sham and other aliases. 81 Fed. Reg. 79,554 (Nov. 14, 2016). On December 28, 2016, the Department announced it was amending the designation of Lashkar e-Tayyiba to add the alias Al-Muhammadia Students ("AMS"). 82 Fed. Reg. 175 (Jan. 3, 2017). See also December 28, 2016 State Department media note, available at [https://2009-](https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266105.htm)

[2017.state.gov/r/pa/prs/ps/2016/12/266105.htm](https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266105.htm).

(2) OFAC

(a) OFAC designations

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2016. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to, individuals or entities the United States has designated as terrorist organizations pursuant to the order. See 81 Fed. Reg. 5520 (Feb. 2, 2016); (one individual—Ali Youssef CHARARA—and one entity—SPECTRUM INVESTMENT GROUP HOLDING SAL); 81 Fed. Reg. 6105 (Feb. 4, 2016) (two individuals—Mohamad NOUREDDINE, and Hamdi ZAHER EL DINE—and one entity—TRADE POINT INTERNATIONAL S.A.R.L.); 81 Fed. Reg. 7891 (Feb. 16, 2016) (one individual—Nayf Salam Muhammad Ujaym AL-HABABI); 81 Fed. Reg. 7891 (Feb. 16, 2016) (three individuals—Husayn JUAYTHINI, Turki Mubarak Abdullah Ahmad AL-BINALI, and Faysal Ahmad 'Ali AL-ZAHRANI); 81 Fed. Reg. 19,712 (Apr. 5, 2016) (four individuals—James Alexander MCLINTOCK, Muhammad Ijaz SAFARASH, Abdul Aziz NURISTANI, and Naveed QAMAR—and two entities—AL RAHMAH WELFARE ORGANIZATION and JAMIA ASARIYA MADRASSA); 81 Fed. Reg. 64,576 (Sep. 20, 2016) (two individuals—Hussam JAMOUS and Mohamad Alsaied ALHMIDAN); 81 Fed. Reg. 66,121 (Sep. 26, 2016) (six individuals—'Abdallah Hadi 'Abd al-Rahman Fayhan Sharban AL-'ANIZI, Ghalib Abdullah AL-ZAIDI, Salmi Salama Salim Sulayman 'AMMAR, Abd al-Muhsin Zabin Mutib Naif AL-MUTAYRI, Nayif Salih Salim AL-QAYSI, and Mostafa MAHAMED); 81 Fed. Reg. 73,474 (Oct. 25, 2016) (four individuals— Muhammad Al-Mukhtar KALLAS, Muhammad Ghaleb HAMDAR, Yosef AYAD, and Hasan JAMAL—AL—DIN—and one entity—GLOBAL CLEANERS S.A.R.L.); 81 Fed. Reg. 77,002 (Nov. 4, 2016) (two individuals—Said Salih Abd-Rabbuh AL-OMGY and Muhammad Salih Abd-Rabbuh AL-OMGY—and one entity— AL—OMGY AND BROTHERS MONEY EXCHANGE); 81 Fed. Reg. 90,409 (Dec. 14, 2016) (two individuals— Abdallah Faysal SADIQ AL-AHDAL and Al-Hasan ALI ALI ABKAR—and one entity—RAMAH CHARITABLE ORGANIZATION); 81 Fed. Reg. 92,000 (Dec. 19, 2016) (one individual— Fawaz Muhammad JUBAYR AL-RAWI and two entities—HANIFA MONEY EXCHANGE OFFICE and SELSELAT AL THAHAB); 82 Fed. Reg. 176 (Jan. 3, 2016) (two individuals— Shahid MAHMOOD and Muhammad SARWAR).

(b) *OFAC de-listings*

In 2016, OFAC determined that 12 persons previously designated pursuant to E.O. 13224 should be removed from the Treasury Department's list of Specially Designated Nationals and Blocked Persons. On June 30, 2016, OFAC removed three individuals from the SDN List (Ahmed Nur Ali Jim'ale; Mohamed Daki; Ali Ghaleb Himmat). 81 Fed. Reg. 66,120 (Sep. 26, 2016). Effective July 27, 2016, OFAC delisted one individual (Abdulbasit ABDULRAHIM). 81 Fed. Reg. 67,431 (Sep. 30, 2016). Effective August 16, 2016, OFAC delisted two entities (INTERNATIONAL ISLAMIC RELIEF ORGANIZATION INDONESIA BRANCH OFFICE and INTERNATIONAL ISLAMIC RELIEF ORGANIZATION PHILIPPINES BRANCH OFFICE). 81 Fed. Reg. 67,431 (Sep. 30, 2016). Effective September 16, 2016, OFAC delisted one entity (the U.S. branch of Al-Haramain). 81 Fed. Reg. 66,120 (Sep. 26, 2016). Effective October 27, 2016, OFAC delisted five individuals (Anas AL-LIBY, Al-Sayyid Ahmad Fathi HUSAYN ALAYWAH, Yasser Abu SHAWEESH, Farid AIDER, and Abd Al Wahab ABD AL HAFIZ), 81 Fed. Reg. 75,921 (Nov. 1, 2016).

c. **Annual certification regarding cooperation in U.S. antiterrorism efforts**

See Chapter 3 for discussion of the Secretary of State's 2016 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

7. **Russia and Ukraine**

a. ***Sanctions in response to Russia's actions in Ukraine***

On September 8, 2016, OFAC identified 133 persons whose property and interests in property are blocked pursuant to E.O. 13660, E.O. 13661, and E.O. 13685, or who are subject to the prohibitions of one or more directives under E.O. 13662. 81 Fed. Reg. 62,245 (Sep. 8, 2016). On October 5, 2016, OFAC published the names of 121 persons whose property and interests in property are blocked pursuant to E.O. 13660, E.O. 13661, and E.O. 13685, or who are subject to the prohibitions of one or more directives under E.O. 13662. On December 20, 2016, OFAC blocked the property and interests in property of seven individuals pursuant to E.O. 13661. 81 Fed. Reg. 95,303 (Dec. 27, 2016). Also on December 20, 2016, OFAC designated eight entities and identified two vessels pursuant to E.O. 13685. *Id.* In addition, on December 20, 2016, OFAC determined, pursuant to Directive 1 of E.O. 13662, that Russian Agricultural Bank owns, directly or indirectly, a 50 percent or greater interest in 14 entities identified in the Federal Register notice. *Id.* And OFAC identified 12 entities in which OAO Novatek owns a 50 percent or greater interest, subjecting them to the prohibitions of Directive 2 pursuant to E.O. 13662. *Id.*

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.

**b. Magnitsky Act**

For background on the Sergei Magnitsky Rule of Law Accountability Act of 2012 (“Magnitsky Act”), see *Digest 2013* at 505-06. On February 1, 2016, the State Department submitted to Congress the third annual report on implementation of the Magnitsky Act. See State Department press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/251969.htm>. Along with the report, the State Department and Treasury Department identified a list of persons meeting the criteria for designation under the Act, either by being involved in the criminal conspiracy uncovered by deceased Russian lawyer Sergei Magnitsky, or by being responsible for or profiting from Magnitsky’s detention, abuse, and death, or by covering up the legal liability for it. The Act also authorizes sanctions on persons responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights against individuals seeking to expose illegal activity by Russian officials or individuals attempting to exercise, defend, or promote their internationally recognized human rights and freedoms in the Russian Federation. With the addition of the February 1, 2016 designations, the list numbered 36 persons.

Also on February 1, 2016, a senior State Department official held a special briefing on implementing the Magnitsky Act, a record of which is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/251989.htm>

On February 1, 2016, OFAC blocked the property of the five individuals identified by the Department of State and Treasury Department pursuant to the Magnitsky Act. 81 Fed. Reg. 6933 (Feb. 9, 2016). The Federal Register notice provides short descriptions of the actions taken by the sanctioned individuals:

Aleksey Vasilyevich Anichin participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky.

Yevgeni Yuvenalievich Antonov is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against an individual seeking to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections, in Russia.

Boris Borisovich Kibis participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky.

Pavel Vladimirovich Lapshov participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky.

Oleg Vyacheslavovich Urzhumtsev participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky.

**8. Iraq**

On August 8, 2016, OFAC published notification in the Federal Register of the removal of an individual from the SDN list who had been designated pursuant to E.O. 13315 (“Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Other Actions”), as amended by E.O. 13350. 81 Fed. Reg. 52,526 (Aug. 8, 2016). The individual identified for delisting is Nabil Abdullah AL-JANABI.

**9. Targeted Sanctions Relating to Threats to Democratic Process and Restoration of Peace, Security, and Stability****a. Burundi**

On June 2, 2016 OFAC blocked the property and interests in property of three individuals pursuant to E.O. 13712, “Blocking Property of Certain Persons Contributing to the Situation in Burundi”: Marius NGENDABANKA, (the commander of the First Military Region, deputy chief of land forces, and Burundian National Defense Forces deputy commander of operations); Ignace SIBOMANA (Burundian Army colonel and chief of military intelligence); and Edouard NSHIMIRIMANA (former lieutenant colonel). 81 Fed. Reg. 36,988 (June 8, 2016).

**b. Democratic Republic of Congo**

On June 23, 2016, OFAC blocked the property and interests in property of one individual—Celestin Kanyama—pursuant to E.O. 13413, “Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo.” 81 Fed. Reg. 42,060 (June 28, 2016). On September 28, 2016 OFAC blocked the property and interests in property of two individuals—Gabriel Amisi Kumba and John Numbi—pursuant to E.O. 13413. 81 Fed. Reg. 68,106 (Oct. 3, 2016). On December 12, 2016, OFAC blocked the property and interests in property of two individuals pursuant to E.O. 13413: Kalev Mutondo and Evariste Boshab. 81 Fed. Reg. 90,921 (Dec. 15, 2016).

**c. Burma**

In 2016, the United States terminated the national emergency with respect to Burma that provided the foundation for the Burma sanctions program. On May 17, 2016 OFAC identified six entities under E.O. 13448 of October 18, 2007, “Blocking Property and Prohibiting Certain Transactions Related to Burma” and also removed ten entities previously included on the SDN List pursuant to E.O. 13310 of July 28, 2003, “Blocking Property of the Government of Burma and Prohibiting Certain Transactions” or E.O. 13464 of April 30, 2008, “Blocking Property and Prohibiting Certain Transactions Related to Burma.” 81 Fed. Reg. 32,384 (May 23, 2016). The six entities added to the SDN list are: 1. SHWE NAR WAH COMPANY LIMITED; 2. GREEN ASIA SERVICES CO., LTD.; 3.

GLOBAL WORLD INSURANCE COMPANY LIMITED; 4. ASIA MEGA LINK CO., LTD.; 5. ASIA MEGA LINK SERVICES CO., LTD.; and 6. PIONEER AERODROME SERVICES CO., LTD. The entities removed are: 1. MYANMA FOREIGN TRADE BANK; 2. MYANMA INVESTMENT AND COMMERCIAL BANK; 3. MYANMA ECONOMIC BANK; 4. MYANMAR TIMBER ENTERPRISE; 5. MYANMAR GEM ENTERPRISE; 6. MYANMAR PEARL ENTERPRISE; 7. CO-OPERATIVE EXPORT-IMPORT ENTERPRISE; 8. NO. 1 MINING ENTERPRISE; 9. NO. 2 MINING ENTERPRISE; 10. NO. 3 MINING ENTERPRISE. *Id.*

On September 14, 2016, the State Department issued a fact sheet on the President's announced intention to terminate the national emergency for Burma. The fact sheet, which is available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261917.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/261917.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261917.htm) explains that the announcement followed the first visit to the United States of Aung San Suu Kyi in her new capacity as Burma's State Counselor. The fact sheet includes the following:

... Burma now has democratically-elected civilian leadership for the first time in over half a century, and is focused on bringing peace and national reconciliation, economic prosperity and social welfare, and respect for human rights to its people.

...

President Obama announced his intention to take action to lift Executive Order-based economic and financial sanctions on Burma. In particular, he intends to terminate the national emergency with respect to Burma, which has been in place since 1997, an action that reflects Burma's progress on democratization and human rights. ...

...[S]everal restrictions remain in place. JADE Act visa ineligibilities remain in effect, including with respect to military leaders and those who provide substantial political and economic support to the Burmese military. Remaining restrictions on foreign assistance to Burma include limitations on assistance to Burma's military.

On October 7, 2016, the President issued E.O. 13742, "Termination of Emergency With Respect to the Actions and Policies of the Government of Burma." 81 Fed. Reg. 70,593 (Oct. 12, 2016). The preamble to the Order explains:

I...find that the situation that gave rise to the declaration of a national emergency in Executive Order 13047 of May 20, 1997, with respect to the actions and policies of the Government of Burma, in particular a deepening pattern of severe repression by the State Law and Order Restoration Council, the then-governing regime in Burma, as modified in scope by Executive Order 13448 of October 18, 2007, and Executive Order 13619 of July 11, 2012, has been significantly altered by Burma's substantial advances to promote democracy, including historic elections in November 2015 that resulted in the former opposition party, the National League for Democracy, winning a majority of seats in the national parliament and the formation of a democratically elected, civilian-

led government; the release of many political prisoners; and greater enjoyment of human rights and fundamental freedoms, including freedom of expression and freedom of association and peaceful assembly. Accordingly, I hereby terminate the national emergency declared in Executive Order 13047, and revoke that order, Executive Order 13310 of July 28, 2003, Executive Order 13448, Executive Order 13464 of April 30, 2008, Executive Order 13619, and Executive Order 13651 of August 6, 2013...

Effective October 7, 2016, OFAC removed from the SDN List the names of 111 persons (listed in the Federal Register notice) whose property and interests in property had been blocked pursuant to E.O. 13310 (Blocking Property of the Government of Burma and Prohibiting Certain Transactions), E.O. 13448 (Blocking Property and Prohibiting Certain Transactions Related to Burma), E.O. 13464 (Blocking Property and Prohibiting Certain Transactions Related To Burma), and E.O. 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma). 81 Fed. Reg. 75,488 (Oct. 31, 2016).

**d. Zimbabwe**

On February 3, 2016, OFAC designated five individuals and three entities pursuant to Executive Order 13288 of March 6, 2003, "Blocking Property of Persons Undermining Democratic Institutions in Zimbabwe," as amended by Executive Order 13391, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe," and Executive Order 13469 of July 25, 2008, "Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe." OFAC added two entities to the list of persons sanctioned pursuant to the Zimbabwe Sanctions Regulations on March 8, 2016. 81 Fed. Reg. 13,037 (Mar. 11, 2016). On August 15, 2016, OFAC removed the name of one person designated previously pursuant to E.O. 13288, as amended. 81 Fed. Reg. 55,522 (Aug. 19, 2016). On October 4, 2016, OFAC removed nine individuals and eleven entities from the SDN list previously designated pursuant to E.O. 13288 as amended. 81 Fed. Reg. 70,274 (Oct. 11, 2016). On November 18, 2016, OFAC removed Sylvester Robert Nguni from the SDN List, where he had been designated pursuant to E.O. 13391. 81 Fed. Reg. 84,693 (Nov. 23, 2016).

**e. Liberia**

In 2016, the UN Security Council terminated international sanctions relating to Liberia. Ambassador David Pressman, Alternate U.S. Representative to the UN for Political Affairs, delivered the explanation of vote on May 25, 2016 at the adoption of Resolution 2288, terminating Liberia sanctions. His statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7298>. See *Digest 2015* at 674 regarding the U.S. determination in November 2015 that Liberia's significant advances in promoting democracy warranted termination of the U.S. sanctions program for Liberia. On

November 4, 2016, OFAC amended its regulations to remove the Liberia sanctions provisions. 81 Fed Reg. 76,861 (Nov. 4, 2016).

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\* \* \* \*

Thank you, Mr. President. As we terminate these sanctions today, it is worth recalling how far Liberia has come. Today is the first day that Liberia is not subject to United Nations sanctions since 1992. The current sanctions date from 2003, shortly after Charles Taylor had gone into exile and a comprehensive peace agreement had been signed. At that time, this Council took swift and effective action to establish a strong sanctions regime aimed at supporting Liberia's peace agreement. The sanctions first included an arms embargo, a targeted travel ban, and import bans on the principal natural resources that were funding the conflict: round logs and timber products originating in Liberia, and rough diamonds from Liberia. These innovative natural resource sanctions, which were carefully tailored to the specific context in Liberia, made a powerful contribution to Liberia's peace and security. The Council adjusted the sanctions as the situation on the ground changed, adding a targeted asset freeze.

Importantly, the Council clearly articulated the objectives of these measures and, therefore, when it would be prepared to terminate them. The arms and travel sanctions were aimed to support the ceasefire, disarmament, demobilization and reintegration, implementation of the peace agreement, and establishing and maintaining stability in Liberia and the sub-region more generally. The diamond sanctions were aimed to prevent diamonds from fueling the conflict and to support the establishment of a certificate of origin regime. The timber sanctions were geared towards ensuring that revenues from the timber industry were not used to fuel conflict. And over time, as the situation in Liberia stabilized and these criteria were progressively met, the Security Council responded by gradually terminating the natural resource sanctions, scaling back the arms embargo, and finally, last year, terminating the targeted sanctions measures. Today, more than 12 years after the end of Liberia's brutal civil war and the Council's imposition of sanctions, Liberia continues to consolidate its progress and the Security Council has determined that the criteria for lifting the sanctions have been met, allowing us to fully terminate the regime.

What lessons can we learn from this history that may be applicable to the threats to international peace and security that we face today?

One is that the Security Council must be creative and courageous in its sanctions design. The Liberia natural resources sanctions were well-tailored to the context and demonstrated this Council's determination to address unconventional sources of conflict financing. We would do well to consider similar measures targeting the funding and fueling of conflict in other situations we are facing today. This is neither unprecedented nor is it novel. It is effective, and one need look no further than Liberia.

A second lesson is that effective monitoring and enforcement of sanctions is imperative. The Liberia Panel of Experts, and the Panel of Experts on Sierra Leone before it, reported on many issues that states saw as sensitive: organized smuggling networks, trafficking of diamonds, control over and use of revenues of the timber industry. . . .

A third lesson is that the effective collaboration of international partners and mechanisms is a key part of making sanctions work effectively. We saw that in Liberia with productive

cooperation between the sanctions committee, the Panel of Experts, the UN Mission in Liberia, and the Liberian government. This was a testament to what can be achieved when sanctions are deployed with purpose, grounded within a clear strategy for promoting international peace and security, and coupled with the necessary political progress from governments.

The fourth, and last, is less a lesson than a reminder: that sanctions, even the sanctions that last the longest, do not last forever. Sanctions end. We saw another example of this earlier this year with the termination of the Côte d'Ivoire sanctions regime. Just as we must never hesitate to strengthen sanctions and their enforcement if necessary to address threats to international peace and security, we must move expeditiously to wind down and end sanctions when they are no longer serving the purpose or when they have achieved what was sought.

That is not to say that Liberia's work to improve its internal security is finished. In order for Liberia to safeguard the gains achieved over the past 12 years, we encourage the government to prioritize further capacity building of its security sector by ensuring that it has the necessary legal framework in place, and by continuing to strengthen the capacity of its security agencies to better monitor arms flows, mark weapons, and patrol its borders. We encourage the legislature to take the remaining steps to finalize the Firearms and Ammunition Control Act, which is an important piece of legislation, in order to address gaps in Liberia's legal framework for arms and ammunition management. ...

\* \* \* \*

**f. South Sudan**

On March 2, 2016, Ambassador Pressman provided the U.S. explanation of vote on Resolution 2271 on South Sudan. Ambassador Pressman's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7163>.

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\* \* \* \*

This Council and the United Nations remain steadfast in their commitment to support the people of South Sudan in their quest for stability, peace, and good governance. Unfortunately, we have a long way to go and much work remains. As such, we must work together to send the right signals to South Sudan's leaders. The Secretary-General perhaps put it best last week when he told the leaders bluntly: "Put peace above politics. Pursue compromise. Overcome obstacles. Establish the Transitional Government of National Unity. And do not delay it."

This Security Council has repeatedly shown its willingness to use targeted sanctions to marginalize spoilers, target those who commit violations and abuses, and impose accountability for atrocities. This Council should consider carefully new proposals to use sanctions to better stabilize the situation, limit the unrestricted flow of arms, and incentivize the parties towards compromise.

Rather than rush this deliberative process, the United States supports the Security Council's decision today to renew the current sanctions measures until April 15th and the mandate of the Panel of Experts for just a few more weeks, until May 15th. This period of time will allow the Council to fully discuss proposals that have been put forward by delegations

around this table and will allow us time to measure the progress made by the parties on implementing the peace agreement and forming the transitional government.

We fully agree that this is a delicate moment in this peace process, but it is also a critical moment where humanitarian needs are greater than ever, human rights violations persist, and the people of South Sudan continue to suffer. Parties to this conflict need to show progress on the peace agreement signed last year.... We urge South Sudanese parties to take the key steps that are necessary for full implementation of the peace agreement.

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On May 31, 2016, Ambassador Pressman provided the U.S. explanation of vote on resolution 2290 on South Sudan. Ambassador Pressman's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7310>.

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... The Security Council has watched the situation in South Sudan particularly closely over these last three months. In early March, as the targeted sanctions established by Resolution 2206 were due to be renewed, the Council extended them for 45 days. We proposed this somewhat unconventional approach because we wanted to keep the fluid situation on the ground under continuous review. In early April, seeing some tentative signs of progress but still no national unity government, the Council extended the sanctions for another short period, and simultaneously adopted a presidential statement reinforcing the steps the Security Council expected the parties to take. We expressed our intention to review progress on those benchmarks before the Security Council considered next steps on the sanctions regime. Finally, just over a month ago, the Transitional Government of National Unity was formed, fulfilling a key provision of the Agreement on the Resolution of the Conflict in South Sudan. Obviously, however, much, much more remains to be done.

While we have now adopted a resolution extending the sanctions framework for a year, we will be no less vigilant or focused on South Sudan as we have been for the last 90 days, and we will be no less prepared to augment or modify the sanctions regime as the situation on the ground demands and the conduct of the parties necessitates. We have all watched too much bloodshed in South Sudan. We have watched leaders prioritize power over peace and we have watched the very real human consequences of their craven policies. As the Secretary-General stated, the people of South Sudan have "been betrayed by those who put power and profit over people." He went on to refer to "epic corruption."

There is no time to delay tackling these challenges. Now is the time to fully implement the peace agreement, which, as the Security Council has emphasized today, includes establishing the hybrid court and the mechanisms outlined in Chapter 5 of the agreement in order to hold accountable those whose actions have cost so many—too many—lives needlessly. Today's resolution should remind South Sudan's leaders that there is no other path and no other choice but full and expeditious implementation of the peace agreement.

The return of Riek Machar, his appointment as the First Vice President, and the subsequent formation of the Transitional Government of National Unity are indeed significant

steps forward, but they are only the beginning of a long path towards peace and healing and a long path towards justice. So long as there continues to be no meaningful progress on the other core elements of the peace agreement—which includes upholding the ceasefire, improving humanitarian access, and ending attacks on humanitarians—the severe suffering of the millions of South Sudanese impacted by this conflict continues. To convey a sense of the scale of this suffering, a report from the United Nations Deputy Humanitarian Coordinator in South Sudan stated that in just five counties in South Sudan’s Unity state, there were over 7,000 violent deaths in a single year. In just five counties, in just one state of South Sudan, in just one year, there were as many violent deaths as there have been in all of Yemen since March of 2015. A survey by UNDP also found that the levels of post-traumatic stress disorder are on par with some of the worst conflict zones in modern history.

The leaders of South Sudan must redouble their efforts to build a better future for their people by fully implementing the peace agreement, including the four reform pillars: drafting and adopting a permanent constitution, restructuring the security sector, establishing transparent management of public finances, and advancing transitional justice, including meaningful reconciliation and accountability.

At the same time, we, as members of the Security Council, must renew our commitment to carefully monitor the situation in South Sudan, including information we receive from the Panel of Experts about the arms flow that pose such a serious threat to the success of the peace agreement and the stability of South Sudan and the region. In light of the Panel of Experts reporting that the parties were continuing to acquire arms even after they signed the peace agreement, the Security Council today—significantly, in this resolution—has asked for a special report from the Panel of Experts on arms procurement since the formation of the Transitional Government of National Unity. We must continue to watch this closely and we must continue to uphold our responsibility to use the full range of tools available to us when such action is necessary for the maintenance of international peace and security.

\* \* \* \*

On April 4, 2016, OFAC amended the designation of Gabriel Jok Riak pursuant to E.O. 13664, “Blocking Property of Certain Persons With Respect to South Sudan.” 81 Fed. Reg. 20,444 (Apr. 7, 2016).

**g. Central African Republic**

As discussed in *Digest 2014* at 663-64, the President issued E.O. 13667, “Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic,” in 2014. Effective March 8, 2016, OFAC designated Joseph Kony and the Lord’s Resistance Army pursuant to E.O. 13667. 81 Fed. Reg. 13,036 (Mar. 11, 2016). On August 23, 2016, OFAC added Ali Kony and Salim Kony to the list of designated persons under E.O. 13667. 81 Fed. Reg. 59,270 (Aug. 29, 2016).

**h. Côte d'Ivoire**

On September 14, 2016, the President terminated the national emergency declared with respect to Côte d'Ivoire in E.O. 13396, "Blocking Property of Certain Persons Contributing to the Conflict in Côte d'Ivoire. See Executive Order 13739 of September 14, 2016, 81 Fed. Reg. 63,673 (Sep. 16, 2016); see also State Department press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261867.htm> which explains:

The President determined that Côte d'Ivoire's advances in restoring peace and democracy and developing its political, administrative, and economic institutions represent significant improvements since President Bush declared the national emergency in 2006. The President's action today highlights the great progress that Côte d'Ivoire has made since the crisis in 2010-11.

The UN Security Council had previously voted to terminate sanctions on Côte d'Ivoire on April 28, 2016. Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered the explanation of vote for the United States at the adoption of resolutions 2283 and 2284, which is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7249>

\* \* \* \*

Mister President, today, as a reflection of the significant progress towards restoring peace and security in Côte d'Ivoire, the Security Council has taken the important decision to terminate the UN sanctions regime and to lay out a timeline for the full withdrawal of UNOCI. These resolutions are notable examples of how multilateral tools, thoughtfully conceived and managed, can serve our shared peace and security interests.

In 2004, Côte d'Ivoire was plagued with political turmoil and violence that threatened its own stability, as well as that of the region. The Council responded, establishing an arms embargo designed to prevent an influx of weapons from worsening the conflict.

Over time, the Council added targeted financial sanctions and travel bans, including against those individuals threatening the peace and national reconciliation process in Côte d'Ivoire, as well as an embargo on Côte d'Ivoire's diamond trade, one of the principal sources of funding for those fueling the violence. These measures were carefully designed to deter those who were undermining Côte d'Ivoire's peace and stability, prevent their access to financial resources and weapons, and promote Côte d'Ivoire's return to the path of peace, stability, and greater prosperity for its people. Indeed, after the electoral crisis in late 2010, we saw the important effect of international diplomatic pressure and the arms embargo in preventing greater violence and arriving at a peaceful resolution by April 2011.

In Côte d'Ivoire, sanctions worked because of the effective collaboration of international partners and mechanisms, including the sanctions committee and expert group, UNOCI, and significantly, the Ivoirian government.

Today's decision to terminate the sanctions on Côte d'Ivoire is a testament to what can be achieved when sanctions are targeted, deployed with purpose, and grounded within a clear strategy for promoting international peace and security.

We also welcome the steps taken today toward transition and closure of UNOCI. The transition must be done in a responsible manner that allows for proper planning and coordination with the UN country team.

\* \* \* \*

**i. Libya**

On April 19, 2016, the President issued a new executive order relating to Libya, E.O. 13726, "Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya." On April 19, 2016, OFAC blocked the property and interests in property of Khalifa Mohamed Ahmed Ghawil pursuant to E.O. 13726. Effective May 13, 2016, OFAC imposed sanctions pursuant to E.O. 13726 (Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya) on one individual (Agila Saleh Essa). 81 Fed. Reg. 31,298 (May 18, 2016).

**j. Balkans**

Effective June 11, 2015, OFAC unblocked the property and interests in property of one individual (Milenko VRACAR) and one entity (PRIVREDNA BANKA SARAJEVO AD) designated under E.O. 13219, "Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans," as amended by E.O. 13304 "Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219 of June 26, 2001." 80 Fed. Reg. 33,338 (Jun. 11, 2015).

**10. Transnational Crime**

On February 16, 2016, OFAC designated two individuals pursuant to Executive Order 13581, "Blocking Property of Transnational Criminal Organizations." 81 Fed. Reg. 8819 (Feb. 22, 2016). On September 22, 2016, OFAC designated twelve individuals, 25 entities, and one blocked property pursuant to E.O. 13581. 81 Fed. Reg. 66,326 (Sep. 27, 2016). On October 11, 2016, OFAC designated four individuals and nine entities pursuant to E.O. 13581. 81 Fed. Reg. 71,199 (Oct. 14, 2016). On December 30, 2016, OFAC designated three individuals and two entities. 82 Fed. Reg. 1783 (Jan. 6, 2017). For background on E.O. 13581, see *Digest 2011* at 518-19.

**11. Malicious Activities in Cyberspace**

On December 28, 2016, President Obama issued Executive Order 13757, "Taking Additional Steps to Address the National Emergency With Respect to Significant

Malicious Cyber-Enabled Activities.” 82 Fed. Reg. 1 (Jan. 3, 2017). E.O. 13757 amends E.O. 13694 of 2015, discussed in *Digest 2015* at 677-78. E.O. 13757 adds an annex listing the following entities and individuals subject to blocking:

**Entities**

1. Main Intelligence Directorate (a.k.a. Glavnoe Razvedyvatel'noe Upravlenie) (a.k.a. GRU); Moscow, Russia
2. Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB); Moscow, Russia
3. Special Technology Center (a.k.a. STLC, Ltd. Special Technology Center St. Petersburg); St. Petersburg, Russia
4. Zorsecurity (a.k.a. Esage Lab); Moscow, ..Russia
5. Autonomous Noncommercial Organization "Professional Association of Designers of Data Processing Systems" (a.k.a. ANO PO KSI); Moscow, Russia

**Individuals**

1. Igor Valentinovich Korobov; DOB Aug 3, 1956; nationality, Russian
2. Sergey Aleksandrovich Gizunov; DOB Oct 18, 1956; nationality, Russian
3. Igor Olegovich Kostyukov; DOB Feb 21, 1961; nationality, Russian
4. Vladimir Stepanovich Alexseyev; DOB Apr 24, 1961; nationality, Russian

On December 29, 2016, OFAC blocked the property and interests in property of two additional individuals pursuant to E.O. 13694, as amended by E.O. 13757: Evgeniy Mikhaylovich BOGACHEV and Aleksey Alekseyevich BELAN. 82 Fed. Reg. 1424 (Jan. 5, 2017).

On December 29, 2016, the President modified E.O. 13694 to “allow for the imposition of sanctions on individuals and entities determined to be responsible for tampering, altering, or causing the misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions.” In conjunction with this amendment to E.O. 13694, five entities and four individuals were added to OFAC’s SDN List. See Chapter 10 for a discussion of additional measures taken by the United States in response to Russia’s interference in the U.S. election and to a pattern of harassment of U.S. diplomats overseas.

**B. EXPORT CONTROLS**

**1. Export Control Litigation**

**a. Goldstein v. Dept. of State**

On January 26, 2016, the U.S. District Court for the District of Columbia granted the State Department’s motion to dismiss a challenge to amendments to the International Traffic in Arms Regulations (“ITAR”) regarding what constitutes “brokering activities” under the Arms Export Control Act (“AECA”). *Goldstein v. Department of State*, No. 15-0311. Plaintiff claimed that the definition and guidance regarding brokering activities

might require him as an attorney providing legal services to clients engaged in transactions involving regulated items to register as a broker or be found in violation of the regulations. The district court held that plaintiff lacked standing because “whether a particular transaction crosses into ‘brokering activity’ is an inherently fact-bound determination dependent on the nature of the transaction and the parties.” The court also found that the claim was not ripe for adjudication. The opinion explains:

...[F]urther factual development here “would ‘significantly advance [the court’s] ability to deal with the legal issues presented.’” *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)). Mr. Goldstein’s request for guidance was phrased in the most general way. As Defendants aptly point out, “[g]iven the complete lack of specific factual information about the proposed transactions . . . [the Directorate] could hardly be expected to provide a response that discussed whether a particular service is a brokering activity in every possible circumstance.” Defs.’ Reply at 5. Whether any particular activity an attorney engages in shades into “brokering activity” will presumably depend on the contours of the particular transaction or activity. And the Court would necessarily have to consider those factual questions to assess Mr. Goldstein’s constitutional vagueness, federalism, and APA claims—all of which require some understanding of whether, and to what extent, State’s definition of “brokering activities” will capture attorneys’ legal services. Unmoored from a fleshed-out factual setting, the Court is hindered in its ability to assess Plaintiff’s claims. Thus, for “many of the same reasons that standing is absent, the Court finds that further factual development is necessary (or at the very least, desirable) here.” *Delta Air Lines*, 85 F. Supp. 3d at 270.

The Court shares Plaintiff’s concern that some uncertainty persists in State’s definition of “brokering activities.” Yet, Plaintiff is not without recourse. If Plaintiff desires concrete guidance before it faces the threat of an enforcement action, nothing precludes it from seeking guidance—and a binding State Department determination—that its proposed activity does not constitute a “brokering activity” by submitting a more detailed request that provides as much information as Plaintiff is able to without disclosing confidential attorney-client information. See 22 C.F.R. § 129.9(a). Even the government acknowledges that, had Plaintiff submitted a request for binding guidance under § 129.9(a) and had been “dissatisfied with the result,” an action challenging State’s response “may have been ripe.” Defs.’ Mem. Supp. at 19. For now, however, Plaintiff has not shown that it is injured by Part 129’s hypothetical application to the legal services it provides and, in any event, its claims are not ripe.

**b. Defense Distributed v. U.S. Dept. of State**

On February 11, 2016, the United States filed its brief on appeal in the U.S. Court of Appeals for the Fifth Circuit in *Defense Distributed et al. v. U.S. Dept. of State et al.*, No.

15-50759. The district court had rejected plaintiffs' challenge to export controls imposed by the State Department on the intended distribution of computer files through an Internet site that would enable production of undetectable firearms using 3-D printers or related devices. See *Digest 2015* at 680-84 for discussion of the district court decision. The U.S. brief on appeal, excerpted below, explains why the court should affirm.

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\* \* \* \*

I. Government officials did not act ultra vires.

Plaintiffs argue that the Department of State acted ultra vires when it required Defense Distributed to obtain a license before uploading to an unrestricted Internet site computer files that allow export-controlled firearm components to be created at the touch of a button. As the district court explained, to establish that the government was acting ultra vires, plaintiffs must "establish that the officer was acting 'without any authority whatever,' or without any 'colorable basis for the exercise of authority.'" Order 8 [ROA.686] (quoting *Danos v. Jones*, 652 F.3d 577, 583 (5th Cir. 2011)). Plaintiffs cannot come close to meeting this standard.

The Arms Export Control Act authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the import and the export of defense articles and defense services." 22 U.S.C. § 2778(a)(1). As particularly relevant here, the statute contemplates the promulgation of regulations designating particular items as "defense articles and defense services," *id.*, and prohibits the exportation of such articles and services without a license or other authorization, *id.* § 2778(b)(2). These powers have been delegated, as relevant here, to the Department of State. *See* Administration of Reformed Export Controls, Exec. Order No. 13,637, § 1(n), 3 C.F.R. 223-224 (2014).

The computer files at issue fall squarely within controlling regulations that have been duly promulgated under that authority. The files, which provide the data necessary for a 3-D printer or related device to produce a firearm or firearm component, relate to the creation of firearms that appear on the U.S. Munitions List. *See* 22 C.F.R. § 121.1, Category I, item (a). Items on the U.S. Munitions List are defined by the regulations to be "defense articles." *Id.* § 120.6. And in addition to including the firearms and firearm components themselves as "defense articles," the Munitions List explicitly includes "[t]echnical data" relating to items on the list. *Id.* § 121.1, Category I, item (i). Plaintiffs properly concede that the statute authorizes the regulations to extend not only to the export of physical firearms, but also to "the export of certain technical data." Appellants' Br. 38.

\* \* \* \*

Because the computer files at issue here constitute "defense articles" under governing regulations, the statute states that they may not be "exported . . . without a license for such export." 22 U.S.C. § 2778(b)(2). The agency reasonably concluded that sharing files with foreign nationals over the Internet constituted an "export." . . .

\* \* \* \*

Plaintiffs do not seriously suggest that the statute and regulations permit them to transfer technical data to foreign nationals. Instead, they focus on their asserted desire to share the files with fellow Americans. But the regulations at issue do not prohibit Defense Distributed from sharing technical data with fellow U.S. citizens on American soil. So far as the State Department is concerned, Defense Distributed may transfer such files, including by making the files available for U.S. citizens to download on the Internet. This may be accomplished by verifying the citizenship status of those interested in the files, or by any other means adequate to ensure that the files are not disseminated to foreign nationals.

What Defense Distributed may not do is make defense articles available to foreign nationals. Placing technical data on an unrestricted Internet site makes the data available for download around the world, and the State Department therefore warned Defense Distributed that the company could be liable under the regulations if it maintained the technical data on such a site. The possibility that an Internet site could also be used to distribute the technical data domestically does not alter the analysis, any more than an email to a foreign national would become immune from export regulations if U.S. citizens were also copied on the email.

- II. The application of the regulations in this case is fully consistent with the Constitution.
- A. The regulations permissibly address the distribution and production of firearms, and any effect on protected speech is fully justified.

As discussed above, this case concerns a set of regulations designed to address the exportation of weapons. Most directly, the regulations prohibit the exportation of firearms without obtaining a license or other authorization. But technological advances permit firearms to be disseminated by distributing computer files that direct 3-D printers or related devices to produce firearm components. Imposing a licensing requirement on the dissemination of firearms to foreign nationals by this mechanism does not violate the First Amendment. The regulations at issue here address the exportation and overseas production of firearms, and do not constitute an effort to regulate the marketplace of ideas.

1. **The regulations serve the government's legitimate interest in regulating the dissemination of arms and technical data.**

Plaintiffs contend that “[c]omputer code conveying information is ‘speech’ within the meaning of the First Amendment.” Appellants’ Br. 43 (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449-50 (2d Cir. 2001)). Even if plaintiffs are correct that computer code can serve as “an expressive means for the exchange of information and ideas about computer programming,” *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000), that potential exchange of ideas is not the basis for the government regulation here. While computer programs can in some cases be read by human beings (such as other computer programmers) and thus convey information, the computer files at issue are subject to regulation because they facilitate automated manufacture of a defense article. The State Department is concerned here with the use of the data files at issue by machines, not with their ability to express a message to humans. Although a person must direct a machine to read the files, “this momentary intercession of human action does not diminish the nonspeech component of [computer] code.” *Corley*, 273 F.3d at 450.

The Supreme “Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United*

*States v. O'Brien*, 391 U.S. 367, 376 (1968). Here, there can be no serious dispute that the government has an important interest in preventing regulated entities from evading the prohibition on exporting firearms by providing the means for the same firearms to be produced abroad.

“The United States and other countries rely on international arms embargoes, export controls, and other measures to restrict the availability of defense articles sought by terrorist organizations.” Aguirre Decl. ¶ 35(b) [ROA.571]. The availability on the Internet of the computer files at issue here would “provide any such organization with defense articles, including firearms, at its convenience, subject only to its access to a 3D printer, an item that is widely commercially available.” *Id.* 22 [ROA.571]. Providing “unrestricted access” to the computer files at issue here “would likewise provide access to the firearms components and replacement parts to armed insurgent groups, transnational organized criminal organizations, and states subject to U.S. or UN arms embargoes.” *Id.* ¶ 35(c) [ROA.571]. In addition, “[m]any countries, including important U.S. allies, have more restrictive firearms laws than the United States and have identified [the files at issue here] as a threat to domestic firearms laws.” *Id.* ¶ 35(d) [ROA.572]. The exports at issue here “would undercut the domestic laws of these nations... and thereby damage U.S. foreign relations with those countries and foreign policy interests.” *Id.* [ROA.572].

The firearms that would be produced by the files at issue here are of particular concern because they “can be produced in a way as to be both fully operable and virtually undetectable by conventional security measures such as metal detectors.” Aguirre Decl. ¶ 35(a) [ROA.570]. If such a firearm were produced and “then used to commit an act of terrorism, piracy, assassination, or other serious crime,” the United States could be held accountable, causing “serious and long-lasting harm to the foreign policy and national security interests of the United States.” *Id.* [ROA.571].

Congress and the Executive Branch thus have ample justification for imposing controls on exports of defense articles in general and the computer files at issue here in particular. These interests are more than sufficient to justify any incidental effects the regulations may have on the expression of ideas.

The government’s interests here would suffice to justify the regulations even if a more demanding standard were thought to apply. ...

\* \* \* \*

Here, Congress and the Executive Branch have concluded that restrictions on the export of arms are essential to the promotion of “world peace and the security and foreign policy of the United States.” 22 U.S.C. § 2778(a)(1). In longstanding regulations, the Department of State has consistently and reasonably concluded that the overseas dissemination of arms cannot meaningfully be curtailed if unfettered access to technical data essential to the production of arms is not similarly subject to the export licensing scheme. *See* 22 C.F.R. §§ 120.6, 120.10. Plaintiffs provide no basis for this Court to disturb those conclusions in these sensitive areas.

\* \* \* \*

**2. Plaintiffs' position cannot be reconciled with the approach taken by other courts of appeals.**

The Ninth Circuit has “repeatedly upheld the constitutionality of the [Arms Export Control Act], and its predecessor, the Mutual Security Act (MSA), under the First Amendment.” *United States v. Mak*, 683 F.3d 1126, 1135 (9th Cir. 2012). That court has properly recognized “the Government’s strong interest in controlling ‘the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise.’” *Id.* at 1135-36 (quoting *United States v. Edler Indus., Inc.*, 579 F.2d 516, 520-21 (9th Cir. 1978)). “[E]ven assuming that the First Amendment offers some protection to the dissemination of technical data,” the Ninth Circuit recognized that “the government has a strong interest in regulating the export of military information.” *United States v. Posey*, 864 F.2d 1487, 1496 (9th Cir. 1989). “Technical data that is relatively harmless and even socially valuable when available domestically may, when sent abroad, pose unique threats to national security.” *Id.* at 1497.

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**3. Plaintiffs' contrary arguments fail to address the basis for applying the regulations in this case.**

Unable to seriously dispute the government’s legitimate interest in preventing the dissemination of firearms overseas, plaintiffs seek to characterize their conduct in different terms. Plaintiffs assert that they seek to communicate “information regarding simple arms of the kind in common use for traditional lawful purposes.” Appellants’ Br. 48. Much “information regarding simple arms” would fall within the regulations’ exception for “information in the public domain.” 22 C.F.R. §§ 120.10(b), 120.11(a). The files at issue here, however, have novel functionality: they enable a 3-D printer or related device, at the push of a button, to create an article that appears on the U.S. Munitions List. *See* Aguirre Decl. ¶ 29 [ROA.567-68].

\* \* \* \*

**C. The regulations provide clear definitions and are not impermissibly subjective.**

Plaintiffs mistakenly suggest that the regulations are void for vagueness under the Fifth Amendment’s Due Process Clause, Appellants’ Br. 60-62, or that they confer inordinate discretion on government officials, *id.* at 50-52. The regulations contain precise and specific definitions. *See generally United States v. Wu*, 711 F.3d 1, 13 (1st Cir. 2013) (“To be within the reach of the Munitions List at all, an item must qualify as a ‘defense article,’ a term defined by the [regulations] with considerable specificity.”). Those definitions are designed not to provide authority to exercise subjective judgments about political or scientific speech, but rather to limit the foreign dissemination of firearms and other weapons of war.

As relevant here, the regulations apply specifically to firearms up to .50 caliber, 22 C.F.R. § 121.1, Category I, item (a), and to “[i]nformation . . . which is required for the . . . production . . . of” such firearms, *id.* § 120.10(a)(1). The regulations contain an exemption for information that is in the “[p]ublic domain,” as that term is defined in the regulations. *Id.* § 120.11. And the regulations define “export” to include “[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.” *Id.* § 120.17(a)(4).

These regulations are clear and specific, and do not provide an open-ended invitation to make subjective judgments about the value of speech or to censor based on disagreement with a message. Plaintiffs identify no statutory or regulatory terms applicable here that give rise to subjective judgments. *See* Order 23 [ROA.701] (noting that plaintiffs “have not made precisely clear which portion of the [regulatory] language they believe is unconstitutionally vague”). Instead, they point to terms with no evident bearing on this case, asserting that “[r]easonable persons must guess at what ‘specially designed’ or ‘military application’ truly mean,” and alluding to “Category XXI” of the U.S. Munitions List. Appellants’ Br. 51. Although plaintiffs provide no explanation of why those terms, in context, are vague, for present purposes it suffices to point out that none of these regulatory terms or categories is relevant here. The Supreme Court has made clear that “a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice.” *Humanitarian Law Project*, 561 U.S. at 20. And as discussed above, plaintiffs have not come close to establishing that any applications of disparate parts of the regulations call for the “strong medicine” of overbreadth under the First Amendment. . . .

Plaintiffs’ argument that the regulations were unclear as applied in this case arises from their observation that it took two years to process Defense Distributed’s commodity-jurisdiction requests. The fact that it took time to analyze the appropriate application of the regulations in a new factual scenario does not render the regulations vague. Even if Defense Distributed’s request presented a close case under the regulations, that would still not pose a constitutional problem. To the contrary, the Supreme Court has made clear that although “[c]lose cases can be imagined under virtually any statute,” “[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Williams*, 553 U.S. at 306. The Court has thus “struck down statutes that tied criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” *Id.* at 306. The regulations here contain no such terms. *See also Humanitarian Law Project*, 561 U.S. at 20-21 (upholding statute that “does not require . . . untethered, subjective judgments”).

Plaintiffs’ suggestion that the regulatory scheme is impermissibly underinclusive is also wide of the mark. Plaintiffs contend that Defense Distributed was singled out by the Department of State because plaintiffs are unaware of similar actions taken against other entities. Appellants’ Br. 59. Plaintiffs offer no authority in support of their apparent view that a regulatory scheme is unconstitutional unless enforcement action is taken in every case. A claim that the regulations were inadequately enforced would amount, at most, to a selective-prosecution claim (though Defense Distributed has not been prosecuted), and plaintiffs make no effort to satisfy the standard applicable to such claims, which the Supreme Court has “taken great pains to explain . . . is a demanding one.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *see also id.* at 464 (“In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.” (internal quotation marks omitted)).

D. The regulations do not violate the Second Amendment.

Plaintiffs’ argument that the regulations violate the Second Amendment is without merit. The regulations at issue here do not meaningfully burden anyone’s Second Amendment rights. Law-abiding, responsible American citizens can “acquir[e] the computer files at issue directly from Defense Distributed” and make firearms using a 3-D printer, and the regulations place no

limitation whatsoever on the ability to obtain firearms from other sources or to possess them, in the home or anywhere else. Order 22 [ROA.700]. While plaintiffs' declarants state that they would like to access Defense Distributed's files on the Internet, they do not allege that the regulations prevent them from exercising their right to keep or bear arms. *See generally* Gottlieb Decl. [ROA.658]; Williamson Decl. [ROA.661]; Versnel Decl. [ROA.664]. The district court properly explained that "[t]he burden imposed here falls well short of that generally at issue in Second Amendment cases." *Id.* at 21 [ROA.699].

There is thus no basis for plaintiffs' assertion that anyone's Second Amendment rights are affected by the regulations at issue here. But at an absolute minimum, the regulations survive any plausibly relevant standard of Second Amendment scrutiny.

\* \* \* \*

On September 20, 2016, the United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of plaintiff's motion for preliminary injunction. *Defense Distributed v. United States Dep't of State*, 838 F.3d 451, 454 (5th Cir. 2016). The Circuit Court's opinion, excerpted below, explains why the district court did not abuse its discretion in denying the preliminary injunction.

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The district court denied the preliminary injunction based on its finding that Plaintiffs-Appellants failed to meet the two non-merits requirements by showing that (a) the threatened injury to them outweighs the threatened harm to the State Department, and (b) granting the preliminary injunction will not disserve the public interest. ... The crux of the district court's decision is essentially its finding that the government's exceptionally strong interest in national defense and national security outweighs Plaintiffs-Appellants' very strong constitutional rights under these circumstances. Before the district court, as on appeal, Plaintiffs-Appellants failed to give *any* weight to the public interest in national defense and national security...

Ordinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case. That is not necessarily true here, however, because the State Department has asserted a very strong public interest in national defense and national security. Indeed, the State Department's stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest.

In the State Department's interpretation, its ITAR regulations directly flow from the AECA and are the only thing preventing Defense Distributed from "exporting" to foreign nationals (by posting online) prohibited technical data pertaining to items on the USML. Plaintiffs-Appellants disagree with the State Department's interpretation, but that question goes to the merits.

\* \* \* \*

If we reverse the district court’s denial and instead grant the preliminary injunction, Plaintiffs-Appellants would legally be permitted to post on the internet as many 3D printing and CNC milling files as they wish, including the Ghost Gunner CNC milling files for producing AR-15 lower receivers and additional 3D-printed weapons and weapon parts. Even if Plaintiffs-Appellants eventually fail to obtain a permanent injunction, the files posted in the interim would remain online essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide. That is not a far-fetched hypothetical: the initial Published Files are still available on such sites, and Plaintiffs-Appellants have indicated they will share additional, previously unreleased files as soon as they are permitted to do so. Because those files would never go away, a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim. Thus, the national defense and national security interest would be harmed forever. The fact that national security might be permanently harmed while Plaintiffs-Appellants’ constitutional rights might be temporarily harmed strongly supports our conclusion that the district court did not abuse its discretion in weighing the balance in favor of national defense and national security.

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**c. Leo Combat, LLC v. U.S. Dept. of State**

On August 29, 2016, the United States District Court for the District of Colorado granted the government’s motion to dismiss plaintiff’s complaint challenging the Arms Export Control Act by asserting that (1) “the registration fee imposed on manufacturers of ‘defense articles’ is facially void because it constitutes excessive delegation of the legislative power”; (2) “that the registration requirement promulgated pursuant to the Foreign Commerce Clause is invalid as applied to non-exporting manufacturers given the lack of any foreign commerce”; and (3) the amount of the registration fee [i]s an undue burden on the exercise of its Second Amendment rights.” *Leo Combat, LLC v. United States Dep’t of State*, No. 15-CV-02323-NYW, 2016 WL 6436653, at \*2 (D. Colo. Aug. 29, 2016). The district court’s opinion, excerpted below, did not reach the merits of plaintiff’s arguments, because it concluded plaintiff did not have standing to pursue the claims.

\* \* \* \*

1. Count I: Standing to Bring a Claim Alleging Unconstitutionally Excessive Delegation of the Legislative Power in Mandatory Fees Charged Under the AECA  
 Defendants’ first argument regarding lack of jurisdiction attacks Plaintiff’s non-delegation claim in Count 1. Defendants argue that Plaintiff has not satisfied the injury-in-fact prong of standing because it does not establish an imminent injury. . . . Plaintiff acknowledges that it has not, as of the filing of the Complaint, manufactured any firearms, either as prototypes or for sale. Nevertheless, Plaintiff seeks to challenge the constitutionality of the AECA’s delegation of legislative power in the mandatory registration fees charged by Defendants for manufacturers of “defense articles.” Plaintiff states that the AECA does not offer appropriate guidance on the level

of the registration fee charged or its relationship to expenditures by any executive agency. According to Plaintiff, Defendants have taken advantage of this lack of guidance by raising the fee from \$400 in 2004 to \$2,250 in 2008. Plaintiff further asserts that “[t]here is nothing in the AECA to prevent the Defendants from doubling the fee annually, or imposing whatever arbitrarily high fee might be desired.”

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Plaintiff concedes it had not yet “manufactured any firearms, either as prototypes or for sale.” The Complaint does not contain any averment that Leo Combat has taken any other steps to facilitate the manufacturing the subject handgun, including but not limited to identifying potential customers, entering contracts to develop a prototype, or securing funding for the manufacturing operation. Nor does the allegation that Leo Combat’s manufacture of “non-firearm products for use by law enforcement officers and private citizens” suggest that the manufacture of the subject handgun is a simple extension of an existing line of business. Counsel for Leo Combat conceded at oral argument that it did not know, and had no way of knowing, how long it might take to reach a point of actual manufacturing. Given these facts as alleged in the Complaint, this court finds that any threat of prosecution is simply too attenuated to rise to the level of a credible threat of prosecution. . . .

\* \* \* \*

## 2. Count II: Standing to Bring a Claim Alleging Unconstitutional Regulation of Domestic Activity Under the Foreign Commerce Power

Defendants next argue that Plaintiff has not demonstrated an injury that would confer standing for Count 2, Plaintiff’s claim that Congress has exceeded its constitutional authority under the Foreign Commerce Clause with respect to the AECA registration and fee requirement as applied to Plaintiff’s purely domestic activities. . . . Consistent with the court’s holding as set forth above, this court finds that Leo Combat’s alleged injury-in-fact is too speculative to confer standing for its second claim for relief. . . .

## 3. Count III: Standing to Bring a Claim Alleging Violation of Second Amendment Rights

...Plaintiff avers that “[t]he AECA’s imposition of a registration fee on firearm manufacturers singles out companies engaged in protected conduct, i.e. manufacture of products whose possession and use is constitutionally protected.” In other words, Leo Combat is asserting that it has cognizable Second Amendment rights as a corporation in manufacturing, and presumably selling, the subject handgun.

\* \* \* \*

In the District of Colorado, Chief Judge Krieger recently touched upon the issue of whether a corporation has Second Amendment rights in *Colorado Outfitters Ass’n v. Hickenlooper* (“*Colorado Outfitters I*”), 24 F. Supp. 3d 1050, 1064 (D. Colo. 2014), *vacated & remanded on other grounds*, 823 F.3d 537 (10th Cir. 2016). In passing on whether the plaintiff associations in that case had independent Second Amendment rights, Chief Judge Krieger observed that the historic purpose of the Second Amendment right to “keep and bear arms” was the ability to acquire, use, possess, or carry lawful firearms *for the purpose of self-defense*. *Colorado Outfitters I*, 24 F. Supp. 3d at 1064; *see, e.g., Heller*, 554 U.S. at 599 (“Self-defense

...was the *central component* of the right itself.”) (emphasis in original)... Chief Judge Krieger expressed “some doubt” that entities in their corporate form had standing to bring a Second Amendment challenge, and engaged in a rigorous analysis of the history and analytic framework for Second Amendment challenges, but ultimately, did not decide that precise issue. *See Colorado Outfitters I*, 24 F. Supp. 3d at 1062.

\* \* \* \*

This court recognizes that corporations are in certain instances characterized as “individuals” and have been found to have certain constitutional rights, including rights under the contracts clause, equal protection clause, due process clause, free speech clause, double jeopardy clause, takings clause, and search and seizure clause. Even then, however, the rights afforded to corporations are not necessarily identical or co-extensive with the rights of natural persons. While courts in other circuits have addressed a variety of issues regarding the scope of the Second Amendment, this court is not aware of any decisions directly addressing a corporation’s standing to assert a claim that it, in its corporate form, possesses Second Amendment rights to manufacture firearms.

\* \* \* \*

In the absence of binding authority holding otherwise, this court is persuaded that the text and historical context of the Second Amendment shows that it confers individual rights, and that any rights extended to a corporation under the Second Amendment are dependent upon the entity’s ability to assert individual rights of third-parties on their behalf.

\* \* \* \*

**d. Stagg P.C. v. U.S. Dept. of State**

On December 16, 2016, the United States Court of Appeals for the Second Circuit affirmed the district court’s denial of plaintiff’s motion for preliminary injunction, which would have broadly enjoined the government from “enforcing *any* licensing or other approval requirements for putting privately generated unclassified information *into* the public domain.” *Stagg P.C. v. United States Dep’t of State*, No. 16-315-CV (2d Cir. Dec. 16, 2016). Plaintiff challenged the licensing scheme in the International Traffic in Arms Regulations (“ITAR”) as “(1) an unconstitutional prior restraint under the First Amendment and (2) impermissibly vague under the Fifth Amendment.” *Id.* The district court’s opinion, excerpted below, concluded without reaching the merits of the case that plaintiff had “not met its burden of showing either that the balance of equities tips in its favor or that an injunction is in the public interest.” *Stagg P.C. v. U.S. Dep’t of State*, 158 F. Supp. 3d 203, 211 (S.D.N.Y. 2016), *aff’d sub nom. Stagg P.C. v. United States Dep’t of State*, No. 16-315-CV (2d Cir. Dec. 16, 2016).

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Plaintiff has demonstrated irreparable harm. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Plaintiff also raises several arguments regarding its likelihood of success on the merits that the Government would be wise to note. I also recognize the Second Circuit’s recent determination, in the context of campaign finance restrictions, that “[c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not dispositive factor.” In this case, however, that determination must be considered together with the Second Circuit’s (and the Supreme Court’s) designation of national security as a “public interest of the highest order,” and the Supreme Court’s admonition to district courts to consider carefully an injunction’s adverse impact on the public interest in national defense. Indeed, even in a case where “appellants [showed] a likelihood—*indeed, a certainty*—of success on the merits” of certain claims, the Second Circuit found that “[i]n light of the asserted national security interests at stake, we deem it prudent” to deny a preliminary injunction suspending a metadata collection program intruding on citizens’ rights to privacy. Even assuming for the purposes of this motion that Stagg P.C. has shown a substantial likelihood of success on the merits of its First and Fifth Amendment and APA claims, the balance of the equities and the public interest both require the denial of this preliminary injunction.

Stagg P.C. does not seek an injunction cabined to its contemplated republication of protected technical data at a bar association event in February; rather, it seeks an expansive injunction barring the enforcement of “any licensing or other approval requirements for putting privately generated unclassified [technical] information into the public domain” under the relevant sections of the ITAR. This would enjoin the application of the ITAR’s approval mechanism not only to situations where an individual or organization wishes to republish previously disclosed technical data, but to all situations where individuals wished to disclose technical data generately privately but covered by the ITAR.

Granting this injunction would have very serious adverse impacts on the national security of the United States. The “privately generated unclassified information” described by Stagg P.C. in this case is a slideshow containing examples of technical data covered by ITAR, not approved for public release, but still available in the public domain. This Court is left to speculate as to the specific technical data that may be in Stagg P.C.’s possession, but can in fact identify other technical data that might be freely republished if Stagg P.C.’s injunction was granted. Examples include: digital plans for 3D-printable plastic firearms, undetectable by metal detectors and untraceable without registration and serial number, privately generated technical data for delivery systems for weapons of mass destruction, such as rockets and missiles, created by defense contractors, and technical data related to chemical and biological agents that could be adapted for use as weapons. This parade of horrors is not an idle fancy. Indeed, without the licensing and approval mechanisms set forth in the AECA and ITAR, *any* unclassified technical data leaked to the Internet would be fair game to republish in any forum without regard to consequences—and in an era where national security information has been successfully leaked, this is not a specious threat. The balance of the equities and the public interest both firmly weigh in favor of the Government, and against the plaintiff.

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The Fifth Circuit Court of Appeals agreed with the district court's determination that the balance of equities and that public interest required denial of the preliminary injunction "to avoid 'very serious adverse impacts' to national security." *Stagg P.C. v. United States Dep't of State*, No. 16-315-CV (2d Cir. Dec. 16, 2016). The court recognized that "national security concerns raised by a preliminary injunction that barred the government from licensing, and thereby controlling, the dissemination of such sensitive information are obvious and significant," *id.* at 2, and that the government "articulated specific, concrete damage to national security that could result if the district court entered [plaintiff's] broad proposed injunction." *id.* at 3. Because the balance-of-equities and public interest factors weighed so heavily against a preliminary injunction, the court did not decide whether plaintiff was likely to succeed on the merits or to suffer irreparable harm.

The court also noted with concern the government's representation that the ITAR "applies to *republication* of information already in the public domain" because "it is unclear where in the *current* ITAR such a prohibition can be located." *Id.* The court, consequently, affirmed the preliminary injunction order without prejudice to the pursuit of narrower relief in the district court." *Id.*

**e. *Rocky Mountain Instrument Co.***

On May 9, 2016, the State Department announced that it had entered into an agreement with Rocky Mountain Instrument Company ("RMI") of Lafayette, Colorado, modifying its debarment pursuant to the International Traffic in Arms Regulations ("ITAR") for violating the Arms Export Control Act ("AECA"). See May 9, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257045.htm>. Details of the limited ITAR-related activity allowed by RMI pursuant to the agreement are contained in the Federal Register notice of the agreement, 81 Fed. Reg. 28,113 (May 9, 2016), and in the oversight agreement available at <https://www.pmdtc.state.gov/compliance/poa/rmi.html>. As explained in the media note:

RMI has satisfied the requirements of its plea agreement with the Department of Justice, cooperated with the Department of State, and implemented or will implement extensive remedial compliance measures. In response to a request from RMI for a reinstatement of export privileges and revocation of the statutory debarment, the Department's Office of Defense Trade Controls Compliance (DTCC) in the Bureau of Political-Military Affairs consulted with the appropriate U.S. agencies regarding mitigation of law enforcement concerns and decided to address RMI's AECA and ITAR violations through an Agreement. Under the terms of the two-year Agreement, RMI will appoint a Responsible Official to oversee the Agreement, RMI's compliance program, and ITAR training regimen, and conduct an external audit of its compliance program and additional required compliance measures.

**f. Microwave Engineering Co.**

On June 20, 2016, the State Department entered into a consent agreement with Microwave Engineering Corporation of North Andover, Massachusetts. The proposed charging letter, available at

[https://www.pmdtc.state.gov/compliance/consent\\_agreements/mec.html](https://www.pmdtc.state.gov/compliance/consent_agreements/mec.html) alleges that Microwave Engineering exported without authorization controlled technical data to a foreign person from the People's Republic of China, a proscribed destination in the ITAR, who was employed as a Research Scientist. Pursuant to the consent agreement, available at

[https://www.pmdtc.state.gov/compliance/consent\\_agreements/mec.html](https://www.pmdtc.state.gov/compliance/consent_agreements/mec.html)

Microwave Engineering, without admitting or denying the allegations, agreed to pay a civil penalty of \$100,000 in complete settlement of the alleged civil violations. The Department of State, considering that Microwave Engineering cooperated with the review, expressed regret for the activities, and took steps to improve its compliance program, determined not to impose an administrative debarment based on the allegations in the proposed charging letter.

**g. Turi**

On October 5, 2016, the State Department announced that it had concluded an administrative settlement with Marc Turi and Turi Defense Group, Inc. ("TDG") of Las Vegas, Nevada. The media note announcing the settlement, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262826.htm)

[2017.state.gov/r/pa/prs/ps/2016/10/262826.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262826.htm), includes the following background on the case.

Following a compliance review by the Department's Office of Defense Trade Controls Compliance (DTCC) in the Bureau of Political-Military Affairs, Mr. Turi and TDG agreed to enter into a Consent Agreement to resolve two alleged civil violations of the ...AECA and ...ITAR...

... DDTC alleged that Mr. Turi, as president of TDG, engaged in brokering activities for the proposed transfer of defense articles to Libya, a proscribed destination under the ITAR, despite the Department's denial of TDG requests for the required prior approval of such activities. The proposal did not result in an actual transfer of defense articles to Libya. Mr. Turi cooperated with DTCC in its review and proposed administrative settlement of the alleged violations.

Under the terms of the Consent Agreement with the Department, Turi will refrain from participating in activities subject to the ITAR for a four-year term. The Department also assessed a \$200,000 penalty, which will be suspended unless Turi and TDG materially violate the Consent Agreement. Based on Turi's cooperation, the Department determined that administrative debarment was not appropriate at this time.

## 2. Export Control Reform

On February 10, 2016, the State Department issued a fact sheet providing an update on export control reform based on the President's Export Control Reform Initiative, which began in 2009. The reforms are intended to enhance U.S. national security by streamlining defense transfers to U.S. allies and partners and also to reduce unnecessary barriers to the purchase of U.S.-origin parts and components. The fact sheet, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252355.htm>, lists key accomplishments:

- The move of less sensitive equipment, parts, and components from the regulatory jurisdiction of the Department of State's U.S. Munitions List (USML) to the Department of Commerce's Commerce Control List (CCL), following comprehensive technical and policy reviews conducted by an interagency team of experts representing all relevant U.S. Government departments and agencies. These reforms were also developed in close consultation with Congress and the private sector, which provided extensive public review and comment on the proposed changes.
- The revision of 18 of 21 categories of the U.S. Munitions List. Fifteen of these categories have been implemented, and the remaining three have been published for public comment. The Department is committed to finalizing the initial review of the entire USML in 2016.
- A more flexible licensing process under the CCL for the export of less sensitive defense products and services to allies and partners, benefitting U.S. manufacturers.
- A 56 percent reduction in license volume in the 15 implemented USML categories for the Department of State's Directorate of Defense Trade Controls, allowing it to enhance efforts to safeguard against illicit attempts to procure sensitive defense technologies.
- The creation of an ongoing transparent periodic interagency review process to continually improve export control regulations, and to engage with industry and the defense export community to solicit public comment on proposed updates to the USML and CCL.

On February 11, 2016, Brian Nilsson, Deputy Assistant Secretary of State for Defense Trade Controls for the Bureau of Political-Military Affairs, testified before the Small Business Committee of the U.S. House of Representatives at a hearing on export control reform. Mr. Nilsson's testimony is excerpted below and available at [http://2009-](http://2009-2017.state.gov/t/pm/rls/rm/2016/252401.htm)

[2017.state.gov/t/pm/rls/rm/2016/252401.htm](http://2009-2017.state.gov/t/pm/rls/rm/2016/252401.htm).

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...I welcome the opportunity to speak with you today about the Administration's Export Control Reform (ECR) initiative. Export controls are a key tool in our national security and foreign policy toolkit yet they historically have not received the attention that they deserve largely because of their detailed, technical nature. The Administration's early and regular engagement with the Congress, and in particular this committee, since the beginning of the reform initiative helped us administer a transparent reform effort in which many companies, large and small, actively participated. This committee in particular helped us develop the partnership with the Small Business Administration that Assistant Secretary Wolf mentioned, so again let me thank you for your continued interest and support.

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We have been engaged in a multi-year, labor-intensive technical review led by the Department of Defense to open each category of the USML and to enumerate those items that provide the United States with a critical military or intelligence advantage. Those less sensitive military items that do not meet this standard are being systemically moved to the Department of Commerce's jurisdiction to allow them to be exported to our allies under less rigorous requirements. This prioritization allows us to better focus our limited resources on the items, destinations, end-users, and end-uses of greatest concern, while improving interoperability with allies and bolstering our defense industrial base by allowing our parts and components manufacturers—many small- and medium-sized businesses—to more easily support systems we have already entrusted to our allies and partners.

In my aircraft example, I can report that since our new controls went into effect for this category and the gas turbine engine category in October 2013, we have seen an 83 percent reduction in license applications for parts, components, accessories, attachments, and associated equipment. That means that most of those companies making or supplying those items, may no longer need to register, pay annual registration fees of at least \$2,250, pay per-license application fees as may be required, no per-purchase order licensing requirements, no agreements licenses, and generally no "see through" rule that requires subsequent Department of State licenses for exports, re-exports, or re-transfers for their items incorporated into other items, until those other items' permanent importation into the United States or their ultimate destruction.

These reforms are only effective if we keep them current. Prior to ECR, the Department of State's control list was largely static. As a result of ECR and as part of our business practices going forward, the Department of State has fundamentally changed how we do business.

First, we can best keep our list current in partnership with all involved in the system—our interagency partners, the Congress, our allies, and industry. It is our companies, large and small, that are our front line of defense. They must be able to clearly understand and implement our rules, if they are to be effective, to provide for our collective security. We have put in place a process so they can advise us on proposed changes that we are contemplating, to tell us if we got it right and equally important, if we got it wrong. They can also advise us as technology evolves in their sectors, so we can make continuous improvements to our list.

Thus far, we have published proposed rules for 18 of our 21 categories. We received significant public input on which we relied in part to publish final rules revising 15 categories that have now gone into effect. As a result, the Department has seen a 56 percent reduction in licenses for these categories. By our most recent tally, based on the volume of license applications received, the largest categories are categories I (Firearms), XII (night vision equipment), XI (Military Electronics) and VIII (Aircraft)/XIX (Space and Missile), with

approximately 10,000; 8,000; 8,000 and 7,000 licenses respectively. Of these, Categories I and XII have not yet been published in final form. The revised categories with the largest volumes are Military Electronics and Aircraft.

Of the remaining six categories, we have published three for public comment. Two of these three, for Category XII (night vision equipment) and for Category XIV (toxicological agents), are our most complicated, and for the night vision equipment category, we are finalizing a second proposed rule to publish for public comment, to ensure that we get it right. We will then turn to preparing final rules for the other two. This leaves three categories that cover firearms, large guns, and ammunition to publish for public comment. We plan to turn to these categories once we complete our work on the current three that are in process. The Department is working towards reviewing the remaining USML categories, and is committed to finalizing an initial review of the entire USML in 2016.

Going forward, we will routinely solicit public input on a category-by-category basis and, drawing upon our own interagency expertise and the public comments, will publish proposed rules to update each category. Earlier this week, on February 9, the Departments of State and Commerce published proposed rules of updated controls for the aircraft and gas turbine engine categories, with public comments due by March 25, 2016, and the public input period for four more categories concluded on December 6<sup>th</sup>, 2015.

We will continue this transparent process going forward. The Arms Export Control Act requires the President to conduct a periodic review of the list and to remove those items that no longer warrant control. This requirement is fully consistent with regulatory reform, one of this committee's top priorities. The President has also provided further guidance in Executive Order 13563 of 2011 on requirements for improving regulations and the regulatory review process.

Second, we are committed to continued enhanced engagement with the exporting community. All our notices, proposed rules, final rules, decision trees, and fact sheets are published on our website, as well as the Administration's central ECR site. We have also expanded our outreach efforts. In Fiscal Year 2015, we organized or participated in over 700 events, ranging from conferences and webinars to end-use monitoring checks and individual company visits. Our response team fielded over 19,000 phone calls and 22,000 e-mail inquiries. These actions were all done in addition to frequent meetings we hold with industry.

Third, we are changing how we manage our controls. Prior to ECR, each of the licensing agencies and the departments and agencies participating in the license application review process were all on independent information technology (IT) systems, or had no IT system at all. A key decision in phase one of the reform initiative was the selection of the secure Department of Defense internal licensing database, called "USXPORTS," as the single licensing database. Moving to this system would ensure that each licensing agency has full information on what the United States Government has collectively approved or denied for export to ensure that current and future licensing decisions are fully informed ones. The Department of State moved to USXPORTS for processing munitions export license applications in July 2013 and for considering Department of Commerce export license applications in October 2015.

To aid industry, particularly small- and medium-sized companies, in compliance efforts, the Departments of State, Commerce, and the Treasury deployed a consolidated screening list comprised of all three departments' various public screening lists that can be downloaded by exporters to self-screen parties to proposed transactions to facilitate compliance. When the initial list was deployed in December 2010, it contained over 24,000 line items of names, including variant spellings and pseudonyms, and was downloaded on average about 32,000 times per

month. Since that time the Administration has deployed incremental improvements to this tool, including automated updates any time a department makes a change to one of its lists, a “fuzzy logic” search function, and new options for downloading for use with existing screening programs. The list is now being used to conduct more than 100,000 screens per day.

These improvements were prerequisites to building a single portal through which exporters can submit requests and receive licenses and other guidance documents. Preliminary work on a single portal in 2010 was placed on hold pending completion of the licensing agencies’ transition to USXPORTS. The development of the single portal has now resumed, with the goal of deploying a smart single interface through which exporters can submit all requests and the system will guide them through the process to correctly route the request to the appropriate licensing authority. This should be of particularly benefit to small- and medium-sized companies.

To support these significant changes, the Department of State last year created and filled a new Chief Information Officer position within the Directorate of Defense Trade Controls to oversee the Department of State’s collaboration with these IT projects and to undertake a comprehensive review to modernization all aspects of the organization’s work. This effort is underway and, when completed, the core aspects of our business will be fully automated. Implementing these modern business tools and practices is anticipated to significantly improve our administration of the munitions export controls.

Fourth, the Department of State will continue to provide foreign policy oversight of our export control system for all controlled items whether administered by the Department of State or Commerce. The export of less sensitive military items moved to Commerce jurisdiction will continue to be guided by all aspects of the Conventional Arms Transfer policy including human rights reviews. These changes will also not diminish the key role that the Department of Defense plays in considering exports to ensure they are consistent with our national security interests. ECR is not a decontrol of these less sensitive military items but a prioritization of how the Executive Branch mitigates risks. Export controls are about risk mitigation.

Export Control Reform has improved how the export control community inside and outside the government interact, allows us to prioritize our controls to better focus our resources of the threats that matter most, improve interoperability with allies, and bolster the health and competitiveness of the U.S. defense industrial base, particularly small- and medium-sized companies. ECR began as an initiative and is now a process. That process could best be administered going forward by the eventual consolidation into a single export control agency with a single control list. This is the logical conclusion of the initiative.

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Over the course of 2016, the Department of State, through the Directorate of Defense Trade Controls (“DDTC”), implemented the final surge of regulatory reforms pursuant to Export Control Reform. This effort included revisions to six categories of the United States Munitions List, updates to the definitions in part 120 of the ITAR, and other rules to harmonize the ITAR with other agencies’ regulations.

**Cross References**

*Foreign terrorist organizations*, **Chapter 3.B.1.**

*Organized crime*, **Chapter 3.B.6.**

*Relations with Burma*, **Chapter 9.A.1.**

*Ukraine*, **Chapter 9.B.1.**

*JASTA*, **Chapter 10.A.1.**

*Attachment of blocked assets*, **Chapter 10.B.6.a.**

*Burundi*, **Chapter 17.A.3.**

*Application of international law in cyberspace*, **Chapter 18.A.3.d.**

*North Korea*, **Chapter 19.B.6.a.**

*Iran*, **Chapter 19.B.6.b.**

## CHAPTER 17

### International Conflict Resolution and Avoidance

#### A. MIDDLE EAST PEACE PROCESS

The Middle East “Quartet”—represented by the United States Secretary of State, the Foreign Minister of the Russian Federation, the UN Secretary General, and the EU High Commissioner—met in Munich on February 12, 2016. The Quartet’s principals issued a statement, released as a State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252441.htm>, and excerpted below.

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The Quartet condemned all acts of terror and expressed its serious concern over the continuing violence against civilians. Reiterating its call for restraint, the Quartet called upon all parties to reject incitement and actively take steps to de-escalate the current tensions.

The Quartet expressed its serious concern that current trends on the ground—including continued acts of violence against civilians, ongoing settlement activity, and the high rate of demolitions of Palestinian structures—are dangerously imperiling the viability of a two-state solution. The Quartet reiterated that unilateral actions by either party cannot prejudice the outcome of a negotiated solution.

The Quartet underlined its commitment to achieving a negotiated, comprehensive, just and enduring resolution of the Palestinian-Israeli conflict, on the basis of United Nations Security Council resolutions 242 (1967) and 338 (1973).

The Quartet reiterated that the status quo is not sustainable and that significant steps, consistent with the transition contemplated by prior agreements, are urgently needed to stabilize the situation and to reverse negative trends on the ground. It noted that the continued absence of such steps was leading to further deterioration, to the detriment of both Israelis and Palestinians. The Quartet underscored that both sides must swiftly demonstrate through policies and actions, a

genuine commitment to a two-state solution in order to rebuild trust and avoid a cycle of escalation.

It emphasized that a robust Palestinian economy and enhanced governance capacity will serve as cornerstones of a Palestinian state, and that genuine Palestinian unity, on the basis of democracy and the PLO principles, is essential to reuniting Gaza and the West Bank under one legitimate, democratic Palestinian authority.

The Quartet urged an immediate focus on accelerating efforts to address the dire situation in Gaza, emphasized the importance of increased access through legal crossings, and called on all international partners to expedite the disbursement of their pledges made at the Cairo Conference in October 2014.

The Quartet will remain engaged with the parties in order to explore concrete actions that both sides can take to demonstrate their genuine commitment to pursuing a negotiated two-state solution.

The Quartet reaffirms its commitment to act in coordination with key stakeholders, including regional countries and the UN Security Council, to stabilize the situation and to actively support a just, comprehensive and lasting settlement of the Palestinian-Israeli conflict. In that regard, the Quartet will prepare a report on the situation on the ground, including recommendations that can help inform international discussions on the best way to advance the two-state solution.

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The Quartet issued another statement on September 23, 2016, which is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262344.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/262344.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262344.htm).

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The Quartet Principals were joined by the Foreign Ministers of Egypt and France during the second part of the meeting to brief on their work to support Middle East peace. All agreed on the importance of close and continuing coordination of all efforts to achieve the common goal of the two-state solution.

The Quartet reiterated its call on the parties to implement the recommendations of the Quartet Report of 1 July 2016, and create the conditions for the resumption of meaningful negotiations that will end the occupation that began in 1967 and resolve all final status issues.

The Quartet recalled its findings from the Quartet Report and expressed concern about recent actions on the ground that run counter to its recommendations. In particular:

The Quartet emphasized its strong opposition to ongoing settlement activity, which is an obstacle to peace, and expressed its grave concern that the acceleration of settlement construction and expansion in Area C and East Jerusalem, including the retroactive “legalization” of existing units, and the continued high rate of demolitions of Palestinian structures, are steadily eroding the viability of the two state solution.

The Quartet expressed serious concern for the continuing dire humanitarian situation in Gaza, exacerbated by the closures of the crossings as well as for the illicit arms build-up and activity by militant Palestinian groups, including rockets fired towards Israel, which increase the risk of renewed conflict. In addition, advancing Palestinian national unity on the basis of the PLO platform and Quartet principles remains a priority.

The Quartet condemned the recent resurgence of violence and called on all sides to take all necessary steps to de-escalate tensions by exercising restraint, preventing incitement, refraining from provocative actions and rhetoric, and protecting the lives and property of all civilians.

The Quartet stressed the growing urgency of taking affirmative steps to reverse these trends in order to prevent entrenching a one-state reality of perpetual occupation and conflict that is incompatible with realizing the national aspirations of both peoples.

The Quartet acknowledged certain practical steps and agreements by Israel and the Palestinian Authority that could improve conditions for the Palestinian people, while stressing the importance of full and timely implementation. The Quartet also noted the importance of a political horizon and reiterated its call for significant policy shifts consistent with the transition to greater Palestinian civil authority contemplated by prior agreements and called for in the Quartet Report.

The Quartet underlined its commitment to achieving a negotiated, comprehensive, just and enduring resolution of the Palestinian-Israeli conflict on the basis of United Nations Security Council resolutions 242 (1967) and 338 (1973).

The Quartet expressed appreciation for the efforts of the United Nations Special Coordinator. It directed the Quartet Envoys to continue engaging with the parties and key stakeholders and to keep the Principals apprised on implementation of the Report's recommendations.

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On October 5, 2016, the State Department issued a press statement condemning Israel's approval of a new West Bank settlement. The press statement follows and is available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/262795.htm>.

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We strongly condemn the Israeli government's recent decision to advance a plan that would create a significant new settlement deep in the West Bank.

Proceeding with this new settlement, which could include up to 300 units, would further damage the prospects for a two state solution. The retroactive authorization of nearby illegal outposts, or redrawing of local settlement boundaries, does not change the fact that this approval contradicts previous public statements by the Government of Israel that it had no intention of creating new settlements. And this settlement's location deep in the West Bank, far closer to Jordan than Israel, would link a string of outposts that effectively divide the West Bank and make the possibility of a viable Palestinian state more remote.

It is deeply troubling, in the wake of Israel and the U.S. concluding an unprecedented agreement on military assistance designed to further strengthen Israel's security, that Israel would take a decision so contrary to its long term security interest in a peaceful resolution of its conflict with the Palestinians. Furthermore, it is disheartening that while Israel and the world mourned the passing of President Shimon Peres, and leaders from the U.S. and other nations prepared to honor one of the great champions of peace, plans were advanced that would seriously undermine the prospects for the two state solution that he so passionately supported.

Israelis must ultimately decide between expanding settlements and preserving the possibility of a peaceful two state solution. Since the recent Quartet report called on both sides to take affirmative steps to reverse current trends and advance the two state solution on the ground, we have unfortunately seen just the opposite. Proceeding with this new settlement is another step towards cementing a one-state reality of perpetual occupation that is fundamentally inconsistent with Israel's future as a Jewish and democratic state. Such moves will only draw condemnation from the international community, distance Israel from many of its partners, and further call into question Israel's commitment to achieving a negotiated peace.

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On December 12, 2016, delegations headed by Palestine Liberation Organization ("PLO") Executive Committee Secretary General Saeb Erakat and Principal Deputy Assistant Secretary of State for Near Eastern Affairs Stuart E. Jones met in Washington for the U.S.-Palestinian Political Dialogue. The joint statement resulting from the dialogue is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265183.htm)

[2017.state.gov/r/pa/prs/ps/2016/12/265183.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/12/265183.htm).

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Both delegations strongly condemned terrorism and its supporters in the region and worldwide. The delegations agreed on the threat presented by ISIL, sharing the deep concern that ISIL has dramatically undermined regional stability, particularly in Iraq and Syria, and continues to commit gross, systemic abuses of human rights and violations of international humanitarian law.

Both delegations also discussed the significance of the PLO's long-standing commitment to non-violence and reiterated their commitment to a negotiated two-state outcome, which is the only way to achieve an enduring peace that meets Israeli and Palestinian security needs and Palestinian aspirations for statehood and sovereignty, end the occupation that began in 1967, and resolve all permanent status issues. They also agreed on the crucial role of civil society, and the need to create economic and political opportunity for the next generation of Palestinians, noting the relevance of last May's Economic Dialogue in Ramallah and last October's Higher Education Dialogue in Washington to these issues.

Both delegations affirmed that the dialogue underscored the strength of the U.S.-Palestinian relationship and look forward to continuing the Political Dialogue in 2017, as an important forum to study and address the serious issues facing the United States, the Palestinians, and the region, including in the fields of trade, investment, youth, women's rights, human rights, religion, agriculture, sports, and more.

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On December 23, 2016, Secretary Kerry issued a press statement on the vote in the UN Security Council on Resolution 2334, condemning violence and settlement activity obstructing peace between Israelis and Palestinians. Secretary Kerry's statement is excerpted below and available at [https://2009-](https://2009-2017.state.gov/secretary/remarks/2016/12/266070.htm)

[2017.state.gov/secretary/remarks/2016/12/266070.htm](https://2009-2017.state.gov/secretary/remarks/2016/12/266070.htm).

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Today, the United States acted with one primary objective in mind: to preserve the possibility of the two state solution, which every U.S. administration for decades has agreed is the only way to achieve a just and lasting peace between Israelis and Palestinians. Two states is the only way to ensure Israel's future as a Jewish and democratic state, living in peace and security with its neighbors, and freedom and dignity for the Palestinian people. That future is now in jeopardy, with terrorism, violence and incitement continuing and unprecedented steps to expand settlements being advanced by avowed opponents of the two state solution. That is why we cannot in good conscience stand in the way of a resolution at the United Nations that makes clear that both sides must act now to preserve the possibility of peace. While we do not agree with every aspect of this Resolution, it rightly condemns violence and incitement and settlement activity and calls on both sides to take constructive steps to reverse current trends and advance the prospects for a two state solution. And it does not seek to impose on the parties a solution to the conflict. It preserves the ability for the parties to negotiate the end of conflict.

As a lifelong friend of Israel, I have taken every opportunity to speak out, or cast a vote, to protect its security and the chance for a peaceful future. This Administration is proud of what Israel's leaders have called its unparalleled record of support for Israel's security, including the largest military assistance package in history, defending Israel against any efforts to undermine its security or legitimacy in international fora, and steadfastly opposing boycotts, divestment campaigns and sanctions targeting the State of Israel. It is that very commitment to Israel's long term security that we are standing up for today. We hope the parties will see this as a moment to urgently advance the peaceful and prosperous future they each deserve.

We all understand that reversing these disturbing trends on the ground will not itself bring an end to the conflict. That is why, over the past four years, I have spent countless hours engaged with the Israelis and Palestinians, countries in the region, and key stakeholders around the world, to explore and advance the prospects for peace. In the coming days, I will speak further to the vote in the Security Council today and share more detailed thoughts, drawn from the experience of the last several years, on the way ahead.

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Ambassador Power delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2334 on the Situation in the Middle East on December 23, 2016. Her statement is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7621>

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Let me begin with a quote: “The United States will not support the use of any additional land for the purpose of settlements during the transitional period. Indeed, the immediate adoption of a settlement freeze by Israel, more than any other action, could create the confidence needed for wider participation in these talks. Further settlement activity is in no way necessary for the security of Israel and only diminishes the confidence of the Arabs that a final outcome can be freely and fairly negotiated.”

This was said in 1982 by President Ronald Reagan. He was speaking about a new proposal that he was launching to end the Israeli-Palestinian conflict. While ultimately, of course, President Reagan’s proposal was not realized, his words are still illuminating in at least two respects.

First, because they underscore the United States’ deep and long-standing commitment to achieving a comprehensive and lasting peace between the Israelis and Palestinians. That has been the policy of every administration, Republican and Democrat, since before President Reagan and all the way through to the present day.

Second, because President Reagan’s words highlight the United States’ long-standing position that Israeli settlement activity in territories occupied in 1967 undermines Israel’s security, harms the viability of a negotiated two-state outcome, and erodes prospects for peace and stability in the region. Today, the Security Council reaffirmed its established consensus that settlements have no legal validity. The United States has been sending the message that the settlements must stop—privately and publicly—for nearly five decades, through the administrations of Presidents Lyndon B. Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and now Barack Obama. Indeed, since 1967, the only president who had not had at least one Israeli-Palestinian-related Security Council resolution pass during his tenure is Barack Obama. So our vote today is fully in line with the bipartisan history of how American Presidents have approached both the issue—and the role of this body.

Given the consistency of this position across U.S. administrations, one would think that it would be a routine vote for the U.S. to allow the passage of a resolution with the elements in this one, reaffirming the long-standing U.S. position on settlements, condemning violence and incitement, and calling for the parties to start taking constructive steps to reverse current trends on the ground. These are familiar, well-articulated components of U.S. policy.

But in reality this vote for us was not straightforward, because of where it is taking place—at the United Nations. For the simple truth is that for as long as Israel has been a member of this institution, Israel has been treated differently from other nations at the United Nations. And not only in decades past—such as in the infamous resolution that the General Assembly adopted in 1975, with the support of the majority of Member States, officially determining that, “Zionism is a form of racism”—but also in 2016, this year. One need only look at the 18

resolutions against Israel adopted during the UN General Assembly in September; or the five Israel-specific resolutions adopted this year in the Human Rights Council—more than those focused on any other specific country, such as Syria, North Korea, Iran, or South Sudan—to see that in 2016 Israel continues to be treated differently from other member states.

Like U.S. administrations before it, the Obama Administration has worked tirelessly to fight for Israel's right simply to be treated just like any other country—from advocating for Israel to finally be granted membership to a UN regional body, something no other UN Member State had been denied; to fighting to ensure that Israeli NGOs are not denied UN accreditation, simply because they are Israeli, to getting Yom Kippur finally recognized as a UN holiday; to pressing this Council to break its indefensible silence in response to terrorist attacks on Israelis. As the United States has said repeatedly, such unequal treatment not only hurts Israel, it undermines the legitimacy of the United Nations itself.

The practice of treating Israel differently at the UN matters for votes like this one. For even if one believes that the resolution proposed today is justified—or, even more, necessitated—by events on the ground, one cannot completely separate the vote from the venue.

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It is because this forum too often continues to be biased against Israel; because there are important issues that are not sufficiently addressed in this resolution; and because the United States does not agree with every word in this text, that the United States did not vote in favor of the resolution. But it is because this resolution reflects the facts on the ground—and is consistent with U.S. policy across Republican and Democratic administration throughout the history of the State of Israel—that the United States did not veto it.

The United States has consistently said we would block any resolution that we thought would undermine Israel's security or seek to impose a resolution to the conflict. We would not have let this resolution pass had it not also addressed counterproductive actions by the Palestinians such as terrorism and incitement to violence, which we've repeatedly condemned and repeatedly raised with the Palestinian leadership, and which, of course, must be stopped.

Unlike some on the UN Security Council, we do not believe that outside parties can impose a solution that has not been negotiated by the two parties. Nor can we unilaterally recognize a future Palestinian state. But it is precisely our commitment to Israel's security that makes the United States believe that we cannot stand in the way of this resolution as we seek to preserve a chance of attaining our long-standing objective: two states living side-by-side in peace and security. Let me briefly explain why.

The settlement problem has gotten so much worse that it is now putting at risk the very viability of that two-state solution. The number of settlers in the roughly 150 authorized Israeli settlements east of the 1967 lines has increased dramatically. Since the 1993 signing of the Oslo Accords—which launched efforts that made a comprehensive and lasting peace possible—the number of settlers has increased by 355,000. The total settler population in the West Bank and East Jerusalem now exceeds 590,000. Nearly 90,000 settlers are living east of the separation barrier that was created by Israel itself. And just since July 2016—when the Middle East Quartet issued a report highlighting international concern about a systematic process of land seizures, settlement expansions, and legalizations—Israel has advanced plans for more than 2,600 new settlement units. Yet rather than dismantling these and other settler outposts, which are illegal even under Israeli law, now there is new legislation advancing in the Israeli Knesset that would

legalize most of the outposts—a factor that propelled the decision by this resolution’s sponsors to bring it before the Council.

The Israeli Prime Minister recently described his government as “more committed to settlements than any in Israel’s history,” and one of his leading coalition partners recently declared that “the era of the two-state solution is over.” At the same time, the Prime Minister has said that he is still committed to pursuing a two-state solution. But these statements are irreconcilable. One cannot simultaneously champion expanding Israeli settlements and champion a viable two-state solution that would end the conflict. One has to make a choice between settlements and separation.

In 2011, the United States vetoed a resolution that focused exclusively on settlements, as if settlements were the only factor harming the prospects of a two-state solution. The circumstances have changed dramatically. Since 2011, settlement growth has only accelerated. Since 2011, multiple efforts to pursue peace through negotiations have failed. And since 2011, President Obama and Secretary Kerry have repeatedly warned—publically and privately—that the absence of progress toward peace and continued settlement expansion was going to put the two-state solution at risk, and threaten Israel’s stated objective to remain both a Jewish State and a democracy. Moreover, unlike in 2011, this resolution condemns violence, terrorism and incitement, which also poses an extremely grave risk to the two-state solution. This resolution reflects trends that will permanently destroy the hope of a two-state solution if they continue on their current course.

The United States has not taken the step of voting in support of this resolution because the resolution is too narrowly focused on settlements, when we all know ... that many other factors contribute significantly to the tensions that perpetuate this conflict. Let us be clear: even if every single settlement were to be dismantled tomorrow, peace still would not be attainable without both sides acknowledging uncomfortable truths and making difficult choices. That is an indisputable fact. Yet it is one that is too often overlooked by members of the United Nations and by members of this Council.

For Palestinian leaders, that means recognizing the obvious: that in addition to taking innocent lives—the incitement to violence, the glorification of terrorists, and the growth of violent extremism erodes prospects for peace, as this resolution makes crystal clear. ...

Our vote today does not in any way diminish the United States’ steadfast and unparalleled commitment to the security of Israel, the only democracy in the Middle East. We would not have let this resolution pass had it not also addressed counterproductive actions by Palestinians. ...

Our commitment to that security has never wavered, and it never will. Even with a financial crisis and budget deficits, we’ve repeatedly increased funding to support Israel’s military. And in September, the Obama administration signed a Memorandum of Understanding to provide \$38 billion in security assistance to Israel over the next 10 years—the largest single pledge of military assistance in U.S. history to any country. And as the Israeli Prime Minister himself has noted, our military and intelligence cooperation is unprecedented. We believe, though, that continued settlement building seriously undermines Israel’s security.

Some may cast the U.S. vote as a sign that we have finally given up on a two-state solution. Nothing could be further from the truth. None of us can give up on a two-state solution. We continue to believe that that solution is the only viable path to provide peace and security for the state of Israel, and freedom and dignity for the Palestinian people. And we continue to believe that the parties can still pursue this path, if both sides are honest about the choices, and

have the courage to take steps that will be politically difficult. While we can encourage them, it is ultimately up to the parties to choose this path, as it always has been. We sincerely hope that they will begin making these choices before it is too late.

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On December 28, 2016, Secretary Kerry delivered remarks in Washington, DC on Middle East peace. His remarks are excerpted below and available at <https://2009-2016.state.gov/secretary/remarks/2016/12/266119.htm>.

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Today, I want to share candid thoughts about an issue which for decades has animated the foreign policy dialogue here and around the world—the Israeli-Palestinian conflict.

Throughout his Administration, President Obama has been deeply committed to Israel and its security, and that commitment has guided his pursuit of peace in the Middle East. This is an issue which, all of you know, I have worked on intensively during my time as Secretary of State for one simple reason: because the two-state solution is the only way to achieve a just and lasting peace between Israelis and Palestinians. It is the only way to ensure Israel’s future as a Jewish and democratic state, living in peace and security with its neighbors. It is the only way to ensure a future of freedom and dignity for the Palestinian people. And it is an important way of advancing United States interests in the region.

Now, I’d like to explain why that future is now in jeopardy, and provide some context for why we could not, in good conscience, stand in the way of a resolution at the United Nations that makes clear that both sides must act now to preserve the possibility of peace.

I’m also here to share my conviction that there is still a way forward if the responsible parties are willing to act. And I want to share practical suggestions for how to preserve and advance the prospects for the just and lasting peace that both sides deserve.

So it is vital that we have an honest, clear-eyed conversation about the uncomfortable truths and difficult choices, because the alternative that is fast becoming the reality on the ground is in nobody’s interest—not the Israelis, not the Palestinians, not the region—and not the United States.

Now, I want to stress that there is an important point here: My job, above all, is to defend the United States of America—to stand up for and defend our values and our interests in the world. And if we were to stand idly by and know that in doing so we are allowing a dangerous dynamic to take hold which promises greater conflict and instability to a region in which we have vital interests, we would be derelict in our own responsibilities.

Regrettably, some seem to believe that the U.S. friendship means the U.S. must accept any policy, regardless of our own interests, our own positions, our own words, our own principles—even after urging again and again that the policy must change. Friends need to tell each other the hard truths, and friendships require mutual respect.

Israel’s permanent representative to the United Nations, who does not support a two-state solution, said after the vote last week, quote, “It was to be expected that Israel’s greatest ally would act in accordance with the values that we share,” and veto this resolution. I am compelled

to respond today that the United States did, in fact, vote in accordance with our values, just as previous U.S. administrations have done at the Security Council before us.

They fail to recognize that this friend, the United States of America, that has done more to support Israel than any other country, this friend that has blocked countless efforts to delegitimize Israel, cannot be true to our own values—or even the stated democratic values of Israel—and we cannot properly defend and protect Israel if we allow a viable two-state solution to be destroyed before our own eyes.

And that's the bottom line: the vote in the United Nations was about preserving the two-state solution. That's what we were standing up for: Israel's future as a Jewish and democratic state, living side by side in peace and security with its neighbors. That's what we are trying to preserve for our sake and for theirs.

In fact, this Administration has been Israel's greatest friend and supporter, with an absolutely unwavering commitment to advancing Israel's security and protecting its legitimacy.

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Like previous U.S. administrations, we have committed our influence and our resources to trying to resolve the Arab-Israeli conflict because, yes, it would serve American interests to stabilize a volatile region and fulfill America's commitment to the survival, security and well-being of an Israel at peace with its Arab neighbors.

Despite our best efforts over the years, the two-state solution is now in serious jeopardy.

The truth is that trends on the ground—violence, terrorism, incitement, settlement expansion and the seemingly endless occupation—they are combining to destroy hopes for peace on both sides and increasingly cementing an irreversible one-state reality that most people do not actually want.

Today, there are a number—there are a similar number of Jews and Palestinians living between the Jordan River and the Mediterranean Sea. They have a choice. They can choose to live together in one state, or they can separate into two states. But here is a fundamental reality: if the choice is one state, Israel can either be Jewish or democratic—it cannot be both—and it won't ever really be at peace. Moreover, the Palestinians will never fully realize their vast potential in a homeland of their own with a one-state solution.

Now, most on both sides understand this basic choice, and that is why it is important that polls of Israelis and Palestinians show that there is still strong support for the two-state solution—in theory. They just don't believe that it can happen.

After decades of conflict, many no longer see the other side as people, only as threats and enemies. Both sides continue to push a narrative that plays to people's fears and reinforces the worst stereotypes rather than working to change perceptions and build up belief in the possibility of peace.

And the truth is the extraordinary polarization in this conflict extends beyond Israelis and Palestinians. Allies of both sides are content to reinforce this with an us or—"you're with us or against us" mentality where too often anyone who questions Palestinian actions is an apologist for the occupation and anyone who disagrees with Israel policy is cast as anti-Israel or even anti-Semitic.

That's one of the most striking realities about the current situation: This critical decision about the future—one state or two states—is effectively being made on the ground every single day, despite the expressed opinion of the majority of the people.

The status quo is leading towards one state and perpetual occupation, but most of the public either ignores it or has given up hope that anything can be done to change it. And with this passive resignation, the problem only gets worse, the risks get greater and the choices are narrowed.

This sense of hopelessness among Israelis is exacerbated by the continuing violence, terrorist attacks against civilians and incitement, which are destroying belief in the possibility of peace.

Let me say it again: There is absolutely no justification for terrorism, and there never will be.

And the most recent wave of Palestinian violence has included hundreds of terrorist attacks in the past year, including stabbings, shootings, vehicular attacks and bombings, many by individuals who have been radicalized by social media. Yet the murderers of innocents are still glorified on Fatah websites, including showing attackers next to Palestinian leaders following attacks. And despite statements by President Abbas and his party's leaders making clear their opposition to violence, too often they send a different message by failing to condemn specific terrorist attacks and naming public squares, streets and schools after terrorists.

President Obama and I have made it clear to the Palestinian leadership countless times, publicly and privately, that all incitement to violence must stop. We have consistently condemned violence and terrorism, and even condemned the Palestinian leadership for not condemning it.

Far too often, the Palestinians have pursued efforts to delegitimize Israel in international fora. We have strongly opposed these initiatives, including the recent wholly unbalanced and inflammatory UNESCO resolution regarding Jerusalem. And we have made clear our strong opposition to Palestinian efforts against Israel at the ICC, which only sets back the prospects for peace.

And we all understand that the Palestinian Authority has a lot more to do to strengthen its institutions and improve governance.

Most troubling of all, Hamas continues to pursue an extremist agenda: they refuse to accept Israel's very right to exist. They have a one-state vision of their own: all of the land is Palestine. Hamas and other radical factions are responsible for the most explicit forms of incitement to violence, and many of the images that they use are truly appalling. And they are willing to kill innocents in Israel and put the people of Gaza at risk in order to advance that agenda.

Compounding this, the humanitarian situation in Gaza, exacerbated by the closings of the crossings, is dire. Gaza is home to one of the world's densest concentrations of people enduring extreme hardships with few opportunities. 1.3 million people out of Gaza's population of 1.8 million are in need of daily assistance—food and shelter. Most have electricity less than half the time and only 5 percent of the water is safe to drink. And yet despite the urgency of these needs, Hamas and other militant groups continue to re-arm and divert reconstruction materials to build tunnels, threatening more attacks on Israeli civilians that no government can tolerate.

Now, at the same time, we have to be clear about what is happening in the West Bank. The Israeli prime minister publicly supports a two-state solution, but his current coalition is the most right wing in Israeli history, with an agenda driven by the most extreme elements. The result is that policies of this government, which the prime minister himself just described as "more committed to settlements than any in Israel's history," are leading in the opposite direction. They're leading towards one state. In fact, Israel has increasingly consolidated control

over much of the West Bank for its own purposes, effectively reversing the transitions to greater Palestinian civil authority that were called for by the Oslo Accords.

I don't think most people in Israel, and certainly in the world, have any idea how broad and systematic the process has become. But the facts speak for themselves. The number of settlers in the roughly 130 Israeli settlements east of the 1967 lines has steadily grown. The settler population in the West Bank alone, not including East Jerusalem, has increased by nearly 270,000 since Oslo, including 100,000 just since 2009, when President Obama's term began.

There's no point in pretending that these are just in large settlement blocks. Nearly 90,000 settlers are living east of the separation barrier that was created by Israel itself in the middle of what, by any reasonable definition, would be the future Palestinian state. And the population of these distant settlements has grown by 20,000 just since 2009. In fact, just recently the government approved a significant new settlement well east of the barrier, closer to Jordan than to Israel. What does that say to Palestinians in particular—but also to the United States and the world—about Israel's intentions?

Let me emphasize, this is not to say that the settlements are the whole or even the primary cause of this conflict. Of course they are not. Nor can you say that if the settlements were suddenly removed, you'd have peace. Without a broader agreement, you would not. And we understand that in a final status agreement, certain settlements would become part of Israel to account for the changes that have taken place over the last 49 years—we understand that—including the new democratic demographic realities that exist on the ground. They would have to be factored in. But if more and more settlers are moving into the middle of Palestinian areas, it's going to be just that much harder to separate, that much harder to imagine transferring sovereignty, and that is exactly the outcome that some are purposefully accelerating.

Let's be clear: Settlement expansion has nothing to do with Israel's security. Many settlements actually increase the security burden on the Israeli Defense Forces. And leaders of the settler movement are motivated by ideological imperatives that entirely ignore legitimate Palestinian aspirations.

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But the problem, obviously, goes well beyond settlements. Trends indicate a comprehensive effort to take the West Bank land for Israel and prevent any Palestinian development there. Today, the 60 percent of the West Bank known as Area C—much of which was supposed to be transferred to Palestinian control long ago under the Oslo Accords—much of it is effectively off limits to Palestinian development. Most today has essentially been taken for exclusive use by Israel simply by unilaterally designating it as “state land” or including it within the jurisdiction of regional settlement councils. Israeli farms flourish in the Jordan River Valley, and Israeli resorts line the shores of the Dead Sea..., where Palestinian development is not allowed. In fact, almost no private Palestinian building is approved in Area C at all. Only one permit was issued by Israel in all of 2014 and 2015, while approvals for hundreds of settlement units were advanced during that same period.

Moreover, Palestinian structures in Area C that do not have a permit from the Israeli military are potentially subject to demolition. And they are currently being demolished at an historically high rate. Over 1,300 Palestinians, including over 600 children, have been displaced by demolitions in 2016 alone—more than any previous year.

So the settler agenda is defining the future of Israel. And their stated purpose is clear. They believe in one state: greater Israel. In fact, one prominent minister, who heads a pro-settler party, declared just after the U.S. election ... “the era of the two-state solution is over,” .... And many other coalition ministers publicly reject a Palestinian state. And they are increasingly getting their way, with plans for hundreds of new units in East Jerusalem recently announced and talk of a major new settlement building effort in the West Bank to follow.

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Now, one thing we do know: if Israel goes down the one state path, it will never have true peace with the rest of the Arab world, and I can say that with certainty. The Arab countries have made clear that they will not make peace with Israel without resolving the Israeli-Palestinian conflict. That’s not where their loyalties lie. That’s not where their politics are.

But there is something new here. Common interests in countering Iran’s destabilizing activities, and fighting extremists, as well as diversifying their economies have created real possibilities for something different if Israel takes advantage of the opportunities for peace. I have spent a great deal of time with key Arab leaders exploring this, and there is no doubt that they are prepared to have a fundamentally different relationship with Israel. That was stated in the Arab Peace Initiative, years ago. And in all my recent conversations, Arab leaders have confirmed their readiness, in the context of Israeli-Palestinian peace, not just to normalize relations but to work openly on securing that peace with significant regional security cooperation. It’s waiting. It’s right there.

Many have shown a willingness to support serious Israeli-Palestinian negotiations and to take steps on the path to normalization to relations, including public meetings, providing there is a meaningful progress towards a two-state solution. My friends, that is a real opportunity that we should not allow to be missed.

And that raises one final question: Is ours the generation that gives up on the dream of a Jewish democratic state of Israel living in peace and security with its neighbors? Because that is really what is at stake.

Now, that is what informed our vote at the Security Council last week—the need to preserve the two-state solution—and both sides in this conflict must take responsibility to do that. We have repeatedly and emphatically stressed to the Palestinians that all incitement to violence must stop. We have consistently condemned all violence and terrorism, and we have strongly opposed unilateral efforts to delegitimize Israel in international fora.

We’ve made countless public and private exhortations to the Israelis to stop the march of settlements. In literally hundreds of conversations with Prime Minister Netanyahu, I have made clear that continued settlement activity would only increase pressure for an international response. We have all known for some time that the Palestinians were intent on moving forward in the UN with a settlements resolution, and I advised the prime minister repeatedly that further settlement activity only invited UN action.

Yet the settlement activity just increased, including advancing the unprecedented legislation to legalize settler outposts that the prime minister himself reportedly warned could expose Israel to action at the Security Council and even international prosecution before deciding to support it.

In the end, we could not in good conscience protect the most extreme elements of the settler movement as it tries to destroy the two-state solution. We could not in good conscience turn a blind eye to Palestinian actions that fan hatred and violence. It is not in U.S. interest to help anyone on either side create a unitary state. And we may not be able to stop them, but we cannot be expected to defend them. And it is certainly not the role of any country to vote against its own policies.

That is why we decided not to block the UN resolution that makes clear both sides have to take steps to save the two-state solution while there is still time. And we did not take this decision lightly. The Obama Administration has always defended Israel against any effort at the UN and any international fora or biased and one-sided resolutions that seek to undermine its legitimacy or security, and that has not changed. It didn't change with this vote.

But remember it's important to note that every United States administration, Republican and Democratic, has opposed settlements as contrary to the prospects for peace, and action at the UN Security Council is far from unprecedented. In fact, previous administrations of both political parties have allowed resolutions that were critical of Israel to pass, including on settlements. On dozens of occasions under George W. Bush alone, the council passed six resolutions that Israel opposed, including one that endorsed a plan calling for a complete freeze on settlements, including natural growth.

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So we reject the criticism that this vote abandons Israel. On the contrary, it is not this resolution that is isolating Israel; it is the permanent policy of settlement construction that risks making peace impossible. And virtually every country in the world other than Israel opposes settlements. That includes many of the friends of Israel, including the United Kingdom, France, Russia—all of whom voted in favor of the settlements resolution in 2011 that we vetoed, and again this year along with every other member of the council.

In fact, this resolution simply reaffirms statements made by the Security Council on the legality of settlements over several decades. It does not break new ground. In 1978, the State Department Legal Adviser advised the Congress on his conclusion that Israel's government, the Israeli Government's program of establishing civilian settlements in the occupied territory is inconsistent with international law, and we see no change since then to affect that fundamental conclusion.

Now, you may have heard that some criticized this resolution for calling East Jerusalem occupied territory. But to be clear, there was absolutely nothing new in last week's resolution on that issue. It was one of a long line of Security Council resolutions that included East Jerusalem as part of the territories occupied by Israel in 1967, and that includes resolutions passed by the Security Council under President Reagan and President George H.W. Bush. And remember that every U.S. administration since 1967, along with the entire international community, has recognized East Jerusalem as among the territories that Israel occupied in the Six-Day War.

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In the end, we did not agree with every word in this resolution. There are important issues that are not sufficiently addressed or even addressed at all. But we could not in good conscience veto a resolution that condemns violence and incitement and reiterates what has been for a long

time the overwhelming consensus and international view on settlements and calls for the parties to start taking constructive steps to advance the two-state solution on the ground.

Ultimately, it will be up to the Israeli people to decide whether the unusually heated attacks that Israeli officials have directed towards this Administration best serve Israel's national interests and its relationship with an ally that has been steadfast in its support, as I described. Those attacks, alongside allegations of U.S.-led conspiracy and other manufactured claims, distract attention from what the substance of this vote was really all about.

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Now, in the end, we all understand that a final status agreement can only be achieved through direct negotiations between the parties. We've said that again and again. We cannot impose the peace.

There are other countries in the UN who believe it is our job to dictate the terms of a solution in the Security Council. Others want us to simply recognize a Palestinian state, absent an agreement. But I want to make clear today, these are not the choices that we will make.

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Now, everyone understands that negotiations would be complex and difficult, and nobody can be expected to agree on the final result in advance. But if the parties could at least demonstrate that they understand the other side's most basic needs—and are potentially willing to meet them if theirs are also met at the end of comprehensive negotiations—perhaps then enough trust could be established to enable a meaningful process to begin.

It is in that spirit that we offer the following principles—not to prejudge or impose an outcome, but to provide a possible basis for serious negotiations when the parties are ready. Now, individual countries may have more detailed policies on these issues—as we do, by the way—but I believe there is a broad consensus that a final status agreement that could meet the needs of both sides would do the following.

Principle number one: Provide for secure and recognized international borders between Israel and a viable and contiguous Palestine, negotiated based on the 1967 lines with mutually agreed equivalent swaps.

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Principle two: Fulfill the vision of the UN General Assembly Resolution 181 of two states for two peoples, one Jewish and one Arab, with mutual recognition and full equal rights for all their respective citizens.

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Principle number three: Provide for a just, agreed, fair, and realistic solution to the Palestinian refugee issue, with international assistance, that includes compensation, options and assistance in finding permanent homes, acknowledgment of suffering, and other measures necessary for a comprehensive resolution consistent with two states for two peoples.

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Principle four: Provide an agreed resolution for Jerusalem as the internationally recognized capital of the two states, and protect and assure freedom of access to the holy sites consistent with the established status quo.

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Principle five: Satisfy Israel's security needs and bring a full end, ultimately, to the occupation, while ensuring that Israel can defend itself effectively and that Palestine can provide security for its people in a sovereign and non-militarized state.

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Principle six: End the conflict and all outstanding claims, enabling normalized relations and enhanced regional security for all as envisaged by the Arab Peace Initiative. It is essential for both sides that the final status agreement resolves all the outstanding issues and finally brings closure to this conflict, so that everyone can move ahead to a new era of peaceful coexistence and cooperation. For Israel, this must also bring broader peace with all of its Arab neighbors. That is the fundamental promise of the Arab Peace Initiative, which key Arab leaders have affirmed in these most recent days.

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Now, we all know that a speech alone won't produce peace. But based on over 30 years of experience and the lessons from the past 4 years, I have suggested, I believe, and President Obama has signed on to and believes in a path that the parties could take: realistic steps on the ground now, consistent with the parties' own prior commitments, that will begin the process of separating into two states; a political horizon to work towards to create the conditions for a successful final status talk; and a basis for negotiations that the parties could accept to demonstrate that they are serious about making peace.

We can only encourage them to take this path; we cannot walk down it for them. But if they take these steps, peace would bring extraordinary benefits in enhancing the security and the stability and the prosperity of Israelis, Palestinians, all of the nations of the region. The Palestinian economy has amazing potential in the context of independence, with major private sector investment possibilities and a talented, hungry, eager-to-work young workforce. Israel's economy could enjoy unprecedented growth as it becomes a regional economic powerhouse, taking advantage of the unparalleled culture of innovation and trading opportunities with new Arab partners. Meanwhile, security challenges could be addressed by an entirely new security arrangement, in which Israel cooperates openly with key Arab states. That is the future that everybody should be working for.

President Obama and I know that the incoming administration has signaled that they may take a different path, and even suggested breaking from the longstanding U.S. policies on settlements, Jerusalem, and the possibility of a two-state solution. That is for them to decide. That's how we work. But we cannot—in good conscience—do nothing, and say nothing, when we see the hope of peace slipping away.

This is a time to stand up for what is right. We have long known what two states living side by side in peace and security looks like. We should not be afraid to say so.

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On December 29, 2016, the State Department issued a fact sheet setting forth principles for Middle East peace. The fact sheet is excerpted below and available at <https://2009-2017.state.gov/r/pa/prs/ps/2016/12/266156.htm>

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In his December 28, 2016 Remarks on Middle East Peace, Secretary of State John Kerry presented the Administration's view on the broad consensus that has emerged regarding principles for a final status agreement that could meet the needs of both sides, reflecting the Secretary's efforts and discussions with the parties and key stakeholders over the past four years.

These principles were offered not to prejudice or impose an outcome, but to provide a possible basis for serious negotiations when the parties are ready.

**Principle 1. Provide for secure and recognized international borders between Israel and a viable and contiguous Palestine, negotiated based on the 1967 lines with mutually agreed equivalent swaps.**

Resolution 242, which has been enshrined in international law for 50 years, provides for the withdrawal of Israel from territories it occupied in 1967 in return for peace with its neighbors and secure and recognized borders. It has long been accepted by both sides, and it remains the basis for an agreement today.

The Arab League has previously agreed, following the Secretary's engagement, that the reference in the Arab Peace Initiative to 1967 lines now includes the concept of land swaps, which the Palestinians have acknowledged. This is necessary to reflect practical realities on the ground, and mutually agreed equivalent swaps will ensure that the agreement is fair to both sides.

There is also broad recognition of Israel's need to ensure that the borders are secure and defensible, and that the territory of Palestine is viable and contiguous. There is also a clear consensus that no changes by Israel to the 1967 lines will be recognized by the international community unless agreed to by both sides.

**Principle 2. Fulfill the vision of the UN General Assembly Resolution 181 of two states for two peoples, one Jewish and one Arab, with mutual recognition and full equal rights for all their respective citizens.**

... Resolution 181 is incorporated into the foundational documents of both the Israelis and Palestinians. Recognition of Israel as a Jewish state has been the U.S. position for years, and many others have expressed that they are prepared to accept it as well, provided the need for a Palestinian state is also addressed.

There are some 1.7 million Arab citizens who call Israel their home and must now and always be able to live as equal citizens. That is why it is so important that in recognizing each other's homeland ... both sides reaffirm their commitment to upholding full equal rights for all of their respective citizens.

**Principle 3.** Provide for a just, agreed, fair, and realistic solution to the Palestinian refugee issue, with international assistance, that includes compensation, options and assistance in finding permanent homes, acknowledgment of suffering, and other measures necessary for a comprehensive resolution consistent with two states for two peoples.

As part of a comprehensive resolution, the Palestinian refugees must be provided with compensation, their suffering must be acknowledged, and there will need to be options and assistance in finding permanent homes. The international community can provide significant support and assistance, including in raising money to help ensure the compensation and other needs of the refugees are met, and many have expressed a willingness to contribute to that effort. But there is a general recognition that the solution must be consistent with two states for two peoples, and cannot affect the fundamental character of Israel.

**Principle 4.** Provide an agreed resolution for Jerusalem as the internationally recognized capital of the two states, and protect and assure freedom of access to the holy sites consistent with the established status quo.

Jerusalem is the most sensitive issue for both sides, and the solution must meet the needs not only of the parties, but of all three monotheistic faiths. That is why the holy sites that are sacred to billions of people around the world must be protected and remain accessible, and the established status quo maintained. Most acknowledge that Jerusalem should not be divided again like it was in 1967. At the same time, there is broad recognition that there will be no peace agreement without reconciling the basic aspirations of both sides to have capitals there.

**Principle 5.** Satisfy Israel's security needs and bring a full end to the occupation, while ensuring that Israel can defend itself effectively and that Palestine can provide security for its people in a sovereign and non-militarized state.

Security is the fundamental issue for Israel. Everyone understands that no Israeli Government can ever accept an agreement that does not satisfy its security needs or risks creating an enduring security threat like Gaza in the West Bank. Israel must be able to defend itself effectively, including against terrorism and other regional threats. There is a real willingness by Egypt, Jordan, and others to work together with Israel on meeting key security challenges. The United States believes that those collective efforts, including close coordination on border security, intelligence-sharing, and joint operations, can play a critical role in securing the peace.

Fully ending the occupation is the fundamental issue for the Palestinians: They need to know that the military occupation will really end after an agreed transitional process, and that they can live in freedom and dignity in a sovereign state while providing security for their population even without a military of their own. This is widely accepted as well.

**Principle 6.** End the conflict and all outstanding claims, enabling normalized relations and enhanced regional security for all as envisaged by the Arab Peace Initiative.

It is essential for both sides that the final status agreement resolves all the outstanding issues and finally brings closure to this conflict, so they can move ahead to a new era of peaceful coexistence and cooperation. For Israel, this must also bring broader peace with its Arab neighbors. That is the fundamental promise of the Arab Peace Initiative, which key Arab leaders have affirmed.

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**B. PEACEKEEPING AND CONFLICT RESOLUTION****1. Sexual exploitation and abuse by UN peacekeepers**

On March 4, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, provided a statement on the UN Secretary-General's Report on Sexual Exploitation and Abuse. Ambassador Power's statement follows and is available at

<http://2009-2017-usun.state.gov/remarks/7167>

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The Secretary-General's report on sexual exploitation and abuse (SEA) is clear—allegations of SEA by UN civilian and uniformed personnel are surging. Worse, over half of these allegations involve the most serious forms of SEA, including rape and sexual activity with minors. The steps the United Nations and its member states have so far taken to address this scourge are demonstrably—and woefully—inadequate.

Of the 69 allegations of SEA for peacekeeping, it is very concerning that approximately 70% of investigations are marked as “pending.” Given the unimaginable suffering of victims around the world, this is outrageous. For any pending allegations, we urge contributing countries and the UN to adhere to the Secretary-General's six-month timeline for completing investigations. The Secretary-General has taken a laudable and critical step toward transparency by reporting the nationality of individuals facing credible allegations of SEA so the world can know which countries are responsible for investigating and, if necessary, prosecuting their personnel, and can track their progress.

The United States has expanded our outreach to troop and police contributing countries to press for immediate and necessary actions to complement the UN's efforts to bolster justice and accountability measures for perpetrators of SEA. In this report, the Secretary-General has requested member states approve several reform initiatives. The United States has always urged the Secretary-General, on his own authority, to take action on SEA, and will also push for member states to approve his requests.

The Security Council has a critical role to play in ensuring the effectiveness of the peacekeeping missions it authorizes, recognizing that SEA by a few undermines the credibility of the many. The United States has tabled a draft resolution to add the Security Council's weight to the United Nations response to this horrific, recurrent problem in peacekeeping missions, including by supporting the Secretary-General's decision to repatriate units that demonstrate a pattern of SEA. I look forward to working with my colleagues in the Council toward swift adoption.

We need a whole-of-UN approach to ending sexual exploitation and abuse and ensuring that those who commit such crimes are held accountable. Solutions to this scourge cannot continue to be marked “pending.”

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Again on March 10, 2016, Ambassador Power addressed the subject of SEA in UN peacekeeping. Her remarks at a Security Council meeting on the subject are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7175>. As indicated in the remarks, the United States proposed a resolution on SEA, which was later adopted by the Security Council as Resolution 2272, empowering the Secretary General to repatriate troops when there are unaddressed allegations of SEA.

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...[D]espite the commitment made by this Council over a decade ago to address this problem, the scourge of sexual exploitation and abuse by peacekeepers persists. According to Secretary-General Ban Ki-moon's report released last week, 69 allegations of SEA were levied against uniformed and civilian personnel serving in peacekeeping missions last year—a 20 percent increase in reported violations from the previous year. More than half of the allegations in peacekeeping operations involve rape or sexual abuse of children. And these are just the cases we know about; as Special Representative of the Secretary-General Parfait Onanga-Anyanga, who took over as head of the UN peacekeeping mission in the Central African Republic last August, has said—the cases reported are likely just the “tip of the iceberg.”

We have long known that one of the most effective ways to prevent sexual abuse and exploitation is to send a clear message that perpetrators will be held accountable. So it is deeply alarming that, according to the Secretary-General's report, out of 69 allegations of SEA in 2015, in only 17 instances were investigations completed by January 31, 2016. Seventeen out of 69. And in only one of those cases did a country report to the UN that it had punished a perpetrator in response to a substantiated allegation. One out of 69. And the perpetrator in that case was found to have engaged in a sexually exploitive relationship; as punishment, he was suspended for nine whole days—nine days.

Now, some have argued that this discussion has no place in the UN Security Council, implying that they do not think sexual exploitation and abuse by peacekeepers has an impact on international peace and security. They are mistaken. In addition to being a heinous abuse, SEA erodes the discipline of military and police units, and undermines the confidence of local communities in peacekeepers—both of which are critical to fulfilling UN Security Council mandates. More broadly, when those entrusted with being protectors become perpetrators, it undermines the credibility of peacekeeping missions everywhere, as well as the legitimacy of the UN writ large—and along with it, it undermines our ability to address effectively the serious threats of our time.

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We deem it our responsibility as a Council to oversee every part of their missions—how many soldiers and police to send, what their mandate is, when they can use force. And we give them clear mandates to protect civilians. So let me pose the question this way to the skeptics:

When governments attack civilians, it is our job.

When armed groups, non-state actors, attack civilians, it is our job.

When terrorists attack civilians, it is our job.

So why in the world, when the UN's own peacekeepers are the ones attacking civilians—when peacekeepers commit the sickening crime of raping children—is it someone else's job? Explain that. Why is that the exception?

The Security Council cannot have responsibility for protecting civilians against all threats, from all forces, except those whom we directly oversee.

As we all know, a crucial part of accountability is transparency. The UN, its Member States, and the Security Council need to know when soldiers and police are accused of abusing the privilege of wearing the blue helmet. We need to know whether those allegations are being adequately investigated and, where appropriate, punished. And victims and their communities—imagine if it was a member of our family—they need to know that justice is being served. Yet the opaqueness of the existing system has made it virtually impossible for any of us to know these things. All too often, we don't know whether investigations have been opened. And even when we know investigations are ongoing, we don't know whether they are being carried out promptly, thoroughly, or impartially. Without basic facts, it is impossible to enforce a zero-tolerance policy. It's no coincidence that we've had a zero-tolerance policy for a long time, and yet, sexual abuse and exploitation allegations have risen—it's not a coincidence. There's not sufficient accountability to our own policy.

One of the most eloquent justices who ever served on the United States Supreme Court, Louis Brandeis, once said, "Sunlight is said to be the best of disinfectants." Yet allegations of sexual exploitation and abuse by peacekeepers too often are allowed to remain in the darkness, where the rot they cause continues to spread—to the detriment of the entire enterprise of peacekeeping.

That is why it is so important, Mr. Secretary-General, that your report for the first time brings to light the nationality of the personnel who face credible allegations of SEA. And it is why we commend the UN for starting to post on its website new allegations of SEA—including the date the report was received, information about the nationality of the accused, and whether the alleged victims are minors. It is through such reporting that we know that, in the first three months of this year alone, 26 additional allegations of SEA have been reported—a horrifying number.

We can and must do more to shine a bright light on this enduring problem. A place to start would be providing additional information on the status of investigations. For example, while we know that the majority of investigations into allegations of SEA from 2015 are "pending," we do not know when those investigations were opened. This data is crucial for gauging whether countries are acting in a timely manner.

Now, some countries have adamantly opposed this push for greater transparency, in particular the practice of identifying the nationality of peacekeepers credibly alleged to have committed such abuses. They claim that it unfairly singles out troop and police contributing countries that are putting themselves at risk in some of the most difficult environments around the world—police and troop-contributing countries whose service we commend.

Let me be very, very clear: The vast majority of the 91,000 troops and 13,000 police in UN peacekeeping missions serve honorably and with courage, putting their lives on the line every day to protect people in countries very far from their own. They do not commit sexual abuse, nor do they turn a blind eye to it. And most troop-contributing countries are serious about holding to account soldiers and police from their forces who would perpetrate such abuses, recognizing that impunity for SEA undermines the effectiveness of their troop contingents as a whole, whether they are serving in a UN mission or any other mission.

Yet this fact, the fact that so many serve so honorably—the vast, vast majority—is all the more reason that troop-contributing countries and police contributing countries should want to bring these cases to light, to investigate them, to hold accountable those who have committed abuses. Those serving honorably are the ones who have the greatest incentive to prevent the sickening acts of a few from tarnishing the noble service of so many.

When peacekeepers commit sexual exploitation and abuse with impunity, the fault not only lies with the peacekeepers who commit these deplorable acts, or the commanders who look the other way, or the countries that fail to conduct proper investigations. The blame rests on all of us—including the countries that fail to adequately train peacekeepers to prevent and root out these problems; the Member States that fail to press troop and police contributing countries to hold perpetrators accountable; the UN institutions that fail to report on the magnitude of the problem or repatriate units when countries prove unable or unwilling to investigate credible allegations of abuse. This is an all-systems failure.

Let me just give one example. According to the UN, there were seven separate allegations of SEA committed by peacekeepers from the Democratic Republic of Congo in a single mission, MINUSCA, over the course of 2015; one allegation was reported in January, one in February, four in August, and one more in September. The majority of the alleged victims of these abuses were kids. As these allegations continued to add up, members of this Council—including the United States—pushed for repatriation of the unit. In the meantime, more and more victims continued to come forward. In January of this year—of 2016—there were three more credible allegations of SEA against the same unit, followed by five more in February. Think about that: eight credible allegations of sexual exploitation and abuse reported against a single group of peacekeepers in just two months. And in seven of those instances, the alleged victims were children. How could we let that happen? All of us—how could we let that happen?

In late February, the entire contingent from DRC was repatriated—the first time the UN has ever repatriated an entire contingent for sexual exploitation and abuse. It was the right thing to do; it sends a clear message to all countries that there will be consequences for failing to address this serious problem. But it should never have taken so long. The Security Council was told the contingent would be repatriated. But this repatriation was delayed for operational reasons. That is unacceptable. The experience should force us all to ask: What if those soldiers had been sent home sooner? How many kids could have been spared suffering unspeakable violations that no child should ever have to endure, and that they will have to carry with them for the rest of their lives?

We have to do better by these victims. This means not only securing justice, but also ensuring they receive the care that they need and deserve in the aftermath of such crimes, both in the short-term and in the long-term. The Secretary-General has proposed a trust fund to support special services for victims, which would withhold payments from repatriated individuals and direct the funds to victims. We should move swiftly together to create this fund.

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... We cannot wait any longer. The United States has tabled a Security Council resolution to take our responsibility addressing this grave issue. As an immediate step, we urge all Council members to support it. I thank you.

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Ambassador Power delivered the following explanation of vote at the adoption of UN Security Council Resolution 2272 on Sexual Exploitation and Abuse in UN Peacekeeping Operations on March 11, 2016. The statement is also available at <http://2009-2017-usun.state.gov/remarks/7183>

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Thank you, Mr. President. On behalf of the United States, I would like to sincerely thank those countries that voted in favor of this resolution. The resolution adopted today underscores the Security Council's responsibility—our responsibility—to address the scourge of sexual exploitation and abuse in UN peacekeeping, which has been allowed to persist for far too long. Impunity for such abuses clearly undermines our efforts to promote international peace and security. This resolution makes clear that it is our job to ensure that there is accountability when men, women, and children are abused by the blue helmets this Council sends to protect them.

The resolution signals the Security Council's strong support for the UN zero tolerance policy, and for the ongoing efforts by the Secretary-General to strengthen this institution's response, reporting, and remedial measures to prevent and combat sexual exploitation and abuse among UN peacekeepers. The resolution underscores that peacekeepers found guilty—not those accused—those found guilty of committing SEA do not deserve to serve in UN peacekeeping missions, sending a clear message to troop- and police- contributing countries who fail to take action to prevent or punish credible allegations of sexual abuse and exploitation, as well as to all Member States, and to UN bodies, to ensure that these investigations are carried out thoroughly, promptly, and impartially.

I also just want to echo my French colleague's comment that the color of the helmet means little to the victim. All of us, wherever we serve, whether it is wearing a blue helmet, or a green helmet, or some other colored helmet, have a responsibility to live up to the standards that this resolution tries to enshrine. All of us have a responsibility if individuals who serve us overseas—the same way that we have a responsibility within our borders—to ensure that these kinds of crimes are never carried out and when they are carried out that the perpetrators are held accountable.

The resolution today endorses the Secretary-General's decision to repatriate UN peacekeeping units that demonstrate widespread or systemic sexual abuse and exploitation. And it requests that the Secretary-General repatriate all uniformed personnel from a contributing country in a given mission if that country fails to take appropriate steps to address credible allegations of SEA, fails to hold the perpetrators accountable, or fails to inform the Secretary-General of the status of such efforts.

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I also take note—a very important comment that Egypt made—of the admission that the measures contained in this resolution, measures requiring accountability, would not have been passed by the General Assembly. We agree—the General Assembly has been totally paralyzed. There are countries within the negotiations that are going on as we speak that have tried to water down the recommendations that the Secretary-General has made. It'd be one thing if we were

succeeding, if it was working, if the system was working. We come in here every day, we lament, we condemn. We condemn the abuse and we condemn the lack of accountability, and then we go to the General Assembly and some of us try to water down provisions to try to strengthen the system. ...

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Let me conclude with two messages.

To the tens of thousands of troops and police who serve honorably in UN peacekeeping operations: We salute you unequivocally for putting your lives on the line for people who live in countries far from your own, with little fanfare or recognition. We, and the civilians that you protect with your bravery, are completely indebted to you for your service. And as I did yesterday, I would single out those countries on this Council who have contributed so many peacekeepers—including Egypt, Senegal, China, Uruguay, of course, the United Kingdom getting involved again. Really, as a country that does not contribute a lot of troops, we are in awe of your service.

To the victims of sexual exploitation and abuse by UN peacekeepers, we pledge that we will do better. We will do better to ensure that the blue helmets we send as your protectors will not become perpetrators. That is what we are striving toward. And when they do, as this resolution demands we do, this Council has committed itself to ensuring that people who violate you, who violate the good name of the United Nations, and the good name of their countries, will be held accountable.

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On March 31, 2016, Ambassador Power delivered a statement while on a visit to the Central African Republic (“CAR”) on new allegations of SEA by peacekeepers in CAR. Her remarks are excerpted below and available at [http://2009-2017-](http://2009-2017-usun.state.gov/remarks/7210)

[usun.state.gov/remarks/7210](http://2009-2017-usun.state.gov/remarks/7210)

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The reports of new allegations of sexual exploitation and abuse committed by UN and non-UN personnel in the Central African Republic are sickening. At the request of the Secretariat, the Security Council is meeting today to be briefed on the allegations. In these cases, as in all reported allegations of sexual exploitation and abuse, it is critically important that prompt, thorough, and impartial investigations be carried out; and that, if the allegations are substantiated, the perpetrators be held accountable.

Today, in the town of Bambari in the Central African Republic, I had the opportunity to meet with some of the families of victims of abuse. It was gut-wrenching to hear them speak about how the peacekeepers they had looked to as protectors became perpetrators. Our conversations highlighted how the pain and suffering—and the acute sense of betrayal—endure long after the heinous acts themselves. In a testament to the ongoing agony being experienced by the families of victims of sexual abuse, the teenage girls who were violated by UN peacekeepers

have been ostracized from their communities, themselves blamed for the abuse inflicted upon them.

The people of the Central African Republic have witnessed the potential for peacekeepers to do tremendous good, and for them to inflict tremendous harm. I came here to attend the inauguration of the country's new president, Faustin-Archange Touadéra—a peaceful, democratic transfer of power that may well have not taken place had it not been for the service of UN peacekeepers and other international forces.

This plague of sexual abuse by peacekeepers must stop. These infernal abuses defy the very values the UN was created to uphold, taint the legitimacy of the institution, and undermine the effectiveness of those honorable peacekeepers who are attempting to protect civilians and promote peace.

Would-be perpetrators have to know that they cannot get away with such abuses. That is why the immediate and full implementation of Security Council Resolution 2272 is critical. UN Member States must thoroughly and impartially investigate and, where appropriate, prosecute individuals alleged to have committed sexual exploitation and abuse. Governments that fail to fulfil their duty to investigate and, where appropriate, prosecute, should be denied the privilege of serving in UN peacekeeping missions, and their units should be repatriated. And the UN Security Council, and all UN Member States, must see to it that we live up to the standards we have set. We are seeing the devastating consequences when we do not. The stakes of addressing this problem—for the victims, for nations like the Central African Republic, and for the UN and its Member States—could not be higher.

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Ambassador Isobel Coleman, U.S. Representative to the UN for UN Management and Reform, testified before the U.S. Senate Foreign Relations Committee on April 13, 2016 on the topic of SEA by UN Peacekeepers. Her testimony is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7233>

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Earlier this month, I had the opportunity to travel with Ambassador Power to the Central African Republic to witness the peaceful handover of power to the country's newly-elected president. In many ways, the trip underscored both the best, and the very worst, of UN peacekeeping. The presence of UN peacekeepers has been crucial in stanching the ethnic violence that has wracked the Central African Republic, resulting in thousands of deaths and the displacement of hundreds of thousands of people.

Yet as we all know, some MINUSCA troops have also been implicated in allegations of horrific sexual abuses, preying on the very people they have been sent to protect. During my time in CAR, Ambassador Power and I traveled to Bambari and visited with the families of some of the victims of that abuse. Their descriptions of the violence their loved ones have suffered at the hands of peacekeepers were powerful personal accounts that, for me, cut through all the statistics, the handwringing and frankly, the excuses about why this scourge has continued to happen.

Sexual exploitation and abuse by UN peacekeepers is not a new problem. It has plagued missions from Bosnia to Haiti, to the DRC to the Central African Republic. Let me read to you just one passage from an internal UN report documenting sexual abuse among peacekeepers: “Some young girls . . . talked of “rape disguised as prostitution”, in which they said they were raped and given money or food afterwards to give the rape the appearance of a consensual transaction.”

These words, I’m sorry to say, are from the Zeid Report, published by the UN in 2005. We know from the scope of current allegations that now, more than a decade later, these very same offenses are still occurring. Despite years of UN leaders insisting on “zero tolerance,” a culture of impunity has been allowed to fester.

When Ambassador Power asked me last year to lead our mission’s efforts in helping to establish a new paradigm for tackling this scourge, it was clear that an unacceptable lack of transparency and accountability were at the heart of the problem. Yes, the UN published an annual report tallying the numbers and types of sexual abuses by peacekeeping mission, but under pressure from the troop contributing countries themselves, it withheld the nationality of alleged perpetrators. That made it difficult for Member States to take collective action on tracking the status of investigations and the outcome of disciplinary action to hold perpetrators to account. In short, without transparency, real accountability was, at best, inconsistent. This, finally, is changing.

Last year, USUN led negotiations in the General Assembly for a breakthrough on transparency, gaining consensus among Member States to support the Secretary General in his intent to name countries in his annual report—a long-overdue step. As of early March, the UN now posts credible allegations on its website, along with the nationality of the alleged perpetrators. With this information, we are pursuing a comprehensive approach as outlined earlier by Ambassador Jacobson, to track individual cases and follow up with the appropriate authorities.

In March, USUN brought the issue of sexual abuse to the Security Council, which adopted Resolution 2272—another significant step forward for accountability. The resolution endorses the Secretary General’s decision to repatriate peacekeeping units that have demonstrated a pattern of abuse—which is a clear indication of insufficient command and control. Going further, Security Council Resolution 2272 empowers the Secretary General to repatriate *all* troops from a mission from a particular troop or police contributing country whose personnel are the subject of an allegation if that country has not taken appropriate steps to investigate allegations against its personnel, has not held perpetrators accountable or has not sufficiently informed the Secretary General of the progress of its investigations.

Our goal is to see Resolution 2272 implemented fully as a means of powerful prevention by ending once and for all the culture of impunity for sexual abuse in peacekeeping that has persisted for too long. Already, we are seeing positive signs of change, with the UN having repatriated military units from MINUSCA for sexual abuse.

The other part of this strategy, as also noted earlier, is to increase the overall supply of peacekeepers such that when military units or contingents are repatriated, others that are well trained and vetted are available to deploy quickly to take their place.

The UN has come a long way in responding to the scourge of sexual abuse, with strong support from the United States. It has built up its investigative capabilities, increased training and vetting of troops, implemented greater community outreach to increase awareness about sexual abuse, instituted penalties for offenders, and is improving victim’s assistance. Clearly, given the

shocking scale and gravity of the sexual abuse incidents being reported from CAR and other missions, these actions by themselves are not sufficient to address the crisis. The UN's recent commitments to greater transparency and accountability *must* result in a long-overdue sea change that ends impunity. Our work is not done. We continue to make it our highest priority both in New York and bilaterally to see perpetrators held to account and sorely lacking integrity restored to peacekeeping.

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Ambassador Coleman delivered remarks on SEA in peacekeeping operations at a UN General Assembly meeting on "Strengthening the UN System" on September 7, 2016. Ambassador Coleman's September 7 statement is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7427>

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The United States welcomes this opportunity to reaffirm our commitment to addressing the scourge of sexual exploitation and abuse, and our collective support for the Secretary-General's zero tolerance policy and his efforts to strengthen its implementation.

Sexual exploitation and abuse by UN personnel inflicts significant harm on vulnerable communities, the very communities who look to the UN for protection and assistance in some of the world's most dangerous situations. It also undermines the legitimacy and effectiveness of the UN.

Many positive efforts have been recently undertaken in this space. In 2015, the Secretary-General's annual report on sexual exploitation and abuse detailed over forty initiatives to address prevention, enforcement, and remedial action. Almost a year ago, the Secretary-General met with Troop and Police Contributing Countries to further discuss these measures. And, following the release of the CAR Panel report, the Secretary-General appointed Jane Holl Lute as the Special Coordinator on Improving the UN's Response to SEA: her efforts to date in harmonizing the UN system's approach to SEA have been critical. This year, the Secretary-General also took important steps towards increasing transparency and accountability on SEA allegations, and established the Victims Assistance Trust Fund.

Member States also took action in the realm of SEA. In March, the Security Council adopted resolution 2272, endorsing the authority of the Secretary-General to hold countries accountable for failing to take appropriate action following allegations of SEA against their personnel.

And in May, the Fifth Committee adopted a peacekeeping cross-cutting resolution which welcomed the Secretary-General's determination to fully implement the zero tolerance policy, reaffirmed the need for enhanced coordination for victim support, and expanded the UN's policy of transparency for allegations of SEA.

These are all important steps in the right direction toward accountability, transparency, prevention, and victims' assistance. Together these reforms are crucial for upholding zero tolerance for sexual exploitation and abuse: and now that they have been fully integrated into the UN's policies and standard operating procedures, we must move forward. We cannot go back.

Sexual exploitation and abuse is not a problem that can be solved by a single decision or action. Member States and the UN together must be constantly vigilant and seek ways to improve the implementation of the letter and the spirit of the zero tolerance policy. In this regard, we welcome the UN's recent step of publishing examples of how T/PCCs, Member States more broadly, and other international organizations handle SEA allegations. By sharing national laws, organizational rules and policies, and examples of actions taken in response to specific SEA allegations, we can identify and build on best practices.

The United States firmly supports the authority of the Secretary-General to implement his zero tolerance policy, and welcomes the initiatives he has undertaken thus far. Member States and the UN share a joint responsibility to prevent and address SEA, and to ensure victims receive the assistance that they need. Today, we must reaffirm our unanimous position that one substantiated case of sexual exploitation and sexual abuse is one too many: and that we all have a collective obligation to address this scourge. Finally, we must also recommit to protecting whistleblowers, since we know that there remains a significant issue of underreporting of cases.

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## 2. Syria

On January 31, 2016, Secretary Kerry provided a statement by video on new UN-sponsored negotiations to try to end the conflict in Syria. Secretary Kerry's statement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/01/251899.htm)

[2017.state.gov/secretary/remarks/2016/01/251899.htm](http://2009-2017.state.gov/secretary/remarks/2016/01/251899.htm).

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For almost five years, the world has watched in horror as Syria has disintegrated into a brutal conflict, killing hundreds of thousands and displacing millions both within and outside the country. Syria today is an unfolding humanitarian catastrophe, unmatched since World War II.

In recent months, a new and broad-based diplomatic initiative was launched, for the first time involving all of the key countries in the conflict. The goal is to reduce the violence, isolate terrorist groups such as Daesh, and create the basis for an inclusive, peaceful, and pluralistic Syria we all seek.

This weekend, we enter a pivotal phase in that diplomatic effort. Officials from the Syrian regime and an inclusive opposition represented by the High Negotiations Committee, begin UN-sponsored negotiations in Geneva. This morning, in light of what is at stake in these talks, I appeal to both sides to make the most of this moment—to seize the opportunity for serious negotiations—to negotiate in good faith, with the goal of making concrete, measurable progress in the days immediately ahead.

The world is hoping that both sides will move quickly to meet the needs of millions of desperate Syrians, to reduce the pressure on neighboring countries, to reduce the levels of migration, and to help restore peace and stability.

The main topics on the agenda for these negotiations include arrangements for a nationwide ceasefire and establishing a path to a political transition that will bring this conflict to an end in accordance with the Geneva Communiqué of 2012 and UN Security Council Resolution 2254.

Now, while battlefield dynamics can affect negotiating leverage, in the end there is no military solution to this conflict. Without negotiations, the bloodshed will drag on until the last city is reduced to rubble and virtually every home, every form of infrastructure, and every semblance of civilization is destroyed. And that will ensure an increased number of terrorists created by, and attracted to, this fight. This conflict could easily engulf the region if left to spiral completely out of control. That is what the negotiations in Geneva can prevent.

There is also an urgent and compelling imperative required by international law and simple human decency that we take steps now to improve the situation on the ground for the Syrian people.

The humanitarian crisis, already disastrous and unacceptable, is actually growing worse by the day. The numbers alone are staggering. An estimated 13.5 million Syrians are in urgent need now of humanitarian aid. Six million are children. ...

Shockingly, less than one percent ... of the besieged population of Syria received food aid in all of 2015. And we are not just talking about remote, hard-to-reach areas.

The town of Madaya is just an hour's drive from Damascus. And yet, in recent months, its people have been reduced to eating grass and leaves. How has the regime and the militias that support it responded? By planting land mines and erecting barbed wire to keep relief workers out. This weekend, we heard reports that another 16 people in the town have died due to starvation amid the bitter winter's cold. Other residents have been described as walking skeletons.

And the tragedy in Madaya is far from the only case. Overall, since the beginning of last year, the Syrian regime has received 113 requests from the United Nations to deliver humanitarian aid. Astonishingly, just 13 of these requests have been approved and implemented. Meanwhile, people are dying; children are suffering not as a result of an accident of war, but as the consequence of an intentional tactic—surrender or starve. And that tactic is directly contrary to the law of war.

Let me be clear. The Syrian regime has a fundamental responsibility; all the parties to the conflict have a duty—to facilitate humanitarian access to populations in desperate need, not in a week, not after further discussions, but right now—today.

Under Resolution 2254, the government and all parties have an obligation, as well, to cease bombings and other attacks against civilians—not eventually, again, but immediately. The international community must be united in pressing for compliance. Both governments supporting the opposition and especially governments that are supporting Bashar al-Assad, whose forces control the vast majority of the territory under siege, have this obligation also.

We must not forget what the Syrian people will always remember: Assad and his allies have, from the very beginning, been by far the primary source of killing, torture, and deprivation in this war; and the primary magnet drawing foreign fighters to Syria, giving cause to Daesh.

In recent weeks, colleagues from the International Syrian Support Group have been in constant contact in order to forge a more unified and collaborative approach to de-escalating this conflict, and also to ensure access to besieged areas for humanitarian workers and supplies. The world needs to push in one direction—toward stopping the oppression and suffering of the Syrian people and ending, not prolonging, this war.

Nothing would do more to cut the legs out from under Daesh than a negotiated political solution in Syria that would allow all sides, all parties, all countries, to focus on defeating the terrorist group Daesh once and for all. This imperative was underlined yet again just this morning, when terrorist bombers attacked a religious shrine, killing dozens, in Damascus.

The people of Syria deserve a real choice about the kind of future that they want. Not a choice between brutal repression on one side and terrorists on the other; that's the choice the Assad regime would like to offer. What the people of Syria need is the kind of choice that emerges from a credible political process.

This week in Geneva, that political process can get underway. The road ahead remains challenging. Success is not assured. But we have seen through years of savage fighting what the absence of serious negotiation yields.

So I urge all parties to seize this opportunity and go forward with the best interests of their country in mind. The United Nations Security Council has created a framework for bringing the war in Syria to an end. It embraces a ceasefire, humanitarian access throughout the country, a transition process, and elections within 18 months in which Syrians can determine the future of Syria.

So the opportunity now is real and present to achieve a future that ensures Syria's unity, independence, territorial integrity, and non-sectarian character; to keep state institutions intact; and to protect the rights of all Syrians, regardless of ethnicity or religious denomination.

We call upon the parties in Geneva to take the first urgent steps and not to miss the chance this moment presents.

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On February 11 and 12, 2016, Germany hosted a meeting of the International Syria Support Group ("ISSG") on the margins of the Munich Security Conference. As explained in the Group's February 11 Joint Statement (released as a February 11, 2016 State Department media note, available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252428.htm)

[2017.state.gov/r/pa/prs/ps/2016/02/252428.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252428.htm)), the meeting focused on commencing humanitarian access to besieged areas, achieving a nationwide cessation of hostilities in Syria, and implementing UN Security Council Resolution 2254 (discussed in *Digest 2015* at 698-702). Among the outcomes of the meeting was the decision to establish an ISSG ceasefire task force, under the auspices of the UN, co-chaired by Russia and the United States with the participation of ISSG members with influence on the parties to the conflict. Secretary Kerry, Russian Foreign Minister Sergey Lavrov, and UN Special Envoy Steffan de Mistura addressed the press on February 12, 2016 regarding the outcomes of their meeting. Secretary Kerry's remarks are excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/02/252431.htm)

[2017.state.gov/secretary/remarks/2016/02/252431.htm](http://2009-2017.state.gov/secretary/remarks/2016/02/252431.htm)

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Last fall, the International Syria Support Group came together out of a shared sense of responsibility for the nightmare that the Syrian people have been enduring for far too long. And in December we agreed on a set of commitments, unanimously endorsed by the UN Security Council, aimed at bringing an end to the war. Obviously, it's been difficult. Everybody understands that. That effort at the UN led to specific UN-sponsored negotiations between the Syrian parties, which began under the stewardship of UN Envoy Staffan de Mistura and the UN itself. And everybody knows that as the situation on the ground in Syria grew steadily worse the talks themselves became wrapped up in the level of violence and in concerns that people had about negotiating under difficult circumstances.

Staffan de Mistura wisely at that moment, after conversing with both sides in what were always scheduled to be proximity talks, then delayed this process knowing that we were meeting here in Munich yesterday and part of this morning. During this time, the perception of many members was that the regime of Bashar al-Assad was violating international law by trying to force surrender through starvation. And with the help of indiscriminate bombing, the regime intensified its assault in Aleppo, killing civilians and forcing more than 60,000 Syrians to flee their homes in search of refuge across the Turkish border. And it is our perception that rather than hurting Daesh, this process has, in fact, empowered Daesh to take advantage of the chaos.

UN Special Envoy de Mistura who convened those talks agreed that we should come here to Munich in order to allow the ISSG nations and the parties themselves to try to make the necessary progress to bring about humanitarian access that is urgently needed on the ground and in trying to implement a ceasefire on both sides.

Foreign Minister Lavrov worked closely with me and with the rest of the members today and I'm pleased to say that as a result today in Munich we believe we have made progress on both the humanitarian front and the cessation of hostilities front. And these two fronts, this progress, has the potential, fully implemented, fully followed through on, to be able to change the daily lives of the Syrian people.

First, we have agreed to accelerate and expand the delivery of humanitarian aid beginning immediately. Sustained delivery will begin this week, first to the areas where it is most urgently needed: Deir al-Zor, Fouah, Kafrayah, the besieged areas of rural Damascus, Madaya, Mouadhimiyyeh, Kafr Batna, and then to all the people in need throughout the country, particularly in the besieged or hard-to-reach areas, the smaller neighborhoods and towns.

This access is specifically called for in UN Security Council resolution 2254 and to ensure that it is fully implemented the United Nations will convene a task force made up of members of the ISSG and of relevant UN entities and of countries that have an influence on the parties particularly. And this working group will meet tomorrow in Geneva. It will ensure that humanitarian access is granted by all sides to all people who require help. And it will meet, as I said, for the first time tomorrow. It will report weekly on progress or lack thereof to help ensure a consistent and timely and approve access moving forward.

I will say that it was unanimous. Everybody today agreed on the urgency of humanitarian access. And what we have here are words on paper. What we need to see in the next few days are actions on the ground in the field. And Staffan will speak to that.

In addition, the ISSG members will work together with the Syrian parties to ensure the immediate approval and the completion of all pending UN access requests. As everybody knows, there have been about 114 of them—only 13 or so, 14 approved—and that has to change.

Second, we have agreed to implement a nationwide cessation of hostilities to begin in a target of one week's time. That's ambitious, but everybody is determined to move as rapidly as possible to try to achieve this. This will apply to any and all parties in Syria with the exception of the terrorist organizations Daesh and al-Nusrah and any other terrorist organization designated by the Security Council.

To that end, we have also established a task force under the auspices of the UN and co-chaired by Russia and the United States. And over the coming week this group will work to develop the modalities for a long-term, comprehensive, and durable cessation of violence, of hostilities. We will begin to exercise our influence by the commitment of every country at the table immediately for a significant reduction in violence as we work towards the full cessation of hostilities.

Now, I want to underscore putting an end to the violence and the bloodshed is obviously essential, as is providing Syrians who are starving the humanitarian aid that they desperately need. But ultimately the end of this conflict will only come when the parties agree on a plan for a political transition in accordance with the Geneva communiqué of 2012. ...

Today all ISSG members agree that the Geneva talks should resume as soon as possible and they should resume in strict compliance with UN Security Council Resolution 2254. And the ISSG also pledges—all of us—to take every single measure we can to facilitate progress within the negotiations. In December we agreed on a six-month timeframe for the political transition process and today we reaffirmed our commitment to that timeline. We approach this, I think, with a uniform belief that the killing and the starvation of innocent people needs to end as soon as possible.

Now, obviously, just in closing I'll say our hard work is obviously far from over. But our work today, while it has produced commitments on paper, I want to restate the real test is clearly whether or not all the parties honor those commitments and implement them in reality. What I've said again and again is we cannot guarantee success in the outcome. What the diplomatic process can guarantee is that we exhaust the possibilities of diplomacy and that we make every best effort to try to produce a platform on which the parties themselves can determine their future.

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On February 22, 2016, arrangements for a cessation of hostilities in Syria concluded under the auspices of the ISSG. Secretary Kerry summarized the cessation of hostilities in a February 22, 2016 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/02/253117.htm>. His statement includes the following:

... If implemented and adhered to, this cessation will not only lead to a decline in violence, but also continue to expand the delivery of urgently needed humanitarian supplies to besieged areas and support a political transition to a government that is responsive to the desires of the Syrian people.

...

We are all aware of the significant challenges ahead. Over the coming days, we will be working to secure commitments from key parties that they will abide by the terms of this cessation of hostilities and further develop modalities for monitoring and enforcement.

This is a moment of promise, but the fulfillment of that promise depends on actions. All parties must meet their commitments under this agreement, ensure full implementation of UN Security Council Resolution 2254, and cease attacks on each other, including aerial bombardments. And all parties must remain committed over a period of time to make possible a political end to this conflict.

As we move forward, we will remain vigilant to ensure that implementation achieves what we set out to do, which is to stop the violence and provide the space and the opportunity for a negotiated political transition, consistent with the Geneva Communiqué of 2012, that unites all Syrians who reject dictatorship and terrorism and want to build a new future for their country.

On the day the cessation of hostilities arrangement was concluded, the United States and Russia issued a joint statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/253115.htm> which follows.

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The United States of America and the Russian Federation, as co-chairs of the International Syria Support Group (ISSG) and seeking to achieve a peaceful settlement of the Syrian crisis with full respect for the fundamental role of the United Nations, are fully determined to provide their strongest support to end the Syrian conflict and establish conditions for a successful Syrian-led political transition process, facilitated by the UN, in order to fully implement the Munich Statement of the ISSG on February 11<sup>th</sup>, 2016, UN Security Council Resolution 2254, the 2015 Vienna Statements and the 2012 Geneva Communiqué.

In this regard, and in furtherance of the February 11<sup>th</sup> decisions of the ISSG, the United States and Russia, as co-chairs of the ISSG and ISSG Ceasefire Task Force, announce the adoption on February 22, 2016, of the Terms for a Cessation of Hostilities in Syria attached as an Annex to this statement, and propose that the cessation of hostilities commence at 00:00 (Damascus time) on February 27, 2016. The cessation of hostilities is to be applied to those parties to the Syrian conflict that have indicated their commitment to and acceptance of its terms. Consistent with UN Security Council Resolution 2254 and the statements of the ISSG, the cessation of hostilities does not apply to “Daesh”, “Jabhat al-Nusra”, or other terrorist organizations designated by the UN Security Council.

Any party engaged in military or para-military hostilities in Syria, other than “Daesh”, “Jabhat al-Nusra”, or other terrorist organizations designated by the UN Security Council will indicate to the Russian Federation or the United States, as co-chairs of the ISSG, their commitment to and acceptance of the terms for the cessation of hostilities by no later than 12:00 (Damascus time) on February 26, 2016. In order to implement the cessation of hostilities in a

manner that promotes stability and protects those parties participating in it, the Russian Federation and the United States are prepared to work together to exchange pertinent information (*e.g.*, aggregated data that delineates territory where groups that have indicated their commitment to and acceptance of the cessation of hostilities are active, and a focal point for each side, in order to ensure effective communication) and develop procedures necessary for preventing parties participating in the cessation of hostilities from being attacked by Russian Armed Forces, the U.S.-led Counter ISIL Coalition, the Armed Forces of the Syrian government and other forces supporting them, and other parties to the cessation of hostilities. Military actions, including airstrikes, of the Armed Forces of the Syrian Arab Republic, the Russian Armed Forces, and the U.S.-led Counter ISIL Coalition will continue against ISIL, “Jabhat al-Nusra,” and other terrorist organizations designated by the UN Security Council. The Russian Federation and United States will also work together, and with other members of the Ceasefire Task Force, as appropriate and pursuant to the ISSG decision of February 11, 2016, to delineate the territory held by “Daesh,” “Jabhat al-Nusra” and other terrorist organizations designated by the UN Security Council, which are excluded from the cessation of hostilities.

In order to promote the effective implementation of the cessation of hostilities, the ISSG Ceasefire Task Force, co-chaired by the United States and Russia, has been established under UN auspices, including political and military officials from the co-chairs and other Task Force members; the UN Office of the Special Envoy for Syria (OSE) serves as secretariat. The primary functions of the Task Force are, as provided in the ISSG Statement of February 11, to: a) delineate the territory held by “Daesh”, “Jabhat-al-Nusra” and other terrorist organizations designated by the United Nations Security Council; b) ensure communications among all parties to promote compliance and rapidly de-escalate tensions; c) resolve allegations of non-compliance; and d) refer persistent non-compliant behavior by any of the parties to the ISSG Ministers or those designated by the Ministers to determine appropriate action, including the exclusion of such parties from the arrangements of the cessation of hostilities, and the protection it affords them.

The United States and Russia are prepared, in their capacities as co-chairs of the Ceasefire Task Force and in coordination with other members of the ISSG Ceasefire Task Force as appropriate, to develop effective mechanisms to promote and monitor compliance with the ceasefire both by the governmental forces of the Syrian Arab Republic and other forces supporting them, and the armed opposition groups. To achieve this goal and to promote an effective and sustainable cessation of hostilities, the Russian Federation and the United States will establish a communication hotline and, if necessary and appropriate, a working group to exchange relevant information after the cessation of hostilities has gone into effect. In addressing incidents of non-compliance, every effort should be made to promote communications among all parties to restore compliance and rapidly de-escalate tensions, and non-forcible means should be exhausted whenever possible before resorting to use of force. The United States and Russia as co-chairs of ISSG Ceasefire Task Force will develop such further modalities and standard operating procedures as may be necessary to implement these functions.

The United States and the Russian Federation together call upon all Syrian parties, regional states and others in the international community to support the immediate cessation of violence and bloodshed in Syria and to contribute to the swift, effective and successful promotion of the UN-facilitated political transition process in accordance with U.N. Security Council Resolution 2254, the February 11 Statement of the ISSG, the 2015 Vienna statements of the ISSG, and the 2012 Geneva Communiqué.

ANNEX  
TERMS FOR CESSATION OF HOSTILITIES IN SYRIA

The nationwide cessation of hostilities is to apply to any party currently engaged in military or paramilitary hostilities against any other parties other than “Daesh”, “Jabhat al-Nusra”, or other terrorist organizations designated by the UN Security Council.

The responsibilities of the Syrian armed opposition are set out in paragraph 1 below. The responsibilities of the Armed Forces of the Syrian Arab Republic, and all forces supporting or associated with the Armed Forces of the Syrian Arab Republic are set out in paragraph 2 below.

1. To take part in the cessation of hostilities, armed opposition groups will confirm—to the United States of America or the Russian Federation, who will attest such confirmations to one another as co-chairs of the ISSG by no later than 12:00 (Damascus time) on February 26 2016—their commitment to and acceptance of the following terms:

- To full implementation of UN Security Council Resolution 2254, adopted unanimously on December 18, 2015—including the readiness to participate in the UN-facilitated political negotiation process;
- To cease attacks with any weapons, including rockets, mortars, and anti-tank guided missiles, against Armed Forces of the Syrian Arab Republic, and any associated forces;
- To refrain from acquiring or seeking to acquire territory from other parties to the ceasefire;
- To allow humanitarian agencies, rapid, safe, unhindered and sustained access throughout areas under their operational control and allow immediate humanitarian assistance to reach all people in need;
- To proportionate use of force (i.e., no greater than required to address an immediate threat) if and when responding in self-defense.

2. The above-mentioned commitments will be observed by such armed opposition groups, provided that the Armed Forces of the Syrian Arab Republic, and all forces supporting or associated with the Armed Forces of the Syrian Arab Republic have confirmed to the Russian Federation as co-chair of the ISSG by no later than 12:00 (Damascus time) on February 26, 2016 their commitment to and acceptance of the following terms:

- To full implementation of UN Security Resolution 2254, adopted unanimously on December 18, 2015, including the readiness to participate in the UN-facilitated political negotiation process;
- To cease attacks with any weapons, including aerial bombardments by the Air Force of the Syrian Arab Republic and the Aerospace Forces of the Russian Federation, against the armed opposition groups (as confirmed to the United States or the Russian Federation by parties to the cessation of hostilities);
- To refrain from acquiring or seeking to acquire territory from other parties to the ceasefire;
- To allow humanitarian agencies, rapid, unhindered and sustained access throughout areas under their operational control and allow immediate humanitarian assistance to reach all people in need;
- To proportionate use of force (i.e., no greater than required to address an immediate threat) if and when responding in self-defense.

The Russian Federation and the United States, as co-chairs of the ISSG and ISSG Ceasefire Task Force, are prepared to work together to ensure effective communications and develop procedures necessary for preventing parties participating in the cessation of hostilities from being attacked by Russian Armed Forces, the U.S.-led Counter ISIL Coalition, the Armed Forces of the Syrian government and other forces supporting them, and other parties to the cessation of hostilities.

All parties further commit to work for the early release of detainees, particularly women and children.

Any party can bring a violation or potential violation of the cessation of hostilities to the attention of the Task Force, either through the OSE or the co-chairs. The OSE and Co-Chairs will establish liaison arrangements with each other and the parties, and inform the public generally about how any party may bring a violation to the attention of the Task Force.

The United States and the Russian Federation as co-chairs confirm that the cessation of hostilities will be monitored in an impartial and transparent manner and with broad media coverage.

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On February 26, 2016, Ambassador Power provided the U.S. explanation of vote on Security Council Resolution 2268 on the cessation of hostilities in Syria. Ambassador Power's statement is excerpted below and available at [http://2009-2017-  
usun.state.gov/remarks/7156](http://2009-2017-<br/>usun.state.gov/remarks/7156)

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We are gathered here at a critical moment. The resolution we have just adopted—in which the Security Council endorses the cessation of hostilities in Syria—offers a genuine opportunity to pause, at least in part, the fighting in one of the most brutal conflicts the world has seen in a generation; a conflict that, for the past five years, this Council and the international community have been unable to stop. This resolution endorses a set of practical, concrete steps—along with terms to which the parties to the conflict must commit—to reduce the violence and create space for a long overdue political transition.

There is some skepticism as to whether this cessation of hostilities—which is scheduled to go into effect in less than an hour, at midnight Damascus time—will be respected from the outset, or, just as important, whether it will hold with time. That skepticism is more than reasonable, given previous efforts that this Council and other multilateral institutions have undertaken to try to stop the monstrous violence and immeasurable suffering experienced by the Syrian people. Yet that record does not change the fact that this is our best chance, it's our best chance to reduce the violence. Today, as in every previous effort, the only measure that matters is not the words on the page of this resolution, it is whether these commitments are actually put into practice and whether these commitments lead to real changes on the ground.

For that to happen, first and foremost, the parties to the conflict must abide by the terms endorsed today. To that end, the United States has continued to consult closely with the major Syrian armed opposition groups, which have confirmed their acceptance of the terms of the

cessation of hostilities through the High Negotiations Committee, the HNC, or directly with us. The vast majority [is] ready to participate in the cessation provided the Syrian government, and the governments and forces supporting it, abide by their commitments under the terms.

We are, therefore, deeply concerned by the continued Syrian and Russian aerial bombardment of towns across Syria; aerial bombing that has caused massive displacement and hundreds of civilian deaths. Many of the towns being hit by Syrian and Russian bombers are towns like Daraya, a suburb of Damascus that is being pummeled—up to this very day—a town that is not held by ISIL or the al-Nusrah Front. It is hard to seem serious and sincere about ceasing hostilities when you ramp up fighting right up to the minute the cessation of hostilities is to take effect.

Second, those countries with influence on the parties must use it to press the parties to live up to their commitments.

And third, when violations occur—as inevitably they will—a sober, coordinated response is critical. The International Syria Support Group has set up a taskforce assigned with specific steps to address allegations of non-compliance, including working with parties to de-escalate violence that could quickly spiral out of control.

Let us be real: it is going to be extremely challenging, especially at the outset, to make this work. In a world of horrific crises, arguably no crisis has done more to threaten international peace and security, or has inflicted as much human suffering, as the conflict in Syria. We are all now broken records here in this Council about the fact that this crisis cannot be resolved through force alone, that it will require a political solution. We've heard it, we've said it. But today, we have an opportunity: if we can make this cessation of hostilities hold—which is a *very* big if—we will take a genuine step toward that political solution we have been talking about for so long.

As we all know, if implemented a cessation of hostilities would not apply to terrorist groups like ISIL, who will continue to fight. Yet even a partial de-escalation would make a real difference in the lives of Syrians. And it would also allow us to expand the reach of humanitarian access, which despite the modest gains that have been made in recent days and weeks, is extremely limited and extremely inadequate—particularly when it comes to hard-to-reach or besieged areas, where people continue to starve to death and die of treatable illness due to a lack of medicine. Man-made starvation continues to go on; man-made deaths because medicine is being stripped from convoys. Regular, sustained, and unimpeded access must be granted to all Syrians in need, no matter where they live.

A cessation of hostilities will also help foster conditions in which Special Envoy de Mistura could reconvene talks between the parties in Geneva, which is crucial to working toward the political transition that offers the only long-term solution to Syria's conflict. That transition, as we have said all along, must be a transition away from Bashar al-Assad, who has lost all legitimacy to lead. As President Obama said yesterday, "It's clear that after years of his barbaric war against his own people—including torture, and barrel bombs, and sieges, and starvation—many Syrians will never stop fighting until Assad is out of power."

The cessation will not itself ensure a political solution is reached, but it does at least create conditions in which one is possible. Beyond respecting the cessation, the parties can take other meaningful steps to build confidence, starting by releasing detainees—especially women and children—who continue to be subjected to deplorable treatment and inhumane conditions.

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It is true that our actions alone will not determine whether or not the cessation of hostilities holds; even if we all act in good faith, other parties have the power to sabotage the cessation by their actions. Yet it is also true that the failure by any one of our nations to live up to our part of the deal—which includes working to ensure that the commitments made are honored, pressing on the parties within our respective spheres of influence, and making sure sober, united steps are taken to de-escalate violations when they occur—could also result in the failure of the cessation. And if this collapses we will lose the most tangible opportunity we have had in a very long time to reduce the suffering of the Syrian people, and to create space for finding a political solution that will finally bring them peace. So much relies on what we do. Let us not squander this chance. Thank you.

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On March 11, 2016, the State Department issued a press statement noting that, after two weeks, the armed factions were adhering to the Cessation of Hostilities in Syria (“COH”) and that the ISSG, the UN, and the United States considered it still in effect at that time. The press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/254633.htm>, also expresses concern about specific violations to the COH, “including attacks on civilians and opposition forces by the regime and its supporters” and calls for the violations to cease. The press statement continues:

The Cessation of Hostilities has produced a dramatic reduction in violence in Syria and permitted humanitarian access to begin in some besieged areas. At the same time, more must be done by the international community to stop the violence, end the sieges permanently, deliver the aid, and release detainees, particularly women and children. We are at a critical moment in this conflict. We should not squander it through neglect or willful negligence. All parties must abide by their obligations.

On May 2, 2016, Secretary Kerry delivered remarks with UN Special Envoy Steffan de Mistura after their meeting in Geneva. Secretary Kerry observed that the COH was beginning to fray. His remarks are excerpted below and available in full at <http://2009-2017.state.gov/secretary/remarks/2016/05/256774.htm>.

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The cessation of hostilities that we were able to negotiate and put in place over the Christmas holiday and into January has had a profoundly positive impact on the lives of many Syrians during the time that it has been kept, and over much of Syria violence has been significantly down, many lives have been saved, and many communities have succeeded in having humanitarian assistance delivered after in some cases years in which they had no humanitarian assistance. But it is a fact that in the last weeks, the cessation of hostilities has been put to test, and it has frayed in certain areas and it has fallen completely in a few areas. And so we are

engaged in an effort with all of the members of the International Syria Support Group and with Russia particularly in an effort to restore that cessation of hostilities in those places where it has been most at risk or most shredded.

In particular, in the last hours of Saturday morning, we were able to restore a brief period of the cessation going back into effect in East Ghouda and in Latakia. And now we are very much working and focused on the question of restoring the cessation of hostilities to the remaining areas where it's been disturbed, but particularly to Aleppo. And Aleppo is particularly disturbing to everyone for what has happened there. There are three health clinics now, one major hospital, that have been attacked from the air by bombs. There are only two air forces flying in that particular area, and the Russians are clear that they were not engaged or flying at that time. The regime has clearly indicated the willingness, over a period of time now, to attack first responders, to attack health care workers and rescue workers. And the attack on this hospital is on unconscionable, under any standard anywhere. It has to stop.

The last pediatrician who was serving people in the Aleppo area was killed the other day in this hospital, not to mention probably some 250 civilians, some of whom were killed by the other side. So both sides—the opposition and the regime—have contributed to this chaos. And we are working over these next hours intensely in order to try to restore the cessation of hostilities, and at the same time to raise the level of accountability that will accompany the day-to-day process of implementing the ceasefire. To that effect Russia and the United States have agreed that there will be additional personnel who will work from here in Geneva on a daily basis—24 hours a day, 7 days a week—in order to try to make sure that there is a better job and a better ability to be able to enforce the cessation of hostilities day to day.

I will be talking later today by telephone with Foreign Minister Lavrov, and Staffan de Mistura will be traveling to Moscow tomorrow for meetings. . . . So we are trying in the next hours to see if it is possible to reach agreement that can not just re-implement cessation, but create a path forward for the cessation to hold so that there isn't one day of silence or two days of silence, but an ongoing process that relieves the people of Syria from this devastation, from this day-to-day killing machine that is being unleashed by the Assad regime. And obviously, it is incumbent on the United States and our colleagues in the International Syria Support Group to keep our part of the bargain, which is to make certain that the opposition is living up to this agreement, and it is incumbent on Russia and Iran as they have accepted responsibility to make sure that the regime is living up to its part of this agreement.

At the same time, it is imperative that the full measure of the United Nations Security Council Resolution 2254—which not only calls on the parties to have a cessation of hostilities, of a country-wide ceasefire, but it is imperative that the humanitarian access that was promised in that resolution is delivered. And the regime, unfortunately, is still preventing access to certain communities. So that has to be part of our ability to be able to get back to political talks. You cannot have legitimate political talks about peace when the parties at the table have both signed up to an agreement which calls for a full cessation of hostilities countrywide as well as a full delivery of humanitarian materials countrywide, and yet one party is blatantly violating that agreement.

So this is the moment to try to make certain that what everybody has signed up to is in fact being delivered, being lived up to, without hypocrisy and without variation. And that's what we're working for, and I'm hopeful that over the course of the next day or so greater clarity will be available as to exactly what progress has been made.

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On May 4, 2016, the State Department issued a press statement reaffirming the cessation of hostilities in Aleppo, Syria. The statement follows and is available at

<http://2009-2017.state.gov/r/pa/prs/ps/2016/05/256865.htm>

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As part of our urgent efforts to de-escalate violence in Syria and reaffirm the Cessation of Hostilities nationwide, the United States and Russia concluded arrangements late yesterday to extend this effort to Aleppo province, including Aleppo city and its surrounding areas. Since this went into effect today at 00:01 in Damascus, we have seen an overall decrease in violence in these areas, even though there have been reports of continued fighting in some locations.

To ensure this continues in a sustainable way, we are coordinating closely with Russia to finalize enhanced monitoring efforts of this renewed cessation. We expect all parties to the Cessation of Hostilities to abide fully by the renewed cessation in Aleppo and throughout the entire country, pursuant to the terms of the arrangements established in Munich in February 2016. Attacks directed against Syria's civilian population can never be justified, and these must stop immediately.

We look to Russia as a co-chair of the International Syria Support Group to press for the Assad regime's compliance with this effort, and the United States will do its part with the opposition. Following the regime's overnight airstrikes against Eastern Ghouta, we welcome today's reaffirmation of the cessation in Eastern Ghouta for the next 48 hours. It is critical that Russia redouble its efforts to influence the regime to abide fully by the cessation.

Our objective remains, and has always been, a single nationwide cessation of hostilities covering all of Syria—not a series of local truces. We are determined to reaffirm the Cessation of Hostilities across Syria and will continue expanding this effort so we can de-escalate the violence, alleviate the suffering, and help create the conditions that enable the parties to resume negotiations focused on a political transition, as called for in UN Security Council Resolution 2254 and the 2012 Geneva Communique.

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On May 9, 2016, the Russian Federation and the United States issued a joint statement on Syria, excerpted below and available as a State Department media note at

<http://2009-2017.state.gov/r/pa/prs/ps/2016/05/256998.htm>

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The Russian Federation and the United States of America, as co-chairs of the International Syria Support Group (ISSG), recognize the progress that has been made with respect to the cessation of hostilities (CoH) in Syria, in accordance with our Joint Statement of February 22, 2016, and in

improving humanitarian access. We believe our joint efforts have brought about a significant decrease in violence in the areas of North Latakia and East Ghouta. However, we also recognize the difficulties faced by the CoH in several areas of the country, especially in the recent period, as well as remaining problems in ensuring humanitarian access to the besieged areas. As a result, we have decided to reconfirm our commitment to the CoH in Syria and to intensify efforts to ensure its nation-wide implementation. We also intend to enhance efforts to promote humanitarian assistance to all people in need in accordance with United Nations Security Council Resolution 2254.

#### Cessation of Hostilities

The co-chairs re-affirm our commitment to the nationwide CoH that went into effect on February 27 across Syria, and have decided to pursue the following measures to reinvigorate it:

1. Recognizing challenges related to the CoH in certain areas the co-chairs have re-emphasized the terms of the COH with field commanders on all sides, especially in Aleppo, Eastern Ghouta, and Latakia, where we are determined to improve and sustain the CoH. We are using our influence with the CoH parties on the ground to press them to abide by the COH, refrain from disproportionate responses to provocations and demonstrate restraint.
2. We demand that parties cease any indiscriminate attacks on civilians, including civilian infrastructure and medical facilities. Where attacks leading to significant civilian casualties are reported to have occurred, the co-chairs are committed to undertaking, within existing channels of interaction in Geneva, the region, and capitals, a joint assessment and to sharing the results with the members of the ISSG Ceasefire Task Force and, through the UN Special Envoy for Syria, to the UN Security Council.
3. The Russian Federation will work with the Syrian authorities to minimize aviation operations over areas that are predominantly inhabited by civilians or parties to the cessation.
4. The co-chairs are urging all states to implement United Nations Security Council Resolution 2253 (December 17, 2015) by preventing any material or financial support to ISIL, the al Nusra Front, as well as any other groups designated as terrorist organizations by the United Nations Security Council, and to prevent attempts by such groups to cross the Syrian border. To that end, the United States is committed to intensifying its support and assistance to regional allies to help them prevent the flow of fighters, weapons, or financial support to terrorist organizations across their borders.
5. In order to maintain the effectiveness of the CoH, the co-chairs are committed to undertaking efforts to develop a shared understanding of the threat posed, and territory controlled, by ISIL and the Nusra Front, and to consider ways to deal decisively against the threat posed by ISIL and the Nusra Front to Syria and international security.

#### Ensuring Humanitarian Access

Since January 2016 the UN, in coordination with the ICRC and Syrian Arab Red Crescent, have taken significant steps to deliver assistance to 255,250 people in besieged areas and 472,975 people in hard-to-reach areas. However, many Syrians with urgent needs have yet to be reached, especially in besieged communities. Life-saving assistance, including certain medical supplies and personnel to ensure their proper use, has been denied to populations in need. UN assessment teams and humanitarian personnel have been barred from accessing certain besieged areas.

In order to urgently deliver humanitarian aid, the Russian Federation and the United States of America are committed to pressing the parties to ensure continuous delivery of assistance to Douma, East Harasta, Arbeen, Zamalka, Darayya, Zabadin, Fouah, Kafrayah, Madaya, Zabadani, Mouadhimiyyeh, Yarmouk, Ein Terma, Hammura, Jisrein, Saqba, and Kafir Batna by land, and that it continues as long as humanitarian needs persist. Deliveries by air will be continued to Deir ez Zor for approximately 110,000 people in need. In addition, we reaffirm the need for continuous deliveries to all locations considered by the UN to be hard-to-reach, such as al Waer, Talbisseh, al Rastan, and Afrin. We also recommend that the UN consider other locations that may meet the criteria for priority designations, including Nubul, Zahra, and Hasakeh. Humanitarian access, including by medical personnel, to these most urgent areas must be a first step toward full, sustained, and unimpeded access throughout the country. As called for in UNSCR 2258, border crossings that are necessary for humanitarian relief should remain open.

Humanitarian aid will be delivered based on need, with the full package of food, medical, and non-food items as decided by the UN authorized for delivery by all sides. The provision of mobile health services and evacuation of urgent medical cases should be facilitated by all sides.

The co-chairs reaffirm that all parties must allow immediate and sustained humanitarian access to reach all people in need, throughout Syria, particularly in all besieged and hard-to-reach areas, in accordance with UNSCR 2254. The co-chairs commit to immediately work together with the Syrian parties to ensure no delay in the granting of approval and completion of all pending UN requests for access in accordance with the UN's monthly plans. The co-chairs urge all parties to effectively address the issue of detainees and hostages in accordance with UNSCR 2254, 2258, and other relevant resolutions. We also support the UN's appeals for continued funding of the Syria Response Plan, and encourage the international community and UN to intensify efforts to meet the needs of internally displaced persons across Syria.

#### Supporting a Political Settlement in Syria

The Russian Federation and United States are determined to redouble efforts to reach a political settlement of the Syrian conflict consistent with UNSCR 2254 through the intra-Syrian negotiations in Geneva under UN auspices. We concur that these talks should be resumed on the basis of the Special Envoy's mediator's summary of April 27, in particular the annex addressing the fundamental issues for a viable transition, and the section on the commonalities on the political transition. We urge all parties to the conflict, fellow ISSG members, and other members of the international community to promote and support a political settlement in Syria through the full implementation of UN Security Council resolutions 2254 and 2268, the 2016 Munich and 2015 Vienna Statements of the ISSG, and the 2012 Geneva Communiqué. In this regard, the co-chairs strongly support efforts to end violence and bloodshed, counter the threat of terrorism, and ensure the implementation of international humanitarian law.

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On May 9, 2016, Secretary Kerry delivered remarks in Paris before meeting with French Foreign Minister Jean-Marc Ayrault. Secretary Kerry's remarks are excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/05/257044.htm)

[2017.state.gov/secretary/remarks/2016/05/257044.htm](http://2009-2017.state.gov/secretary/remarks/2016/05/257044.htm).

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...[T]oday the Russian Federation and the United States released, as co-chairs of the International Syria Support Group and shared with all of our colleagues, a document that will reinstate a nationwide cessation of hostilities as well as calls on the full delivery of humanitarian assistance according to the UN Security Council Resolution 2254.

Now, as I said before when we were in Vienna, these are words on a piece of paper. They are not actions, but they are a commitment by Russia to, in fact, limit the Syrian regime from its ability to fly in civilian-occupied areas as well as to work with the commanders on the ground in order to try to deliver stability and a reaffirmation of the cessation of hostilities.

So the most we diplomats can do is try and bring the parties together and put together an agreement that asserts the international community's imperative. It is going to be up to the commanders on the field and the interested parties, which includes us. We have a responsibility ... to make certain that the opposition lives up to this, and Russia and Iran have a responsibility to make sure that the Assad regime lives up to this. But after many hours of discussions, the Russians made clear that that's the route that they're prepared to go. But again, the proof will be in the eating of the pudding, not the making, and we'll have to see what happens.

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Also on May 9, 2016, a U.S. government official provided a special briefing on Syria and the joint statement with Russia. The briefing is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257042.htm>

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...[T]he statement with Russia affirms our shared understanding of efforts to revitalize the nationwide cessation of hostilities in Syria, and that's opposed to reverting to local ceasefires. It also explains our commitment to making particularly intensive efforts in specific hot spot areas of Aleppo, Eastern Ghouta, and Latakia. It has a clear demand which Russia joins on parties to cease any indiscriminate attacks on civilians, including civilian infrastructure and medical facilities. It has a commitment for undertaking a joint assessment where such incidents are reported to have occurred with casualties, as well as to share that with the members of the task force and through the UN Special Envoy Staffan de Mistura to the UN Security Council.

There's also a commitment by Russia to work with the Syrian authorities to minimize aviation operations over areas that are predominantly inhabited by civilians or parties to the cessation. There's also a clear call on the parties for ensuring continuous delivery of humanitarian access including to besieged areas that haven't been reached yet, and those are specifically named, and for unconditional delivery without obstruction of medical personnel and equipment, having access to those areas as well.

... There has been a reduction in violence in various parts of Aleppo. We've seen a decrease, although there are pockets where that has not been the case. There has been fighting in the southwest, for example, fairly intensive, although that fighting is involving Nusrah and other groups that are not party to the cessation. So fighting there shouldn't be seen as indicative of the

cessation not being in effect or being extended in Aleppo. We are fully committed to its extension in Aleppo. Each side has communicated with commanders, saying that the other side is called upon to honor the cessation and that they should reciprocate.

So the cessation of hostilities is in effect in Aleppo, but there are periods—pockets where there has been fighting, certainly in the last 12 to 24 hours. One would like to see a decrease there, but in the areas I just mentioned where Nusra is operating we may not see that right away.

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... the cessation went into effect on the 27th of February as far as not striking parties to the cessation or civilians. I think we've raised serious concerns about the strains and the very real strains the cessation underwent and violations that we've seen in recent weeks, and so we believe that it was quite important to renew the commitment with a particularly intensive focus on areas or hot spots where we've seen more violence, Aleppo being among them.

Now, there is no prohibition on overflight or general air operations, so an undertaking on their part to work with minimizing air operations over these areas is an additional measure that, if implemented, would strengthen the COH. They are not restricted from striking Nusra, but minimizing air operations even where Nusra is present, if in an area that's predominantly inhabited by civilians or the parties to the cessation would help with implementation of the cessation more generally.

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So our view is that the renewal of the cessation of hostilities coupled with humanitarian access—indeed being allowed in the besieged and hard-to-reach areas and for the assistance to be continuous—these things create ... a far more conducive environment towards the parties being able to tackle very difficult political issues.

The statement points to the mediator's summary that was issued following the last round of talks between the 13th and the 27th of April, which in its annex listed many different issues that the parties need to tackle for the political transition to be viable. And it's important to note in there that among the things it covers are how is power to be exercised in practice by the transitional governance, including in relation to the presidency, executive powers, control over the government's own security institutions.

... But they're very, very difficult issues, to be certain. So the issues are difficult, and equally the cessation—... when it went into effect, we knew that it would face setbacks and that it would take strenuous efforts to get it back on track. The same remains today. But the commitment that we have from both co-chairs is to work through those challenges—indeed, to try to get it back on track.

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On May 17, 2016, the State Department published as a media note another statement by the ISSG. The statement follows and is available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257295.htm)

[2017.state.gov/r/pa/prs/ps/2016/05/257295.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257295.htm).

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Meeting in Vienna on May 17, 2016, as the International Syria Support Group (ISSG), the Arab League, Australia, Canada, China, Egypt, the European Union, France, Germany, Iran, Iraq, Italy, Japan, Jordan, Lebanon, The Netherlands, the Organization of Islamic Cooperation, Oman, Qatar, Russia, Saudi Arabia, Spain, Turkey, the United Arab Emirates, the United Kingdom, the United Nations, and the United States reaffirmed the ISSG's determination to strengthen the Cessation of Hostilities, to ensure full and sustained humanitarian access in Syria, and to ensure progress toward a peaceful political transition.

#### Cessation of Hostilities

Members, emphasizing the importance of a full cessation of hostilities to decreasing violence and saving lives, stressed the need to solidify the cessation in the face of serious threats, particularly during the past several weeks. The members welcomed the Joint Statement of May 9 by Ceasefire Task Force Co-Chairs, the Russian Federation and the United States, recommitting them to intensify efforts to ensure the cessation's nationwide implementation. In this regard, they welcomed the ongoing work of the Task Force and other mechanisms to facilitate solidifying of the cessation such as the UN Operations Center and Russian-U.S. Coordination Cell in Geneva.

The ISSG Members urged full compliance of the parties to the terms of the cessation, including the ceasing of offensive operations, and undertook to use their influence with the parties to the cessation to obtain this compliance. Additionally, the ISSG called upon all parties to the cessation to refrain from disproportionate responses to provocations and to demonstrate restraint. If the commitments of the parties to the cessation are not implemented in good faith, the consequences could include the return of full-scale war, which all the Members of the ISSG agreed would be in no one's interest. Where the co-chairs believe that a party to the cessation of hostilities has engaged in a pattern of persistent non-compliance, the Task Force could refer such behavior to the ISSG Ministers or those designated by the Ministers to determine appropriate action, including the exclusion of such parties from the arrangements of the cessation and the protection it affords them. Moreover, the failure of the cessation of hostilities and/or of the granting of access to the delivery of humanitarian relief will increase international pressure on those failing to live up to these commitments.

Noting previous calls by the ISSG and the unanimously-adopted UNSCR 2254 of December 18, 2015, the ISSG reiterated its condemnation of the indiscriminate attacks by any party to the conflict. The ISSG expressed its serious concern about growing civilian casualties in recent weeks, making clear that the attacks on civilians, including attacks on medical facilities, by any party, is completely unacceptable. The ISSG took note of the March 2016 commitment by the Syrian government not to engage in indiscriminate use of force and urged the fulfillment of that commitment. The ISSG committed to intensifying its efforts to get the parties to stop any further indiscriminate use of force, and welcomed the Russian Federation's commitment in the Joint Statement of May 9 to "work with the Syrian authorities to minimize aviation operations over areas predominantly inhabited by civilians or parties to the cessation, as well as the United States' commitment to intensifying its support and assistance to regional allies to help them prevent the flow of fighters, weapons, or financial support to terrorist organizations across their borders."

The ISSG, noting that Da'esh and the Nusra Front are designated by the UN Security Council as terrorist organizations, urged that the international community do all it can to prevent any material or financial support from reaching these groups and dissuade any party to the cessation from fighting in collaboration with them. The ISSG supports efforts by the co-chairs of the Ceasefire Task Force to develop a shared understanding of the threat posed, and delineation of the territory controlled, by Da'esh and the Nusra Front, and to consider ways to deal decisively with the threat posed by Da'esh and the Nusra Front to Syria and international security. The ISSG stressed that in taking action against these two groups, the parties should avoid any attacks on parties to the cessation and any attacks on civilians, in accordance with the commitments contained in the February 22 Joint Statement of the Russian Federation and the United States.

The ISSG also pledged support for seeking to transform the cessation into a more comprehensive nationwide ceasefire in parallel with progress in negotiations for a political transition between the Syrian parties consistent with the Geneva Communiqué of June 2012, relevant UNSC Resolutions and ISSG decisions.

#### **Ensuring Humanitarian Access**

Since the ISSG's last meeting, the UN, in coordination with the International Committee of the Red Cross (ICRC) and Syrian Arab Red Crescent, has delivered assistance to 255,000 people in besieged areas and 473,000 people in hard-to-reach areas. However, the Syrian government has yet to permit access to many locations including a number of besieged communities in Rural Damascus, in contravention of the Munich Statement. UN assessment teams, life-saving assistance, including medical supplies and personnel to ensure their proper use, have been denied to populations in need. Although some urgent medical evacuations have taken place, many cases have been delayed or denied.

The members of the ISSG reaffirmed that sieges of civilian populations in Syria are a violation of International Humanitarian Law and called for the immediate lifting of all sieges. The ISSG committed to use its influence with all parties on the ground and in coordination with the United Nations to ensure immediate, unimpeded and sustained humanitarian access throughout Syria, and allow humanitarian assistance to reach all people in need, particularly in all besieged and hard-to-reach areas, as defined by the UN and called for in UNSCR 2254. As called for in UNSCR 2258, border crossings that are necessary for humanitarian relief should remain open.

The ISSG insisted on concrete steps to enable the provision of urgent humanitarian deliveries to the following locations: Arbeen, Darraya, Douma, East Harasta, Mouadhimiyeh, Zabadin and Zamalka. Regular humanitarian deliveries must continue, according to the UN's monthly plans, to all other besieged and hard to reach locations, including Fouah, Kefraya, Kafr Batna, Ein Terma, Hammura, Jisrein, Madaya, Zabadani, Yarmouk. Starting June 1, if the UN is denied humanitarian access to any of the designated besieged areas, the ISSG calls on the World Food Program to immediately carry out a program for air bridges and air drops for all areas in need. The ISSG pledges to support such a program, and also calls on all parties to the cessation of hostilities to provide a secure environment for that program. Air deliveries should also continue to Dayr al-Zour. The ISSG stressed that such access, as in other areas, must be continuous for as long as humanitarian needs persist. Humanitarian access to these most urgent areas will be a first step toward full, sustained, and unimpeded access throughout the country.

The Members of the ISSG look forward to seeing the UN's June plan for priority humanitarian deliveries and urge the government to approve it swiftly and in its entirety to make up for lost time. All ISSG members commit to work together immediately with the Syrian parties to ensure no delay in the granting of approval and completion of all UN requests for access consistent with UNSCR 2254, paragraph 12.

The ISSG reaffirmed that humanitarian access should not benefit any particular group over any other, but must be granted by all sides to all people in need, in full compliance with UNSCR 2254. Humanitarian aid is to be delivered based on need, for the number of beneficiaries specified by the UN, with the full package of food, medical, surgical, water, sanitation, non-food items, and any other urgently required goods as determined by the UN. The provision of mobile health services and evacuation of urgent medical cases should be facilitated by all sides based solely on urgency and need.

The ISSG asked the UN to report weekly, on behalf of the Task Force, on progress on the implementation of the plan referenced above, so that in any cases where access lags or approvals are lacking, relevant ISSG members could use their influence to press the requested party or parties to provide that approval and access. The ISSG further decided that in cases where humanitarian access is systematically denied, either fully or by the denial of delivery of certain categories of humanitarian aid or disagreements over the number of beneficiaries, the ISSG, with the agreement of the co-chairs, can inform the Security Council through the UN Special Envoy for Syria.

ISSG co-chairs and participants pledged to ensure that humanitarian aid convoys are used solely for humanitarian purposes. International humanitarian organizations, in particular the United Nations, will play the central role, as they engage the Syrian government, Syrian Arab Red Crescent, the opposition and local populations, in arranging the monitoring and sustained and uninterrupted distribution of aid.

We encourage the international community and the UN to intensify efforts to meet the needs of internally displaced persons across Syria, without losing sight of the imperative of building conditions for the safe return of the refugees, including during the transition, in accordance with all norms of international humanitarian law and taking into account the interests of the host countries.

#### Advancing a Political Transition

The ISSG reiterated the objective of meeting the target date established by UNSCR 2254 of August 1 for the parties to reach agreement on a framework for a genuine political transition, which would include a broad, inclusive, non-sectarian transitional governing body with full executive powers. In this regard, they welcomed the "Mediator's Summary" issued after the third round of intra-Syrian talks on April 27 by UN Special Envoy Staffan de Mistura, and endorsed in particular the "Commonalities on Political Transition" noted within the report as well as the "Fundamental Issues For a Viable Transition" contained in Annex 1 of the report that may serve as the basis for the next round of the intra-Syrian negotiations. The ISSG notes that the parties have accepted a political transition will be overseen by a transitional governing body formed on the basis of mutual consent and vested with full executive powers, to ensure continuity of governmental institutions, in accordance with UNSCR 2254. On the basis of the Geneva Communiqué, the ISSG urged the parties to engage constructively with the UN Special Envoy in addressing the fundamental issues for a transition, as set out by the Special Envoy. ISSG Members believe that the parties should return to negotiations on that basis at an appropriate time.

All ISSG members reaffirmed that political transition in Syria must be Syrian-owned and Syrian-led, and expressed their unequivocal and united commitment to facilitating the start of political transition in Syria by consistent with resolution 2254 (2015) and previous ISSG statements of October 30 and November 14, 2015, and February 11, 2016. The ISSG also requests UN Special Envoy for Syria de Mistura to facilitate agreements between the Syrian parties for the release of detainees. The ISSG called upon any party holding detainees to protect the health and safety of those in their custody.

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The parties were not able to meet the target of August 1 to reach agreement on a framework for a political transition and the cessation of hostilities further unraveled over the summer.

Secretary Kerry provided a statement to the press after the ISSG meeting on September 22, 2016 in New York City, New York. That statement is excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/09/262314.htm>.

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... There are reports that even as we were meeting this afternoon, a regime offensive was taking place in Aleppo, which is exactly the kind of regime action that has done so much damage to this process and to the credibility of the concept of restraint or ceasefire.

As I said yesterday in the UN Security Council, this is a moment of truth for Russia, it's a moment of truth for the Assad regime and for the opposition. And it's a moment of truth for everybody, all of us, who are determined to try to end this war in Syria and to defeat the terrorist groups Nusrah and Daesh/ISIL.

So let's confront some of the hard truths here. The United States continues to believe that the objectives and the processes laid out in Geneva earlier this month were and are the right ones: a renewal of the cessation of hostilities, the resumption of aid deliveries, the isolation of al-Nusrah and Daesh, and the beginning of a Syrian-led negotiating track that can provide a pathway out of the conflict and make possible the restoration of a united and peaceful Syria.

We remain absolutely convinced there is no such thing as a military solution. There can only be a political solution in order to actually get extremists and all of the parties to end the violence. Without that political solution, one party or the other will continue to prosecute in its own way—whether it's just suicide belts or car bombs—but the violence will continue, and the capacity to put Syria back together will not present itself.

Now, obviously, no one can possibly be satisfied with the events that have unfolded in the last few days—far, far from it. The cessation offered a glimmer of what could be achieved in the first few days when violence dropped significantly, but then the spoilers went to work. Humanitarian aid deliveries were blocked. The ceasefire was violated by one or the other again and again. And accusations were then exchanged. And then Monday, one of the first aid convoys that was actually allowed to move towards Aleppo was brutally attacked.

Let me be clear: The United States makes absolutely no apology for going the extra mile to try to ease the suffering of the Syrian people and to ensure that they have access to food and to medicine and to other critical supplies. We will continue to fight for that. This war has been going on for five years, and for a few moments here and there, when we've been able to try to get the parties to stop fighting, we've been able to see what a reduction of violence can actually look like. And we've been able to witness how much the Syrian people themselves, wherever they live, long for a taste of normalcy.

But we can't be the only ones trying to hold this door open. Russia and the regime must do their part, or this will have no chance. The question now is whether there remains any real chance of moving forward, because it's clear we cannot continue on the same path any longer.

This effort has always depended on Russia having the will and the wherewithal both to comply and to deliver the Assad regime and its partners, and depends on the opposition and its supporters willing to live up to their obligations, to their commitments. And in the end, without that compliance, none of this can work.

And we have said for days that it will take significant and immediate steps in order to put things back on track, not little changes around the margins. A lot of people doubt that this can be done or that, in fact, the key parties want it done. So the first thing that we have to do is find the way to restore credibility to the process if that can be done, and that means that we need significant action now. It can't be based on exceptions and loopholes and carve-outs that every time are exploited by one party or another in order specifically to undermine the cessation of hostilities. It has to be achieved through a genuine and sustained reduction in violence as well as unfettered humanitarian access that is unmistakable to everyone.

The only way to achieve that is if the ones who have the air power in this part of the conflict simply stop using it—not for one day or two, but for as long as possible so that everyone can see that they are serious. Absent a major gesture like this, we don't believe there is a point in making more promises or issuing more plans or announcing something that simply can't be enforced or reached. If Russia demonstrates that it is serious, we will work with the opposition to reciprocate and to pull back from this cycle of escalation, because the opposition also has a responsibility to observe the cessation of hostilities if the government does and to disassociate from al-Nusra.

So make no mistake: The United States will continue to pursue every avenue of progress that we can, because it is the only way to stop the killing, it's the only way to ease the suffering, and it's the only way to make possible the restoration of a united Syria. And because if we do not succeed in doing this one way or the other, this catastrophic situation is going to get even worse.

But at the same time, we can't go out to the world and say we have an agreement when we don't, nor can we tell our partners that there is a cessation when there isn't. The simple reality is that we can't resolve a crisis if one side is unwilling to do what is necessary to avoid escalation. And we won't get anywhere if we begin by ignoring facts and plain common sense or denying the truth.

I want to emphasize that both the regime and the opposition have an obligation to comply with the United Nations Security Council mandates that international humanitarian law be observed, that aid be allowed to reach besieged areas, that the UN role be respected, and that the safety of aid workers be guaranteed.

Now, Sergey Lavrov and I have spent a part of the last couple of days discussing how and whether we can agree on the necessary steps in order to be able to move forward, and we had good suggestions in the ISSG today about monitoring and other ways to try to advance this

process. And we have exchanged ideas with the Russians and we plan to consult tomorrow with respect to those ideas.

In today's meeting of the ISSG, we heard near unanimity that this process is the only viable path forward. So I am no less determined today than I was yesterday, but I am even more frustrated, obviously. If the Russians come back to us with constructive proposals, we will listen. ... This is not a time for maneuvering or for delay. It is time to make decisions that will benefit the people of Syria and hopefully bring stability to a country and to a region that is in absolutely desperate need.

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Also on September 22, 2016, senior U.S. government officials provided a background briefing on the ISSG meeting via teleconference. Excerpts follow from the transcript of the briefing, which is available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262319.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/262319.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262319.htm).

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...[W]e just got out of a two-and-a-half-hour-plus meeting of the International Syria Support Group. It was a pretty contentious meeting, which is not surprising because it's been a pretty contentious week on the subject of Syria both here in New York and then obviously and more importantly on the ground in Syria as well.

We received reports during the course of the meeting of an announced regime offensive on the city of Aleppo, which was just further evidence of what the Secretary has been describing all week of the type of acts that are eroding the credibility of this process, and also of why we are not sure at this point whether or not it can be fixed.

As we've said for days, getting things back on track is going to require extraordinary steps by the Russians and the regime. And as the Secretary has been quite clear about, bombing has been the biggest challenge both to the cessation of hostilities and also the biggest threat to Syrian civilians during the course of this conflict. So the discussion of extraordinary steps has focused very much on bombing and on the types of steps that could take regime and Russian forces out of the skies over parts of the country where this has been a problem.

As you heard the Secretary say, he and Foreign Minister Lavrov have exchanged ideas on these topics. They have agreed to continue consulting on this subject both tomorrow and on these ideas both tomorrow and in the coming days. And our view at this point is if the Russians come back to us with something significant and something serious, we will be ready to listen. But again, I want to stress at this point that it's going to require something extraordinary beyond the types of things that have been agreed in the past, and that we are not sure at this point whether they are ready and willing to take those kinds of steps.

The only other thing I want to tell people about this ISSG meeting is about the only thing that there was clear consensus on is that this process, troubled as it is, gives us the best chance of any available avenue for finding a way forward in Syria that can reduce the violence, increase the humanitarian access, and eventually get us to the point where we can have a viable conversation about a political transition.

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On September 24, 2016, the Secretary of State joined the foreign ministers of France, Italy, Germany, the United Kingdom, and the High Representative of the European Union in issuing a statement on Syria. The statement follows and was posted as a State Department media note at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262382.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/262382.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262382.htm).

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The devastating events in Syria this week underscore what we have been saying for some time: the burden is on Russia to prove it is willing and able to take extraordinary steps to salvage diplomatic efforts to restore a cessation of hostilities (CoH), allow unfettered humanitarian assistance and create the conditions necessary for the resumption of UN-led talks about a political transition.

The outrageous bombing of a humanitarian convoy, the Syrian regime's public denunciation of the CoH, continuing reports that the regime is using chemical weapons, and the unacceptable ongoing regime offensive on eastern Aleppo, supported by Russia, blatantly contradicts Russia's claim that it supports a diplomatic resolution. The Quint nations and the European Union High Representative therefore call on Russia to take extraordinary steps to restore the credibility of our efforts, including by halting the indiscriminate bombing by the Syrian regime of its own people, which has continually and egregiously undermined efforts to end this war. We welcome recent proposals made in the International Syria Support Group to enhance monitoring of these efforts.

We reaffirm our commitment to the destruction of Da'esh in Syria and Iraq and urge Russia to follow through on its pledge to actually focus on this group. We also reaffirm our shared view that the Nusra Front, al Qaeda's affiliate in Syria, is a terrorist organization and an enemy of the international community. Nusra rejects a negotiated political transition and inclusive democratic future for Syria, and we call on all armed groups fighting in Syria to cease any collaboration with Nusra.

We demand immediate, expanded humanitarian access to all areas of Syria, including those on the United Nations' priority list, and we deplore the delays and obstruction caused primarily by the Syrian regime of humanitarian deliveries to Syrians in desperate need. We fully support the United Nations investigations of the use of chemical weapons in Syria and are resolved to take further action to address it.

Finally, the Quint and the EU High Representative reaffirm calls made in this week's meetings of the International Syria Support Group for the Co-Chairs to continue their diplomatic consultations on these issues, but also underscore that patience with Russia's continued inability or unwillingness to adhere to its commitments is not unlimited. We therefore also call on the UN Security Council to take urgent further steps to address the brutality of this conflict, and particularly the assault on Aleppo.

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On December 15, 2016, Secretary Kerry delivered remarks on Syria in Washington, DC. His remarks are excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/12/265696.htm>.

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Hello, everybody. I just wanted to bring you all up to date on what we've been trying to do with respect to the tragic situation in Syria, and obviously mostly focused or especially Aleppo.

I don't think I have to elaborate, but I'm going to certainly focus on the anger and the anguish that everybody feels—or most people feel—about the continued relentless and inexcusable attacks that have been directed at the civilian population in Aleppo, including women, children, humanitarian workers, and medical personnel. And there is absolutely no justification whatsoever for the indiscriminate and savage brutality against civilians shown by the regime and by its Russian and Iranian allies over the past few weeks, or indeed for the past five years.

Now, the position of the United States remains clear, and I have personally reiterated that position in conversations over the past weeks and especially over the past 24 hours, with the UN Special Envoy Staffan de Mistura, who I talked with earlier today who was in Paris meeting now with Jean-Marc Ayrault, and with senior officials from Russia, Qatar, Turkey, Egypt, Saudi Arabia, and other countries in the region.

What the United States is working toward, and has been working towards for some period of time now, under difficult circumstances, where, if some parties do not want to move in that direction, it remains very difficult to secure, obviously, a ceasefire; but what we want in Aleppo right now, which is the precursor to any ability to move to other things, is an immediate and verifiable, durable cessation of hostilities, and that includes all attacks by the regime, its allies, and other combatants in Aleppo—all combatants in Aleppo.

And we've been working very hard on that. We worked on that in Hamburg, in my meetings with Foreign Minister Lavrov, where we reached some measure of agreement—in fact, a considerable measure of agreement—but weren't able to secure every component of what was needed in order to move forward. We want safe passage, corridors of evacuation, which we're beginning today to see perhaps take shape. But we want to see those for both civilians and fighters who choose to evacuate the city. We want full access for the delivery of humanitarian supplies to people in need throughout Syria. And with these steps, we are convinced that the killing and the suffering in Syria could stop, and it could stop very, very quickly, if Russia and the regime made the decision to do so.

This morning, I was encouraged by reports that, after a number of fits and starts, what we worked on in Paris and then got picked up on in continued conversations—which, by the way, we were informed of by Russia and Turkey were going to take place—to build out on what we'd talked about, actually using the same template that we had created. There are individual ceasefires being worked out, individual arrangements with armed opposition group commanders. And it appears, for some period of time at least—we don't know yet if it will hold or where it is—that airstrikes and shelling have stopped and that the ceasefire may—I emphasize may—be taking hold.

Buses, some of them in convoys, are beginning to move. And my understanding is that the first group of 21 buses and 19 ambulances reached its checkpoint at Khan al-Assal. Now, this convoy includes more than 1,000 people who are on their way to the Turkish border. However, ... we also heard reports that a convoy of injured people was fired on by forces from the regime or its allies. And we remain deeply concerned as well that we are hearing reports of Syrian men between the ages of 18 and 40 who have apparently been detained or conscripted into military service when trying to pass through government checkpoints and that some who—of these actually went missing days or even weeks ago, and we still don't have, the families don't have, their loved ones don't have accountability for what has happened to them. Obviously, these actions are despicable and they're contrary to the laws of war and to basic human decency.

Now, more positively, we have finally received pledges from Russia that it will assist in the monitoring of evacuations, that the International Red Cross and the Syrian Arab Crescent, Red Arab Crescent, will also be allowed access in order to be able to try to help with the monitoring. The UN is prepared to receive evacuees in numerous sites, and emergency relief kits have been pre-positioned to try to help people. Medical assistance is also going to be available. The Government of Turkey is prepared to accept more evacuees for aid and treatment. So it appears that the necessary preparations have been made for the evacuation process that will eventually save lives, but the implementation of that process continues to be dependent on the actions of the regime and its allies on the ground.

Let me emphasize, we're going to continue to do our part. The United States of America is going to continue to try to push the parties towards a resolution. As President Obama said the other day, in giving us all both his impressions as well as instructions about these next days, we're going to be trying every way we can to try to save lives and push this to where it needs to get to. To date, we've provided more than \$6 billion in food, water, medicine, and other supplies to people who've been affected by the violence in the region.

...[W]hat has happened already in Aleppo is unconscionable, but there remains tens of thousands of lives that are now concentrated into a very small area of Aleppo, and the last thing anybody wants to see—and the world will be watching—is that that small area turns into another Srebrenica. It is imperative that key actors step up and do their part, and I call on the entire international community to join in exerting pressure on all parties to go forward with the process that has been laid out for some period of time now, to abide by the cessation of hostilities, and to bring the killing and the cruelty, particularly starting with Aleppo, which lays the groundwork to be able to take the next steps particularly in Aleppo.

Now, all of you know that we've been engaged in a lot of talks over ... an extended period of time now. And all of those talks have been geared towards trying to end ... the civil war in Syria. In September, after months of very tough negotiation, Foreign Minister Lavrov and I were able to stand up late at night and make an announcement in Geneva that we had arrived at an agreement, September 9th. And that agreement required a number of days, as everybody knows, of calm in order to indicate the seriousness of purpose, and then we were going to have joint cooperation in order to move forward.

Regrettably, for a number of different reasons—Syrian troops that were accidentally bombed, and a humanitarian convoy that was not accidentally but purposefully destroyed by Assad regime to start with and then by others who joined in—it fell apart. And everybody feels the pain of the lost moment, of a lost opportunity, for externalities that we did not have, apparently, control over.

More than a year ago, we agreed on a series of steps that could have and should have produced a lasting ceasefire and direct negotiations. But the process has not succeeded mostly, in my judgment, because of the continued, constant unwillingness of the Assad regime to live by those agreements, to always press it, to always break out, to always try to gain more territory, and to go out publicly not reaffirming its willingness to go to Geneva and negotiate but always affirming publicly in one brash statement after another its readiness to take back the whole country, to crush the opposition, and to do everything without regard to the real underlying concerns of many people who want to be part of a legitimate government, part of a legitimate process, but fear that Assad is not going to be their leader and that he will never be able to unite the country. That's what's fueled this and kept it going.

So we have arrived now at another critical point, another critical juncture. If Aleppo falls completely and people are slaughtered in that small area, it will be even harder to be able to bring people around. And it will not end the war. The fall of Aleppo, should it happen, does not end the war. It will continue. There still is the challenge of governing and the challenge of reuniting the country and the challenge of rebuilding the country. And how many countries will step up and rebuild it for the policies that are being executed today?

So provided we are able to stabilize the situation in Aleppo, it is essential that we move forward at the earliest possible moment with a Syrian-led political process aimed at ending the war and transitioning to a new and more representative government. And without that meaningful transition of power in which the voices of the Syrian people are heard, the opposition will continue to fight, terrorists will continue to be drawn to the country, and millions of Syrians will continue to be forced to flee their homes.

...[E]very stakeholder tells me they are ready and willing to get back on the path to Geneva—and that includes the legitimate Syrian opposition, it includes Turkey and Qatar and the Arab states. The only remaining question is whether the Syrian regime, with Russia's support, is willing to go to Geneva, prepared to negotiate constructively, and whether or not they're willing to stop this slaughter of their own people.

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... But all of the parties have now told me, with the exception of what we haven't heard from Assad himself and his willingness to go out and actually negotiate in good faith and try to bring Syria back together. That is the only way to make progress towards a united and peaceful Syria that is reflected in Resolution 2254 as well as in the ISSG statements, which include Russia and Iran. So hopefully people will put actions where the words have been.

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### **3. Burundi**

On January 19, 2016, the State Department issued a press statement expressing U.S. alarm at reports of mass graves and serious human rights abuses in Burundi. The press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251504.htm> includes the following:

The United States is deeply alarmed by reports, including those from the UN High Commissioner for Human Rights and the African Commission on Human and Peoples' Rights, of serious human rights violations and abuses in Burundi, including eyewitness reports of mass graves, a sharp increase in alleged enforced disappearances and torture, and reports of sexual violence by security forces.

These and other reports further underscore the urgent need for the Government of Burundi to allow for the immediate full deployment and unimpeded access of African Union human rights observers to investigate these allegations. It is imperative that the Government of Burundi remove all bureaucratic and practical roadblocks it has used to prevent the AU human rights and military observers from fulfilling their mandate for the past six months to investigate reports of violence committed by any side in the conflict.

We call upon the Government of Burundi to permit an immediate, impartial investigation into these recent allegations and to hold accountable all those found responsible for crimes. The United States remains concerned about Burundi's ongoing political and humanitarian crisis and the resulting suffering it has brought to the people of Burundi. We once again call on all parties to reject unlawful violence, and reiterate that the only way to resolve the crisis gripping the country is for all parties to agree promptly to engage in internationally-mediated, inclusive dialogue without preconditions.

On March 2, 2016, the Department of State issued a press statement, calling on the Government of Burundi to carry out its commitments to accept AU observers and UN experts, release detainees, allow for freedom of expression, and in other ways support efforts to stabilize and secure a resolution of the situation in Burundi. The U.S. press statement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253917.htm)

[2017.state.gov/r/pa/prs/ps/2016/03/253917.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/03/253917.htm).

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The United States welcomes signs of intensified regional and international commitment to resolving the Burundi crisis. This includes the appointment of former Tanzanian President Benjamin Mkapa as the full-time facilitator for the regionally mediated dialogue and recent commitments by the Government of Burundi to the UN and African Union (AU) to release political prisoners and allow independent monitors.

In particular, the United States recognizes the AU High Level Delegation's success in securing the Government of Burundi's acceptance of 200 AU human rights and security observers, and we urge the government to allow these officials complete and free access to perform their duties by signing the memorandum of understanding associated with their deployment without delay.

We urge prompt action by the Government of Burundi to implement President Nkurunziza's promise to release at least 2,000 detainees. ... We welcome the decision by the Government of Burundi to accept the first visit by three United Nations independent experts ... to investigate violations and abuses, and to meet with all stakeholders.

The United States looks forward to the East African Community immediately announcing a date for the resumption of dialogue with all stakeholders, both those inside and outside the country. The United States continues to urge all sides to lay the groundwork for a successful dialogue by refraining from the daily grenade attacks, extrajudicial killings, sexual violence, and other acts of violence that continue to destabilize Burundi. We also urge all the stakeholders to publicly commit to participating in the regionally-mediated dialogue without preconditions or red lines.

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On April 1, 2016, Ambassador David Pressman, U.S. Alternate Representative to the UN for Special Political Affairs, provided the U.S. explanation of vote at the adoption of UN Security Council Resolution 2279 on Burundi. The statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7212>

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The situation in Burundi is beyond fragile. The ongoing repression, harassment, and violence against the legitimate political opposition, the closure of free and impartial media, and widespread impunity for human rights violations and abuses—including those involving killings and alleged sexual violence by security services against political opponents, members of civil society and others—continue. Almost a quarter of a million have fled. Again, over a quarter of a million Burundians have already fled the country since April 2015 out of fear for their lives, and countless more have been internally displaced. ...

Against this backdrop, let's be clear: progress will be measured by peace, and peace will come from genuine political dialogue that is inclusive. To date, while there have been opening ceremonies, the real discussions have not commenced. We strongly support former President Mkapa in his efforts to move this process forward and urge a date be scheduled for discussions to begin. Each day that this crisis continues makes it that much harder for Burundi to regain the progress it has achieved over the past decade, risking a much longer-term and much deadlier crisis.

While in our discussions, some have pointed to the release of a "significant number of prisoners." This resolution does not do that. This resolution instead welcomes "the steps made by the Government of Burundi" towards that end and urges them to fulfill their commitments. The progress made by the Government of Burundi to date is woefully insufficient. There have been plenty of press releases, but not enough political prisoner releases. We acknowledge the government's acts of clemency for prisoners who are old, under-aged, or infirm—but that is not the same as releasing political prisoners, and they must begin to deliver on those important promises.

We have been promised that free media would be allowed to operate, but today only 2 out of 5 banned outlets are today operating.

It was agreed that 200 African Union human rights and military observers would be deployed, but today there are currently 32 human rights observers and 15 military observers on the ground in Burundi, and they do not have a Memorandum of Understanding with the government.

Recognizing the enormity of these problems, today's action by the Security Council is indeed important.

With this resolution, the Security Council expresses its support for the African Union's efforts in Burundi, including the deployment of the 200 AU human rights observers and military observers. We call on the Government of Burundi to cooperate fully to facilitate the implementation of the mandate of these human rights observers and military experts. With this resolution, the Security Council endorses the EAC-led, regionally-mediated dialogue. Only such an inclusive and regionally-mediated dialogue can resolve this crisis and restore stability to Burundi. We urge all stakeholders to expedite the resumption of this dialogue in pursuit of a peaceful and consensual path forward for Burundi.

With this resolution, the Security Council urges the Government of Burundi to deliver in reality what it has committed to in the press. With this resolution, the Security Council has sent a strong message to the Government of Burundi and the opposition to cease all violence, refrain from provocation, and to commit to peacefully resolving this crisis through dialogue – a dialogue based on respect for the Arusha Agreement.

And with this resolution, we are today sending a more robust, larger international civilian presence into Burundi to advance political dialogue, security, and rule of law. We are also asking for options for the deployment of a police mission, which should include options on the deployment of formed police units, to Burundi to advance rule of law.

The United State appreciates the efforts the Security Council members and our colleagues have made to find consensus on this important resolution.

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On April 26, 2016, the State Department issued a statement welcoming the resumption of the Burundian Dialogue. The statement follows and is available at

<http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256616.htm>

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The United States welcomes the announcement by former Tanzanian President Benjamin Mkapa, as the facilitator of the East African Community (EAC)-led Burundian dialogue, that the next round of talks will take place May 2–6 in Arusha, Tanzania. We continue to support the regionally mediated dialogue as the best means to restoring peace and stability to Burundi and strongly urge all stakeholders to fully participate without preconditions or redlines.

The resumption of dialogue is critical, as the situation in the country is increasingly dire. This year-long crisis already has claimed over 400 lives and led over a quarter million Burundians to flee their country. We continue to see reports of sharp increases in killings, including the recent assassination of General Kararuzza, torture, forced disappearances, and

sexual violence, along with the use of illegal detention facilities by government security forces and armed factions of the ruling party youth wing. This horrific violence must end, and those responsible for atrocities must be held accountable. The opening of a preliminary examination in Burundi by the Prosecutor of the International Criminal Court sends a strong warning in this regard to all perpetrators and would-be perpetrators.

The United States stands ready to support the EAC and all Burundian stakeholders in their pursuit of a peaceful, consensual solution to this crisis. The sooner this crisis is resolved, the sooner we can help Burundi realize greater development and prosperity.

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On May 2, 2016, the State Department issued a press statement urging the resumption of the Burundian Dialogue. The press statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/256794.htm>

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While the United States strongly supports the regionally mediated Burundi dialogue, led by former President Mkapa under the auspices of the East African Community, we are disappointed the scheduled dialogue did not resume today.

Postponement of this dialogue only serves to worsen a crisis that has already resulted in hundreds of lives lost, thousands injured, more than 260,000 Burundian refugees displaced, and a worsening economic situation.

We call upon all stakeholders to ensure the dialogue resumes immediately and to commit to participating without preconditions or redlines.

Burundi's political leaders owe it to their citizens to take concrete steps to resolve this crisis as soon as possible within the framework of the Arusha Accords, the foundation for peace and stability in Burundi. Now is the time for all parties to cease all violence and exercise restraint and engage in an inclusive and peaceful dialogue.

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On July 29, 2016, Ambassador Power delivered the U.S. explanation of vote on UN Security Council Resolution 2203 on Burundi. Ambassador Power's statement follows and is available at <http://2009-2017-usun.state.gov/remarks/7392>

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Thank you, Mr President. We are profoundly concerned about the dramatic deterioration of the situation in Burundi over the last year and a half. During this period, as we all know, some 270,000 people have been displaced; at least 348 people have reportedly been the victims of extrajudicial killings; and 651 reported cases of torture have been documented. These are just the crimes that we know about. All are worrying signs that the country's brutal past may be

repeating itself. This week, appalling new reports emerged of sexual violence by members of the ruling party's youth militia, which we and other Council members have been warning about for several years. Women have said that they were raped simply because of their political party affiliations. This is sickening. Absent serious, concerted international engagement and pressure, the situation is all but certain to deteriorate further.

The Council is not alone in its grave concern regarding these crimes or in its efforts to stop them and bring the perpetrators to justice. The UN has established an office in Burundi, drawn up contingency plans, sent the Secretary-General to Bujumbura, and opened a Human Rights Council independent investigation into the situation. And, as we all know, in January the Security Council traveled to Burundi, where we urged President Nkurunziza to change course and pursue a path to peace. None of the steps that we asked the president to take has he embarked upon.

Meanwhile, the African Union authorized the deployment of 200 human rights and military monitors, dispatched a delegation of five heads of state to help address the evolving crisis, and authorized, initially, a 5,000-strong peacekeeping force to stem the violence. The AU began the deployment of human rights observers and military experts to Burundi on July 22, 2015—more than one year ago—after the AU Peace and Security Council agreed to deploy monitors in May of 2015. But rather than facilitating the deployment of AU monitors, the Government of Burundi spent months delaying the implementation of a memorandum of understanding that would have allowed the monitors to do their job. After rejecting a peacekeeping force, the government promised AU heads of state in February of this year that 200 monitors would be allowed to deploy. Yet today, only 36 monitors are in Burundi. I want to stress: this is the Government of Burundi that many members of this Council have stressed we should coordinate the UN deployment with. Of course the deployment must be coordinated with the Government of Burundi. Of course. In order for anybody to deploy, you have to coordinate that with the government that provides visas, that provides landing rights at the airport, that allows people to move around.

But honestly, listening to this session today, I feel like we're living in a parallel universe: Council members speaking, in many cases, with no regard for what the government is doing to Africa's own monitors. It is especially disappointing not to hear the two abstainers from Africa even acknowledge the fate of Africa's own monitors. We have got to merge the reality that we live in ... with the reality that is playing out on the ground every day.

Today was an occasion that we could have sent a clear, unified message to the Government of Burundi that we will not allow similar tactics to delay the police deployment authorized today, and that continued obstruction of the AU mission must stop. If the African members of the Council can't stand for this, I don't know what we're doing here. This is a government that's blocking your people from deploying. You're trying to help. We're trying to help you help.

The Government of Burundi has remained ... unwilling to listen to its neighbors, partners, and the international community, and resistant to following through on the commitments it has made. Meanwhile, it has to be stressed that some of those who oppose the government continue also to resort to violence and to commit abuses. The United States strongly condemns violence perpetrated by all sides in Burundi and we hope that this presence, as it evolves, will document those abuses and empower us to come to agreement on what further steps might be taken.

The authorization of a UN police component will put additional eyes and ears on the ground, who will be able report directly to the Security Council. That is valuable. But we should not harbor any illusions that this will fix Burundi's problems. It will only, at best, observe those problems. Police are not being deployed to protect civilians, even though civilians are in dire need of protection. That should embarrass us. Instead, police are effectively being asked to be human rights monitors. That is the most that we as a Council were able to agree upon—and we couldn't even secure consensus on this. This really raises questions about this Council's will when it comes to preventing atrocities, especially when a government is implicated in atrocities. What the people of Burundi deserve—and what this Council needs to continue to insist on—is serious engagement by the government in a process of dialogue with all stakeholders in order to reach agreement on a peaceful way forward. The games have to stop, the preconditions have to stop. The government is still insisting on sitting down only with those it already agrees with. It must stop lashing out at civil society and the opposition. And the opposition—those who have engaged in violence must renounce it and must itself must refrain from setting these onerous preconditions for the dialogue. Nobody will get anywhere if things continue as they are.

The United States has settled for much less than what it wanted with this resolution. Others have spoken about good faith proposals; I assure you lots of good faith proposals do not appear in the text of this resolution. But I have to say—just as somebody who's looked at the issue of mass atrocities over many years and studied it on many continents—we worry that our inability to unite even on this sends precisely the wrong message to parties that already feel a great sense of impunity. These abstentions will be solace to a government that relishes our division—they've always made that clear. And it is not at all clear to me that a Council that says repeatedly that it has learned the lessons of Rwanda, has in fact done so. It is not at all clear to me that for all the talk at yesterday's Africa peacebuilding session about the importance of prevention, that we in the UN Security Council are serious about prevention. This is a prevention moment. And yet, this is where we are. What is clear is that we believe in prevention of atrocities by non-state actors, but when a government is implicated we can't even unite to send a robust monitoring presence.

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#### 4. Colombia

On January 25, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, provided the U.S. explanation of vote at the adoption of UN Security Council Resolution 2261 establishing a UN observer mission to assist with implementing the peace agreement reached in Colombia. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7104>.

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After nearly four years of negotiations, the Colombian Peace Process has yielded agreements on a set of extraordinarily complex issues—including an accord on “victims of the conflict,”.... Colombia is now on the precipice of a historic achievement. Forging a lasting peace agreement

will not resolve all of Colombia's challenges, nor will it instantly help heal the deep wounds inflicted over the last five decades. . . .

With today's resolution, the Security Council shows that the United Nations stands with the Colombian people as they forge this new future. This resolution represents the UN's answer to the joint call made by the Government of Colombia and the FARC for UN engagement to help end this conflict. The requested UN observer mission will serve as the international component of a tripartite mechanism that will monitor and verify the ceasefire and the cessation of hostilities, and be responsible for monitoring the laying down of weapons. This Mission will be strengthened by the participation of observers from other countries in the region, and will complement the important work of UN agencies already in Colombia, such as the Office of the High Commissioner for Human Rights.

With our vote today, the United States underscores its continued partnership with Colombia. Just as we have supported the government since it developed the Plan Colombia strategy nearly 16 years ago, so have we backed the government's efforts to negotiate a just and lasting peace agreement—one that should be consistent with Colombia's domestic and international legal obligations, and make accountability and rule of law the bedrock of a sustainable peace.

As Colombia works toward this goal, the United States remains at your side, ready to assist in the hard work ahead—in the lead-up to the Final Peace Agreement, and then in the challenging process of implementation that will follow, where what is put in writing must be translated into practice. Victims and vulnerable individuals will need access to justice, protection, and dispute resolution services. Communities that suffered in the conflict will need basic security and additional public services. Former combatants will need to be reintegrated with society. Landmines will need to be removed so that communities can return to their lands, and more rural economic development can occur. The United States will support critical government initiatives like those to expand the rule of law and economic opportunity in former conflict zones; to bolster civilian law enforcement; to support the victims of conflict; and to expand protections for human rights.

Let me conclude. Back in September, President Santos travelled to Havana, where he reached an agreement with the FARC to complete a peace deal by March. He said at the time, "We are adversaries, on different sides, but today we advance in the same direction, the direction of peace."

Today Colombia has taken another step in that direction of peace. The road ahead will surely have its bumps, and much will rest on implementation. But because of the Government of Colombia's commitment—its "unyielding determination," as President Obama put it—to fight for peace, the destination is in sight. With today's vote, the United Nations recognizes your achievement, and offers our collective support as you complete the journey.

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On June 23, 2016, State Department officials held a briefing to discuss the Colombia peace accord. The transcript of the briefing is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259009.htm>. The officials described the U.S. role in the peace process in Colombia.

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As many of you know, this is an issue where the Secretary has been personally involved for decades, going back to his time in the Senate when he was chairman of the Western Hemisphere Subcommittee and was actively engaged in passing Plan Colombia. And since he became Secretary, it's been one of his highest priorities in the Western Hemisphere. I think within 10 days of his taking office, he had a conversation with President Santos, where they discussed how they could move the peace process forward. And over the past three and a half years, they've remained in regular contact as issues arose and obstacles arose and opportunities arose for where the Secretary could step in and help drive this process.

In December of 2014, the Secretary met with President Santos in Colombia, where Santos suggested that the U.S. may take a more direct role in support of the peace process. And it was shortly after that that the Secretary appointed Bernie Aronson as his special envoy for the Colombian peace process. Since then, Bernie's taken, I think, about 20 trips to Havana to meet with the negotiating teams on both sides. After each one of these, he updates the Secretary. And over the past few years, the Secretary's also been in regular contact with President Santos, Foreign Minister Holguin, and with Cuban, Vatican, and other regional counterparts.

In the last few months, I think we sensed that there was a real opportunity to bring this—to make major strides forward, and so our efforts have intensified. President Santos's visit to Washington in February was a good opportunity for the Administration to demonstrate our full support for the peace process. And then in March, while accompanying President Obama down to Cuba, the Secretary held lengthy meetings with the negotiating teams on both sides—first with the government, and then with the FARC. And these meetings focused specifically on how to reach agreement on the key issues that are being announced today. And our understanding is that those meetings had a very positive effect in pushing the two sides forward.

In addition to his personal engagement, the Secretary also directed the department to redouble our efforts to demonstrate support for the process, including directing our embassy in Bogota to help Colombia address the security threats that had hindered the peace talks and which have helped pave the way for the security guarantee in the agreement. We've also mobilized additional resources to help create the conditions for successful implementation if we get to a final agreement. In our FY17 budget request, as part of Paz Colombia, we increased our request by ... almost 25 percent. And these funds will help Colombia secure post-conflict areas, address the needs of conflict victims, and promote economic development.

And finally, the Secretary also assumed leadership of the Global Demining Initiative for Colombia, which is a multinational effort to rid Colombia of landmines in five years, and we are actively recruiting other nations to join that.

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We expect this afternoon the Colombian Government and the FARC delegations will issue a joint communiqué in Havana, where they will announced they've reached agreements on a definitive bilateral ceasefire, the timetable for a full cessation of hostilities, the disarmament process, and the essential security guarantees for demobilized combatants and members of civil society in those conflicted zones. We understand that the announcement today will be led by Colombian President Juan Manuel Santos and FARC leader Timochenko.

The United States welcomes these developments. We are very hopeful that they will conclude successfully and they will lay the foundation for a just and lasting peace after more than 50 years of armed conflict. We congratulate President Santos and his team for their unwavering commitment to peace in Colombia and this major step toward a final peace accord. We look forward to partnering with Colombia on this important work, as both Official One and Official Two outlined, in terms of the additional support that we will be making to the implementation of the peace process.

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...[T]he United States is not a party to these negotiations. This really was between the government and the FARC, and our role was to support the parties as they move forward. ...

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President Santos has consistently and repeatedly made it clear that there will be a plebiscite that he intends to consult with the Colombian people on the agreement. ...

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Secretary Kerry issued a press statement on June 23, 2016 on the Colombia peace process, which is excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/06/259007.htm>.

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Today's announcement regarding the "end of conflict" in Colombia is welcome news to the people of that country and to all who desire peace. I congratulate President Santos and his negotiating partners for this milestone in their ongoing effort to conclude a conflict with the Revolutionary Armed Forces of Colombia (FARC) that has plagued their nation for 52 years, the longest running war in our hemisphere.

I am pleased that, after more than four years of intensive talks, the Colombian government and the FARC have achieved breakthroughs on some of the most challenging issues before them. Although hard work remains to be done, the finish line is approaching and nearer now than it has ever been.

President Santos deserves credit for his courage, leadership, and unwavering commitment to peace. I also want to recognize the hard work of the negotiating teams and the constructive role played by the governments of Norway and Cuba, who have served as guarantors of the peace process. Thanks are due, as well, to U.S. Special Envoy, Bernie Aronson, for his tireless efforts in support of a settlement.

For many years and on a bipartisan basis, the United States has supported Colombia in its efforts to strengthen its democracy and safeguard the security of its people. That friendship will continue as Colombia's leaders strive to complete the peace process and take steps to recover from the many years of division and conflict.

To this end, the United States will work closely with Colombia to ensure that commitments made during the negotiations yield tangible benefits for the country's citizens. In February, President Obama announced Paz Colombia, a new strategic framework for our bilateral engagement. As part of that plan, the President asked me to lead a Global Demining Initiative for Colombia, together with our partner Norway. I look forward to fulfilling that important and life-saving commitment.

Today, I congratulate all Colombians and ask the U.S. Congress and the international community to join in supporting the people of that nation as they continue to make progress towards a just and lasting peace.

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On August 25, 2016, Secretary Kerry welcomed the final peace accord reached by the Government of Colombia and the FARC. Secretary Kerry's statement follows and is available at <http://2009-2017.state.gov/secretary/remarks/2016/08/261259.htm>

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After over fifty years of conflict and four years of difficult negotiations, a final peace accord has been reached by the Colombian government and the FARC. The United States strongly supports this accord that can achieve a just and lasting peace for all Colombians.

I salute the courage and leadership of President Santos, whose unwavering commitment to peace made these breakthroughs possible. I also want to recognize the hard work and commitment of the negotiating teams, as well as the constructive role of Norway and Cuba, guarantors of the peace process over the past four years. And I want to thank the U.S. Special Envoy for the Colombian Peace Process, Bernie Aronson, for his tireless efforts.

The United States has been Colombia's steadfast partner, through Administrations and Congresses led by both political parties, as the Colombian people defended their democracy. We will remain Colombia's partner as they continue to take steps to secure the just and lasting peace the Colombian people deserve.

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Ambassador Power provided a statement on the adoption of UN Security Council Resolution 2307 on Colombia on September 13, 2016. Ambassador Power's statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7428>

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The UN Security Council today took another important step in support of the August 24 agreement between the Colombian government and Revolutionary Armed Forces of Colombia (FARC), detailing how the UN will support the peace process once the historic peace accord

enters into force. With this resolution, the UN can now complete operational planning for its monitoring and verification role, which will be critical to the agreement's implementation.

The people of Colombia are taking groundbreaking steps to end a half-century of conflict, which has killed hundreds of thousands and displaced millions, and the United States remains committed to our longstanding Colombian partners as they work to forge a new, more peaceful future. Earlier this year, President Obama announced the establishment of "Paz Colombia," which will provide a framework for U.S. assistance focused on reinforcing security gains, reintegrating former combatants into society, extending economic opportunity, and strengthening the rule of law.

Today, the UN and Colombia deepen their partnership in service of peace. As one Colombian noted as the peace negotiators announced a final agreement from Havana, "finally I'll see my country without violence and with a future for my children."

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Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2307 on Colombia on September 13, 2016. The explanation of vote, available at <http://2009-2017-usun.state.gov/remarks/7429>, includes the following:

Today, the United States welcomes the support of the Security Council to help Colombia implement its final peace accord with the FARC, and congratulates the parties for their sustained commitment to ending the longest-running conflict in the Americas, which has tragically resulted in hundreds of thousands of deaths, tens of thousands of kidnappings, and displaced millions of Colombians. We also thank Cuba and Norway for the special roles they have played as co-guarantors, as well as Venezuela and Chile, who have accompanied the process.

As President Obama has said, "even as we mark the end of an era of war, we recognize that the work of achieving a just and lasting peace is only beginning. Yet just as the United States has been Colombia's partner in a time of war, we will be Colombia's partner in waging peace." Through this resolution, the Security Council makes clear that the United Nations also stands with the Colombian people as they work towards implementing the Final Peace accord. The Agreement's successful implementation is integral to the hard work of securing a truly just and lasting peace, which all those gathered here today know is something the Colombian people unquestionably deserve.

Today's resolution will ensure the readiness of the UN Monitoring and Verification Mission in Colombia by updating the mandate with details that were unavailable last January, when UN Security Council Resolution 2261 was adopted. The United States commends those countries that will be playing a role in the UN Monitoring and Verification Mechanism to monitor and verify the bilateral ceasefire, the cessation of hostilities, and the disarmament process. The stakes for the success of this mission are high.

On October 2, 2016, Colombia held a democratic referendum on the peace agreement between the Government of Colombia and the FARC, which resulted in a majority "No" vote on the deal. See October 3, 2016 State Department press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262703.htm>. The United States expressed continued support for the ongoing efforts to achieve peace. On October 5, 2016, a senior State Department official conducted a special briefing on the Colombia peace process, which is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262835.htm>.

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As everyone knows, the October 2nd plebiscite resulted in a majority vote for the no campaign. It's about a 51,000 vote difference between the two sides, and the turnout was about 37 percent. President Santos immediately recognized and accepted the results of the plebiscite, as do all of the international community, and recognize and respect the views of the Colombian people on this. Nobody in the plebiscite voted for resuming the war. That's the good news. And President Santos has made it clear that he is open to and seeks a dialogue with those who voted no as well as those who didn't vote at all, to see if he can build a new national consensus that will allow for a final peace settlement.

Both the FARC and the government reiterated their desire to maintain the current ceasefire. The UN monitoring and verification mission is still in place and playing the role that was intended to do so. The FARC and the government continue to cooperate in removing land mines and searching for the remains of disappeared to be returned to their relatives, cooperating in the return of child soldiers, cooperating in crop substitution and anti-narcotics, all of which are called for under the agreement. Secretary Kerry has been in touch with President Santos and reiterated strong U.S. support for the peace process. Obviously, Colombia is divided about the best terms on which to end this war through negotiations, because it's not divided on the desire to end this war through negotiations. So it's obviously up to Colombians to try to come to some new consensus that will allow the peace process to be finalized, and the United States stands ready to help that effort in any way the Colombian Government wishes us to do so.

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But what the plebiscite clearly revealed was that while Colombians desperately want to see an end to violence and have, I think, appreciated the fact that the war has really been dormant for the last two years under the unilateral ceasefire, they are deeply divided about the terms on which they would settle a final peace agreement. And so what I think the government has said it is doing is to reach out to all voices and all sectors inside the country, including those who opposed the agreement, to listen to their views about why they took the stance they had and see whether their concerns can be addressed, and see whether a new national consensus can be built that would allow for the agreement to go forward. Whether there'd be a second plebiscite or not is not an issue that has been discussed and is probably not really germane at this point in the process.

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On November 12, 2016, Secretary Kerry congratulated the government and people of Colombia on the revised peace agreement they concluded. Secretary Kerry's statement, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/11/264264.htm)

[2017.state.gov/secretary/remarks/2016/11/264264.htm](http://2009-2017.state.gov/secretary/remarks/2016/11/264264.htm) notes:

President Santos and his negotiating team, those from the "No" campaign, and other important sectors of Colombian society deserve credit for engaging in a far reaching and respectful national dialogue following the plebiscite. This agreement has the benefit of many hours of discussion between supporters and critics of the original Peace Accords. After 52 years of war, no peace agreement can satisfy everyone in every detail. But this agreement constitutes an important step forward on Colombia's path to a just and durable peace. The United States, in coordination with the Government of Colombia, will continue to support full implementation of the final peace agreement.

On December 1, 2016, Secretary Kerry issued a press statement welcoming the vote by the Colombian congress to approve the revised peace accord between the Colombian Government and the FARC. Secretary Kerry's statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/12/264709.htm> notes that the terms of the accord include the FARC demobilizing, disarming, and forming a political organization to participate in Colombia's democratic system. The United States pledged to continue to support Colombia, including the Paz Colombia Initiative

## 5. Mali

On June 29, 2016, Ambassador Pressman, U.S. Alternate Representative to the UN, provided the U.S. explanation of vote at the adoption of UN Security Council Resolution 2295 on the situation in Mali. Ambassador Pressman's statement is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7358>.

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Mr. President, The United States welcomes the Security Council's unanimous vote today to extend MINUSMA for an additional year. This decision comes at a critical time in Mali's history and for the future of United Nations peacekeeping.

Over the last year alone in Mali, 27 MINUSMA peacekeepers have been killed. Over the last year alone, 112 have been wounded. Ten of these attacks used improvised explosive devices that targeted MINUSMA convoys. UN peacekeepers are increasingly being called upon to fulfil

complex mandates in dangerous environments that include asymmetric threats. This requires more prompt, effective, and agile responses by the UN system and Member States deploying or providing capabilities to successfully operate in such environments. It also requires clarity from the United Nations Security Council.

In light of the volatile security situation, particularly in central and northern Mali, the Security Council's decision to reinforce the mission's vital protection of civilians and stabilization mandate should help to rationalize the mission's posture with the prevailing security environment. The Security Council is also requesting that the Secretary-General enhance MINUSMA's cooperation with regional security initiatives, such as the G5-Sahel, so that the mission has greater awareness of the broader regional security dynamics in which it operates.

The Security Council took an important step today by reconciling MINUSMA's current mandate with its security environment and by calling on the Secretary-General and Member States to urgently give MINUSMA the capabilities it needs to enable the mission's more mobile, proactive, and robust posture in the pursuit of its mandate. The Security Council resolution is emphasized that MINUSMA must anticipate, deter, and counter threats, including asymmetric threats, to protect civilians and United Nations personnel. This means that MINUSMA must take robust and active steps, including direct operations, if necessary, against serious and credible threats. When MINUSMA is attacked or threatened as it carries out its mandate, MINUSMA is expected to act, and we are expected to ensure MINUSMA has the ability to do so effectively. This is not ambiguous, as some have suggested. It is rational and it is necessary when a mission is deployed in this kind of environment. It is a critical step forward for this peacekeeping mission.

Today, the Security Council also affirmed that the gradual restoration and extension of State authority across Mali, and particularly the reformed and reconstituted Malian Defense and Security Forces, would contribute to the stability that all Malians seek. This would also help to deter the terrorist threat, which continues to claim the lives of Malian security forces and those supporting the Malian people—namely the French forces and MINUSMA peacekeepers—to achieve the peace they have so long desired. And we certainly pay tribute to their sacrifices in Mali.

The Agreement on Peace and Reconciliation in Mali was signed over a year ago, and yet today it remains largely unimplemented. Failure to move forward, to take the political risks necessary for the greater good of Mali's enduring peace creates openings for spoilers and for terrorists. While the United States is encouraged by the recent agreement amongst the signatories on the interim authorities, as well as President Keita's decision to appoint a high-level representative on implementation, we continue to urge—as this resolution rightly underscores—that all the signatories immediately implement the broad range of institutional, security, development, and defense provisions of the Agreement. Too much time has passed. Patience is wearing thin. Political will is dissipating and implementation is urgently necessary.

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Ambassador Power delivered remarks at a ministerial meeting on implementation of the Agreement for Peace and Reconciliation for Mali on September 23, 2016 at the UN. Her remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7449>.

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... The signing of the peace accord was a truly significant achievement, and we welcome the commitments that continue to be made by the parties to implement these accords. We know that the threats that the people of Mali face in this crisis and—as you noted, Mr. President—this meeting is just the latest emblem of the international community’s support for the people of Mali. Fifteen months have passed, though, since the signing, and we join others in expressing deep concern that not enough has changed for the people of Mali. The government is still not present in nearly half of its territory. Insecurity appears to have increased—not decreased—in places like Gao, Timbuktu, and Kidal. And we see little evidence to suggest that the situation is on the verge of changing for the better. Let me make three quick points on what it seems needs to change.

First, we urge the Malian government to take greater responsibility for the peace process. The peace accord called for certain basic confidence-building measures to take place right away, including joint patrols between the Malian Army and the signatory groups. Preparations have been made for these patrols, but they are still not happening. The peace process can’t be just about passing laws and setting up commissions. We urge you, Mr. President, to focus on concrete, visible actions that improve the security environment and build trust among all accord signatories and the Malian population. This includes, as others have noted, providing social services, which remain very scarce in the north. We know that the environment is very difficult and insecure, but the lack of resources in the north only strengthens the hand of extremists. You must extend your authority and your security presence. The lack of security and the government’s lack of investment in local governance have led, just in one example, to the closure of 44 schools in Mopti and 37 schools in Gao, just in the last year. And even among the schools that are open, many still lack teachers. The government needs to extend its authority in the ways that matter most to the Malian families who live in those areas.

We also appeal to the Malian government to stop any support to proxies that are fueling conflict among factions within the Coordination and Platform association. One sitting Malian general even continues to direct a northern armed militia. These are actions that harken back to policies aimed at dividing northern groups, which failed in the past and will only make it harder to promote a united and democratic future for Mali.

Second, Mali’s armed groups need to comply with their obligations under the peace accord. This means providing lists of their combatants for cantonment, a task now 14 months overdue. The armed groups have failed to fully submit the names of their participants for commissions on disarmament, demobilization, and reintegration. Mali’s armed groups must support steps to create an inclusive, republican military force capable of protecting Mali’s civilians. Building a unified Mali cannot be achieved without the full participation of all northern groups, and these groups will not achieve a better outcome through violence.

Yet, the all-too-predictable result of Mali’s stalled peace process is an increase in fighting on the ground. In recent weeks, all sides have violated the ceasefire, with heavy clashes around Kidal. The United States calls on the parties to halt these military actions, de-escalate immediately, and focus at last on establishing the security arrangements outlined in the peace accord.

Third and finally, as others have stressed, all Member States—including all of us here represented—must do our part to give the MINUSMA peacekeeping mission the resources it desperately needs to help promote stability. MINUSMA’s troops deploy under some of the most grueling and dangerous circumstances in the world—in remote outposts and in areas rife with traffickers, criminal gangs, and terrorist groups. We join others in paying tribute to those peacekeepers who have made the ultimate sacrifice. These circumstances make supporting an effective and properly-equipped MINUSMA force all the more important. We need Member States to step up in committing replacements for the mission’s contingent of four helicopter units, the loss of which was a real blow to this mission, to providing additional armored personnel carriers, and to ensure that their deployed forces are equipped according to the Statement of Unit Requirements.

The longer the delay in taking these three concrete steps toward stability, the more that popular frustration with the peace process will rise. Earlier this summer, youth in Gao took to the streets carrying signs that read, “Enough is enough,” demanding that the state do more to provide security and economic opportunity. People seem to be losing faith; as the SG noted, new momentum is urgently needed. These youth have reason to demand more, and so do all of us. It is past time for the parties in Mali to focus on implementing the truly worthy peace accord that they signed. And we are here to support you as you do, Mr. President. Thank you.

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## 6. Democratic Republic of the Congo

On January 2, 2017, the State Department issued a press statement applauding the agreement reached between the government and the opposition in the Democratic Republic of the Congo (“DRC”). The statement is excerpted below and available at <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266198.htm>

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The United States welcomes the December 31 signing of an inclusive political compromise agreement by the Government of the Democratic Republic of Congo (DRC) and opposition party leaders. By paving the way for peaceful, democratic elections in 2017, this agreement marks an important and historic step for the DRC and the region of Central Africa. We commend the willingness of President Kabila and opposition leaders to compromise on key issues, thereby laying the groundwork for the country’s first democratic transfer of power.

We also commend the tireless mediating role played by the DRC’s Conference of Catholic Bishops leading to this agreement.

We encourage the DRC government and opposition leaders to continue their cooperation as they work to implement this agreement and preserve the progress achieved on behalf of the Congolese people.

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On February 3, 2016, the State Department issued another statement on the DRC, this time welcoming the DRC government's renewed cooperation with MONUSCO, the UN mission in the DRC. The statement is excerpted below and available at

<http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252100.htm>

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The United States welcomes the recent announcement that the Government of the Democratic Republic of the Congo (DRC) and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) have signed an agreement to permit resumed cooperation against illegal armed groups. This agreement follows nearly a year during which such cooperation had ceased.

We urge both MONUSCO and the Government of the DRC to take action quickly against illegal armed groups, which continue to commit atrocities against Congolese citizens and communities. We note the particular importance of ending the presence of foreign armed groups in eastern DRC—including the Allied Democratic Forces and Democratic Forces for the Liberation of Rwanda (FDLR)—which pose a threat to broader regional peace and security.

This agreement provides an important opportunity for MONUSCO and the DRC's armed forces (FARDC) to deal the FDLR a decisive blow. Strong cooperation between MONUSCO and the DRC Government is particularly important during the current electoral period. As the largest financial contributor to MONUSCO and a provider of security assistance to professionalize the DRC armed forces, the United States will continue to support combined efforts by MONUSCO and the DRC Government in civilian protection and the consolidation of peace throughout the DRC.

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## 7. South Sudan

On January 22, 2016, the State Department issued, as a media note, the joint statement of the governments of the United States, the United Kingdom, and Norway (the "Troika") urging the South Sudanese parties to form a transitional government. The media note containing the joint statement is available at [https://2009-](https://2009-2017.state.gov/r/pa/prs/ps/2016/01/251657.htm)

[2017.state.gov/r/pa/prs/ps/2016/01/251657.htm](https://2009-2017.state.gov/r/pa/prs/ps/2016/01/251657.htm). The joint statement expresses the Troika members' "deep concern at delays in forming the Transitional Government of National Unity, which was due to be completed [January 22, 2016]." The statement continues:

Advancing implementation of the peace agreement, reviving the economy, and implementing critical reforms depend on the formation of the transitional government. The Presidential Decree establishing 28 states has created an obstacle to consensus. We urge all parties to make immediate efforts to resolve

this impasse and to form the transitional government as soon as possible. It is time for leaders on all sides to put aside partisan bickering and prioritize the interests of the South Sudanese people.

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The Troika issued a joint statement on April 22, 2016, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256503.htm>.

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The members of the Troika (United States, United Kingdom, and Norway) are deeply disappointed by Riek Machar's continued failure to return to South Sudan's capital Juba to form the Transitional Government of National Unity. This represents a willful decision by him not to abide by his commitments to implement the Agreement on the Resolution of the Conflict in the Republic of South Sudan. We congratulate the government for demonstrating maximum flexibility for the sake of peace by agreeing to the compromise proposal on the return of security forces proposed by regional and international partners and mediated by the Joint Monitoring and Evaluation Commission. It remains important that the government fully withdraws its troops from Juba as called for in the peace agreement. We also welcome the opposition's support for the compromise proposal and demand that Machar abide by this commitment and return to Juba by 23 April. Machar's failure to go to Juba, despite efforts from the international community to support his return, places the people of South Sudan at risk of further conflict and suffering and undermines the peace agreement's reform pillars—demilitarizing South Sudan, injecting transparency of public finances, and pursuing justice and reconciliation—that offer South Sudan a chance for renewal. We will pursue appropriate measures against anyone who further frustrates implementation of the peace agreement.

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The Troika issued a joint statement on April 29, 2016, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/04/256723.htm>.

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The members of the Troika (United States, United Kingdom, and Norway) welcome the long-awaited formation of South Sudan's transitional government of national unity. We also welcome the April 26 statements by President Salva Kiir and First Vice President Riek Machar calling for cooperation, reconciliation, and peaceful coexistence. We call on South Sudan's leaders to continue this spirit of cooperation and to start the difficult task of rebuilding their country. While formation of the transitional government is a step forward, with thousands dead, widespread atrocities committed and millions displaced from their homes during the conflict, this is no time

for celebration. Today the international community stands united in urging the transitional government to start to work for the people of South Sudan. The fighting must stop, decisive action must be taken to tackle the economic crisis and there must be full cooperation with the UN and humanitarian agencies to ensure aid reaches those in need; formal and informal impediments must be removed.

The Troika countries will remain long-term partners and friends of South Sudan's people. We stand ready to support the transitional government if it shows it is serious about working for the good of the country and implementing the peace agreement in full. In that regard, decisions undermining provisions the parties agreed to in negotiations, such as not fully meeting obligations for women's participation in the council of ministers, sets a concerning precedent at the beginning of the transition. We expect the transitional government to honor its commitments. The people of South Sudan deserve nothing less.

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On June 10, 2016, the U.S. Department of State issued a press statement expressing support for the full implementation of the peace agreement in South Sudan. The statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258361.htm>.

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The United States remains committed to the full implementation of the 2015 Agreement on the Resolution of the Conflict in South Sudan. One of the most important components of the Agreement is facilitating transitional justice, reconciliation and accountability. Both President Salva Kiir and First Vice President Riek Machar signed the agreement, which calls for establishing the Hybrid Court for South Sudan and a Commission for Truth, Reconciliation and Healing. We firmly support the subsequent efforts of the African Union to establish the Hybrid Court. So do the people of South Sudan, who overwhelmingly support accountability for crimes committed during the conflict and oppose amnesty. In that spirit, it is imperative that the Transitional Government of National Unity (TGNU) cooperates fully in establishing the Hybrid Court as well as establish the Commission for Truth, Reconciliation and Healing. The United States recently awarded a \$6 million grant to support the complementary efforts of the South Sudan Council of Churches to promote reconciliation across the country. Ensuring reconciliation and justice, as history has proven in countless post-conflict situations, is essential to long-term peace and stability.

The United States' enduring partnership with the people of South Sudan continues as they work to recover from devastating conflict. We are heartened to see the TGNU make progress on a range of security and political challenges. We plan to continue to support the TGNU as long as it demonstrates commitment to the full range of reforms outlined in the Agreement. The United States strongly encourages South Sudan's leaders to remain steadfast in their effort to fully implement the agreement, so the country can regain peace and stability and resume development and advancement.

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On July 29, 2016, Ambassador Power delivered the U.S. explanation of position at the adoption of UN Security Council resolution 2302 on the UN Mission in South Sudan. Ambassador Power's statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7391>.

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The renewal of violence in South Sudan earlier this month was horrifying, but sadly not unexpected. Horrifying because, as we all know, in only a few days 300 men, women, and children were reportedly killed, tens of thousands were displaced, and 4,500 metric tons of humanitarian aid—food that would have fed 220,000 people in dire need for a full month—was looted. Yet the renewal of the conflict in Juba was also foreseeable, because of the inability of South Sudan's leaders to work together and put the interest of the people of South Sudan ahead of their own.

The Heads of State and Government of IGAD Plus, South Sudan's neighbors and their partners, are now calling for UNMISS to have an enhanced capacity—particularly in Juba—in response to the deteriorating security situation there. The African Union Assembly has endorsed this decision. The Peace and Security Council has as well. And they're all recommending that regional forces contribute to UNMISS to provide it. We all need to support them. The United States believes the region's proposal offers a basis to reestablish a secure environment in Juba, which is critical for the parties to make progress on implementing the peace agreement they signed onto almost a year ago, as well as to ensure the unfettered delivery of humanitarian aid to those who are at grave risk of famine.

Of course, the proposal—as many Council members have noted—merits thorough review, and translating its purpose into a mandate for UNMISS must be done with great care, and in consultation with TCCs and all members of this Council. We have to get this right. But it also must be done with great urgency. Let us not be fooled into believing that time is on our side. It is not. Events in recent weeks have demonstrated how quickly violence can reignite, and how devastating are the human consequences when it does. I want to stress this also for Council members here today—we have just received very disturbing reports of significant violence in the Equatorias in South Sudan. And all of us need to be on alert, I think, this weekend, because events could spiral rapidly out of control, yet again. Every report of a spike in violence, of course, costs human lives and leaves an indelible and searing mark on those affected by it.

Just to give one example, on July 18, a young woman was reportedly grabbed only meters away from the gate to the UN camp in Juba where she had taken shelter, after being displaced by the violence. She told a reporter from *The Guardian* that the five men in uniform gave her a choice. She said, "I could choose the one who would rape me, or they all would." The woman said, "I begged them to kill me instead." Unfortunately, she told the reporter, the men dragged her to the side of the road and raped her. In broad daylight. UNMISS as it is currently configured, has proven unable—and in some cases unwilling—to prevent horrors like this. We must work together urgently to fix that.

No one has more of a stake in finding a way out of this conflict and in bringing justice than the people of South Sudan, who have already endured such tremendous suffering in the short history of their nation, and of course their neighbors who have been clear about what this situation requires. Let us be motivated by the pain of South Sudanese civilians and by the initiative shown by the region. And let us work with tremendous urgency and will to protect civilians and create the conditions critical to bringing an end to this ghastly conflict in South Sudan.

This resolution offers additional time for the regional leaders to meet, to engage the Government of South Sudan, and it offers us additional time to find a way forward before we proceed with mandating this new force within UNMISS.

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On October 20, 2016, the Department of State issued a press statement decrying South Sudan's support of armed Sudanese opposition groups. The statement follows and is also available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263373.htm>

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The United States calls on the Government of the Republic of South Sudan to comply with its commitments to cease harboring or providing support for Sudanese armed opposition groups, as required by UN Security Council Resolution 2046 (2012). Despite its obligations under international law and repeated agreements between the Government of the Republic of South Sudan and the Government of Sudan to end such support, credible reports continue to indicate the Government of the Republic of South Sudan is harboring and providing assistance to armed Sudanese opposition groups. We urge South Sudan's leaders to redouble their efforts to meet the commitments they recently reached with Sudan under which both sides agreed to end support for armed opposition groups on either side.

The presence of Sudanese armed opposition forces in South Sudan, and their involvement in South Sudan's internal conflicts, destabilizes both Sudan and South Sudan. It is, moreover, a violation of the terms of the Agreement for the Resolution of the Conflict in the Republic of South Sudan. We call on the Government of the Republic of South Sudan to ensure Sudanese armed opposition groups are not in a position to conduct armed operations within South Sudan or across the border in Sudan. We call on the Government of South Sudan to either expel Sudanese armed opposition groups or disarm them and place them in cantonment.

We also urge both Sudan and South Sudan to fully respect the 2012 Agreement on Security Arrangements, and withdraw their armed forces from the Safe Demilitarized Border Zone.

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## 8. Sudan

On February 18, 2016, the U.S. Department of State issued a press statement, calling for an end to the violence in Jebel Marra, Darfur, Sudan. The statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/02/252619.htm>.

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The United States is deeply concerned about the increased violence against civilians and the grave humanitarian situation in and around Jebel Marra, Darfur. Initial attacks by the Sudan Liberation Army-Abdul Wahid opposition group on Sudanese armed forces prompted a response by Sudan's military that included aerial bombardments despite the UN Security Council demand that Sudan cease offensive military flights over Darfur. These attacks have forced 73,000 people to flee their homes, and thousands more are trapped in the conflict zone of Jebel Marra without access to aid.

The United States calls on both the Government of Sudan and the armed movements of the Sudanese Revolutionary Front (SRF) to re-commit to their cessation of hostilities declarations for Darfur and in South Kordofan and Blue Nile states. We welcome the recent absence of major offensive action in South Kordofan and urge all parties to show the same restraint in Darfur and also in Blue Nile state, where government and opposition forces each carried out attacks last month.

There is no military solution to Sudan's internal conflicts. We call on the Government of Sudan and the SRF to de-escalate the violence and work with the African Union and others to agree to a comprehensive cessation of hostilities agreement that will allow immediate and unfettered humanitarian access for Darfur, South Kordofan, and Blue Nile. We also urge the government to create an environment conducive to the participation of armed movements and other political opposition parties in a comprehensive and inclusive national dialogue that addresses systemic governance issues in Sudan.

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On April 8, 2016, the Troika issued a joint statement encouraging the Sudanese parties to agree on the African Union High-level Implementation Panel ("AUHLIP") Roadmap Agreement for ending conflict in Sudan. The April 8 joint statement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255633.htm)

[2017.state.gov/r/pa/prs/ps/2016/04/255633.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/04/255633.htm).

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The Troika (Norway, the United Kingdom and the United States) supports the efforts of the African Union High-level Implementation Panel (AUHIP) to create a Roadmap Agreement for ending conflict in Sudan.

While we welcome the Government of Sudan's signing of the Roadmap agreement, we urge the government to clarify its commitments regarding the inclusion of other relevant stakeholders in the National Dialogue and to uphold the results of any National Dialogue preparatory meetings arranged by the AUHIP between Sudan's National Dialogue Steering Committee known as the 7+7 Committee and opposition groups. Once that is done, we would urge the Justice and Equality Movement, the Sudan Liberation Movement-Minni Minawi, the Sudan People's Liberation Movement-North (SPLM-N), and the National Umma Party to sign the Roadmap.

If agreed to by all parties to the conflicts, the AUHIP Roadmap could allow genuine political dialogue at both regional and national levels that is needed to address the underlying causes of the armed conflicts that have plagued Sudan for so long.

We are deeply concerned about the increase in fighting between Government forces and the SPLM-N in both Blue Nile and South Kordofan and urge both sides to show restraint and avoid ambushes, military offensives, rocket attacks, and aerial bombardments that negatively affect civilian populations.

We call on both sides to renew their unilateral cessation of hostilities commitments and to fully respect those commitments in order to create a more conducive environment for implementation of the AUHIP Roadmap. There is no military solution to Sudan's conflicts. Further violence only serves to increase the suffering of the Sudanese people. The Troika calls on all parties at conflict in Sudan to seize this opportunity to end the wars and find a path towards lasting peace.

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After the Government of Sudan declared a unilateral cessation of hostilities in Southern Kordofan and Blue Nile, the State Department issued a press statement on June 21, 2016 welcoming the step toward a broader resolution of conflict in other regions in Sudan, particularly Darfur. The June 21, 2016 press statement, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258960.htm> goes on to say:

...An end to military offensives and fighting in these areas would bring much needed relief to thousands of Sudanese and create an improved environment for dialogue leading to a political solution.

We urge the Sudan Revolutionary Front to reciprocate by ceasing all military action against the Sudanese Armed Forces and recommit to the cessation of hostilities it declared nearly two months ago. We encourage both the Government of Sudan and the opposition to work under the auspices of the African Union High-Level Implementation Panel to translate their cessation of hostilities declarations, which must ultimately include the region of Darfur, into a sustainable end to this conflict. A negotiated solution that addresses the key political and security drivers of conflict in all areas of Sudan will be needed in order to establish a lasting peace.

Ambassador Pressman delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2296 on the situation in Darfur on June 29, 2016. The U.S. explanation of vote is available at <http://2009-2017-usun.state.gov/remarks/7359> and appears below.

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...The United States supports the Security Council's adoption of the resolution renewing the African Union-United Nations Hybrid Operation in Darfur (UNAMID) for another year.

The United States welcomes the Government of Sudan's recent declaration of a unilateral cessation of hostilities in Southern Kordofan and the Blue Nile, and we would like to see that declaration extended to the Darfur region, as unfortunately, fighting by the government and its proxies continues in Darfur. An end to military offensives and fighting in all of these areas would bring much needed relief to thousands of Sudanese and create an improved environment for dialogue leading to a political solution. Lasting peace will only come from a negotiated solution that addresses the key political and security drivers of conflict in all areas of Sudan.

Civilians continue to suffer in Darfur, with—according to the United Nations—at least 80,000 newly displaced in 2016 alone and over two million IDPs in need of aid and who cannot return to their homes. In the absence of a comprehensive political agreement and in the face of these pressing needs, UNAMID plays a critical role protecting civilians and facilitating the delivery of humanitarian assistance in Darfur. Any calls for the mission to leave Sudan are woefully premature. We urge the Government of Sudan to allow the mission to carry out the mandate this Security Council has given it, including by not placing restrictions on its freedom of movement or its needed food and supplies. We understand that, as of June 23, all UNAMID food ration shipments that had been held at Port Sudan by the Government of Sudan have been cleared for release. We welcome this development and call on the Government of Sudan to urgently release the almost 300 remaining containers of much needed equipment, in compliance with its obligations under the Status of Forces Agreement with the United Nations.

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Finally, we reiterate that any exit strategy for UNAMID is pretty clear. It is one linked to the achievement of the agreed benchmarks on an inclusive political process, protection of civilians, and prevention of violence. We look forward to progress on achieving these benchmarks.

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On August 9, 2016, the Governments of the United States of America, the United Kingdom, Norway, Germany, and the European Union issued a joint statement welcoming the signing of the Roadmap Agreement by the various groups engaged in the conflict in Sudan. The joint statement was published as a State Department media note at <http://2009-2017.state.gov/r/pa/prs/ps/2016/08/260937.htm> and appears below.

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The representatives of the Troika (Norway, the United Kingdom and the United States), Germany, and the European Union welcome the signing of the Roadmap Agreement by the Justice and Equality Movement, the Sudan Liberation Movement-Minni Minnawi, the Sudan People's Liberation Movement-North, and the National Umma Party. In signing the Roadmap Agreement, these groups have taken an important first step in ending the conflicts in Sudan and moving towards a process of dialogue as a basis for lasting peace in their country. We welcome the support of the Roadmap by other members of the Sudan Call alliance of opposition groups.

We also commend the Government of Sudan for signing the Roadmap Agreement on 16 March 2016, and subsequently clarifying its commitments regarding the inclusion of other relevant stakeholders in the National Dialogue and to continue to uphold any decisions reached between the opposition signatories and the 7+7 Mechanism, the steering committee of the National Dialogue.

We recognize that the opposition expressed valid concerns which have been noted by the African Union High-level Implementation Panel (AUHIP). We believe these constitute legitimate agenda items for any preparatory meetings.

The Roadmap Agreement constitutes a valuable step towards ending the wars in Sudan. We urge the signatories to lose no further time in agreeing to a cessation of hostilities and modalities for humanitarian access in Darfur and the Two Areas.

In parallel, we encourage opposition parties in Sudan to seize this opportunity to come together inside a process of dialogue to achieve a political settlement addressing the challenges that continue to face their people. And we appeal to the Government of Sudan to take all necessary steps to ensure a conducive environment for this process to succeed.

We wish to underscore the significant efforts of the AUHIP in helping to achieve this Roadmap Agreement, and we call on the signatories to engage constructively and sincerely to build on the Roadmap in order to realize a peaceful and stable Sudan.

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## 9. Nagorno-Karabakh

On April 2, 2016, the United States issued a statement condemning ceasefire violations along the Nagorno-Karabakh Line of Contact. The statement decries the violations for causing casualties, including civilians. The statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/04/255432.htm> goes on to say:

We extend our condolences to all affected families. We urge the sides to show restraint, avoid further escalation, and strictly adhere to the ceasefire. The unstable situation on the ground demonstrates why the sides must enter into an immediate negotiation under the auspices of the OSCE Minsk Group Co-Chairs on a comprehensive settlement of the conflict.

We reiterate that there is no military solution to the conflict. As a co-chair country, the United States is firmly committed to working with the sides to reach a lasting and negotiated peace.

On December 8, 2016, the heads of delegation of the OSCE Minsk Group Co-Chair Countries issued a joint statement on Nagorno-Karabakh, which is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/12/264999.htm>

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We, the Heads of Delegation of the OSCE Minsk Group Co-Chair countries—Foreign Minister of the Russian Federation Sergey Lavrov, Secretary of State of the United States John Kerry, and Foreign Minister of France Jean-Marc Ayrault—remain fully committed to a negotiated settlement of the Nagorno-Karabakh conflict.

In light of the dramatic escalation in violence along the Line of Contact in April, we express concern over continuing armed incidents, including reports on the use of heavy weapons, and strongly condemn the use of force or the threat of the use of force. There is no military solution to this conflict and no justification for the death and injury of civilians. We are also aware of allegations of atrocities committed on the field of battle in April, which we condemn in the strongest terms. We appeal to the sides to confirm their commitment to the peaceful resolution of the conflict as the only way to bring real reconciliation to the peoples of the region. We also urge them to adhere strictly to the 1994/95 ceasefire agreements that make up the foundation of the cessation of hostilities in the conflict zone.

We call on Baku and Yerevan to honor the agreements reflected in the Joint Statements of the 16 May Summit in Vienna and the 20 June Summit in St. Petersburg. We welcome the sides' progress in implementing the exchange of data on missing persons under the auspices of the International Committee of the Red Cross. We urge the parties to remove all remaining obstacles to expanding the mission of the Personal Representative of the OSCE Chairperson-in-Office and to make progress on a proposal to establish an OSCE investigative mechanism. The proposals should be implemented together with the immediate resumption of negotiations on a settlement. We would like to reiterate our call to the leaders of Armenia and Azerbaijan to demonstrate flexibility and to return to the negotiation table with the firm aim of moving toward a sustainable peace on the basis of the current working proposals. Unless progress can be made on negotiations, the prospects for renewed violence will only increase, and the parties will bear full responsibility.

We remind the sides that the settlement must be based on the core principles of the Helsinki Final Act, namely: non-use of force, territorial integrity, and the equal rights and self-determination of peoples, and additional elements as proposed by the Presidents of the Co-Chair countries, including return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and

international security guarantees that would include a peacekeeping operation. Our countries will continue to work closely with the sides, and we call upon them to make full use of the assistance of the Minsk Group Co-Chairs as mediators.

The Co-Chair countries are prepared to host a meeting of the Presidents of Armenia and Azerbaijan when they are ready. We firmly believe that the Presidents need to engage in negotiations in good faith at the earliest opportunity. Continuous and direct dialogue between the Presidents, conducted under the auspices of the Co-Chairs, remains an essential element in building confidence and moving the peace process forward.

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## 10. Yemen

Throughout 2016, the United States actively participated in joint efforts with foreign leaders of governments including Saudi Arabia, the United Arab Emirates, the United Kingdom, and UN Special Envoy to Yemen Ismail Ould Cheikh Ahmed to broker a peaceful solution to the ongoing conflict in Yemen. Talks led by the UN Special Envoy yielded the announcement in March 2017 of a nationwide cessation of hostilities in Yemen beginning April 10th in advance of the next round of peace talks, to start April 18th in Kuwait. The United States urged all parties to de-escalate violence in advance of the cessation of hostilities and to honor it once it commenced. See March 24, 2016 Daily Press Briefing, available at [https://2009-](https://2009-2017.state.gov/r/pa/prs/dpb/2016/03/255119.htm)

[2017.state.gov/r/pa/prs/dpb/2016/03/255119.htm](https://2009-2017.state.gov/r/pa/prs/dpb/2016/03/255119.htm)

After further discussions on April 7, 2016, Secretary Kerry stated:

The United States very strongly supports the efforts of Saudi Arabia and others who have been trying to establish a cessation of hostilities in key areas with the goal of a full cessation of hostilities April 10th, and a new round of real negotiations starting on April 18th.

Remarks with Saudi Foreign Minister Adel Al-Jubeir, available at [https://2009-](https://2009-2017.state.gov/secretary/remarks/2016/04/255599.htm)

[2017.state.gov/secretary/remarks/2016/04/255599.htm](https://2009-2017.state.gov/secretary/remarks/2016/04/255599.htm). While conflict continued in some parts of Yemen in April, the cessation of hostilities held in April and talks resumed on April 21.

Secretary Kerry met with Saudi Foreign Minister Adel al-Jubeir on May 9, 2016, when they discussed a range of issues, including the Yemen peace talks being held in Kuwait. Secretary Kerry “expressed the U.S. Government’s appreciation for the key role Saudi Arabia continues to play in combating terrorism and AQAP in Yemen, in particular. Saudi leadership in making available an operations center and contributing the largest number of forces has been indispensable to recent successes, including most recently in al Mukallah.” Readout of Secretary’s Meeting, available at [https://2009-](https://2009-2017.state.gov/r/pa/prs/ps/2016/05/257004.htm)

[2017.state.gov/r/pa/prs/ps/2016/05/257004.htm](https://2009-2017.state.gov/r/pa/prs/ps/2016/05/257004.htm).

On July 19, 2016, the foreign ministers of the United Kingdom, United States, Saudi Arabia and United Arab Emirates met in London to review the situation in Yemen, following the resumption of UN led-peace talks in Kuwait on July 16, 2016. The four governments issued the following joint statement after their meeting, available at <https://yemen.usembassy.gov/pr072016.html>

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The Ministers expressed their concern about the deteriorating humanitarian and economic situation in Yemen and reiterated their strong support for the UN Special Envoy Ismail Ould Cheikh Ahmed and for the role of the UN in mediating a lasting political solution to the crisis, based on the agreed references for the UN talks, namely the relevant UN Security Council Resolutions, including Resolution 2216, the GCC initiative and the outcomes of the National Dialogue Conference.

The Ministers expressed their strong appreciation to Kuwait for hosting the talks and providing political support to the UN Special Envoy.

The Ministers stressed that now was the time to reach an agreement in Kuwait.

The Ministers discussed the sequencing of a potential agreement and affirmed that a successful resolution would include arrangements that would require the withdrawal of armed groups from the capital and other areas, and a political agreement that would allow for the resumption of a peaceful, inclusive political transition.

The Ministers agreed that the conflict in Yemen should not threaten Yemen's neighbours and reaffirmed that the re-establishment of an inclusive government was the only means to combat effectively terrorist groups like Al-Qaida and Da'esh and to address successfully the humanitarian and economic crisis. Ministers also called for the unconditional and immediate release of all political prisoners.

The Ministers agreed to remain in close touch over the coming weeks to support UN-led efforts to reach an agreement.

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After further meetings on August 25, 2016 in Jeddah, Saudi Arabia, Secretary Kerry and Saudi Foreign Minister Adel Al-Jubeir jointly met with members of the press. The cessation of hostilities reached in April had eroded considerably by August. The joint press availability is transcribed at <https://2009-2017.state.gov/secretary/remarks/2016/08/261273.htm>. Secretary Kerry's comments are excerpted below.

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This afternoon Adel and I met with our counterparts from the Gulf Cooperation Council—UAE, Oman, Kuwait, Qatar, Bahrain, and the United Kingdom joined us, as well as UN Special Envoy Ismail Ahmed. The purpose of our meetings was, quite simply, to see if together we could find a

way to end the violence of Yemen, to end the war, and to address the deeply troubling situation there, which has now not only killed more than 6,500 people to date, but become a humanitarian crisis of enormous magnitude and a growing security threat ... [I]f we cannot find a solution to the war that meets the appropriate needs of respecting the sovereignty and the security of Saudi Arabia, while at the same time providing the Houthi, a minority, an opportunity to be part of a government in the future, then things can only go in one direction, and that is worse, in Yemen.

The restoration of stability to Yemen is vital in order to ease the suffering and to prevent groups like al-Qaida and Daesh from taking further advantage of the political and security vacuum and the instability that has been created. It is essential for Yemen, for countries in the region, and for the world community in general to agree on a plan to end the fighting and achieve a lasting peace.

The bloodshed, I think most would agree, has simply gone on for too long. It has to stop. And everyone that we met with today, all of the ministers who came here, were in full agreement: there is no military solution.

As I made clear in our meetings today ... the United States is committed to the security of Saudi Arabia. We were deeply troubled by the attacks on Saudi territory. We were deeply troubled by the photographs which were shown to me early on by His Royal Highness Mohammed bin Nayef showing missiles that had come from Iran that were being positioned on the Saudi border. And we are deeply concerned about missile attacks that have taken place on border towns.

It is basic international law: Every country has a right to a safe and sovereign border, and any violation of that is unacceptable and a violation of international law; and a country has a right to defend itself. The threat additionally posed by the shipment of missiles and other sophisticated weapons into Yemen from Iran extends well beyond Yemen. It is not a threat just to Saudi Arabia; it is a threat to the region, it is a threat to the United States, and it cannot continue.

As we have stated previously, we're also extremely concerned by reports of civilian casualties and the destruction of vital infrastructure no matter who causes it. Strikes that damage or destroy homes, businesses, and hospitals not only exacerbate the suffering of the Yemeni people, but they also undermine attempts to try to resolve peacefully the challenges that the country faces.

I did raise this in a number of our meetings, but let me share with you, I know it is a concern fully shared by Foreign Minister al-Jubeir and by the Government of Saudi Arabia. And he has committed and the government have committed to investigating troubling reports that we've all seen in order to prevent similar tragedies in the future.

Now, we all know that the humanitarian situation in Yemen has deteriorated rapidly. And frankly, that just underscores the reasons that we came here today, and it underscores the work that we have to do. The numbers don't begin to capture the true depth of the tragedy, but they are nevertheless staggering. More than 2 million Yemenis are now displaced from their homes. Food shortages have driven prices up 60 percent since last March, and they have brought the country to the brink of famine. More than 14 million people are facing severe hunger and malnutrition, including one in three children under the age of five. Overall, 80 percent of Yemenis are in need of humanitarian assistance.

I have to say that, to date, the international response to this crisis has fallen short of filling the gap between the supplies that are available and those that are required. The United States has been the largest donor—by far—and today I can announce we will contribute another \$189 million dollars in urgently needed aid. We strongly urge other countries in and outside the region to expand their contributions as well. And every party has an obligation to allow the unfettered flow of humanitarian assistance to Yemenis in all parts of the country. That is necessary to save lives, and it is also mandated under international law, and it is the right thing to do.

But the surest way to relieve the hardships and the hunger is to stop the fighting, end the war. And we need to return, as quickly as possible, to a ceasefire that can lead to a permanent end to the conflict.

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On October 18, 2016, parties to the conflict in Yemen agreed to resume the cessation of hostilities for a 72-hour period. Secretary Kerry issued a press statement on the day the renewed cessation of hostilities was announced. The statement appears below and at <http://2009-2017.state.gov/secretary/remarks/2016/10/263252.htm>

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The United States welcomes today the announcement of a renewable 72-hour Cessation of Hostilities agreed upon by all Yemeni parties and the Saudi-led Coalition, which the UN Special Envoy, Ismail Ould Cheikh Ahmed, has said will take effect on Wednesday, October 19. This cessation requires all parties to implement a full and comprehensive halt to military activities of any kind and help facilitate the delivery of humanitarian assistance to Yemenis across the country. It will also enable the Special Envoy to continue his consultations and renew the peace negotiations as soon as possible. We ask the parties to take all steps necessary to advance the implementation of this cessation, call on them to sustain it, and strongly encourage its unconditional renewal. We reiterate the Special Envoy's request to "allow free and unhindered access for humanitarian supplies and personnel to all parts of Yemen, in addition to a full and comprehensive halt to military activities of any kind." The people of Yemen are depending on the full cooperation of all parties with the Special Envoy's request.

We note again that peaceful resolution of this conflict requires compromises and commitments by everyone. The United States, alongside the international community, is ready to provide assistance and will continue to work with all parties to conclude a negotiated settlement that will bring a permanent and lasting end to the conflict.

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The United States urged all sides to abide by and extend the renewable 72-hour cessation of hostilities. See October 24, 2016 State Department daily press briefing, available at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/10/263482.htm#YEMEN2>. Nonetheless, the October 19 cessation of hostilities failed to hold.

On November 20, 2016, Secretary Kerry welcomed the public commitment by parties to the conflict in Yemen to a renewable cessation of hostilities for an initial period of 48 hours. His statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/11/264466.htm>, called on all sides to honor their commitments and allow for delivery of humanitarian aid to support efforts to advance peace talks. Secretary Kerry reiterated U.S. support for the efforts of UN Special Envoy Ahmed to restart negotiations towards a comprehensive agreement by the end of the month, using the UN Roadmap.

The initial 48-hour cessation of hostilities referenced by Secretary Kerry in his November 20, 2016 statement did not take hold and was not renewed. Secretary Kerry continued to pursue a cessation of hostilities in Yemen in collaboration with the government of Saudi Arabia and the UN special envoy. See transcript of November 21, 2016 State Department daily press briefing, available at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/11/264484.htm>.

## C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

### 1. Protecting Civilians

On June 10, 2016 Ambassador Power delivered remarks at a UN Security Council open debate on the protection of civilians in the context of peacekeeping operations.

Ambassador Power's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7327>.

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...I would like to focus my remarks today on three ways the Security Council can help address chronic shortcomings when it comes to civilian protection and peacekeeping.

The first should be easy—that is, reporting. We strongly support the Secretary-General's demand in the report he released last month that “any failure by peacekeepers to act or follow orders will be brought to the Council's attention.” However, we all know that such failures are rarely reported to the Council in a timely manner; more often, reports take many, many months to emerge, if they emerge at all. To give just one example, a report by the UN's internal oversight office in 2014 found that in 507 attacks against civilians from 2010 to 2013, peacekeepers virtually never used force to protect those coming under attack, likely resulting in the deaths of thousands of civilians. And yet, those same investigators could not find a single case—not one—in which the failure of a peacekeeping unit to execute the order of a Force Commander was conveyed to the Security Council, or even included in the mission situation reports that are regularly sent to DPKO. This is not a functional system; this is not a system acting in accordance to the will expressed by the Secretary-General, and the necessity for this Security Council to know what is happening in the field in missions that we have mandated and we must take responsibility to try to strengthen. This must change, and we collectively have to be the ones to make it change.

Reporting is critical both for accountability and for surfacing problems that have to be solved to make the collective enterprise more effective. Without reporting, impunity persists and bad practices become more common—civilians are the ones who get hurt. When, on the other hand, a problem is reported to the Council, that is not a panacea, but we at least have a shot at using the bilateral and multilateral tools in our toolkit to address it. Regular reporting can also help the Council right-size missions, taking into account the performance of peacekeepers on the ground while allowing Council members, in their national capacity, to offer targeted training and equipment to address the challenges the troop-contributing countries face. When appropriate, it also allows the Secretary-General to repatriate contingents that prove unwilling to protect civilians, or that fail to investigate allegations of abuse or hold perpetrators accountable.

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The second way the Council can improve protection of civilians is through improving the way it plans and adapts missions to conditions on the ground. Fulfilling our responsibility to protect civilians demands anticipating and pre-empting threats that analysis suggests are likely to emerge. This has to happen not only at the planning stage for missions, but also at regular intervals for as long as the mission is deployed in order to respond to kinetic and evolving circumstances in real time. This is basic common sense. And yet, as we all know, it is far too rare.

Third and finally, we must get better at matching the will and capacity of troop-contributing countries with mandates. Let's be honest, this was hard to do in the past due to the scant supply of troops and police. But the nearly 50,000 additional troops and police pledged at last September's peacekeeping summit, and in the days that followed, were a game changer—allowing us and the UN system to help ensure a better fit between what missions demand and what troops and police from a given country are willing and able to do. Troop- and police-contributing countries that have qualms about the mandates—or that doubt their capacity to do what is asked of them—should no longer deploy to missions simply because nobody else will. And neither the UN nor this Council should feel forced to leave in place blue helmets who are unwilling or unable to do what is asked by them.

Here, I agree with the Minister, the Kigali Principles can be extremely helpful in aligning the will and capacity of contributors with the demand of respective missions. The principles are designed to provide a concrete blueprint for shaping the practice of peacekeepers in volatile situations, particularly with respect to the theme of this meeting, protection of civilians. To give just one example, the Principles call for troop-contributing countries to empower the military commander of a peacekeeping contingent to make decisions on whether to use force to protect civilians, because experience has taught us that if a commander has to wait hours for guidance, it may mean not being able to react in time to repel a fast-approaching attack on a nearby village. If properly implemented, these Principles can make peacekeeping missions more effective, improve security, and save lives.

At present, 29 countries, including the United States, Senegal as we heard, Uruguay, France have announced support for the Kigali Principles, accounting for more than 40,000 troops and police currently serving in UN peacekeeping operations. That is well over one-third of the uniformed personnel on the ground right now. We encourage all troop-contributing countries to make these principles their own as we believe they are indispensable to effective peacekeeping in the 21st century. Given the real-life implication of these principles—and what they suggest about a country's willingness to protect civilians under threat—we urge the UN to attach considerable

weight to a country's commitment to implementing the Kigali Principles when it is selecting units for peacekeeping operations—particularly those operations deployed to volatile environments with civilian protection mandates.

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On September 21, 2016, Sarah Sewall, U.S. Under Secretary of State for Civilian Security, Democracy, and Human Rights, delivered remarks at the 9th Annual Ministerial on the Responsibility to Protect. Under Secretary Sewall's remarks are excerpted below and available at <http://2009-2017.state.gov/j/remarks/262339.htm>.

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When I began working on civilian protection in the early 1990s at the U.S. Department of Defense, I was one of just two people in our office on peacekeeping. Now, there are presidential summits focused exclusively on peacekeeping while demand for peacekeeping has remained high, and increasingly, roles and expectations have changed. Civilian protection is now a routine priority objective or mandated task.

As is so often the case, our normative goals outstrip capacity to implement those goals. Our work now—and the purpose of the Kigali Principles—is to move toward practical realization of civilian protection on the ground. The United States proudly stands with the 36 other countries that have endorsed the Kigali Principles, and we call on others to join us.

These principles include steps to strengthen civilian protection, such as calling on troop and police contributing countries to empower commanders of peacekeeping contingents to use force at their discretion, so they can, for example, act to repel an attack on civilians instead of waiting precious hours for guidance from their capitals.

Peacekeepers and countries that provide peacekeeping training and equipment also have a responsibility to realize the Kigali Principles. And we can all help elevate the principles by making support for them a key factor in selecting sector and contingent commanders, along with nominees for mission leadership.

The United Nations can also prioritize the deployment of units that have demonstrated the will—and the means—to implement protection mandates. That is what the United States seeks to do with our capacity-building support for peacekeepers.

Of course, we must hold contingents accountable for underperformance, or worse, for egregious failures to protect civilians. In these cases, repatriation and replacement must be on the table.

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Over the last decade, the international community vastly increased the demands placed on peacekeepers. We often ask them to do more with less in ever more challenging environments. So we owe it to them, and the communities they serve, to make peacekeeping a more effective instrument for protection. Thank you.

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## 2. Atrocities Prevention

On March 17, 2016, consistent with Section 7033 of P.L. 114-113, the State Department issued the atrocities prevention report, describing targeting of and attacks against civilians, including members of religious and ethnic groups in the Middle East and in Burma. See *infra* for discussion of Secretary Kerry's announcement on March 17, 2016 that he judged Da'esh to be responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. The atrocities prevention report is available at <http://2009-2017.state.gov/j/drl/rls/254807.htm>.

On May 18, 2016, the President of the United States issued an executive order laying out a comprehensive U.S. approach to atrocity prevention and response. Senior U.S. government officials provided a special briefing, explaining the background for the order. Excerpts follow from the briefing, a record of which is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257366.htm>.

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It was about four years ago, a little more than four years ago, when President Obama announced that preventing mass atrocities was a national security priority of the United States in addition to being a moral imperative. And it's since then that we've been working through the Atrocity Prevention Board to ensure that the possibility of mass killings of civilians in countries abroad is something that we are constantly scanning the horizon for, that we are ensuring is discussed and placed at the right level of attention within the U.S. Government, that we are developing tools to address and mitigate the consequences of mass casualties, and that we are doing this in a way where we're consciously learning lessons and institutionalizing the responses to become better both ourselves and as part of a broader multinational community that's committed to atrocity prevention.

So the APB itself convenes monthly to review the intelligence and other non-classified information about the potential for mass civilian harm throughout the globe, and it considers individual countries both as they arise by virtue of the events going on in the world but also takes a more conscious and strategic review approach to cases that have been identified as being at risk.

The main goal of the Atrocity Prevention Board as it has functioned is to move upstream in the prevention realm. Because the interagency process is well developed for ongoing crises that receive significant attention from policymakers, the main value added of the APB as it has evolved has been to do the over-the-horizon scanning and to get us ahead of the curve both unilaterally and multilaterally in doing conflict prevention work that bears on atrocities.

The board itself includes some 11 departments and federal agencies, and we've worked very hard not just to improve our awareness and predictive ability and the refinement of our priorities for focus, but to really develop a process in which we are focusing on the policies and the programs and the specific actions that can be taken on individual cases to mitigate risks.

And I want to just run through three typologies that are examples of the three different phases in which we've been working. One is ... to galvanize interventions before it is even on the screen of the international community that there is the potential for mass atrocities, and Burundi would be our case in point, where years before the international community was seized of Burundi, we were concerned about the early warning signs of atrocity risk. We sent a team to go and examine the drivers and the potential for mitigation, doing their risk assessment. We put together a resource plan with some 7 million of programming—and this was three years ago—doing community leader training on conflict resolution, helping civil society with tools to monitor hate speech, to amplify messages of peace—those types of interventions. We also sent a prevention advisor to the embassy there to do more intensive analysis and we supported civil society assessments. And then we worked on the sticks piece as the situation evolved, ... and we coordinated with our European allies to reinforce this message.

Obviously, the situation in Burundi has evolved to a place where it remains at significant risk for mass atrocities, but I think that we feel confident that ... we have helped to mitigate the risks that civilians have been killed as the crisis has continued to unfold.

... Central African Republic is a great example of how the Atrocity Prevention Board, having identified in the post-December 2013 violence escalation ... the need to focus on the stabilization after the political resolution there, ways to focus the government's efforts on DDR, on security sector reform; the need to get a special representative and get President Obama to do a peace message; the need to find ways to engage the urban youth that typically at times of political mobilization have been most inclined to actually carrying out violence—a whole host of stabilization measures with an aim to preventing the return to past cycles of violence that we've seen that have targeted civilians.

And then finally, the third sort of typology I want to share with you is the case of Burma, where, as you know, the potential for mass atrocities remains high, in particular in Rakhine state, with tensions between the Rohingya communities and the Rakhine community—the Burmese Rakhine community. 2012, we saw a lot of violence. What has been done on the ground there is to create a heads-of-mission group that has focused our posts and their tools on preventing violence—six different countries working with the UN and international humanitarian organizations with a coordinating mechanism that is focused on a unified diplomatic strategy that is built around atrocity prevention and the deployment of full-time advisors there to monitor dynamics to support the heads-of-mission group. So that's an example of something that's very forward-looking and that is focused on activity in the field.

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... the President released an executive order entitled “A Comprehensive Approach to Atrocity Prevention and Response.” The executive order sets out the structure and protocols of the Atrocity Prevention Board. ... At the time that it was created, I think we spoke about the possibility of an executive order that would basically codify its responsibilities and protocols, and this executive order is sort of the culmination of that commitment.

... [I]t restates the policy set forth in Presidential Study Directive 10, which dates back to 2011, which states that preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States. It offers a very brief definition, a non-legal definition of what we mean by mass atrocities in this context, which is these are large-scale and deliberate attacks on civilians, including acts that [may] fall within the definition of genocide. It lays out the responsibilities that the board has, which I think is very useful in terms

of creating a blueprint for any next administration that wants to take up the work of the board—and we believe that this is an institution that is worth enduring through to the next administration as some comparable bodies do in other policy spaces. It lays out the structure and protocols of the board, which we haven't previously made public, and then it talks about the work the departments and agencies belong to the board are going to be doing to support the agenda sort of within their own structures.

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So the board was designed to ensure that we did not have a situation in which senior officials were unaware of mass atrocities and the U.S. did not have every opportunity to take action in response. The highest value added for the board in a government that, by definition, is constantly dealing with atrocity issues in the context of ongoing issues in which the government is deeply involved, is to focus the board's attention on the upstream preventive measures, we all know and agree that we would prefer to prevent atrocities than respond to them.

But there are many cases in which the ongoing conflict means that there are atrocities going on. To suggest that those cases implicate the board as having failed, I think is an unrealistic expectation for any single government let alone any one piece of government.

In the case of the Yezidis, the charge, I think, is even more wrong, to be honest, because the U.S. is leading an international coalition to fight Daesh. So Daesh has been the source of the atrocities against the Yezidis and we are currently engaged in leading an international coalition to fight Daesh. So I think ...it would be inaccurate to imply that the Atrocity Prevention Board has failed because there have been atrocities against Yezidis.

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The text of E.O. 13729 of May 18, 2016, "A Comprehensive Approach to Atrocity Prevention and Response," follows. 81 Fed. Reg. 32,611 (May 23, 2016).

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By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* As articulated in Presidential Study Directive-10 (PSD- 10), preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States. Noting that governmental engagement on mass atrocities and genocide too often arrives too late, when opportunities for prevention or low-cost, low-risk action have been missed, PSD-10 directed the establishment of an interagency Atrocities Prevention Board (Board), with the primary purpose of coordinating a whole-of-government approach to prevent mass atrocities and genocide. PSD-10 also directed an interagency study to develop and recommend the membership, mandate, structure, operational protocols, authorities, and support necessary for the Board to coordinate and develop atrocity prevention and response policy. This order continues in place the Board established in 2012 as I directed in PSD-10, sets

out the support to be afforded by executive departments, agencies, and offices, and updates and memorializes the terms on which the Board will continue to operate in the service of its important mission.

*Sec. 2. Definition.* For purposes of this order, the term “mass atrocities” or “atrocities,” neither of which is defined under international law, refers to large scale and deliberate attacks on civilians, and includes acts falling within the definition “genocide” as defined in international law and under U.S. domestic statute.

*Sec. 3. Responsibilities.* The Board shall seek to ensure that mass atrocities and the risk thereof are effectively considered and appropriately addressed by the U.S. Government, and shall coordinate the development and execution of policies and tools to enhance our capacity to prevent and respond to mass atrocities.

(a) In order to ensure that emerging mass atrocity risks and mass atrocity situations are considered and addressed, the Board shall monitor developments around the world that heighten the risk of mass atrocities, and analyze and closely review specific mass atrocity threats or situations of heightened concern.

(b) The Board shall also identify any gaps related to the prevention of and response to mass atrocities in the current policies and ongoing inter-agency processes concerning particular regions or countries and shall make recommendations to strengthen policies, programs, resources, and tools related to mass atrocity prevention and response to relevant executive departments and agencies (agencies), including through the Board’s function as an interagency policy committee, as detailed in section 4 of this order. In these efforts, the Board shall focus in particular on ways for the U.S. Government to develop, strengthen, and enhance its capabilities to:

(i) monitor, receive early warning of, and coordinate responses to potential mass atrocities;

(ii) deter and isolate perpetrators of mass atrocities through all available and appropriate authorities;

(iii) promote accountability of and deny impunity for perpetrators of mass atrocities, including by denying safe haven for perpetrators found in the United States;

(iv) engage allies and partners, including the United Nations and other multilateral and regional institutions, to build capacity and mobilize action for preventing and responding to mass atrocities;

(v) deploy civilian personnel with expertise in conflict prevention, civilian protection, mediation, and other relevant skills, including on a rapid response basis, to assist in mass atrocity prevention and response efforts;

(vi) increase capacity for our diplomats, armed services, development professionals, and other actors to engage in mass atrocity prevention and response activities;

(vii) develop and implement tailored foreign assistance programs as well as doctrine for our armed services to address and mitigate the risks of mass atrocities;

(viii) ensure intelligence collection, analysis, and sharing of information, as appropriate, relating to mass atrocity threats and situations; and

(ix) address any other issue regarding mass atrocity prevention and response that the Board determines is appropriate. *Sec. 4. Structure and Protocols of the Atrocities Prevention Board.* The

Board shall continue to operate and will have the following structure and protocols:

(a) The Board shall function as an interagency policy committee, or body of equivalent standing, chaired by a member of the National Security Council staff at the Senior Director level or higher who shall be designated by the President (Chair).

(b) The Chair shall convene the Board on a monthly basis to perform the responsibilities set forth in section 3 of this order. The Board shall also meet as needed on an ad hoc and time-sensitive basis to consider and address emerging mass atrocity threats or situations.

(c) The Deputies Committee of the National Security Council (Deputies) shall meet at least twice per year, and the Principals Committee of the National Security Council (Principals) shall meet at least once per year, to review and direct the work of the Board.

(d) The Board shall be composed of individuals at the Assistant Secretary- level or higher who shall be designated by the leadership of their respective departments or agencies. Within 60 days of a vacancy on the Board, the relevant department or agency or office head shall designate a replacement representative and notify the National Security Advisor. In addition to the Chair, the Board shall consist of the designated representatives from the following:

(i) the Office of the Vice President; (ii) the Department of State; (iii) the Department of the Treasury; (iv) the Department of Defense;

(v) the Department of Justice;

(vi) the Department of Homeland Security;

(vii) the U.S. Mission to the United Nations;

(viii) the Office of the Director of National Intelligence;

(ix) the Central Intelligence Agency;

(x) the U.S. Agency for International Development;

(xi) the Joint Chiefs of Staff; and

(xii) such other agencies or offices as may request to participate in coordination with the Chair.

(e) The Chair shall report, through the National Security Advisor, to the President by April 30 each year on the work of the U.S. Government in mass atrocity prevention and response, including the work of the Board.

(f) The Chair shall prepare written updates for the public, on an annual basis, on the work of the U.S. Government in mass atrocity prevention and response, including the work of the Board.

(g) Consistent with the objectives set out in this order and in accordance with applicable law, the Board shall conduct outreach, including regular consultations, with representatives of nongovernmental organizations with expertise in mass atrocity prevention and response and other appropriate parties. Such outreach shall be for the purpose of assisting the Board with its work on considering and addressing emerging mass atrocity threats or situations and on developing new or improved policies and tools, as well as for the purpose of providing transparency on the work of the Board.

(h) In order to conduct the work set forth in this order effectively, the Board may:

(i) request information or analysis from the Intelligence Community (IC), Chiefs of Mission, agencies, and offices;

(ii) develop policy recommendations and programmatic recommendations for agencies, offices, and existing interagency processes;

(iii) in conjunction with existing interagency processes, formulate policy recommendations and programmatic recommendations;

(iv) coordinate with the Office of Management and Budget (OMB) to develop guidance on mass atrocity prevention resource priorities for agencies and offices; and

(v) bring urgent or significant matters to the attention of the Deputies and, as appropriate, request that the Deputies convene to address a situation of concern, consistent with Presidential Policy Directive-1 or its successor.

*Sec. 5. Enhancing Capabilities and Tools.* Agencies shall take the following actions in support of the United States Government's policy of working to prevent and respond to mass atrocities:

(a) Agencies, in coordination with the Board, shall ensure that mass atrocity prevention and response staffing, training, funding, and activities are addressed in their strategic planning and budget processes, including Department Quadrennial Reviews, Mission Resource Requests, State Department Integrated Country Strategies, U.S. Agency for International Development (USAID) Joint Strategic Plans, State Department Bureau Strategic Resource Plans, and related strategic planning and budget processes and documents. The Chair shall make recommendations to the National Security Advisor on the inclusion of material in the President's National Security Strategy that addresses mass atrocity prevention and response.

(b) The Department of State and USAID shall work with OMB to support the maintenance of civilian assistance accounts and authorities that enable swift civilian responses to mass atrocity threats and situations.

(c) The Department of State and USAID shall offer mass atrocity prevention and response training courses to all officers deployed or planning deployment to countries deemed by the IC to be at high or substantial risk for mass atrocities.

(d) The Department of State and USAID shall continue to build and use civilian capacity (i.e., the ability to deploy personnel with expertise in conflict prevention, civilian protection, mediation, and other relevant skills) effectively for mass atrocity prevention and response, and shall develop mechanisms for enhanced partnerships with non-U.S. Government actors that could provide surge capacity, such as the United Nations and other multilateral and regional organizations, foreign governments, and non-governmental organizations.

(e) The IC shall continue to monitor developments worldwide and, as changing conditions warrant, prepare an IC-coordinated assessment updating IC judgments in its National Intelligence Estimate on the global risk of mass atrocities and genocide at regular intervals to inform the work of the Board.

(f) Recognizing mass atrocity prevention as a core national security interest of the United States, the IC shall allocate resources so as to permit a collection surge for countries where the Board determines, and the Deputies concur, that there are ongoing or acute risks of mass atrocities that merit increased attention, in accordance with the National Intelligence Priority Framework and available resources.

(g) The IC shall work with partner governments to encourage the collection and analysis of mass atrocity-related intelligence and the sharing of this intelligence with the U.S. Government and its partners in mass atrocity prevention and response.

(h) The Department of Homeland Security (DHS) and the Department of Justice, in coordination with the Department of State, shall continue to develop proposals for legislative, regulatory, or administrative amendments or changes that would permit the more effective use and enforcement of immigration and other laws to deny impunity to perpetrators of mass atrocities and that would enhance our ability to prosecute such perpetrators subject to the jurisdiction of the United States and remove those who are not citizens.

(i) The Department of Defense (DOD) shall continue to develop joint doctrine and training that support mass atrocity prevention and response operations and shall address mass atrocity prevention and response as part of its general planning guidance to combatant commands and services.

(j) The Department of State, the Department of the Treasury, DHS, the U.S. Mission to the United Nations (USUN), and other agencies as appropriate, shall coordinate with bilateral and multilateral partners on the deployment of mass atrocity prevention and response tools, including isolating and deterring perpetrators of mass atrocities through all available authorities (including administrative actions, visa authorities, and capacity-building support), as appropriate.

(k) The Department of State, in coordination with USUN, DOD, and other agencies as appropriate, shall work bilaterally, multilaterally, and with regionally based organizations to enhance effectiveness in the fields of early warning, analysis, prevention, response, and accountability, and shall work with international partners to build or encourage building the capacity of our allies and partners to prevent and respond to mass atrocities.

Sec. 6. *General Provisions.* (a) Members of the Board shall serve without any additional compensation for their work on the Board.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, 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.

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### 3. Daesh and Atrocities

On March 17, 2016, Secretary Kerry delivered remarks on Daesh and atrocities. His remarks, excerpted below, are available at

<http://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

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In 2014, the terrorist group Daesh began to seize territory in Syria and Iraq, overrunning major cities and committing atrocities. The United States responded quickly by denouncing these horrific acts and—more importantly—taking coordinated actions to counter them. In September of that year, President Obama mobilized an international coalition, now 66 members strong, to halt and reverse Daesh’s momentum. And that is what we are doing.

In the 18 months since, coalition airstrikes have helped to liberate Kobani, Tikrit, Ramadi, and other key cities and towns. We have pushed the terrorists out of 40 percent of the territory that they once controlled in Iraq and 20 percent in Syria. We have degraded their leadership, attacked their revenue sources, and disrupted their supply lines. And currently we are engaged, as you all know, in a diplomatic initiative aimed at trying to end the war in Syria. That civil war fuels Daesh, and in doing what we are doing now, we are working to further isolate, to weaken and ultimately to defeat them. We are working intensively to stop the spread of Daesh and its affiliates within and beyond the region.

All of this constitutes an extraordinary effort by a large segment of the international community and the United States. And that effort is fully warranted by the appalling actions of the organization that we oppose.

My purpose in appearing before you today is to assert that, in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. Daesh is genocidal by self-proclamation, by ideology, and by actions—in what it says, what it believes, and what it does. Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.

I say this even though the ongoing conflict and lack of access to key areas has made it impossible to develop a fully detailed and comprehensive picture of all that Daesh is doing and all that it has done. We have not been able to compile a complete record. I think that's obvious on its face; we don't have access to everywhere. But over the past months, we have conducted a review of the vast amount of information gathered by the State Department, by our intelligence community, by outside groups. And my conclusion is based on that information and on the nature of the acts reported.

We know, for example, that in August of 2014 Daesh killed hundreds of Yezidi men and older women in the town of Kocho and trapped tens of thousands of Yezidis on Mount Sinjar without allowing access to food, water, or medical care. Without our intervention, it was clear those people would have been slaughtered. Rescue efforts aided by coalition airstrikes ultimately saved many, but not before Daesh captured and enslaved thousands of Yezidi women and girls—selling them at auction, raping them at will, and destroying the communities in which they had lived for countless generations.

We know that in Mosul, Qaraqosh, and elsewhere, Daesh has executed Christians solely because of their faith; that it executed 49 Coptic and Ethiopian Christians in Libya; and that it has also forced Christian women and girls into sexual slavery.

We know that Daesh massacred hundreds of Shia Turkmen and Shabaks at Tal Afar and Mosul; besieged and starved the Turkmen town of Amerli; and kidnapped hundreds of Shia Turkmen women, raping many in front of their own families.

We know that in areas under its control, Daesh has made a systematic effort to destroy the cultural heritage of ancient communities—destroying Armenian, Syrian Orthodox, and Roman Catholic churches; blowing up monasteries and the tombs of prophets; desecrating cemeteries; and in Palmyra, even beheading the 83-year-old scholar who had spent a lifetime preserving antiquities there.

We know that Daesh's actions are animated by an extreme and intolerant ideology that castigates Yezidis as, quote, "pagans" and "devil-worshippers," and we know that Daesh has threatened Christians by saying that it will, quote, "conquer your Rome, break your crosses, and enslave your women."

Shia Muslims, meanwhile, are referred to by Daesh as, quote, “disbelievers and apostates,” and subjected to frequent and vicious attacks. In December, a year ago, a 14-year-old boy named Usaid Barho approached the gate of a Shiite mosque in Baghdad, unzipped his jacket to show that he was wearing an explosive vest and he surrendered to the guards. He had been recruited by Daesh in Syria, and joined to serve Islam, but he was told after his recruitment that, unless he obeyed every order, Shiites would come and rape his mother. Daesh said of Shias, and I quote, “It is a duty imposed upon us to kill them, to fight them, to displace them, and to cleanse the land of their filth.”

One element of genocide is the intent to destroy an ethnic or religious group, in whole or in part. We know that Daesh has given some of its victims a choice between abandoning their faith or being killed, and that for many is a choice between one kind of death and another.

The fact is that Daesh kills Christians because they are Christians; Yezidis because they are Yezidis; Shia because they are Shia. This is the message it conveys to children under its control. Its entire worldview is based on eliminating those who do not subscribe to its perverse ideology. There is no question in my mind that if Daesh succeeded in establishing its so-called caliphate, it would seek to destroy what remains of ethnic and religious mosaic once thriving in the region.

I want to be clear. I am neither judge, nor prosecutor, nor jury with respect to the allegations of genocide, crimes against humanity, and ethnic cleansing by specific persons. Ultimately, the full facts must be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal. But the United States will strongly support efforts to collect, document, preserve, and analyze the evidence of atrocities, and we will do all we can to see that the perpetrators are held accountable.

I hope that my statement today will assure the victims of Daesh’s atrocities that the United States recognizes and confirms the despicable nature of the crimes that have been committed against them.

Second, I hope it will highlight the shared interest that otherwise diverse groups have in opposing Daesh. After all, the reality of genocide underscores even more starkly the need for a comprehensive and unified approach to defeating Daesh both in its core in Syria and Iraq and more broadly in its attempt to establish external networks.

Part of our response to Daesh must, of course, be to destroy it by military force, but other dimensions are important as well, and we dare not lose track of that. In the past two and a half years, the United States has provided more than 600 million in emergency aid to Iraqis who have been displaced from their communities by Daesh. We are working closely with local authorities to assist in the recovery of cities that have been liberated and whose residents face grave challenges—both material and psychological—and people who desperately need help in rebuilding their lives. We are funding the investigation of mass graves, and supporting care for the victims of gender-based violence and those who have escaped captivity.

We continue to engage with the government of Baghdad to make sure that its security forces and other institutions are more representative and inclusive. And we are coordinating with our coalition partners to choke off Daesh’s finances and to slow its recruitment of foreign fighters. And we are preparing for future efforts to liberate occupied territory—with an eye to the protection of minority communities. In particular, the liberation of Mosul, of Nineveh province in Iraq, and parts of Syria that are currently occupied by Daesh, and that will decide whether

there is still a future for minority communities in this part of the Middle East. For those communities, the stakes in this campaign are utterly existential. This is the fight that Daesh has defined. Daesh has created this. Daesh has targeted their victims. Daesh has self-defined itself as genocidal.

So we must bear in mind, after all, that the best response to genocide is a reaffirmation of the fundamental right to survive of every group targeted for destruction. What Daesh wants to erase, we must preserve. That requires defeating Daesh, but it also demands the rejection of bigotry and discrimination—those things that facilitated its rise in the first place.

This means that, as more areas are liberated, residents will need help not only to repair infrastructure, but also to ensure that minorities can return in safety, that they are integrated into local security forces, and that they receive equal protection under the law. Our goal, after all, is not just to defeat Daesh—only to find that in a few years some new terrorist group with a different acronym has taken its place. Our purpose is to marginalize and defeat violent extremists once and for all.

Now, that is not easy; we know that. As President Obama and I have consistently said—it won't happen overnight. But today, I say to all our fellow citizens and to the international community, we must recognize what Daesh is doing to its victims. We must hold the perpetrators accountable. And we must find the resources to help those harmed by these atrocities be able to survive on their ancestral land.

Naming these crimes is important. But what is essential is to stop them. That will require unity in this country and within the countries directly involved, and the determination to act against genocide, against ethnic cleansing, against the other crimes against humanity must be pronounced among decent people all across the globe.

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#### 4. Pursuing Justice for War Crimes In Syria

On April 14, 2016, Ambassador Power delivered remarks at an informal meeting on “Syria: War Crimes and the Pursuit of Justice” at the UN. Her remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7226>.

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[W]hen the war is finally over—and it will end, even if some days a settlement seems very elusive—Syria will be home to literally millions of victims .... The last five years have brought a catalogue of cruelty that few could have dreamed up, even if they were writing the worst horror movie imaginable ... Illegal detentions, often involving torture, rape, murder; chemical weapon attacks against civilians; bombs landing on schools, hospitals, and civilian neighborhoods; sieges of entire cities; starving people to death willfully when you have the power with a pen—a pen stroke—to allow food to people you know are going to die if they don't get food, and you just

simply don't sign the form. The Assad regime is the leading perpetrator of these crimes by a long shot, but ISIL and other armed groups, of course, are responsible for their share of atrocities.

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The Syrian people will be the best placed to choose the right balance of justice, accountability, and reconciliation processes ... and people who've worked on international justice, the conversations you're having, the thinking you are doing is going to prove useful someday. The documentation, the secure storage, the analysis, the reporting on the atrocities, the work of the commission of inquiry—the many, many reports that they have done. Such information can be used to support future prosecution—whether at the international level or eventually, again though it seems far-fetched now, in credible domestic courts.

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And even if you don't yet have a lot to point to in the way of people being held accountable for the horrors that they have inflicted on your people, there are other trials that you can point to. You can point to the recent conviction of Radovan Karadzic, the Bosnian Serb leader who thought that he would be immune and inoculated. He had an attitude much like that you've encountered on the streets of Syria. The trial of the former Chadian dictator Habre, where his victims who never thought that they would ever be able to confront him in a courtroom, able to do so all these years later.

...[J]ustice can be painstakingly slow, the victims and the potential witnesses can feel rightly desperate and demoralized and feel like the international community has let them down. But it is our job to take what you all have begun and turn it into something real for people who deserve justice, who want reconciliation but need accountability as a foundation for that reconciliation. And I think this session is just a chance for us to remind the perpetrators who are strutting around Syria today, feeling as if they have that impunity, that their actions have not gone unseen and they will not go unpunished. ...

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**Cross References**

*International tribunals*, **Chapter 3.C.**

Sokolow, **Chapter 5.A.2.**

*Human Rights Council statement on Israel*, **Chapter 6.A.3.a.**

*Human Rights Council actions on Syria, South Sudan, Burundi*, **Chapter 6.A.3.**

*Women, peace, and security*, **Chapter 6.B.2.b.**

*Water, peace, and security*, **Chapter 6.B.2.b.**

*Criminal accountability of UN officials and experts on missions*, **Chapter 7.A.2.**

*UN-African Union cooperation*, **Chapter 7.A.8.**

*Suspension of bilateral channel with Russia for Syria cessation of hostilities*, **Chapter 9.A.4.**

*Protecting Syrian cultural property*, **Chapter 14.B.**

*Syria-related sanctions*, **Chapter 16.A.2.**

*Sanctions*, **Chapter 16.A.**

*Civilians in armed conflict*, **Chapter 18.A.3.a.**

*Syria chemical weapons*, **Chapter 19.D.1.**

## CHAPTER 18

### Use of Force

#### A. GENERAL

##### 1. Use of Force Issues Related to Counterterrorism Efforts

###### a. *International Law and the Counter-ISIL Campaign*

On April 1, 2016, State Department Legal Adviser Brian J. Egan delivered remarks at the annual meeting of the American Society of International Law (“ASIL”) on international law, legal diplomacy, and the counter-ISIL campaign. Mr. Egan’s remarks are excerpted below and available at <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm>. Past expositions on this topic by U.S. government officials, and other U.S. government statements referenced by Mr. Egan, are available in: *Digest 2015* at 750-57 (Mr. Preston’s ASIL remarks); *Digest 2014* at 725 (Article 51 notification to the UN); *Digest 2013* at 540-552 (President Obama’s speech at the NDU; Attorney General Holder’s letter to Congress; Presidential Policy Guidance or “PPG”); *Digest 2012* at 575-92 (Mr. Johnson’s speech at Yale; Attorney General Holder’s speech at Northwestern; Mr. Johnson’s speech at Oxford); *Digest 2011* at 548-50 (Mr. Koh’s ASIL remarks).

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I am here today to talk about some key international law aspects of the United States’ ongoing armed conflict against ISIL. In so doing, I am following in the footsteps of others who have gone to some lengths in recent years to explain our government’s positions on key aspects of the law of armed conflict. This includes, most prominently, President Obama in his 2013 speech at the National Defense University and his 2014 remarks at West Point. A number of Administration lawyers have also spoken on these topics, including my predecessor, Harold Hongju Koh; former Attorney General Holder; and former Defense Department General Counsels Jeh Johnson and

Stephen Preston. The Defense Department's promulgation of its Law of War Manual last year has also made a significant contribution to the public discourse on these issues.

Some have said, however, that our legal approach to the counter-ISIL conflict has been one of the "most discussed and least understood" topics of U.S. practice in recent years.

Thus, at the risk of disappointing you at the outset of this talk, I suspect and hope that much of what I will say today will not be surprising. I also hope, however, that these remarks will provide clarity and help you understand better the U.S. international law approach to these important and consequential operations.

International law matters a great deal in how we as a country approach counterterrorism operations. Prior to my confirmation, I served as a Deputy White House Counsel and Legal Adviser to the National Security Council for nearly three years. Based on my experience in that position, I can tell you that the President, a lawyer himself, and his national security team have been guided by international law in setting the strategy for counterterrorism operations against ISIL. I can attest personally that the President cares deeply about these issues, and that he goes to great lengths to be sure that he understands them.

To start from first principles—the United States complies with the international law of armed conflict in our military campaign against ISIL, as we do in all armed conflicts. We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.

I do not mean to suggest that identifying and applying key international law principles to this fight is easy or without controversy. The United States is engaged in an armed conflict with a non-State actor that controls significant territory, in circumstances in which multiple States and non-State actors also have been engaging in military operations against this enemy, other groups, and each other for several years. These conflicts raise novel and difficult questions of international law that the United States is called to address literally on a daily basis in conducting operations.

Of course, international law is also vitally important to other States. And as the President's counterterrorism strategy has prioritized the development of partnerships with those who share our interests, I submit that it is increasingly important for the United States to engage in what I will call legal diplomacy with those countries with which we partner, as well as those with which we may not see eye to eye. Our ability to engage and work with partners can and often does turn on international legal considerations. We want to work with partners who will comply with international law, and our partners expect the same from us. In this way, international law serves as a critical enabler of international cooperation and joint action on a full range of matters, from the mundane to those that hit the front pages, such as the Iran nuclear deal, efforts to promote peace in Syria, maritime claims in the South China Sea, data privacy, and surveillance.

I will address three topics in my remarks. First, I will attempt to explain in greater detail the United States' international legal basis for using force against ISIL, and some of the key rules of the law of armed conflict that apply to our fight against ISIL. Second, I will address how law of armed conflict-related considerations arise in the context of "partnered" operations—an area in which legal diplomacy is particularly critical. Third, I will address the interplay between law and policy in the conduct of hostilities by the United States—specifically those undertaken under

the Presidential Policy Guidance that the President signed on May 22, 2013, known as the “PPG.”

*Jus ad bellum*

I will begin with the United States’ international law justification for resorting to the use of force, or the *jus ad bellum*.

As I mentioned a few minutes ago, the United States’ armed conflict with ISIL is taking place in a complicated environment—one in which a non-State actor, ISIL, controls significant territory and where multiple States and non-State actors have been engaging in military operations against ISIL, other groups, and each other for several years. Unfortunately, this scenario is not unprecedented in today’s world. Iraq and Syria resemble other countries where multiple armed conflicts may be going on simultaneously—countries like Yemen and Libya.

In such complex circumstances, States can potentially find themselves in more than one armed conflict or with multiple legal bases for using force. This complexity is why it is all the more important that we are clear and systematic in our thinking through how *jus ad bellum* principles for resorting to force apply to our actions and what uses of force those principles permit.

The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force. Article 2(4) of the U.N. Charter provides in relevant part that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Article 51 of the U.N. Charter, on the other hand, specifies that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.” Thus, the U.N. Charter recognizes the inherent right to resort to force in individual or collective self-defense. Similarly, the Charter does not prohibit an otherwise lawful use of force when undertaken with the consent of the State upon whose territory the force is to be used.

As a matter of international law, the United States has relied on both consent and self-defense in its use of force against ISIL. Let’s start with ISIL’s ground offensive and capture of Iraqi territory in June 2014 and the resulting decision by the United States and other States to assist with a military response. Beginning in the summer of 2014, the United States’ actions in Iraq against ISIL have been premised on Iraq’s request for, and consent to, U.S. and coalition military action against ISIL on Iraq’s territory in order to help Iraq prosecute the armed conflict against the terrorist group.

Upon commencing air strikes against ISIL in Syria in September 2014, the United States submitted a letter to the U.N. Security Council explaining the international legal basis for our use of force in Syria in accordance with Article 51 of the U.N. Charter. As the letter explained, Iraq had made clear it was facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria and had requested that the United States lead international efforts to strike ISIL in Syria. Consistent with the inherent right of individual and collective self-defense, the United States initiated necessary and proportionate actions in Syria against ISIL. The letter also articulated the United States’ position that Syria was unable or unwilling to effectively confront the threat that ISIL posed to Iraq, the United States, and our partners and allies.

Thus, although the United States maintains an individual right of self-defense against ISIL, it has not relied solely on that international law basis in taking action against ISIL. In Iraq, U.S. operations against ISIL are conducted with Iraqi consent and in furtherance of Iraq’s own armed conflict against the group. And in Syria, U.S. operations against ISIL are conducted in individual self-defense and the collective self-defense of Iraq and other States.

To say a few more words about self-defense: First, the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States. Nor is the right of self-defense on the territory of another State against non-State actors, such as ISIL, something that developed after 9/11. To the contrary, for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As but one example, the oft-cited Caroline incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Although the precise wording of the justification for the exercise of self-defense against non-State actors may have varied, the acceptance of this right has remained the same.

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to imminent ones before they occur.

When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against a particular non-State actor, the United States analyzes a variety of factors, including those identified by Sir Daniel Bethlehem in the enumeration he set forth in the American Journal of International Law—the ASIL’s own in-house publication—in 2012. These factors include the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

In the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. Under the PPG, however, the concept of imminence plays an important role as a matter of policy in certain U.S. counterterrorism operations, even when it is not legally required.

I’d also like to say a few words on how State sovereignty and consent factor into the international legal analysis when considering the use of force. President Obama has made clear that “America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.” This is true of our operations against ISIL as it has been true in our non-international armed conflict against al-Qa’ida and associated forces.

Indeed, under the *jus ad bellum*, the international legal basis for the resort to force in self-defense on another State’s territory takes into account State sovereignty. The international law of self-defense requires that such uses of force be necessary to address the threat giving rise to the right to use force in the first place. States therefore must consider whether unilateral actions in self-defense that would impinge on a territorial State’s sovereignty are necessary or whether it might be possible to secure the territorial State’s consent before using force on its territory against a non-State actor. In other words, international law not only requires a State to analyze whether it has a legal basis for the use of force against a particular non-State actor—which I’ll call the “against whom” question—but also requires a State to analyze whether it has a legal

basis to use force against that non-State actor in a particular location—which I’ll call the “where” question.

It is with respect to this “where” question that international law requires that States must either determine that they have the relevant government’s consent or, if they must rely on self-defense to use force against a non-State actor on another State’s territory, determine that the territorial State is “unable or unwilling” to address the threat posed by the non-State actor on its territory. In practice, States generally rely on the consent of the relevant government in conducting operations against ISIL or other non-State actors even when they may also have a self-defense basis to use force against those non-State actors, and this consent often takes the form of a request for assistance from a government that is itself engaged in an armed conflict against the relevant group. This is the case with respect to ISIL in Iraq.

Of course, the concept of consent can pose challenges in a world in which governments are rapidly changing, or have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought. The U.S. Government carefully considers these issues when considering the question of consent.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State’s territory without the territorial State’s consent. For example, in the case of ISIL in Syria, as indicated in our Article 51 letter, we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL. This “unable or unwilling” standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State’s territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using its territory as a base for attacks and related operations against other States.

With respect to the “unable” prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating. This is the case with respect to the situation in Syria. By September 2014, the Syrian government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL’s control.

#### *Jus in bello*

In the next few minutes I’d like to shed some light on the *jus in bello*—the legal rules we follow in carrying out the fight against ISIL. As a threshold matter, some of our foreign partners have asked us how we classify the conflict with ISIL and thus what set of rules applies. Because we are engaged in an armed conflict against a non-State actor, our war against ISIL is a non-international armed conflict, or NIAC. Therefore, the applicable international legal regime

governing our military operations is the law of armed conflict covering NIACs, most importantly, Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in non-international armed conflicts.

The rules applicable in NIACs have received close scrutiny since the September 11 attacks within the U.S. Government, in our courts in the context of ongoing litigation concerning detention and military commission prosecutions, and in the expanding and ever more sophisticated treatment that these issues receive in academia.

I would like to clarify briefly some of the rules that the United States is bound to comply with as a matter of international law in the conduct of hostilities during NIACs. In particular, I'd like to spend a few minutes walking through some of the targeting rules that the United States regards as customary international law applicable to all parties in a NIAC:

- First, parties must distinguish between military objectives, including combatants, on the one hand, and civilians and civilian objects on the other. Only military objectives, including combatants, may be made the object of attack.
- Insofar as objects are concerned, military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The United States has interpreted this definition to include objects that make an effective contribution to the enemy's war-fighting or war-sustaining capabilities.
- Feasible precautions must be taken in conducting an attack to reduce the risk of harm to civilians, such as, in certain circumstances, warnings to civilians before bombardments.
- Customary international law also specifically prohibits a number of targeting measures in NIACs. First, attacks directed against civilians or civilian objects as such are prohibited. Additionally, indiscriminate attacks, including but not limited to attacks using inherently indiscriminate weapons, are prohibited.
- Attacks directed against specifically protected objects such as cultural property and hospitals are also prohibited unless their protection has been forfeited.
- Also prohibited are attacks that violate the principle of proportionality—that is, attacks against combatants or other military objectives that are expected to cause incidental harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated.
- Moreover, acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

To elaborate further and correct some possible misunderstandings regarding who the United States targets as an enemy in its ongoing armed conflicts, I'd like to explain how the United States assesses whether a specific individual may be made the object of attack.

In many cases we are dealing with an enemy who does not wear uniforms or otherwise seek to distinguish itself from the civilian population. In these circumstances, we look to all available real-time and historical information to determine whether a potential target would be a lawful object of attack. To emphasize a point that we have made previously, it is not the case that all adult males in the vicinity of a target are deemed combatants. Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member of an organized armed group with which

we are engaged in an armed conflict. For example, with respect to membership in an organized armed group, we may examine the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of State militaries that are liable to attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.

#### Partnerships and legal diplomacy

I'd like to turn next to discussing the international coalitions and other partnerships that are critical to the fight against ISIL and the legal diplomacy that helps facilitate and sustain those partnerships. Sixty-six partners are engaged as part of the coalition that is steadily degrading ISIL. In the course of building and maintaining that strong coalition, we have also sought to navigate legal differences and find common legal ground. Some of our allies and partners have different international legal obligations because of the different treaties to which they are party, and others may hold different legal interpretations of our common obligations. Legal diplomacy plays a key role in building and maintaining the counter-ISIL military coalition and fostering interoperability between its members. Legal diplomacy builds on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State's international obligations or interpretations.

Public explanations of legal positions are an important part of legal diplomacy. The United States is not alone in providing such public explanations. Over the last 18 months, for example, nine of our coalition partners have submitted public Article 51 notifications to the U.N. Security Council explaining and justifying their military actions in Syria against ISIL. Though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL. Those States' military actions against ISIL in Syria and their public notifications are perhaps the clearest evidence of this understanding of the international law of self-defense.

More frequently, however, it is through private consultations that governments seek to understand each other's legal rationale for military operations. These private discussions help frame the public conversation on some of the central legal issues, and they are crucial to securing the vital cooperation of partners who want to understand our legal basis for acting. For example, there are times when the United States has sought the assistance of key allies in taking direct action against terrorist targets, but before these allies would aid us, the lawyers in their foreign ministries have sought a better understanding of the legal basis for our operations. The prompt, compelling, and—at times—very early morning explanations provided by our attorneys can be crucial to enabling such operations.

These conversations also go the other way. The U.S. commitment to upholding the law of armed conflict also extends to promoting law of armed conflict compliance by our partners. In the campaign against ISIL and beyond, coalitions and partnerships with other States and non-State actors are increasingly prominent features of current U.S. military operations. When others seek our assistance with military operations, we ensure that we understand their legal basis for acting. We also take a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance. Examples of such measures include vetting and training recipients of our assistance and monitoring how our assistance is used.

Some have argued that the obligation in Common Article 1 of the Geneva Conventions to “ensure respect” for the Conventions legally requires us to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict. Although we do not share this expansive interpretation of Common Article 1, as a matter of policy, we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same. As a matter of international law, we would look to the law of State responsibility and our partners’ compliance with the law of armed conflict in assessing the lawfulness of our assistance to, and joint operations with, those military partners.

#### Law and Policy

Finally, I’d like to touch on the interplay between law and policy when the United States takes lethal action in armed conflicts and how the United States often applies policy standards that exceed what the law of armed conflict requires.

As a matter of international law, the United States is bound to adhere to the law of armed conflict. In many cases, the United States imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict. For example, the U.S. military may impose an upper limit as a matter of policy on the anticipated number of non-combatant casualties that is much lower than that which would be lawful under the rule that prohibits attacks that are expected to cause excessive incidental harm.

Additionally, although the United States is not a party to the 1977 Additional Protocol II to the 1949 Geneva Conventions and therefore not bound to comply with its provisions as a matter of treaty law, current U.S. practice is already consistent with the Protocol’s provisions, which provide rules applicable to States parties in non-international armed conflict. This is a treaty that the Reagan Administration submitted to the Senate for its advice and consent to ratification, and every subsequent Administration has continued that support.

I’d like to focus my comments over the next few minutes on U.S. operations to capture or employ lethal force against terrorist targets outside areas of active hostilities. In addition to the law of armed conflict, these operations are governed by policy guidance issued by the President in 2013. This policy guidance, known as the PPG, reflects this Administration’s efforts to strengthen and refine the process for reviewing and approving counterterrorism operations outside of the United States and “areas of active hostilities.”

The phrase “areas of active hostilities” is not a legal term of art—it is a term specific to the PPG. For the purpose of the PPG, the determination that a region is an “area of active hostilities” takes into account, among other things, the scope and intensity of the fighting. The Administration currently considers Afghanistan, Iraq, and Syria to be “areas of active hostilities,” which means that the PPG does not apply to operations in those States.

Substantively, the PPG imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting. The President has done so out of a belief that implementing such heightened standards outside of hot battlefields is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.

Of course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG’s heightened policy standards may not be met. But in every case in which the United States takes military action, whether in or outside an area of active hostilities, we are bound to adhere as a matter of international law to the law of armed conflict. This includes, among other things, adherence to the fundamental law of armed conflict principles of distinction, proportionality, necessity, and humanity.

The Administration has already identified a number of the aspects in which the PPG imposes policy standards for the use of lethal force in counterterrorism operations that go beyond the requirements of the law of armed conflict. I'd like to focus on one key aspect here. The PPG establishes measures that go beyond the law of armed conflict in order to minimize risks to civilians to the greatest extent possible. In particular, the PPG establishes a threshold of "near certainty" that non-combatants will not be injured or killed. This standard is also higher than that imposed by the law of armed conflict, which contemplates that civilians will inevitably and tragically be killed in armed conflict.

In addition, with respect to lethal action, the PPG generally requires an assessment that capture of the targeted individual is not feasible at the time of the operation. The law of armed conflict does not itself impose any such "least restrictive means" obligation; instead, combatants may be targeted with lethal force at any time, provided that they are not "out of the fight" due to capture, surrender, illness, or injury.

I hope that this discussion of the PPG and other distinctions between law and policy has given you an understanding not only of the difference between the legal and policy constraints on U.S. lethal targeting, but also better appreciation of the lengths this government goes to in order to minimize harm to civilians outside of hot battlefields while also taking the direct action necessary to protect the United States, our partners, and allies.

#### Conclusion

In closing, I'll speak to a final aspect of legal diplomacy, one which my predecessors have emphasized in their public remarks as well. As Legal Adviser, one of my roles is to serve as a spokesperson for the U.S. Government on the importance and relevance of international law, and how the U.S. Government interprets, applies, and complies with international law. Part of our legal diplomacy is carried out with our foreign counterparts behind closed doors. But public legal diplomacy is a critical aspect of our work as well, as my predecessors—several of whom are in the audience today—have ably demonstrated.

It is not enough that we act lawfully or regard ourselves as being in the right. It is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions. Even if other governments or populations do not agree with our precise legal theories or conclusions, we must be able to demonstrate to others that our most consequential national security and foreign policy decisions are guided by a principled understanding and application of international law.

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#### **b. 2013 Presidential Policy Guidance**

As discussed in *Digest 2013* at 549-52, President Obama signed policy guidance (the "PPG") in 2013, establishing a framework for the use of force in counterterrorism operations outside the United States, which was described contemporaneously in a White House fact sheet. In 2016, the U.S. government released a redacted version of the 2013 PPG in connection with a Freedom of Information Act ("FOIA") action in U.S. district court. *ACLU v. Dept. of Justice*, No. 15-1954 (S.D.N.Y.). The released document is available at [https://www.justice.gov/oip/foia-](https://www.justice.gov/oip/foia-library/procedures%20for%20approving%20direct%20action%20against%20terrorist%20targets/download)

[library/procedures for approving direct action against terrorist targets/download](https://www.justice.gov/oip/foia-library/procedures%20for%20approving%20direct%20action%20against%20terrorist%20targets/download)

## 2. Presidential Memorandum on Use of Force and Accompanying Report

On December 5, 2016, the President issued a memorandum, "Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations." Daily Comp. Pres. Docs. 2016 DCPD No. 00820, pp. 1-2. The memorandum is excerpted below.

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The United States has used military force and conducted related national security operations within legal and policy frameworks that are designed to ensure that such operations are lawful and effective and that they serve our interests and values. Consistent with my commitment to transparency, my Administration has provided to the public an unprecedented amount of information regarding these frameworks through speeches, public statements, reports, and other materials. We have attempted to explain, consistent with our national security and the proper functioning of the executive branch, when and why the United States conducts such operations, the legal basis and policy parameters for such operations, and how such operations have unfolded, so that the American people can better understand them.

In addition to the efforts we have made to date, there is still more work that can be done to inform the public. Thus, consistent with my Administration's previous efforts, by this memorandum I am directing national security departments and agencies to take additional steps to share with the public further information relating to the legal and policy frameworks within which the United States uses military force and conducts related national security operations. Accordingly, I hereby direct as follows:

Section 1. Report. National security departments and agencies shall prepare for the President a formal report that describes key legal and policy frameworks that currently guide the United States use of military force and related national security operations, with a view toward the report being released to the public.

Sec. 2. Keeping the Public Informed. On no less than an annual basis, the National Security Council staff shall be asked to, as appropriate, coordinate a review and update of the report described in section 1 of this memorandum, provide any updated report to the President, and arrange for the report to be released to the public.

Sec. 3. Definitions. For the purposes of this memorandum:

"National security departments and agencies" include the Departments of State, the Treasury, Defense, Justice, and Homeland Security, the Office of the Director of National Intelligence, the Central Intelligence Agency, and such other agencies as the President may designate.

"Related national security operations" include operations deemed relevant and appropriate by national security departments and agencies for inclusion in the report described in section 1 of this memorandum, such as detention, transfer, and interrogation operations.

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Pursuant to the December 5, 2016 Memorandum, the White House released its Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations ("Transparency Report"), available at

[https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf)

The report consolidates administration positions on the legal and policy frameworks guiding the United States' use of military force and related national security operations. As summarized in a fact sheet on the report, available at

<https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/fact-sheet-presidential-memorandum-legal-and-policy-transparency>

Part One of the report focuses on frameworks for the use of U.S. military force overseas and U.S. military support for other nations' use of force. Topics include the domestic and international legal basis for the use of U.S. military force; the end of armed conflicts with non-state armed groups; working with others in an armed conflict; and the application of legal and policy frameworks to U.S. operations in key theaters (Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen).

Part Two describes key legal and policy frameworks related to the conduct of hostilities. Topics include targeting; the capture of individuals in armed conflict; the detention of individuals in armed conflict; the prosecution of individuals through the criminal justice system and military commissions; and the transfer of armed conflict detainees.

Excerpts below (with endnotes omitted) from Part One of the report pertain to the U.S. legal bases for the use of military force and include discussion of the 2016 determination that al-Shabaab is covered by the 2001 Authorization for Use of Military Force ("AUMF"). Excerpts from Part Two of the report appear in section C, *infra*.

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Shortly after the September 11th attacks, Congress passed the Authorization for Use of Military Force (2001 AUMF). In that joint resolution, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Through the 2001 AUMF, Congress intended to give the President the statutory authority he needed "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The 2001 AUMF plainly covers al-Qa'ida, the "organization" that "planned, authorized, committed, [and] aided the terrorist attacks that occurred on September 11, 2001," as well as the Taliban, which "harbored" al-Qa'ida. Thus, in accordance with this statutory authorization, the United States commenced military operations against al-Qa'ida and the Taliban on October 7, 2001. The 2001 AUMF continues to provide the domestic legal authority for the United States to use military force against the terrorist threats identified above.

### *1. The Scope of the 2001 AUMF*

All three branches of the U.S. Government have affirmed the ongoing authority conferred by the 2001 AUMF and its application to al-Qa'ida, to the Taliban, and to forces associated with those two organizations within and outside Afghanistan.

In March 2009, the Department of Justice filed a brief addressing the question of the scope of the government's detention authority under the 2001 AUMF in litigation over detention at Guantanamo Bay. The brief explained that the 2001 AUMF authorizes detention of enemy forces as an aspect of the authority to use force. With respect to the scope of detention authority under the 2001 AUMF, the brief explained that the 2001 AUMF authorized the detention of "persons who were part of, or substantially supported, Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." The brief stated that, in applying that standard, "[p]rinciples derived from law-of-armed-conflict rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized" in the 2001 AUMF.

In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress expressly affirmed "that the authority of the President to use all necessary and appropriate force pursuant to the [2001] Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war." In turn, subsection (b) of that Act defined a "covered person" as "any person" who either "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" or "who was a part of or substantially supported al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

Similarly, the Federal courts have issued rulings in the detention context that affirmed the President's authority to detain individuals who are part of al-Qa'ida, the Taliban, or associated forces, or who substantially supported those forces in the armed conflict against them.

### *2. Definition of "Associated Forces"*

As noted in the previous sub-section, all three branches of government have recognized that the 2001 AUMF authorizes the use of force against "al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

To be considered an "associated force" of al-Qa'ida or the Taliban for purposes of the authority conferred by the 2001 AUMF, an entity must satisfy two conditions. First, the entity must be an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban. Second, the group must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners. Thus, a group is not an associated force simply because it aligns with al-Qa'ida or the Taliban or embraces their ideology. Merely engaging in acts of terror or merely sympathizing with al-Qa'ida or the Taliban is not enough to bring a group within the scope of the 2001 AUMF. Rather, a group must also have entered al-Qa'ida or the Taliban's fight against the United States or its coalition partners.

### *3. Application of the 2001 AUMF to Particular Groups and Individuals*

Consistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001

AUMF: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa'ida in Libya; al-Qa'ida in Syria; and ISIL.

A determination was made at the most senior levels of the U.S. Government that each of the groups named above is covered by the 2001 AUMF only after a careful and lengthy evaluation of the intelligence concerning each group's organization, links with al-Qa'ida or the Taliban, and participation in al-Qa'ida or the Taliban's ongoing hostilities against the United States or its coalition partners. Moreover, the Administration also regularly briefs Congress about U.S. operations against these groups and the legal basis for these operations.

Although much of the intelligence underlying a determination that a group is covered by the 2001 AUMF is necessarily sensitive, many of these groups have made plain their continued allegiance and operational ties to al-Qa'ida. For example, this determination was made recently with respect to al-Shabaab because, among other things, al-Shabaab has pledged loyalty to al-Qa'ida in its public statements; made clear that it considers the United States one of its enemies; and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa. In short, al-Shabaab has entered the fight alongside al-Qa'ida and is a co-belligerent with al-Qa'ida in hostilities against the United States, making it an "associated force" and therefore within the scope of the 2001 AUMF.

A particularly prominent group that the Administration has determined to fall within the ambit of the 2001 AUMF is the enemy force now called ISIL. As discussed below, Congress has expressed support for this action.

As the Administration has explained publicly, the 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004. The facts underlying this determination are as follows: a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to Osama bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before the September 11th attacks—conducted a series of terrorist attacks in Iraq beginning in 2003. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, which adopted the name al-Qa'ida in Iraq (AQI) when it merged with al-Qa'ida, conducted deadly terrorist attacks against U.S. and coalition forces. In response to these attacks, U.S. forces engaged in combat operations against the group from 2004 until U.S. and coalition forces left Iraq in 2011. The group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel that are now present in Iraq at the invitation of the Iraqi Government.

The subsequent 2014 split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF. Although ISIL broke its affiliation with al-Qa'ida, the same organization continues to wage hostilities against the United States as it has since 2004, when it joined bin Laden's al-Qa'ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it—not al-Qa'ida's current leadership—is the true executor of bin Laden's legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa'ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests. In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue

using force against ISIL—a group that has been subject to that AUMF for more than a decade—simply because of conflicts between the group and al-Qa’ida’s current leadership. A contrary interpretation of the statute would allow an enemy force—rather than the President and Congress—to control the scope of the 2001 AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

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Excerpts below (with endnotes omitted) from Part One of the report pertain to the international law bases for the use of military force.

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The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force, a question that is governed by the body of international law known as the *jus ad bellum*. In particular, Article 2(4) of the U.N. Charter provides in relevant part that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Article 51 of the U.N. Charter, however, specifies that “[n]othing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.”

Although a comprehensive discussion of when a State may resort to force on the territory of another State under international law is beyond the scope of this report, the United States generally recognizes three circumstances under which international law does not prohibit such a use of force: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State. Each of these three bases is described below and their application to the United States’ current uses of military force is described in Part One, Section V.

The three international law bases for using force on the territory of another State are not mutually exclusive, and States may have more than one international legal basis for using force. The United States has relied on all three bases at various points during this Administration. Moreover, although this portion of the report is focused on the *jus ad bellum*, all U.S. military operations involving the use of military force under any of the justifications noted above are conducted consistent with the law of armed conflict, also known as the *jus in bello*.

#### *A. U.N. Security Council Authorization*

The U.N. Security Council may, under Chapter VII of the U.N. Charter, authorize the use of force as may be necessary to maintain or restore international peace and security. For example, during this Administration, the United States and other States have used force pursuant to a U.N. Security Council resolution under Chapter VII to protect civilian populated areas under threat of attack in Libya, to combat piracy in and off the coast of Somalia, and to support the International Security Assistance Force (ISAF) in Afghanistan.

#### *B. The Inherent Right of Individual and Collective Self-Defense*

##### *1. Basic Principles*

The U.N. Charter recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack, subject to the customary international law

requirement that any use of force in self-defense must be limited to what is necessary and proportionate to address the threat.

#### 2. Self-Defense Against Non-State Actors

The inherent right of self-defense is not restricted to threats posed by States. Even before the September 11th attacks, it was clear that the right of self-defense applies to the use of force against non-State actors on the territory of another State. For centuries, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As one example, the oft-cited *Caroline* incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Nearly two hundred years later, this right remains widely accepted. Moreover, States may use force in self-defense against non-State actors either individually or collectively; for example, the United States is currently using force against ISIL in Syria in the collective self-defense of Iraq (and other States).

#### 3. Self-Defense in Response to Imminent Armed Attacks

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. These factors include “the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.” Moreover, “the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.” Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an “imminent” attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

#### 4. Self-Defense and “Unable or Unwilling”

Under international law, a State may use force on the territory of another State in self-defense only if it is necessary to do so in order to address the threat giving rise to the right to use force in the first instance. States therefore must consider whether actions in self-defense that would impinge on another State’s sovereignty are necessary, which entails assessing whether the territorial State is able and willing to mitigate the threat emanating from its territory and, if not, whether it would be possible to secure the territorial State’s consent before using force on its territory against a non-State actor.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used against a non-State armed group. Under international law, States may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face actual or imminent armed attacks by a non-State armed group and the use of force is necessary because the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by the non-State actor for such attacks. In particular, there will be cases in which there is a reasonable and objective basis for concluding

that the territorial State is unable or unwilling to confront effectively a non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State's territory without its consent.

As the Executive Branch has said previously, this “unable or unwilling” standard, in the circumstances here, is “an important application of the requirement that a State, when relying on self-defense for its use of force in another State's territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.” Through this legal basis for action, customary international law recognizes that a State may defend itself against a non-State actor that is able to launch attacks from within another State's territory.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using the State's territory as a base for attacks and related operations against other States. With respect to the “unable” prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the “unwilling” prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.

#### 5. Application of the *Jus ad Bellum* in an Ongoing Armed Conflict

Once a State has lawfully resorted to force in self-defense against a particular actor in response to an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is occurring or imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. In addition, in armed conflicts with non-State actors that are prone to shifting operations from country to country, the United States does not view its ability to use military force against a non-State actor with which it is engaged in an ongoing armed conflict as limited to “hot” battlefields. This does not mean the United States can strike wherever it chooses: the use of force in self-defense in an ongoing armed conflict is limited by respect for States' sovereignty and the considerations discussed above, including the customary international law requirements of necessity and proportionality when force could implicate the rights of other States.

#### *C. Consent to Use Force in an Otherwise Lawful Manner*

Another circumstance in which the use of force on the territory of another sovereign does not violate international law is when undertaking an otherwise lawful use of force with the consent of a territorial State. The provision of such consent need not be made public. The United States has relied on State consent in various military operations. In many cases, consent operates in conjunction with the right of self-defense in an ongoing armed conflict. In operations against ISIL, for example, the United States has relied on both its right of self-defense and the consent of certain territorial States.

The concept of consent can pose challenges in certain countries where governments are rapidly changing, have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought and the form such consent should take. The U.S. Government carefully considers these issues when examining the question of consent.

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### 3. International Humanitarian Law

#### a. *Civilians in Armed Conflict*

On January 19, 2016, Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, delivered remarks at the UN Security Council on the protection of civilians in armed conflict. Her remarks are excerpted below and available at

<http://2009-2017-usun.state.gov/remarks/7102>

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...[W]e have to talk about protection of civilians regardless of whether or not peacekeepers are deployed in a particular area. And it reminds us, above all, of the growing disregard for granting humanitarian access—which used to be a principle that was observed as a general rule, even though there were always exceptions—the disregard for international humanitarian law, and most fundamentally and most disturbingly, the apparent disregard for human life. That is what we’re dealing with—a numbing that would allow people to inflict that kind of harm willfully on civilians and on children.

More than 4 million Syrians now live in areas where the UN struggles to deliver assistance. Time and again, the Syrian regime has promised to uphold its most basic responsibilities to its citizens. Time and again, they’ve agreed to allow life-saving aid to reach starving people. And time and again, the Syrian regime has failed to follow through. Throughout last year, Damascus did not even bother to respond to more than half of UN requests to deliver assistance across conflict lines. And those countries in the UN who have influence over the Syrian regime, who are partnering with them now in the conflict, who are coming in some places to their rescue: please use that influence to get them, in the first instance to respond to UN requests, and above all to grant those requests.

The UN estimates that if the regime approved the outstanding requests—those are the requests outstanding just today—1.4 million people would receive assistance. And it bears stressing that while we all have rightly talked about the use of starvation as a weapon of war here today, that use of food as a weapon of war is happening right alongside other horrific tactics—barrel bombs, chemical weapons use, and systematic torture against civilians by the regime. Of course, when it comes to ISIL, some of the most barbaric and gruesome tactics that we have ever seen employed—including the use of children to execute their parents; including the summoning of civilians, as we saw over the weekend in Deir Az Zour—somewhere between 100 and 300

people executed in cold blood; the sexual enslavement of women like Nadiya, whom we heard from in December at our session on human trafficking.

Where is the sanctity of life? Where is the respect for the human dignity of the person in conflict today? Yemen, South Sudan, Central African Republic, Burundi, the list goes on and on. Civilians are not just going unprotected, but are often coming under deliberate attack.

Let me briefly suggest three areas in which we—and by we I mean the Security Council, the UN, and we each as Member States—can and must seek immediate improvements.

The first should be straightforward, it is on the transmission of information. When UN staff, leaders, and experts—or when any of us as Member States, through our partners on the ground—recognize looming threats or anticipate potential crises, they or we must immediately inform the Council. When something shocks the conscience—of someone who works for an NGO or for the UN or for a Member State—come forward. Again, jump up and down, sound the alarm. The Council must also hear immediately from the Department of Peacekeeping Operations when peacekeeping contingents that are tasked with protecting civilians do not fulfil that component of their mandate, as has been documented happens too often. In that instance, we in the Council can try to use our leverage—our leverage in capital in terms of our bilateral ties, and our leverage as a Council—to ensure that appropriate action is taken. Building upon the Secretary-General's Implementation Report on the High-Level Independent Panel on Peace Operations, DPKO should also work to more systematically bring to the Council's attention the most pressing protection challenges and strategies needed to address them. Shine the spotlight back on us rather than internalizing the constraints that may well exist, but put it back on the Council where it belongs.

The second area is peacekeeping performance and accountability. With nearly all peacekeepers now mandated to protect civilians, they represent one of our most powerful tools in this effort, even if they can't be and aren't everywhere. It is incumbent upon the Council to ensure that all contingents are appropriately prepared and sufficiently trained and equipped, and that they are held accountable if they fail to uphold their mandate. From the outset, we must ensure that the mission planning process takes full account of the protection of civilians; this priority should inform strategy development and resource allocation. We must also ensure that the troops being deployed are adequately prepared.

Others have touched upon the importance of the Kigali principles and we share the appreciation for the initiative taken by Rwanda. The United States is prioritizing support for troop-contributing countries that have committed to the Kigali principles or who have otherwise demonstrated a commitment to fully implementing mission mandates. Once deployed, the UN's leadership must be prepared to replace any contingents that are not effectively protecting civilians—and certainly also any that would harm civilians, including through sexual exploitation and abuse. The additional 50,000 soldiers and police pledged at the September peacekeeping summit give the UN new choices and the ability to replace failing units—this option must be exercised. And in this regard we welcome the UN decision to remove the DRC peacekeepers from the Central African Republic as an important signal of zero tolerance on abuse. Full accountability is needed across this and other missions for all the allegations that have surfaced.

Third and finally, Mr. President, this Council and this organization must also recognize that its responsibility for the protection of civilians is not limited to those countries hosting peacekeeping missions. From Madaya to Burundi, when civilians come under threat, the Council must consider every appropriate action at its disposal. We may disagree on what the perfect tool

is, but we must agree that we need to open up the toolbox and try to put as many tools in place as have a chance at achieving influence. This could include sustained bilateral pressure, the development of mediation and peacekeeping options, the consideration of sanctions against those who are perpetrators or organizers of attacks against civilians or attacks against peacekeepers. Think of how many peacekeepers were attacked in 2015 and ask how many of those who attacked UN peacekeepers—the very people sent by this Council—were ever held accountable. Ever. And look at that record over a decade. The answer is a show of the impunity that the perpetrators against peacekeepers feel, and you can imagine if that is the case for those coming from Member States of this United Nations sent by the Council, what it is like for the average civilian that has been attacked.

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On May 3, 2016, Ambassador Michele J. Sison, U.S. Deputy Representative to the United Nations, delivered the U.S. explanation of vote at the adoption of UN Security Council Resolution 2286 on the protection of civilians in armed conflict. Ambassador Sison's statement is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7258>

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Let me, first of all, express my deep appreciation and respect for the critical work and life-saving work that the International Committee of the Red Cross and Médecins Sans Frontières do around the world. We also thank the penholders of this unanimously adopted resolution for focusing this Council's attention on the importance of protecting medical personnel and access to medical care in armed conflict. At the outset, it is important to be clear: all those who are engaged exclusively in medical work must be respected and protected as civilians, regardless of their affiliation. The United States strongly supports efforts to safeguard access to medical care in situations of armed conflict. We also support efforts to increase awareness of the international laws that provide legal protection for medical personnel, as well as medical facilities and transportation in conflict situations.

I would like to focus my comments today on practical ways of protecting medical care in conflict, the human consequences of attacks, and Syria—where we see the most egregious examples of attacks on medical facilities and personnel. But first, let me take a moment to state up front, that the United States deeply regrets the tragic and mistaken attack on the Médecins Sans Frontières hospital in Kunduz, Afghanistan last October. I would like to echo the words of President Obama, and once again express our profound condolences for the Afghan medical professionals and other civilians killed and injured in the tragic attack. U.S. forces are prohibited from targeting protected medical facilities, and U.S. forces are committed to complying with the international humanitarian law principles that protect hospitals and medical staff caring for patients, including wounded combatants in conflict zones.

As you are aware, the Pentagon, following a six-month investigation of the incident in Kunduz, has disciplined 16 service members for mistakes that led to the tragedy, including the suspension of an officer from command. The disciplinary action taken highlights the seriousness with which we take this incident. This tragedy was the direct result of human error, compounded by systems and procedural failures, and U.S. forces will learn from this incident, study what went wrong, and will take the necessary steps to prevent any such tragic incidents in the future.

As some in this room may remember, one of the worst recorded cases of assault on the wounded and sick occurred in November 1991 in the Croatian town of Vukovar. The same day ICRC secured agreement on the neutral status of the hospital, 300 patients and their relatives were forced onto buses: the bodies of 200 of them were later found in a mass grave, and 51 are still missing today. Despite the outcry that this event generated over 20 years ago, we have seen similar instances of targeted violence against patients and medical workers in countless conflicts since then. Unfortunately, many instances occurred only last month.

Nowhere has the increasing trend of attacks on medical personnel, facilities, and transportation been more apparent than in Syria, where such attacks are overwhelmingly carried out by the regime. The Commission of Inquiry recently reported that the targeting of hospitals and medical personnel, as well as denial of access to medical care, remain ingrained features of the Syrian conflict. Last week, Under-Secretary General Stephen O'Brien told the Council that the presence of a hospital or health facility is now perceived by neighbors to be a threat to their safety. For instance, of the 33 hospitals open in Aleppo city in 2010, fewer than 10 are reportedly still functioning. Just last week, we all heard the report of the horrific attack by the Syrian regime on Al-Quds hospital in Aleppo—a hospital supported by both MSF and ICRC. Reports suggest that at least 27 people died in the attack, including one of the last pediatricians in Aleppo City, as the Secretary-General and others have noted, along with a dentist and a nurse.

The Al-Quds attack came the day after the Syrian Civil Defense station in the town of Al-Atareb, Aleppo province, was struck five times, tragically killing five members of the Civil Defense—a humanitarian and first responder group most commonly known as the “White Helmets”. Both of these attacks came a week after targeted attacks on a cardiologist in Hama—Dr. Hasan al-Araj—and another physician in Zabadani, Dr. Mohammed al-Khous. It is clear that the regime has been targeting medical facilities and personnel.

We are also concerned by the report of today's attack on the al-Dabit hospital, on which we are still gathering information, and we are saddened by the deaths resulting from this attack. I regret to say that all of these attacks on medical workers and facilities took place in April alone. To date in Syria, according to several organizations, over 725 physicians in the country have been killed, and over 350 attacks on medical facilities have taken place—the vast majority of them at the hands of the regime. In fact, from January through March of this year—including during an agreed cessation of hostilities—Physicians for Human Rights documented 13 attacks on medical facilities and the deaths of 25 medical personnel. Syrian government forces were responsible for 12 of the attacks and 24 of the deaths.

Allies of the Asad regime—including Russia—have an urgent responsibility to press the regime to fulfill its commitments under UN Security Council Resolution 2254—to stop attacking civilians, medical facilities, and first responders, and to abide fully by the cessation of hostilities. ISIL, too, has directed multiple bombings of medical centers, including the triple bombing of a clinic in Tel Tamer in Hasakah province that killed more than 50 civilians on December 10th of last year.

And we are also deeply concerned by the devastating toll of the crisis in Yemen. Throughout the Yemen conflict, we have urged all sides to take all feasible steps to avoid harm to civilians to comply with obligations under international humanitarian law, including with regard to the protection of medical personnel and facilities. We continually remind the parties in Yemen of their obligations under international humanitarian law not to direct attacks against protected hospitals or places where the sick and wounded are present. Impartial humanitarian organizations must be allowed to continue their critical work saving lives free from threats from armed groups.

Let me conclude by saying that we commend the tireless work of OCHA and ICRC to promote practical ways that parties to armed conflicts can better protect medical personnel and facilities through the establishment of deconfliction systems. Establishing humanitarian deconfliction systems allows humanitarian organizations to submit geolocation data to parties to the conflict. Parties to any conflict share the responsibility for ensuring that such data is effectively incorporated into no-strike lists. For the United States, one result of the Kunduz investigation was to set out a number of operational improvements that have been made as a result of this accident, including the preloading of key information regarding targets onto aircraft systems.

However, we must all do more to improve the protection of medical personnel and hospitals in armed conflict. In Syria, specifically, we call again on Russia and other allies of the Syrian regime to use all their influence to stop the regime's deliberate targeting of medical professionals and facilities. With the deeply concerning increase in violence in Aleppo, we support the UK recommendation for an open meeting on the situation there.

We look forward to the Secretary-General's recommendations on preventive measures. We hope this can be an occasion, in the lead up to the World Humanitarian Summit, for us to recommit collectively to the core principles of international humanitarian law, including those that protect medical personnel and hospitals.

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On July 7, 2016, President Obama issued Executive Order 13732, "United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force." 81 Fed. Reg. 44,485 (July 7, 2016). Excerpts follow from E.O. 13732.

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Section 1. *Purpose.* ... As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.

The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and

enhance the legitimacy and sustainability of U.S. operations critical to our national security. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians.

Civilian casualties are a tragic and at times unavoidable consequence of the use of force in situations of armed conflict or in the exercise of a state's inherent right of self-defense. The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians.

*Sec. 2. Policy.* In furtherance of U.S. Government efforts to protect civilians in U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense, and with a view toward enhancing such efforts, relevant departments and agencies (agencies) shall continue to take certain measures in present and future operations.

(a) In particular, relevant agencies shall, consistent with mission objectives and applicable law, including the law of armed conflict:

(i) train personnel, commensurate with their responsibilities, on compliance with legal obligations and policy guidance that address the protection of civilians and on implementation of best practices that reduce the likelihood of civilian casualties, including through exercises, pre-deployment training, and simulations of complex operational environments that include civilians;

(ii) develop, acquire, and field intelligence, surveillance, and reconnaissance systems that, by enabling more accurate battlespace awareness, contribute to the protection of civilians;

(iii) develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force in different operational contexts;

(iv) take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population (unless the circumstances do not permit), adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished, and taking other measures appropriate to the circumstances; and

(v) conduct assessments that assist in the reduction of civilian casualties by identifying risks to civilians and evaluating efforts to reduce risks to civilians.

(b) In addition to the responsibilities above, relevant agencies shall also, as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict:

(i) review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, such as other agencies, partner governments, and nongovernmental organizations, and take measures to mitigate the likelihood of future incidents of civilian casualties;

(ii) acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed;

(iii) engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties, including through appropriate training and assistance; and

(iv) maintain channels for engagement with the International Committee of the Red Cross and other nongovernmental organizations that operate in conflict zones and encourage such organizations to assist in efforts to distinguish between military objectives and civilians, including by appropriately marking protected facilities, vehicles, and personnel, and by providing updated information on the locations of such facilities and personnel.

*Sec. 3. Report on Strikes Undertaken by the U.S. Government Against Terrorist Targets Outside Areas of Active Hostilities.* (a) The Director of National Intelligence (DNI), or such other official as the President may designate, shall obtain from relevant agencies information about the number of strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities from January 1, 2016, through December 31, 2016, as well as assessments of combatant and non-combatant deaths resulting from those strikes, and publicly release an unclassified summary of such information no later than May 1, 2017. By May 1 of each subsequent year, as consistent with the need to protect sources and methods, the DNI shall publicly release a report with the same information for the preceding calendar year.

(b) The annual report shall also include information obtained from relevant agencies regarding the general sources of information and methodology used to conduct these assessments and, as feasible and appropriate, shall address the general reasons for discrepancies between post-strike assessments from the U.S. Government and credible reporting from nongovernmental organizations regarding non-combatant deaths resulting from strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities.

(c) In preparing a report under this section, the DNI shall review relevant and credible post-strike all-source reporting, including such information from nongovernmental sources, for the purpose of ensuring that this reporting is available to and considered by relevant agencies in their assessment of deaths.

(d) The Assistant to the President for National Security Affairs may, as appropriate, request that the head of any relevant agency conduct additional reviews related to the intelligence assessments of deaths from strikes against terrorist targets outside areas of active hostilities.

*Sec. 4. Periodic Consultation.* In furtherance of the policies and practices set forth in this order, the Assistant to the President for National Security Affairs, through the National Security Council staff, will convene agencies with relevant defense, counterterrorism, intelligence, legal, civilian protection, and technology expertise to consult on civilian casualty trends, consider potential improvements to U.S. Government civilian casualty mitigation efforts, and, as appropriate, report to the Deputies and Principals Committees, consistent with Presidential Policy Directive 1 or its successor. Specific incidents will not be considered in this context, and will continue to be examined within relevant chains of command.

*Sec. 5. General Provisions. . . .*

(d) The policies set forth in this order are consistent with existing U.S. obligations under international law and are not intended to create new international legal obligations; nor shall anything in this order be construed to derogate from obligations under applicable law, including the law of armed conflict.

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**b. Additional Protocols to the Geneva Conventions**

On October 10, 2016, Emily Pierce, Counselor for the U.S. Mission to the United Nations, addressed the 71<sup>st</sup> Session of the UN General Assembly Sixth Committee on the status of the Additional Protocols to the Geneva Conventions of 1949. Ms. Pierce's remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7533>.

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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, and we recognize the vital importance of compliance with its requirements during armed conflict. President Obama has consistently reaffirmed the need for nations to work together within a rule of law framework in addressing the numerous security challenges currently confronting States; as he stated in his address to the U.N. General Assembly in September, “binding ourselves to international rules . . . enhances our security.” Accordingly, the United States continues to ensure that all of our military operations that are conducted in connection with armed conflict comply with international humanitarian law, as well as all other applicable international and domestic law.

As we reported in the last discussion of this agenda item in this Committee two years ago, the United States announced its intent to seek the U.S. Senate’s advice and consent to ratification of Additional Protocol II, and this treaty is pending before the Senate for its advice and consent. An extensive interagency review found that U.S. military practice was consistent with the Protocol’s provisions, and we believe it remains so 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.

The United States is committed to complying with its obligations under the law of armed conflict, including those obligations that address the protection civilians. The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective of civilians than would otherwise be required under the law of armed conflict. Some examples of best practices that are taken to enhance the protection of civilians are in Executive Order 13732 on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, which was issued by President Obama in July of this year.

I’d also like to take this opportunity to discuss the ongoing international initiative on strengthening compliance with international humanitarian law and to provide an update on our views following the 32nd International Conference of the Red Cross and Red Crescent held in December of last year. Over the past four years, the United States has been a strong supporter of creating a new forum to facilitate substantive, non-politicized discussion between States about international humanitarian law, and we believe that remains a worthy—and achievable—goal. It will be essential, however, to ensure that the forum’s modalities guard against politicization, such as by focusing discussions on best practices rather than violations, and ensuring that States report on their own practice rather than the practice of other States. We look forward to the further development of this initiative—as well as the initiative on strengthening protections for persons deprived of their liberty during armed conflict. Although the United States recognizes the progress States have made in improving the implementation of international humanitarian law over the past decades, more can and should be done to promote best practices.

We would also briefly like to signal our strong support for ongoing work in the Montreux Document Forum, which was launched in December 2014 and which held its second plenary meeting in January 2016. We are looking forward to the third plenary meeting next year, and we will continue to engage in the Montreux Document Forum to support regular dialogue on outreach regarding and implementation of the Montreux Document.

These various initiatives offer opportunities for States to engage in substantive discussions regarding good practices for strengthening implementation of international humanitarian law. We look forward to continuing to work with the International Committee of the Red Cross, with the United Nations, and with our other partners around the world in these endeavors.

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**c. *Legal Adviser’s Letter on Enhanced Interrogation Techniques***

On June 13, 2016, the Department of State released, in response to a Freedom of Information Act (“FOIA”) request, the February 9, 2007 letter from then State Department Legal Adviser John B. Bellinger, III to the Department of Justice Office of Legal Counsel. The letter provides the views of the Legal Adviser on the Justice Department’s draft opinion on “enhanced interrogation techniques.” Excerpts follow from the letter, as released pursuant to FOIA, which is available at

<https://www.state.gov/s/l/c8183.htm>

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I am writing to provide State Department reactions to the Office of Legal Counsel’s draft opinion on “enhanced interrogation techniques” (“EITs”). As you will see from our comments, I have focused primarily on the Common Article 3 analysis contained on pages 46-70 of the draft opinion, given the State Department’s role and expertise in interpreting treaties. But I have also offered comments on the other sections of the OLC analysis, to the extent that our research on the Common Article 3 section suggested different approaches there. In addition, in light of the fact that this opinion interprets the Geneva Conventions—treaties that directly impact the treatment provided by and to U.S. forces—I believe it is important for DOD to review this draft opinion.

At the outset, I must express concern about the draft opinion’s conclusion that the EITs in question are consistent with Common Article 3 of the Geneva Conventions. As I will explain below, the EITs that involve nudity and prolonged sleep deprivation would appear to be prohibited by Common Article 3. Further, the opinion does little to identify or analyze the safeguards that must, in my view, be in place to ensure that any of the remaining techniques can be administered in a manner that does not violate U.S. obligations under Common Article 3.

*General Methodological Concerns: Rules of Treaty Interpretation*

We have a basic disagreement about the methodology used by the draft opinion to give meaning to the prohibition contained in Common Article 3. In particular, we believe that the opinion relies too heavily on U.S. law to guide our interpretation of treaty terms. The opinion cites but fails to apply with appropriate weight the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties (“VCLT”). The rules contained in Article 32 of the VCLT, which, while not binding, the United States consistently has applied in its treaty practice for decades, provide that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . A State may, of course, implement its treaty obligations in its domestic law, and this often requires efforts to interpret treaty language in a way that makes sense within that State’s legal regime. But the general relevance of domestic law for interpreting a treaty is to show what a state party had in mind during treaty negotiations; to examine state practice under the treaty (if the domestic law does in fact represent state practice under the treaty); or to establish a general principle of law common to major legal systems, to fill in a gap in a treaty that contemplates the use of “background principles.”

As I will explain in more detail below, the draft opinion fails to rely on these well-accepted norms of treaty interpretation, and in their place substitutes novel theories concerning the relevance of domestic law to support controversial conclusions about the meaning and applicability of Common Article 3. As a general matter, we do not believe that we can state unilaterally that paragraphs 1(a) and 1(c) of Common Article 3 prohibit only those activities prohibited by our Fifth Amendment. The opinion’s effort to interpret Common Article 3 primarily by reference to U.S. domestic laws is inconsistent with traditional U.S. treaty practice, is unlikely to be viewed as objective legal analysis, and, in our view, ultimately leads to incorrect conclusions.

#### *Nudity and Sleep Deprivation*

We are not prepared at this point to conclude that the nudity (or nudity in combination with extended sleep deprivation) techniques as described in the OLC draft analysis are consistent, under any circumstances, with the Common Article 3 obligation in paragraph 1(c) to prohibit “outrages upon personal dignity, in particular humiliating and degrading treatment” and with the requirement of humane treatment.

*Outrages upon personal dignity.* We disagree in several critical respects with the opinion’s interpretation of the legal standard that flows from the prohibition against committing “outrages upon personal dignity, in particular humiliating and degrading treatment” that are contained in paragraph 1(c) of Common Article 3.

First, we disagree with the weight the opinion places on interpreting this standard by turning to our “domestic legal tradition.” As noted above, this interpretive approach is inconsistent with traditional treaty interpretation rules. . . . [T]he opinion relies heavily on our domestic legal tradition to conclude that the [Detainee Treatment Act’s or] DTA’s “shocks the conscience” standard is the appropriate contextual standard and . . . a “substantial factor” in determining that the program is not a violation of paragraph 1(c). . . . We do not believe that Congress endorsed such “equivalency” . . .

Setting aside . . . the “shocks the conscience” standard, what is the proper interpretation of paragraph 1(c)? We agree with the opinion’s conclusions that “humiliating and degrading” treatment must rise to the level of an “outrage upon personal dignity” to be proscribed; we agree that some measure of contextual analysis may be appropriate in determining whether a particular act would be prohibited; and we agree that the acts covered by this prohibition must be, as Pictet

describes, those acts “which world opinion finds particularly revolting—acts which were committed frequently during the Second World War.” All of these conclusions may safely be drawn through an interpretation of the plain meaning of the language in question, interpreted in light of the object and purpose of the Geneva Conventions, and taking into account the *travaux préparatoires*.

We further agree that the ICTY *Aleksovski* case cited in the draft opinion stands for the proposition that one should evaluate a reasonable person’s reaction to the act in determining if it would be an “outrage.” But the opinion fails to note . . . the need to take into account the cultural background of the victims “when assessing whether the conduct amounted to an outrage upon personal dignity. . . .” In a World War II trial in an Australian military court, defendants were convicted of violating the 1929 Geneva Conventions for cutting off the hair and beards of Sikh Indians and of making them smoke cigarettes. Thus, the *Aleksovski* court recognized that both subjective and objective elements are relevant.

Applying the “objective” standard from *Aleksovski*, we believe that nudity in any circumstances, and most certainly nudity combined with shackling a person in order to prevent sleep, would be viewed as inconsistent with paragraph 1(c) of Common Article 3. We believe that the reasonable person, as well as world opinion, would consider such acts to constitute humiliation and degradation of a level to be considered an outrage upon personal dignity. We believe that the world would find these acts particularly revolting. The public reaction to the images at Abu Ghraib of an individual standing naked with a sack over his head or of individual detainees naked in handcuffs was incredibly hostile and a reliable indicator of public opinion. We have little reason to believe that the public reaction to an image of an individual standing in a detainee facility wearing only a diaper, with his hands shackled in front of him, deeply fatigued, would be more favorable, even if this treatment (unlike the abuse at Abu Ghraib) occurred pursuant to a carefully regulated, limited program that existed for clear reasons.

Descriptions in the draft itself advance the conclusion that an objective person would find the technique of nudity to be an outrage upon personal dignity. The draft acknowledges that the purpose behind the use of nudity is to “cause embarrassment,” “induce psychological discomfort,” and to “exploit the detainee’s fear of being seen naked.” For an average person, there is little difference between doing an act to make an individual feel vulnerable and embarrassed, and doing an act to humiliate that individual.

Application of the “subjective” cultural background test of the *Aleksovski* case only deepens our concern, because it is highly likely that the subjects of these EITs will be Muslim males. It is our understanding that many Muslim men are particularly uncomfortable with nudity, even between men, and that it is highly disturbing for a Muslim man to have a woman see him naked, as might occur with these EITs. The draft opinion fails to discuss any potentially relevant cultural norms that would affect a court’s assessment of the EITs.

In this connection, we note that the most recent draft of the OLC opinion now identifies in the section on the War Crimes Act a directly relevant congressional exchange suggesting bipartisan concerns among several Senators that nakedness and sleep deprivation would be grave breaches of Common Article 3 and thus criminal offenses. . . .

The OLC draft opinion concludes that, in view of another set of comments by legislators stating that the [Military Commissions Act or] MCA prescribed only general standards, not specific techniques, this aspect of the legislative history is not particularly illuminating. We do not read these two sets of statements as necessarily inconsistent: it is possible for legislators to agree that the MCA does not list particular techniques that are or are not acceptable, and also for

some of those legislators to conclude that certain techniques nevertheless would not be permissible under the legal standards contained in the law...

*Humane treatment.* We are concerned that the draft opinion's discussion of what constitutes "humane treatment" may construe that requirement too narrowly. In particular, the Commentary to Article 27 of the Fourth Geneva Convention, which requires High Contracting Parties to treat protected persons humanely at all times, states:

What constitutes humane treatment follows logically from the principles explained in [paragraph 1 of Article 27 – "respect for their persons, their honor, . . . their religious convictions and practices, and their manners and customs"], and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example . . . any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity, etc.). . . . The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character . . . . They are valid 'in all circumstances' and 'at all times', and apply, for example, to cases where a protected person is the legitimate object of strict measures, since the dictates of humanity and measures of security or repression even when they are severe, are not necessarily incompatible.

Pictet, Commentary to GCIV at 204-05. While this discussion does not provide detailed guidance about what constitutes humane treatment, it does suggest that the requirements exceed the provision of the basic necessities of life and the prohibitions found elsewhere in Common Article 3.

A statement in the Report on U.S. Practice, submitted to the ICRC in 1997 as it developed its Customary International Humanitarian Law Study, further supports this conclusion. . . . The submission stated, "It is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5, and 6 AP II." . . .

I am especially concerned about the opinion's conclusions that the use of extended periods of sleep deprivation, and the techniques used to achieve that sleep deprivation, constitute "humane treatment." As we understand it, the detainee will be forced to stand, shackled, for prolonged periods of time, in a position the opinion acknowledges will produce muscle stress. Although the detainee is not allowed to hang by his wrists from the chains, he may periodically collapse from exhaustion and be pulled awake by his shackles. I think it is unlikely that forcing a detainee to stay awake for up to 96 hours at a time under these conditions would be viewed as humane, and as not humiliating and degrading.

*Remaining EITs and Need for Safeguards*

We are also unable to concur that the remaining EITs would in all cases be consistent with the prohibitions contained in Common Article 3. . . . Past OLC opinions addressing DOD interrogation techniques have stressed the importance of procedural safeguards, including the need for safeguards that take into account factors such as the detainee's emotional and physical

strengths and weaknesses and that require interrogators or doctors to assess whether a detainee is medically and operationally suitable for interrogation, considering all techniques to be used in combination. ...[I]t is imperative that OLC provide clear legal guidance on the safeguards necessary to ensure that techniques, when used individually or in combination, do not violate Common Article 3. ...The current draft does not offer this level of analysis.

*Practice of Treaty Partners and International Tribunals*

I believe that the practice of our treaty partners and the decisions of international tribunals provide a clear indication that the world would disagree with the interpretations of Common Article 3 contained in the draft opinion.

*Treaty partners.* The discussion of the meaning of Common Article 3's terms fails to reflect that our treaty partners almost certainly would disagree with the conclusion that each of the EITs complies with Common Article 3. The view of our European treaty partners would flow both from relevant court cases ...and from an increasing lack of tolerance in Europe and elsewhere for activities that might appear to contravene the individual dignity and humanity of an individual. ...

The experience of the United Kingdom, our closest ally and a government keenly attuned to the need to combat terrorism aggressively, is instructive. The UK was ...the defendant in the 1972 *UK v. Ireland* case, based on its use of five aggressive interrogation techniques (including bread and water diets and deprivation of sleep) on IRA members. ...Despite this conclusion [of the majority of the court in the case that the techniques could be used in conformity with Common Article 3], the Prime Minister stated that his government "decided that the techniques which the Committee examined will not be used in future as an aid to interrogation." Thus, despite their clear value to the UK in its efforts to defeat the IRA, the UK apparently has not used these techniques for thirty years.

[Redacted paragraph]

*Foreign Tribunals.* As a related matter, I believe that the opinion must discuss in greater detail the facts and conclusions of the Israeli Supreme Court and European Court of Human Rights cases that analyze the legality of similar interrogation techniques. ...

With regard to the ECHR case, the draft opinion suggests that the UK presented the ECHR with no rationale for the use of techniques such as sleep deprivation. But, as described above, this is not correct—it is clear that the UK believed that it needed to use such techniques against members of the IRA, a terrorist group, to gather information that the UK had been unable to obtain using more limited interrogation techniques. This rationale is, of course, similar to our rationale for the need for EITs.

I do not argue with the fact that the underlying legal standards that applied to the UK in that case ...are slightly different than CA3's prohibition on "cruel treatment." But in interpreting their CA3 obligations, European allies will be influenced by the ECHR's interpretation of relevant terms. This includes the ECHR's description of "inhuman or degrading treatment" in the *UK v. Ireland* case, in which the ECHR stated . . . that treatment is degrading when it is such as to arouse in a person "feelings of fear, anguish and inferiority capable of humiliating and debasing him" and "possibly breaking [his] physical or moral resistance."...

With regard to the Israel Supreme Court case, the current draft relies heavily on the fact that the Court concluded that the Israeli General Security Service was not authorized to use physical means of interrogation. But the Court only reached that issue after it had evaluated the various interrogation techniques and concluded that the techniques were not "reasonable." ...Thus, when the Court concludes that the technique of intentionally depriving an individual of

sleep for a prolonged period of time to tire him out or “break” him is not within the scope of a “reasonable” interrogation, some may read the Court’s opinion as shedding light on what activity constitutes cruel, inhuman, or degrading treatment...

In view of the UK experience and these court cases, I request that the opinion include a sentence that states, “Notwithstanding the difference in legal standards, the State Department believes that it is highly likely that foreign courts and international tribunals would consider certain of these EITs—at a minimum, nudity and prolonged sleep deprivation—to be violations of Common Article 3.” This could mean that CIA personnel who administer EITs would be more likely to be sought for criminal process in foreign countries, as discussed below.

*Contemporary context.* The opinion invokes an interpretive tool to “reconcile the residual imprecision of Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a decision to provide flexibility to state parties as they confront circumstances unforeseen at the time of the treaty’s drafting.” ... We are unaware of a legal basis for this method of treaty interpretation. One cannot retroactively interpret the object and purpose of Common Article 3 as providing “flexibility and discretion for the Executive Branch...” under that Article. ... Since the Supreme Court has concluded that the conflict with al Qaeda falls within the terms of Article 3, the imperfect fit of al Qaeda into that Article is no longer relevant in interpreting what that Article means.

To the extent that DOJ chooses to retain this interpretive method in its opinion, a reliance on contemporary circumstances cannot focus exclusively on the U.S. view of those circumstances. That is, the opinion fails to explain that contemporary views by treaty partners of the importance of Common Article 3 may have changed as well; certain behavior that might have been viewed in 1950 as consistent with Common Article 3 may be seen as inconsistent with that Article in 2007.

#### *Legal Risks*

We think it would be useful for the opinion to assess risks of civil or criminal liability in foreign tribunals. As noted above, we do not think foreign tribunals would agree with this opinion’s conclusions about Common Article 3, and we do not think these tribunals would defer to U.S. interpretations of that provision. There have been increasing numbers of criminal investigations in European countries of U.S. officials for various activities, including alleged renditions. We therefore cannot say that the risk of criminal exposure overseas of U.S. officials involved in this program, including CIA officers, is insubstantial. ...[W]e would recommend that the opinion assess the degree to which the U.S. Government might be susceptible to claims by other states for mistreating their nationals...

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In addition to these more specific concerns, I have an overarching concern about this opinion. While it does a careful job analyzing the precise meanings of relevant words and phrases, I am concerned that the opinion will appear to many readers to have missed the forest for the trees. Will the average American agree with the conclusion that a detainee, naked and shackled, is not being subject to humiliating and degrading treatment? At the broadest level, I believe that the opinion’s careful parsing of statutory and treaty terms will not be considered the better interpretation of Common Article 3 but rather a work of advocacy to achieve a desired outcome.

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**d. *Applicability of international law to conflicts in cyberspace***

On November 10, 2016, Department of State Legal Adviser Brian J. Egan delivered remarks on international law and stability in cyberspace at Berkeley Law School. His remarks are excerpted below and available at [https://2009-](https://2009-2017.state.gov/s/l/releases/remarks/264303.htm)

[2017.state.gov/s/l/releases/remarks/264303.htm](https://2009-2017.state.gov/s/l/releases/remarks/264303.htm).

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... The remarkable reach of the Internet and the ever-growing number of connections between computers and other networked devices are delivering significant economic, social, and political benefits to individuals and societies around the world. In addition, an increasing number of States and non-State actors are developing the operational capability and capacity to pursue their objectives through cyberspace. Unfortunately, a number of those actors are employing their capabilities to conduct malicious cyber activities that cause effects in other States' territories. Significant cyber incidents—including many that are reportedly State-sponsored—frequently make headline news.

In light of this, it is reasonable to ask: could we someday reach a tipping point where the risks of connectivity outweigh the benefits we reap from cyberspace? And how can we prevent cyberspace from becoming a source of instability that could lead to inter-State conflict?

I don't think we will reach such a tipping point, but how we maintain cyber stability in order to preserve the continued benefits of connectivity remains a critical question. And international law, I would submit, is an essential element of the answer.

Existing principles of international law form a cornerstone of the United States' strategic framework of international cyber stability during peacetime and during armed conflict. The U.S. strategic framework is designed to achieve and maintain a stable cyberspace environment where all States and individuals are able to realize its benefits fully, where there are advantages to cooperating against common threats and avoiding conflict, and where there is little incentive for States to engage in disruptive behavior or to attack one another.

There are three pillars to the U.S. strategic framework, each of which can help to ensure stability in cyberspace by reducing the risks of misperception and escalation. The first is global affirmation of the applicability of existing international law to State activity in cyberspace in both peacetime and during armed conflict. The second is the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace during peacetime, which is of course the predominant context in which States interact. And the third is the development and implementation of practical confidence-building measures to facilitate inter-State cooperation on cyber-related matters. I'll address two of these pillars—international law and voluntary, non-binding norms—in greater detail today.

#### International Law

In September 2012, my predecessor, Harold Koh, delivered remarks on "International Law in Cyberspace" at U.S. Cyber Command's Legal Conference. It says a lot about where we were four years ago that the first two questions Koh addressed in his speech were as fundamental as: "Do established principles of international law apply to cyberspace?" and "Is cyberspace a

law-free zone, where anything goes?” (So as not to leave you hanging, the answers to those questions are an emphatic “yes” and “no” respectively!)

We have made significant progress since then. One prominent forum in which these issues are discussed is the United Nations (UN) Group of Governmental Experts (GGE) that deals with cyber issues in the context of international security. The GGE is a body established by the UN Secretary-General with a mandate from the UN General Assembly to study, among other things, how international law applies to States’ cyber activities, with a view to promoting common understandings. In 2013, the 15-State GGE recognized the applicability of existing international law to States’ cyber activities. Just last year, the subsequent UN GGE on the same topic, expanded to include 20 States, built on the 2013 report and took an additional step by recognizing the applicability in cyberspace of the inherent right of self-defense as recognized in Article 51 of the UN Charter. The 2015 GGE report also recognized the applicability of the law of armed conflict’s fundamental principles of humanity, necessity, proportionality, and distinction to the conduct of hostilities in and through cyberspace. With other recent bilateral and multilateral statements, including that of the leaders of the Group of Twenty (G20) States in 2015, we have seen an emerging consensus that existing international law applies to States’ cyber activities.

Recognizing the applicability of existing international law as a general matter, however, is the easy part, at least for most like-minded nations. Identifying how that law applies to specific cyber activities is more challenging, and States rarely articulate their views on this subject publicly. The United States already has made some efforts in this area, including by setting forth views on the application of international law to cyber activities in Koh’s 2012 speech and also in the U.S. submission to the 2014–15 UN GGE, both of which are publicly available in the Digest of U.S. Practice in International Law. The U.S. Department of Defense also has presented its views on aspects of this topic in its publicly available Law of War Manual. But more work remains to be done.

Increased transparency is important for a number of reasons. Customary international law, of course, develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Faced with a relative vacuum of public State practice and *opinio juris* concerning cyber activities, others have sought to fill the void with their views on how international law applies in this area. The most prominent and comprehensive of these efforts is the Tallinn Manual project. Although this is an initiative of the NATO Cooperative Cyber Defence Centre of Excellence, it is neither State-led nor an official NATO project. Instead, the project is a non-governmental effort by international lawyers who first set out to identify the international legal rules applicable to cyber warfare, which led to the publication of “Tallinn Manual 1.0” in 2013. The group is now examining the international legal framework that applies to cyber activities below the threshold of the use of force and outside of the context of armed conflict, which will result in the publication of a “Tallinn Manual 2.0” by the end of this year.

I commend the Tallinn Manual project team on what has clearly been a tremendous and thoughtful effort. The United States has unequivocally been in accord with the underlying premise of this project, which is that existing international law applies to State behavior in cyberspace. In this respect, the Tallinn Manuals will make a valuable contribution to underscoring and demonstrating this point across a number of bodies of international law, even if we do not necessarily agree with every aspect of the Manuals.

States must also address these challenging issues. Interpretations or applications of international law proposed by non-governmental groups may not reflect the practice or legal views of many or most States. States' relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other's views on the applicable legal framework. In the context of a specific cyber incident, this uncertainty could give rise to misperceptions and miscalculations by States, potentially leading to escalation and, in the worst case, conflict.

To mitigate these risks, States should publicly state their views on how existing international law applies to State conduct in cyberspace to the greatest extent possible in international and domestic forums. Specific cyber incidents provide States with opportunities to do this, but it is equally important—and often easier—for States to articulate public views outside of the context of specific cyber operations or incidents. Stating such views publicly will help give rise to more settled expectations of State behavior and thereby contribute to greater predictability and stability in cyberspace. This is true for the question of what legal rules apply to cyber activity that may constitute a use of force, or that may take place in a situation of armed conflict. It is equally true regarding the question of what legal rules apply to cyber activities that fall below the threshold of the use of force and take place outside of the context of armed conflict.

Although many States, including the United States, generally believe that the existing international legal framework is sufficient to regulate State behavior in cyberspace, States likely have divergent views on specific issues. Further discussion, clarification, and cooperation on these issues remains necessary. The present task is for States to begin to make public their views on how existing international law applies.

In this spirit, and building on Harold Koh's remarks in 2012 and the United States' 2014 and 2016 submissions to the UN GGE, I would like to offer some additional U.S. views on how certain rules of international law apply to States' behavior in cyberspace, beginning first with cyber operations during armed conflict, and then turning to the identification of voluntary, non-binding norms applicable to State behavior during peacetime.

### Cyber Operations in the Context of Armed Conflict

Turning to cyber operations in armed conflict, I would like to start with the U.S. military's cyber operations in the context of the ongoing armed conflict with the Islamic State of Iraq and the Levant (ISIL). As U.S. Defense Secretary Ashton Carter informed Congress in April 2016, U.S. Cyber Command has been asked "to take on the war against ISIL as essentially [its] first major combat operation [...] The objectives there are to interrupt ISIL command-and-control, interrupt its ability to move money around, interrupt its ability to tyrannize and control population[s], [and] interrupt its ability to recruit externally."

The U.S. military must comply with the United States' obligations under the law of armed conflict and other applicable international law when conducting cyber operations against ISIL, just as it does when conducting other types of military operations during armed conflict. To the extent that such cyber operations constitute "attacks" under the law of armed conflict, the rules on conducting attacks must be applied to those cyber operations. For example, such operations must only be directed against military objectives, such as computers, other networked devices, or possibly specific data that, by their nature, location, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Such

operations also must comport with the requirements of the principles of distinction and proportionality. Feasible precautions must be taken to reduce the risk of incidental harm to civilian infrastructure and users. In the cyber context, this requires parties to a conflict to assess the potential effects of cyber activities on both military and civilian infrastructure and users.

Not all cyber operations, however, rise to the level of an “attack” as a legal matter under the law of armed conflict. When determining whether a cyber activity constitutes an “attack” for purposes of the law of armed conflict, States should consider, among other things, whether a cyber activity results in kinetic or non-kinetic effects, and the nature and scope of those effects, as well as the nature of the connection, if any, between the cyber activity and the particular armed conflict in question.

Even if they do not rise to the level of an “attack” under the law of armed conflict, cyber operations during armed conflict must nonetheless be consistent with the principle of military necessity. For example, a cyber operation that would not constitute an “attack,” but would nonetheless seize or destroy enemy property, would have to be imperatively demanded by the necessities of war. Additionally, even if a cyber operation does not rise to the level of an “attack” or does not cause injury or damage that would need to be considered under the principle of proportionality in conducting attacks, that cyber operation still should comport with the general principles of the law of war.

Other international legal principles beyond the rules and principles of the law of armed conflict that I just discussed are also relevant to U.S. cyber operations undertaken during armed conflict. As then-Assistant to the President for Homeland Security and Counterterrorism John Brennan said in his September 2011 remarks at Harvard Law School, “[i]nternational legal principles, including respect for a State’s sovereignty [...], impose important constraints on our ability to act unilaterally [...] in foreign territories.” It is to this topic—the role played by State sovereignty in the legal analysis of cyber operations—that I’d like to turn now.

#### Sovereignty and Cyberspace

In his remarks in 2012, Harold Koh stated that “States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict.” I would like to build on that statement and offer a few thoughts about the relevance of sovereignty principles to States’ cyber activities.

As an initial matter, remote cyber operations involving computers or other networked devices located on another State’s territory do not constitute a per se violation of international law. In other words, there is no absolute prohibition on such operations as a matter of international law. This is perhaps most clear where such activities in another State’s territory have no effects or de minimis effects.

Most States, including the United States, engage in intelligence collection abroad. As President Obama said, the collection of intelligence overseas is “not unique to America.” As the President has also affirmed, the United States, like other nations, has gathered intelligence throughout its history to ensure that national security and foreign policy decision makers have access to timely, accurate, and insightful information. Indeed, the President issued a directive in 2014 to clarify the principles that would be followed by the United States in undertaking the collection of signals intelligence abroad.

Such widespread and perhaps nearly universal practice by States of intelligence collection abroad indicates that there is no per se prohibition on such activities under customary international law. I would caution, however, that because “intelligence collection” is not a defined term, the absence of a per se prohibition on these activities does not settle the question of

whether a specific intelligence collection activity might nonetheless violate a provision of international law.

Although certain activities—including cyber operations—may violate another State’s domestic law, that is a separate question from whether such activities violate international law. The United States is deeply respectful of other States’ sovereign authority to prescribe laws governing activities in their territory. Disrespecting another State’s domestic laws can have serious legal and foreign policy consequences. As a legal matter, such an action could result in the criminal prosecution and punishment of a State’s agents in the United States or abroad, for example, for offenses such as espionage or for violations of foreign analogs to provisions such as the U.S. Computer Fraud and Abuse Act. From a foreign policy perspective, one can look to the consequences that flow from disclosures related to such programs. But such domestic law and foreign policy issues do not resolve the independent question of whether the activity violates international law.

In certain circumstances, one State’s non-consensual cyber operation in another State’s territory could violate international law, even if it falls below the threshold of a use of force. This is a challenging area of the law that raises difficult questions. The very design of the Internet may lead to some encroachment on other sovereign jurisdictions. Precisely when a non-consensual cyber operation violates the sovereignty of another State is a question lawyers within the U.S. government continue to study carefully, and it is one that ultimately will be resolved through the practice and *opinio juris* of States.

Relatedly, consider the challenges we face in clarifying the international law prohibition on unlawful intervention. As articulated by the International Court of Justice (ICJ) in its judgment on the merits in the Nicaragua Case, this rule of customary international law forbids States from engaging in coercive action that bears on a matter that each State is entitled, by the principle of State sovereignty, to decide freely, such as the choice of a political, economic, social, and cultural system. This is generally viewed as a relatively narrow rule of customary international law, but States’ cyber activities could run afoul of this prohibition. For example, a cyber operation by a State that interferes with another country’s ability to hold an election or that manipulates another country’s election results would be a clear violation of the rule of non-intervention. For increased transparency, States need to do more work to clarify how the international law on non-intervention applies to States’ activities in cyberspace.

Some may ask why it matters where the international community draws these legal lines. Put starkly, why does it matter whether an activity violates international law? It matters, of course, because the community of nations has committed to abide by international law, including with respect to activities in cyberspace. International law enables States to work together to meet common goals, including the pursuit of stability in cyberspace. And international law sets binding standards of State behavior that not only induce compliance by States but also provide compliant States with a stronger basis for criticizing—and rallying others to respond to—States that violate those standards. As Harold Koh stated in 2012, “[i]f we succeed in promoting a culture of compliance, we will reap the benefits. And if we earn a reputation for compliance, the actions we do take will earn enhanced legitimacy worldwide for their adherence to the rule of law.” Working to clarify how international law applies to States’ activities in cyberspace serves those ends, as it does in so many other critical areas of State activity.

Before leaving the topic of sovereignty, I’d like to address one additional related issue involving a State’s control over cyber infrastructure and activities within, rather than outside, its territory. In his 2012 speech, Koh observed that “[t]he physical infrastructure that supports the

Internet and cyber activities is generally located in sovereign territory and is subject to the jurisdiction of the territorial State.” However, he went on to emphasize that “[t]he exercise of jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations.”

I want to underscore this important point. Some States invoke the concept of State sovereignty as a justification for excessive regulation of online content, including censorship and access restrictions, often undertaken in the name of counterterrorism or “countering violent extremism.” And sometimes, States also deploy the concept of State sovereignty in an attempt to shield themselves from outside criticism.

So let me repeat what Koh made clear: Any regulation by a State of matters within its territory, including use of and access to the Internet, must comply with that State’s applicable obligations under international human rights law.

There is no doubt that terrorist groups have become dangerously adept at using the Internet and other communications technologies to propagate their hateful messages, recruit adherents, and urge followers to commit violent acts. This is why all governments must work together to target online criminal activities—such as illicit money transfers, terrorist attack planning and coordination, criminal solicitation, and the provision of material support to terrorist groups. U.S. efforts to prevent the Internet from being used for terrorist purposes also focus on criminal activities that facilitate terrorism, such as financing and recruitment, not on restricting expressive content, even if that content is repugnant or inimical to our core values.

Such efforts must not be conflated with broader calls to restrict public access to or censor the Internet, or even—as some have suggested—to effectively shut down entire portions of the Web. Such measures would not advance our security, and they would be inconsistent with our values. The Internet must remain open to the free flow of information and ideas. Restricting the flow of ideas also inhibits spreading the values of understanding and mutual respect that offer one of the most powerful antidotes to the hateful and violent narratives propagated by terrorist groups.

That is why the United States holds the view that use of the Internet, including social media, in furtherance of terrorism and other criminal activity must be addressed through lawful means that respect each State’s international obligations and commitments regarding human rights, including the freedom of expression, and that serve the objectives of the free flow of information and a free and open Internet. To be sure, the incitement of imminent terrorist violence may be restricted. However, certain censorship and content control, including blocking websites simply because they contain content that criticizes a leader, a government policy, or an ideology, or because the content espouses particular religious beliefs, violates international human rights law and must not be engaged in by States.

### **State Responsibility and the “Problem of Attribution” in Cyberspace**

I have been talking thus far about States’ activities and operations in cyberspace. But as many of you know, it is often difficult to detect who or what is responsible for a given cyber incident. This leads me to the frequently raised and much debated “problem of attribution” in cyberspace.

States and commentators often express concerns about the challenge of attribution in a technical sense—that is, the challenge of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State’s determinations about a particular cyber incident. Others have raised issues related to political decisions about attribution—that is,

considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn that act as unacceptable. These technical and policy discussions about attribution, however, should be distinguished from the legal questions about attribution. In my present remarks, I will focus on the issue of attribution in the legal sense.

From a legal perspective, the customary international law of state responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise governmental authority are attributable to that State, if such organs, persons, or entities are acting in that capacity.

Additionally, cyber operations conducted by non-State actors are attributable to a State under the law of state responsibility when such actors engage in operations pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own.

Thus, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies. When there is information—whether obtained through technical means or all-source intelligence—that permits a cyber act engaged in by a non-State actor to be attributed legally to a State under one of the standards set forth in the law of state responsibility, the victim State has all of the rights and remedies against the responsible State allowed under international law.

The law of state responsibility does not set forth explicit burdens or standards of proof for making a determination about legal attribution. In this context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not—and cannot be—required. Instead, international law generally requires that States act reasonably under the circumstances when they gather information and draw conclusions based on that information.

I also want to note that, despite the suggestion by some States to the contrary, there is no international legal obligation to reveal evidence on which attribution is based prior to taking appropriate action. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But that is a policy choice—it is not compelled by international law.

#### **Countermeasures and Other “Defensive” Measures**

I want to turn now to the question of what options a victim State might have to respond to malicious cyber activity that falls below the threshold of an armed attack. As an initial matter, a State can always undertake unfriendly acts that are not inconsistent with any of its international obligations in order to influence the behavior of other States. Such acts—which are known as acts of retorsion—may include, for example, the imposition of sanctions or the declaration that a diplomat is *persona non grata*.

In certain circumstances, a State may take action that would otherwise violate international law in response to malicious cyber activity. One example is the use of force in self-defense in response to an actual or imminent armed attack. Another example is that, in exceptional circumstances, a State may be able to avail itself of the plea of necessity, which, subject to certain conditions, might preclude the wrongfulness of an act if the act is the only way for the State to safeguard an essential interest against a grave and imminent peril.

In the time that remains, however, I would like to talk about a type of State response that has received a lot of attention in discussions about cyberspace: countermeasures. The customary international law doctrine of countermeasures permits a State that is the victim of an internationally wrongful act of another State to take otherwise unlawful measures against the responsible State in order to cause that State to comply with its international obligations, for example, the obligation to cease its internationally wrongful act. Therefore, as a threshold matter, the availability of countermeasures to address malicious cyber activity requires a prior internationally wrongful act that is attributable to another State. As with all countermeasures, this puts the responding State in the position of potentially being held responsible for violating international law if it turns out that there wasn't actually an internationally wrongful act that triggered the right to take countermeasures, or if the responding State made an inaccurate attribution determination. That is one reason why countermeasures should not be engaged in lightly.

Additionally, under the law of countermeasures, measures undertaken in response to an internationally wrongful act performed in or through cyberspace that is attributable to a State must be directed only at the State responsible for the wrongful act and must meet the principles of necessity and proportionality, including the requirements that a countermeasure must be designed to cause the State to comply with its international obligations—for example, the obligation to cease its internationally wrongful act—and must cease as soon as the offending State begins complying with the obligations in question.

The doctrine of countermeasures also generally requires the injured State to call upon the responsible State to comply with its international obligations before a countermeasure may be taken—in other words, the doctrine generally requires what I will call a “prior demand.” The sufficiency of a prior demand should be evaluated on a case-by-case basis in light of the particular circumstances of the situation at hand and the purpose of the requirement, which is to give the responsible State notice of the injured State's claim and an opportunity to respond.

I also should note that countermeasures taken in response to internationally wrongful cyber activities attributable to a State generally may take the form of cyber-based countermeasures or non-cyber-based countermeasures. That is a decision typically within the discretion of the responding State and will depend on the circumstances.

#### Voluntary, Non-Binding Norms of Responsible State Behavior in Peacetime

In the remainder of my remarks, I'd like to discuss very briefly another element of the United States' strategic framework for international cyber stability: the development of international consensus on certain additional voluntary, non-binding norms of responsible State behavior in cyberspace that apply during peacetime.

Internationally, the United States has identified and promoted four such norms:

. First, a State should not conduct or knowingly support cyber-enabled theft of intellectual property, trade secrets, or other confidential business information with the intent of providing competitive advantages to its companies or commercial sectors.

. Second, a State should not conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide service to the public.

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Third, a State should not conduct or knowingly support activity intended to prevent national computer security incident response teams (CSIRTs) from responding to cyber incidents. A State also should not use CSIRTs to enable online activity that is intended to do harm.

Fourth, a State should cooperate, in a manner consistent with its domestic and international obligations, with requests for assistance from other States in investigating cyber crimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory.

These four U.S.-promoted norms seek to address specific areas of risk that are of national and/or economic security concern to all States. Although voluntary and non-binding in nature, these norms can serve to define an international standard of behavior to be observed by responsible, like-minded States with the goal of preventing bad actors from engaging in malicious cyber activity. If observed, these measures—which can include measures of self-restraint—can contribute substantially to conflict prevention and stability. Over time, these norms can potentially provide common standards for responsible States to use to identify and respond to behavior that deviates from these norms. As more States commit to observing these norms, they will be increasingly willing to condemn the malicious activities of bad actors and to join together to ensure that there are consequences for those activities.

It is important, however, to distinguish clearly between international law, on the one hand, and voluntary, non-binding norms on the other. These four norms identified by the United States, or the other peacetime cyber norms recommended in the 2015 UN GGE report, fall squarely in the voluntary, non-binding category. These voluntary, non-binding norms set out standards of expected State behavior that may, in certain circumstances, overlap with standards of behavior that are required as a matter of international law. Such norms are intended to supplement existing international law. They are designed to address certain cyber activities by States that occur outside of the context of armed conflict that are potentially destabilizing. That said, it is possible that if States begin to accept the standards set out in such non-binding norms as legally required and act in conformity with them, such norms could, over time, crystallize into binding customary international law. As a result, States should approach the process of identifying and committing to such non-binding norms with care.

In closing, I wanted to highlight a few points. First, cyberspace may be a relatively new frontier, but State behavior in cyberspace, as in other areas, remains embedded in an existing framework of law, including international law. Second, States have the primary responsibility for identifying how existing legal frameworks apply in cyberspace. Third, States have a responsibility to publicly articulate applicable standards. This is critical to enable an accurate understanding of international law, in the area of cyberspace and beyond. I hope that these remarks have furthered this goal of transparency, and highlighted the important role of international law, and international lawyers, in this important and dynamic area.

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On December 23, 2015, the UN General Assembly adopted a resolution (U.N. Doc. A/RES/70/237) requesting the establishment of a further Group of Governmental Experts (“GGE”) on Developments in the Field of Information and Telecommunications in the Context of International Security with a mandate to continue to study, among other things, how international law applies to the use of information and

communications technologies by States. In October 2016, the United States submitted the following paper to the 2016–17 GGE. See *Digest 2014* at 732-40 for the 2014 U.S. submission to the GGE.

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### I. Overall Purpose of the Report

Since 2009, the United Nations Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (GGE) has served as a productive and groundbreaking expert-level venue for discussing international cyber stability issues. The consensus recommendations of the three GGE reports (2010, 2013, 2015) have provided guidance for States on the applicability of international law to States' use of information and communications technologies (ICTs), the stabilizing role of voluntary, non-binding norms of responsible State behavior in peacetime, and the importance of confidence-building measures (CBMs). These reports reflect an emerging strategic framework of international cyber stability, designed to achieve and maintain a peaceful cyberspace environment where all States are able to fully realize its benefits, where there are advantages to cooperating against common threats and avoiding conflict, and where there is little incentive for States to engage in disruptive behavior or to attack one another.

The GGE plays a pivotal role in promoting this framework, but the GGE's recommendations must be implemented in order to preserve international cyber stability. To achieve the mandate set out for this Group, and to provide a substantive contribution that builds upon previous GGE reports, the current Group should address how to achieve widespread observation and implementation of existing consensus recommendations. This can be facilitated through a new GGE report that provides greater clarity on certain recommendations in past GGE reports and practical guidance to States on steps they can take to implement those recommendations.

### II. Existing and Potential Threats

The existing and emerging threats outlined in the 2015 GGE report remain accurate and relevant to the Group's work. This Group should continue to focus on the potential for low-probability, high-risk State-on-State conflict that could pose the most significant threat to international peace and security.

### III. International Law

The U.S. submission to the 2014–15 GGE set out some basic principles of international law that apply to State behavior in cyberspace and provided some considerations that States may take into account when determining how such principles apply to States' use of ICTs in specific situations they may confront. That submission addressed in greatest detail the *jus ad bellum* (the body of law that addresses, *inter alia*, uses of force triggering a State's right to use force in self-defense) and the *jus in bello* (the body of law governing, *inter alia*, the conduct of hostilities in the context of armed conflict, also known as international humanitarian law (IHL) or the law of armed conflict). It also described how international law concerning, among other things, human rights and State responsibility, including countermeasures, applies to State behavior in cyberspace. The U.S. submission to the 2014–15 GGE is attached as an annex, as the topics addressed therein continue to merit discussion by this Group. The sub-sections that follow set

out some additional views regarding how international law applies to States' use of ICTs. They should be read in conjunction with the 2014–15 submission.

**i. Sovereignty Principles**

In considering what this Group may wish to address as part of its mandate to continue to study how international law applies to States' use of ICTs, it will be critical to achieve a balance in terms of the international legal rules and principles discussed in the report. The 2015 GGE report contained numerous affirmations of the applicability of principles of State sovereignty, including sovereign equality and the principle of non-intervention.<sup>16</sup> Acknowledging the applicability of these principles is important, and the United States has affirmed that State sovereignty, among other longstanding international legal principles, must be taken into account in the conduct of activities in cyberspace.<sup>17</sup> As the 2015 GGE report notes, one implication of that principle is that “States have jurisdiction over the ICT infrastructure located within their territory.”<sup>18</sup> The exercise of such jurisdiction by the territorial State, however, is not unlimited; it must be consistent with applicable international law, including international human rights obligations. This Group's report should clarify that concept.

**ii. Self-Defense, Countermeasures, and International Humanitarian Law**

Although this Group cannot cover all international law that is potentially applicable to States' use of ICTs, as noted above, it must ensure that any report strikes an appropriate balance in its discussion of various international legal rules and principles. In particular, this Group could make a helpful contribution by providing guidance on aspects of international law that apply to a State's response to malicious cyber activity, including the international legal constraints that might apply to such a response. For example, this Group should expand on the statement in paragraph 28(c) of the 2015 GGE report to make clear to the international community that any use of force by a State in the exercise of its inherent right of self-defense must be limited, in the cyber context just as it is in any other context, to that which is necessary and proportionate to respond to an actual or imminent armed attack.<sup>19</sup> Additionally, this Group could make a helpful contribution by addressing in more detail how the doctrine of countermeasures applies to States' use of ICTs. The U.S. submission to the 2014–15 GGE offers an example of how this Group could provide guidance to States on this subject.<sup>20</sup>

This Group also should do more to reassure the international community that the applicability of IHL to States' use of ICTs in situations of armed conflict is *not* in question.<sup>21</sup> It clearly applies, and a robust affirmation of its applicability furthers the general purpose of that body of law: to regulate the conduct of hostilities so as to minimize their effects on civilians and avoid unnecessary suffering. Embracing the humanitarian principles of IHL is in no way inconsistent with our common commitment to the pursuit of peace.

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<sup>16</sup> Report of the 2014–15 Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (July 22, 2015) (the “2015 GGE Report”), UN Doc. A/70/174, paras. 26, 27, and 28(b).

<sup>17</sup> See, e.g., *United States Submission to the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (2014–15)* (the “2014–15 U.S. GGE Submission”), pp. 6–7.

<sup>18</sup> 2015 GGE Report, para. 28(a).

<sup>19</sup> See 2014–15 U.S. GGE Submission, pp. 2–4.

<sup>20</sup> See 2014–15 U.S. GGE Submission, p. 8.

<sup>21</sup> See 2014–15 U.S. GGE Submission, pp. 4–6.

**iii. Attribution and the Law of State Responsibility**

Attribution plays an important role in States' responses to malicious cyber activities as a matter of international law. It is crucial, however, to distinguish legal attribution from attribution in the technical and political senses. States and commentators often express concerns about the challenge of attribution in a *technical* sense—that is, the challenge in light of certain characteristics of cyberspace of obtaining facts, whether through technical indicators or all-source intelligence, that would inform a State's policy and legal determinations about a particular cyber incident. Others have raised issues related to *political* decisions about attribution—that is, considerations that might be relevant to a State's decision to go public and identify another State as the actor responsible for a particular cyber incident and to condemn a particular cyber act as unacceptable. The discussion in this sub-section sets aside those technical and political issues and focuses instead on the issue of attribution under international law.

From a legal perspective, the law of State responsibility supplies the standards for attributing acts, including cyber acts, to States. For example, cyber operations conducted by organs of a State or by persons or entities empowered by domestic law to exercise elements of governmental authority are attributable to that State. Additionally, cyber operations conducted by non-State actors are attributable to a State under the law of State responsibility when such operations are engaged in pursuant to the State's instructions or under the State's direction or control, or when the State later acknowledges and adopts the operations as its own. Thus, as a legal matter, States cannot escape responsibility for internationally wrongful cyber acts by perpetrating them through proxies. When there is information—whether obtained through technical means or all-source intelligence—that permits attribution of a cyber act of an ostensibly non-State actor to a State under one of the standards set forth in the law of State responsibility, the victim State has all of the rights and remedies against the responsible State permitted to it under international law.

It is important to note that the law of State responsibility does not set forth burdens or standards of proof for attribution. Such questions may be relevant for judicial or other types of proceedings, but they do not apply as an international legal matter to a State's determination about attribution of internationally wrongful cyber acts for purposes of its response to such acts, including by taking unilateral, self-help measures permissible under international law, such as countermeasures. In that context, a State acts as its own judge of the facts and may make a unilateral determination with respect to attribution of a cyber operation to another State. Absolute certainty is not required. Instead, international law generally requires that States act reasonably under the circumstances.

Finally, it is important to note that there is no international legal obligation to reveal evidence on which attribution is based. There may, of course, be political pressure to do so, and States may choose to reveal such evidence to convince other States to join them in condemnation, for example. But that is a policy choice—it is not compelled by international law.

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## B. CONVENTIONAL WEAPONS

### 1. Unmanned Aerial Vehicles

On October 5, 2016, the State Department issued a fact sheet on the joint declaration reached by the United States and 44 other nations on the export and subsequent use of armed or strike-enabled unmanned aerial vehicles (“UAVs”). The fact sheet is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/262812.htm>

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As a world leader in the development and deployment of military UAVs, the United States seeks to promote efforts to ensure the responsible export and subsequent use of this rapidly expanding technology. In February 2015, the United States announced the U.S. Export Policy for Unmanned Aerial Systems, which put in place stringent conditions on the U.S. sale or transfer of military UAVs. In the 2015 policy, we also stated our intent to “work with other countries to shape international standards for the sale, transfer, and subsequent use of military UAVs.”

This Joint Declaration reflects a logical next step in this process by:

- Establishing broad international consensus that, as with other weapon systems, the use of armed or strike-enabled UAVs is subject to international law, including both the law of armed conflict and international human rights law, as applicable;
- Committing to the responsible export of armed or strike-enabled UAVs in line with existing relevant international arms control and disarmament norms, as well as consistent with multilateral export control and nonproliferation regimes;
- Acknowledging the benefits of transparency on the export of armed or strike-enabled UAVs including reporting of military exports through existing mechanisms, where appropriate; and
- Pledging continued international dialogue about the export and use of armed or strike-enabled UAVs in light of the rapid development and proliferation of UAV technology, and welcoming additional countries to join the Joint Declaration.

This Joint Declaration will serve as the basis for discussions on a more detailed set of international standards for the export and subsequent use of armed or strike-enabled UAVs, which the United States and its partners will convene in Spring 2017. These discussions will be open to all countries, even if they choose not to join the Joint Declaration.

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### 2. Convention on Conventional Weapons

Principal Deputy Legal Adviser Richard Visek delivered the opening statement for the U.S. delegation at the Fifth Review Conference of the Convention on Conventional Weapons (“CCW”) in Geneva on December 12, 2016. The opening statement is excerpted below and available at <https://geneva.usmission.gov/2016/12/12/u-s->

[opening-statement-at-the-fifth-review-conference-of-the-convention-on-conventional-weapons-ccw/](#)

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The United States places great value in the Conference of the Convention on Certain Conventional Weapons (CCW) as an international humanitarian law (IHL) treaty framework that brings together States with diverse security interests to discuss issues related to weapons that may be deemed to be excessively injurious or to have indiscriminate effects. We believe that the CCW provides a unique forum for discussing these important issues as it has an appropriate mix of technical, policy, political, and military experts.

We would like to commend the excellent efforts of the various coordinators of the work related to Amended Protocol II and Protocol V. We are pleased with the decisions of the High Contracting Parties to Amended Protocol II and Protocol V, and we look forward to adopting these decisions during this Review Conference.

The United States recognizes the need for universalization and full implementation of the CCW and its protocols. We welcome those States that have become party to the CCW and its protocols since the last Review Conference.

The importance of universalization and implementation has been reinforced by recent events. We have seen concerning reports that incendiary weapons continue to be used in places where civilians have been present, as well as increased reports of indiscriminate use of IEDs and landmines in places like Syria, Libya, Ukraine, and Yemen. These disturbing reports underscore that the universalization and implementation of the CCW and its protocols, are crucial if we want to help preclude such conduct from occurring in the future. We call on all High Contracting Parties that are parties to those conflicts to abide by their obligations under the CCW and we call on those States not yet party to the CCW and its protocols to become parties at the earliest opportunity.

The United States has supported the decision by the High Contracting Parties to discuss lethal autonomous weapons systems (LAWS). We continue to believe that the CCW is the right forum to consider this complex topic. This subject requires in-depth discussions and we continue to encourage States to participate actively in this process. In 2017, we should continue to seek a better understanding of the potential issues associated with LAWS, consistent with the recommendations of the Informal Meeting of Experts in April.

The United States supports concluding a legally binding protocol on mines other than anti-personnel mines (MOTAPM). That said, we see value in building on the constructive discussions that we have had, both formally and informally, in recent years. We strongly encourage High Contracting Parties to agree to the proposal put forth by Ireland to resume our work on this issue. MOTAPM, unlike LAWS, are existing weapons that continue to be used indiscriminately and that therefore pose a clear danger to civilians in conflict areas.

Madame President, with respect to our work in 2017, the United States supports an efficient work plan that is still sufficient to ensure that we are able to implement the decisions we take related to future work. Noting the unfortunate constraints placed on this Review Conference due to insufficient funds, we must prioritize our work given our limited resources.

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## C. DETAINEES

### 1. Law and Policy Report Regarding Detainees

The Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, discussed in section A.2, *supra*, includes a section on the legal and policy frameworks regarding detention during armed conflict. Excerpts follow (with most notes omitted) from section III of Part Two of the Report regarding detention of individuals in armed conflict.

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Under the 2001 AUMF, the United States may detain those persons who were part of, or substantially supported, Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces. ...

Examination of whether an individual is "part of" an enemy force is informed by the fact that the armed groups against which the President is authorized to use force under the 2001 AUMF neither abide by the law of armed conflict nor typically issue membership cards or uniforms. Therefore, information relevant to a determination that an individual joined with or became part of an enemy force might range from formal membership, such as through an oath of loyalty, to more functional indications, such as training with al-Qa'ida (as reflected in some cases by staying at al-Qa'ida or Taliban safehouses that are regularly used to house militant recruits), taking positions with enemy forces, or in planning or carrying out attacks against the United States and its allies' persons or interests, particularly U.S. persons or interests. Often these factors operate in combination. In each case, given the nature of the irregular forces and the practice of their participants or members to try to conceal their affiliations, judgments about whether a particular individual falls within the scope of the authority conferred by the 2001 AUMF will necessarily turn on the totality of the circumstances.

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As noted above, the United States has also interpreted the 2001 AUMF to authorize the detention of individuals who "substantially support" enemy forces in the course of their hostilities against the United States or its coalition partners. This interpretation is informed by the law of armed conflict governing international armed conflicts, which allows for the detention of a narrow category of individuals who are not part of the enemy but bear sufficiently close ties to those forces as to be detainable. By providing "substantial support," an individual is "more or less part of" the enemy force. ...

Under the 2001 AUMF, as informed by the law of armed conflict, detention is generally authorized until the end of hostilities. The relevant inquiry in determining whether detention remains authorized is whether active hostilities have ceased, not whether a particular combat mission is over. During ongoing hostilities, the U.S. Government's legal authority to detain "is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities." However, as a matter of policy, a detainee may be released or transferred while active hostilities are ongoing if a competent authority determines that the threat the individual poses to the security of the United States can be mitigated by other lawful means. This discretionary designation of a detainee for possible transfer from a detention facility, including the facility at Guantanamo Bay, does not affect the legality of his continued detention under the 2001 AUMF pending transfer.

B. Review of the Continued Detention of Detainees at Guantanamo Bay

In his first week in office, President Obama issued Executive Order 13492 regarding the review and disposition of individuals detained at Guantanamo Bay and the closure of the detention facility. As the Administration has made clear, the facility's continued operation weakens U.S. national security by furthering the recruiting propaganda of violent extremists, hindering relations with key allies and partners, and draining resources. ...

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...As of the release of this report, there are 59 detainees at Guantanamo, compared to 242 detainees on January 20, 2009, when the President took office.

C. Treatment of Armed Conflict Detainees

1. *Fundamental Treatment Guarantees for Armed Conflict Detainees*

The standards in Common Article 3 of the 1949 Geneva Conventions apply to detainees in any military operation. Common Article 3 reflects a minimum standard of humane treatment protections in non-international armed conflict for all persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Additional rules regarding treatment of detainees will apply depending on the particular context. In particular, Article 75 of Additional Protocol I to the Geneva Conventions sets forth fundamental guarantees for persons in the hands of an opposing force in an international armed conflict, including prohibitions on torture and humiliating and degrading treatment, as well as fair trial guarantees. The United States is not party to Additional Protocol I, but the United States 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 it expects all other nations to adhere to these principles as well.

Additional Protocol II to the Geneva Conventions contains detailed humane treatment standards and fair trial guarantees that would apply in the context of non-international armed conflicts, such as the hostilities authorized by the 2001 AUMF. The United States signed Additional Protocol II in 1987 and President Reagan submitted it to the Senate for advice and consent to ratification. In March 2011, this Administration urged the Senate to act on the Protocol as soon as practicable. Prior to urging the Senate to act, the U.S. Government conducted an extensive interagency review, which concluded that U.S. military practice is already consistent with the Protocol's provisions. The Executive Branch noted that joining the treaty would not only assist the United States in continuing to exercise leadership in the international

community in developing the law of armed conflict, but would also reaffirm the United States' commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

## 2. *The Prohibition on Torture and Ill-Treatment*

Torture and cruel, inhuman, or degrading treatment or punishment (CIDTP) are categorically prohibited under domestic and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.

### a. The Prohibition on Torture and Ill-Treatment Under U.S. Domestic Law

Torture and ill-treatment are prohibited as a matter of U.S. domestic law. The Detainee Treatment Act of 2005 requires that “no individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” This language means that under U.S. domestic law, every U.S. official, wherever he or she may be, is prohibited from engaging in torture or CIDTP.

Additionally, immediately upon taking office in January 2009, President Obama issued Executive Order 13491, which requires that any individual detained in any armed conflict who is in the custody or under the effective control of the United States or detained within a facility owned, operated, or controlled by the United States “shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment).”

Moreover, Executive Order 13491 requires that no individual in U.S. custody or under U.S. control in any armed conflict “shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in [the] Army Field Manual.” This requirement is applicable to all departments and agencies that conduct interrogations of terrorism suspects or detainees in armed conflict.

The President has stated repeatedly that waterboarding is torture, and the Army Field Manual explicitly prohibits it. Executive Order 13491 also revoked all executive directives, orders, and regulations inconsistent with that order.

The 2016 NDAA codified many of the key interrogation-related reforms required by that Executive Order. Specifically, it codified the requirement that an individual in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a U.S. department or agency, in any armed conflict, may not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The 2016 NDAA also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.

### b. The Prohibition on Torture and Ill-Treatment in International Law

The prohibition on torture is also binding as a matter of customary international law at all times on all States and all parties to an armed conflict, including the United States, regardless of a State's status as party or non-party to any particular treaty.

In the law of armed conflict, Common Article 3 of the 1949 Geneva Conventions explicitly prohibits torture and humiliating, degrading, or cruel treatment. Article 75 of Additional Protocol I explicitly prohibits torture of all kinds, whether physical or mental. Article

4(2)(a) of Additional Protocol II, which applies in non-international armed conflicts, prohibits violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment. Although the United States is not a party to Additional Protocol II, U.S. military practices, including its detention and interrogation practices, are consistent with its requirements, as noted above.

In international human rights law, the International Covenant on Civil and Political Rights prohibits torture and CIDTP. The United States has had international law obligations under this treaty as a State party since 1992. The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) creates a variety of legal obligations related to torture and CIDTP that are binding on the United States as a matter of international law, including that each State Party must take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction, to ensure that all acts of torture are offences under its criminal law, and to promptly and impartially investigate credible allegations of torture in territory under its jurisdiction. The United States ratified the UNCAT in 1994, and enacted the Torture Convention Implementation Act to implement certain aspects of the Convention's requirements that were not already codified as part of U.S. domestic law.

The United States recognizes that a time of war does not suspend the operation of the UNCAT, which continues to apply even when a State is engaged in armed conflict. The law of armed conflict and the UNCAT contain many provisions that complement one another and are in many respects mutually reinforcing: for example, the obligations to prevent torture and CIDTP in the UNCAT remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims.<sup>198</sup> However, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations. International human rights treaties, according to their terms, may also be applicable in armed conflict.

Additionally, the United States has stated that where the text of the UNCAT provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, "territory under its jurisdiction" extends to "all places that the State Party controls as a governmental authority." The United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft.<sup>199</sup>

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<sup>198</sup> For example, although Article 14 of the Convention contemplates an enforceable right to fair and adequate compensation for victims of torture, it would be anomalous under the law of armed conflict to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation against the Detaining Power for alleged unlawful conduct. The Geneva Conventions contemplate that claims related to the treatment of POWs and Protected Persons are to be resolved on a state-to-state level, and war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations as opposed to private lawsuits.

<sup>199</sup> Besides these areas, whether the Convention applies with respect to particular territory is context-specific and would vary depending on the facts and circumstances. For example, occupied territory would likely be considered "territory under (a state's) jurisdiction" for the purposes of the Convention if the occupying power exercises the requisite control as a governmental authority in the occupied territory.

*c. The Prohibition on Torture and Ill-Treatment in U.S. Policy*

As discussed above, the 2016 NDAA and Executive Order 13491 require that individuals in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subject to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The requirements of Army Field Manual 2-22.3 are binding on the U.S. military, as well as on all federal government departments and agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of Federal law enforcement agencies. The Army Field Manual explicitly prohibits threats, coercion, and physical abuse. Army Field Manual 2-22.3 must also remain available to the public, and any revisions must be made available to the public 30 days before taking effect.

Consistent with Executive Order 13491 and the 2016 NDAA, Army Field Manual 2-22.3 lists the 18 approved interrogation approaches. Those approaches include those that make use of incentives, emotions, and silence, as well as the limitations on their use. Additionally, Appendix M of Army Field Manual 2-22.3 lists the one approved restricted interrogation technique (separation) that may be authorized during the intelligence interrogation of detained “unlawful enemy combatants.” Appendix M also includes the limitations on the use of this technique. Separation involves separating a detainee from other detainees and their environment. The use of this restricted technique requires Combatant Commander approval, and approval of each interrogation plan by the first General Officer or Flag Officer in the interrogator’s chain of command.

In addition to the Army Field Manual, the Department of Defense has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09 requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2311.01E requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.” All reportable incidents must be investigated and, where appropriate, remedied by corrective action. Moreover, under U.S. law and policy, the Department of Defense does not use contract interrogators except in limited circumstances.

Department of Defense policy also includes specific requirements with regard to humane treatment in medical care during the period of detention. Consistent with Additional Protocol II to the Geneva Conventions, Department of Defense policy requires that health care personnel charged with the medical care of detainees in armed conflict protect detainees’ physical and mental health and provide appropriate treatment for disease. Upon arrival in any Department of

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Defense detention facility, all detainees receive medical screening and any necessary medical treatment. The medical care that detainees receive throughout their time in U.S. custody is generally comparable to that which is available to U.S. personnel serving in the same location.

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Excerpts below come from Part Two, Section V of the Report, regarding transfers of detainees in armed conflict from U.S. custody and specifically, U.S. policy on humane treatment assurances from the country to which detainees are transferred.

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The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This includes transfers conducted in the context of an armed conflict. The U.S. Government's policy is reflected in a statutory statement of U.S. policy and memorialized in court submissions.

For individuals who are detained at Guantanamo Bay, a decision to transfer a detainee from Guantanamo prior to the end of hostilities also reflects the best judgment of U.S. Government experts, including counterterrorism, intelligence, and law enforcement professionals, that, to the extent a detainee poses a continuing threat to the United States, the threat has been or will be sufficiently mitigated—and the national interest will be served—if the detainee is transferred to another country under appropriate security measures. When contemplating such a transfer of a detainee to another country, the United States considers the totality of relevant factors relating to the individual to be transferred and the government in question, including any security and humane treatment assurances received and the reliability of those assurances.

\* \* \* \*

Humane treatment assurances may be sought in advance of a detainee transfer as a prudential matter or, in certain cases, where, if credible and reliable, the assurances could mitigate treatment concerns, such that the transfer would ultimately be consistent with applicable law and policy. The essential question in evaluating foreign government assurances relating to humane treatment in any post-transfer detention is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he or she is being transferred. There have been cases where the United States has considered the use of assurances but nevertheless declined to transfer individuals because the United States was not satisfied that even with assurances the transfer would be consistent with its obligations, policies, or practices.

Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be

consistent with applicable international and domestic law. The U.S. Government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial and penal conditions and practices of the receiving State; U.S. relations with the receiving State; the receiving State's capacity and incentives to fulfill its assurances; political or legal developments in that State; the State's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

Where appropriate, the U.S. Government also seeks assurances or a commitment that the receiving State will permit credible, independent organizations or, in some circumstances, U.S. Government officials to have consistent, private access to transferred detainees for post-transfer humanitarian monitoring. The U.S. Government has raised concerns, as appropriate, regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns come to its attention, whether from U.S. Government-obtained information, the results of monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

In a case in which the United States became aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments made to the U.S. Government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed.

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## 2. Guantanamo Closure Plan

On February 23, 2016, the press secretary for the Department of Defense, Peter Cook, issued a statement on the submission to Congress of a plan for the closure of the detention facility at Guantanamo Bay. The statement is excerpted below and available

at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/671225/statement-by-pentagon-press-secretary-peter-cook-on-submission-of-guantanamo-cl>

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The Department of Defense formally submitted the administration's plan for closing the Guantanamo Bay detention facility to Congress today. As the president has stated, responsibly closing the Guantanamo detention facility is a national security imperative. For this reason,

among others, Secretary Carter supports the president's commitment to bringing a responsible end to detention at Guantanamo.

Implementing this plan will enhance our national security by denying terrorists a powerful propaganda symbol, strengthening relationships with key allies and counterterrorism partners, and reducing costs. As the president has said, it "makes no sense" to keep open a facility that "the world condemns and terrorists use to recruit."

The plan provides a way ahead for closing the detention facility at Guantanamo Bay, which will markedly enhance our national security, while continuing to treat all detainees in U.S. custody in a manner that is consistent with international and domestic law. The plan has four primary tenets:

1. Securely and responsibly transferring to foreign countries detainees who have been designated for transfer by the president's national security team;
2. Continuing to review the threat posed by those detainees who are not currently eligible for transfer through the Periodic Review Board (PRB);
3. Identifying individualized dispositions for those who remain designated for continued law of war detention, including possible Article III, military commission, or foreign prosecutions;
4. Working with the Congress to establish a location in the United States to securely hold detainees whom we cannot at this time transfer to foreign countries or who are subject to military commission proceedings.

The plan does not endorse a specific facility to house Guantanamo detainees who cannot be safely transferred to other countries at this time. The administration seeks an active dialogue with Congress on this issue and looks forward to working with Congress to identify the most appropriate location as soon as possible.

The plan does include ranges of costs for closure, including low-end and high-end potential one-time costs and recurring costs. It also discusses savings that would be achieved by closure. The savings range reflects differing variables, like location selected and differing options in detention models.

Recurring costs at Guantanamo would be between \$65 million and \$85 million higher annually than at a U.S. facility. The one-time transition costs would be offset within three to five years due to the lower operating costs of a U.S. facility with fewer detainees. Closing Guantanamo could therefore generate at least \$335 million in net savings over 10 years and up to \$1.7 billion in net savings over 20 years.

Secretary Carter remains firmly committed to responsibly ending detention operations at Guantanamo Bay, and this plan gives the department an opportunity to do so in a way that is consistent with our interests, laws, and values. He looks forward to working with Congress on this effort.

The administration recognizes that there are currently statutory provisions restricting the transfer of Guantanamo detainees to the United States and the use of funds to build or modify facilities for such transfers. The administration looks forward to working with Congress to lift those restrictions.

The plan is available  
here: [http://www.defense.gov/Portals/1/Documents/pubs/GTMO\\_Closure\\_Plan\\_0216.pdf](http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf)

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### 3. Transfers

The number of detainees remaining at Guantanamo Bay declined further in 2016 as part of U.S. government efforts to close the facility. As of January 6, 2016, 105 detainees remained at Guantanamo Bay. As of December 4, 2016, there were 59.\*

On January 6, 2016, the Department of Defense announced the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby from the detention facility at Guantanamo Bay to the Government of Ghana. Bin Atef and Al-Dhuby were approved for transfer by the Guantanamo Review Task Force. DOD release no. NR-003-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/641768/detainee-transfers-announced>.

On January 8, DOD announced the repatriation of Faез Mohammed Ahmed Al-Kandari to Kuwait. Al-Kandari was recommended for transfer by the Periodic Review Board established by E.O. 13567. DOD release no. NR-008-17, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/641982/detainee-transfer-announced>.

On January 11, DOD announced the repatriation of Muhammed Abd Al Rahman Awn Al-Shamrani to Saudi Arabia. His transfer was recommended by the Periodic Review Board. DOD release no. NR-010-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/642178/detainee-transfer-announced>.

On January 14, DOD announced the transfers of Fahed Abdullah Ahmad Ghazi, Samir Naji al-Hasan Muqbil, Adham Mohamed Ali Awad, Mukhtar Yahya Naji al-Warafi, Abu Bakr Ibn Muhammad al-Ahdal, Muhammad Salih Husayn al-Shaykh, Muhammad Said Salim Bin Salman, Said Muhammad Salih Hatim, Umar Said Salim al-Dini, and Fahmi Abdallah Ahmad Ubadi al-Tulaqi—all of whom had been approved for transfer by the Guantanamo Review Task Force—to the Government of Oman. DOD release no. NR-016-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/643066/detainee-transfers-announced>.

On January 21, DOD announced the transfer of Tariq Mahmoud Ahmed Al Sawah to the Government of Bosnia and Herzegovina after his transfer received approval by the Periodic Review Board. DOD release no. NR-025-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/643910/detainee-transfer-announced>.

Also on January 21, DOD announced the transfer of Abd al-Aziz Abduh Abdallah Ali Al-Suwaydi to the Government of Montenegro after the transfer was approved by the Guantanamo Review Task Force. DOD release no. NR-026-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/643912/detainee-transfer-announced>.

On April 4, 2016, Secretary Kerry issued a press statement expressing gratitude to the Republic of Senegal for offering humanitarian resettlement to two former Guantanamo detainees. See press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/04/255449.htm>.

Also on April 4, 2016, the Defense Department announced the transfer of the two Libyan nationals, Salem Abdu Salam Ghereby and Omar Khalif Mohammed Abu Baker Mahjour Umar. Ghereby was

\* Editor's note: As of January 19, 2017, 41 detainees remained at Guantanamo Bay.

approved for transfer by the Guantanamo Review Task Force and Umar's transfer was recommended by the Periodic Review Board. DOD release no. NR-118-16, available at

[https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/712382/detainee-transfers-announced)

[View/Article/712382/detainee-transfers-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/712382/detainee-transfers-announced). On April 16, DOD announced the transfer of Ahmed Umar Abdullah Al-Hikimi, Abdul Rahman Mohammed Saleh Nasir, Ali Yahya Mahdi Al-Raimi, Tariq Ali Abdullah Ahmed Ba Odah, Muhammed Abdullah Muhammed Al-Hamiri, Ahmed Yaslam Said Kuman, Abd al Rahman Al-Qyati, Mansour Muhammed Ali Al-Qatta, and Mashur Abdullah Muqbil Ahmed Al-Sabri to Saudi Arabia, following their approval for transfer by the appropriate review process. DOD release No. NR-135-16, available at [https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/722845/detainee-transfers-announced)

[View/Article/722845/detainee-transfers-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/722845/detainee-transfers-announced).

On June 22, 2016, DOD announced the transfer of Abdel Malik Ahmed Abdel Wahab Al Rahabi to the Government of Montenegro. Transfer was recommended by the Periodic Review Board. DOD release no. NR-234-16, available at

[https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/810253/detainee-transfer-announced)

[View/Article/810253/detainee-transfer-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/810253/detainee-transfer-announced)

On July 10, 2016, DOD announced the transfer of Fayiz Ahmad Yahia Suleiman from the detention facility at Guantanamo Bay to the Government of Italy. Transfer was recommended by the Guantanamo Review Task Force. DOD release no. NR-258-16, available at [https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/832604/detainee-transfer-announced)

[View/Article/832604/detainee-transfer-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/832604/detainee-transfer-announced).

On July 11, 2016, Secretary Kerry announced that Serbia had offered humanitarian resettlement to two former Guantanamo detainees. July 11, 2016 press statement, available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/07/259522.htm)

[2017.state.gov/secretary/remarks/2016/07/259522.htm](http://2009-2017.state.gov/secretary/remarks/2016/07/259522.htm). The transfer of Tajik national Muhammadi Davlatov was approved by the Guantanamo Review Task Force, and the transfer of Yemeni national Mansur Ahmad Saad al-Dayf was recommended by the Periodic Review Board process. DOD release no. NR-260-16, available at

[https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/832874/detainee-transfers-announced)

[View/Article/832874/detainee-transfers-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/832874/detainee-transfers-announced)

On August 15, 2016, DOD announced the transfer of 15 detainees to the United Arab Emirates: Abd al-Muhsin Abd al-Rab Salih al-Busi, Abd al-Rahman Sulayman, Mohammed Nasir Yahi Khussrof Kazaz, Abdul Muhammad Ahmad Nassar al-Muhajari, Muhammad Ahmad Said al-Adahi, Abdel Qadir al-Mudafari, Mahmud Abd Al Aziz al-Mujahid, Saeed Ahmed Mohammed Abdullah Sarem Jarabh, Mohammed Kamin, Zahar Omar Hamis bin Hamdoun, Hamid al-Razak (aka Haji Hamidullah), Majid Mahmud Abdul Ahmed, Ayub Murshid Ali Salih, Obaidullah, and Bashir Nasir Ali al-Marwalah. Six of the 15 were approved for transfer by the Guantanamo Review Task Force and the other nine by the Periodic Review Board process. DOD release no. NR-298-16, available at

[https://www.defense.gov/News/News-Releases/News-Release-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/915216/detainee-transfers-announced)

[View/Article/915216/detainee-transfers-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/915216/detainee-transfers-announced)

On October 17, 2016, DOD announced the transfer of Mohamedou Ould Slahi to the Government of Mauritania. Transfer was recommended by the Periodic Review Board. DOD release no. NR-371-16, available at [https://www.defense.gov/News/News-](https://www.defense.gov/News/News-Releases/News-Release-View/Article/975922/detainee-transfer-announced)

[Releases/News-Release-View/Article/975922/detainee-transfer-announced](https://www.defense.gov/News/News-Releases/News-Release-View/Article/975922/detainee-transfer-announced)

On December 4, 2016, DOD announced the transfer of Shawqi Awad Balzuhair to the Government of Cabo Verde. Transfer was recommended by the Periodic Review Board. DOD release no. NR-426-16, available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1019445/detainee-transfer-announced>.

#### 4. U.S. court decisions and proceedings

##### a. *Detainees at Guantanamo: Habeas Litigation*

###### (1) *Al Razak v. Obama*

As discussed in *Digest 2015* at 775-76, several detainees filed habeas petitions asserting that they were being unlawfully detained because hostilities in Afghanistan had ended. In one such case, *Al Razak v. Obama*, No. 05-1601 (D.D.C.), the district court issued its decision denying the detainee's petition for habeas on March 29, 2016. The court's opinion is excerpted below (with footnotes omitted). While the case name is *Al Razak*, the detainee explained that name was erroneous and the court's opinion refers to him by the name, Haji Hamdullah. The opinion is available in full at at

<https://www.state.gov/s/l/c8183.htm>

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Petitioner's Petition raises two issues: whether "active hostilities" are considered to have ended, and who makes that determination. Both parties appear to agree that the Court should rely on the President's decision, but differ as to how to interpret President Obama's position. Petitioner relies on speeches made by the President declaring an end to combat operations in Afghanistan, ... while Respondents rely on the assertions by individuals in the political branches that active hostilities continue. ...

While entitled to some deference, the President's position is not dispositive. Our Court of Appeals has stated that, under separation of powers principles, "[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on that matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war." *Al Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (citing *Ludecke v. Watkins*, 335 U.S. 160, 168-70 & n.13 (1948)). But, the *Hamdi* plurality recognized that deference to the Executive must have limits. *Hamdi*, 542 U.S. at 530 ("history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [an immediate threat to national security]"). As Judge Lamberth noted in *Al Warafi v. Obama*, the *Hamdi* Court held that the AUMF's detention authorization turns partly on whether "the record establishes that United States troops are still involved in active combat in Afghanistan." *Al Warafi v. Obama*, No. 09-CV-2368, 2015 WL 4600420 at \*3 (D.D.C. July 30, 2015) (emphasis added in *Al Warafi*) (quoting *Hamdi*, 542 U.S. at 521). As Judge Lamberth indicated, a "record" implies review by a court, and suggests that *Hamdi* stands for the proposition that a court can and must examine the issue of whether

active combat continues. *Id.* The Court need not fully address Respondents' separation of powers argument at this time because the Court finds that the President has not declared the end of active hostilities and because the Court agrees with Respondents' position that active hostilities continue in Afghanistan.

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## ANALYSIS

### A. Cessation of Active Hostilities

The crux of the Parties' disagreement is whether detention is authorized for the duration of "active combat" or "active hostilities." Compare *Hamdi*, 542 U.S. at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force'.") with *Hamdi*, 542 U.S. at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities."); see also Third Geneva Convention, Art. 118 (prisoners of war must be released "after the cessation of active hostilities").

The "cessation of active hostilities" standard was first adopted in the 1949 Geneva Conventions following the delayed repatriation of prisoners of war in earlier armed conflicts. See 3 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War, 541-43 (J. Pictet gen. ed. 1960) ("Third Convention Commentary").

The two predecessor multilateral law-of-war treaties to the 1949 Geneva Conventions required repatriation of prisoners of war only "after the conclusion of peace." See *id.* at 541. Repatriation delays arose after World Wars I and II due to a substantial gap in time between the cessation of active hostilities and the signing of formal peace treaties. *Id.* The "cessation of active hostilities" requirement sought to correct this problem, thereby making repatriation no longer contingent on a formal peace accord or political agreement between the combatants. *Id.* at 540, 543, 546-47.

In light of this history, Petitioner correctly interprets the Third Geneva Convention's "cessation of active hostilities" so that final peace treaties are no longer a prerequisite to mandatory release of prisoners of war. Based on that change, Petitioner argues that the Third Geneva Convention contemplates the possibility that some degree of conflict might continue even after the core of the fighting has subsided. ...

Petitioner argues that cessation of active hostilities requires only an end to active combat. ... Petitioner reaches this conclusion by comparing the language of the Third Geneva Convention with language in Articles 6 and 133 of the Fourth Geneva Convention. ... Article 133 of the Fourth Geneva Convention addresses the internment of civilians in wartime and provides that such internment "shall cease as soon as possible after the close of hostilities." Fourth Geneva Convention art. 133. Relying on the Fourth Convention's Commentary, Petitioner attempts to show that "close of hostilities" could be a point in time that might occur after "cessation of active hostilities." The Court is not convinced. Indeed, the Commentary Petitioner cites acknowledges that the provisions are similar and "should be understood in the same sense." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 514-15 (J. Pictet gen. ed. 1960) ("Fourth Convention Commentary"). Petitioner also looks to Article 6 of the Fourth Geneva Convention, which states that application of the Fourth Geneva Convention "shall cease on the close of military operations." Fourth Geneva Convention, art. 6. The phrase "close of military operations" was understood to mean "the final end of all fighting between all those concerned." Fourth Convention Commentary at 62. The

Court agrees with Petitioner that “cessation of active hostilities” is distinct from “close of military operations,” and that active hostilities can cease prior to the close of military operations. This distinction is consistent with the differing purposes of Article 6 (defining the period of time in which the Fourth Geneva Convention, in its entirety, applies) and Article 118 (focusing on detention specifically). But, it does not necessarily follow that “cessation of active hostilities” therefore requires only an end to combat operations, as Petitioner argues. ...

For the foregoing reasons, the Court concludes that the appropriate standard is cessation of active hostilities and that active hostilities can continue after combat operations have ceased. But, cessation of active hostilities is not so demanding a standard that it requires total peace, signed peace agreements, or an end to all fighting.

**B. Mr. Hamdullah’s Detention Under the AUMF**

Next, the Court looks to whether active hostilities have, in fact, ceased. Petitioner relies heavily on the Bilateral Security Agreement and the President’s speeches regarding the end of the combat mission and war in Afghanistan in support of his argument that active hostilities have ceased.

Petitioner relies on the Bilateral Security Agreement’s requirement that the United States receive consent from the Afghan government prior to conducting combat operations in Afghanistan as evidence that combat operations have ceased. ... Even assuming this to be true, the Court has already determined that “active hostilities” are not the same as “combat operations.” See *supra*, Section III.A. The Bilateral Security Agreement is not evidence that active hostilities have ceased. Respondents add that although the United States has ended its combat mission in Afghanistan, this shift does not mark the end of active hostilities in Afghanistan, and indeed, fighting still continues. ...

Petitioner cites to speeches by the President, including his 2015 State of the Union Address and his May 2014 Statement on Afghanistan, but notably, none of these statements discuss the end of “active hostilities.” ... The end of the combat mission is not synonymous with the end of active hostilities. See *supra*, Section III.A. Indeed, the President has expressly stated that active hostilities continue. ...

Petitioners point to greatly reduced troop numbers in Afghanistan as evidence of cessation of active hostilities. Respondents counter that the continued presence of nearly 10,000 U.S. troops in Afghanistan is actually evidence of ongoing active hostilities. ... While troop numbers alone are not sufficient to determine whether active hostilities persist, ... a United States presence of nearly 10,000 troops certainly supports the conclusion that ongoing active hostilities exist.

Respondents provide numerous examples of ongoing conflict in Afghanistan and instances of hostile forces engaging U.S. personnel. ... In 2015, there were over 360 “close air support missions carried out by the United States in Afghanistan involving the release of at least one weapon.” *Id.* at 16. Coalition forces conducted air strikes in southern Afghanistan that destroyed a large al-Qaeda training camp and U.S. armed forces continue to participate in certain ground operations. *Id.* at 17.

“The Geneva Conventions require release and repatriation only at the ‘cessation of active hostilities.’” *Al-Bihani*, 590 F.3d at 874 (citing Third Geneva Convention art. 118). As this Court has noted, “The Supreme Court and the D.C. Circuit have repeatedly held that detention under the AUMF is lawful for the duration of active hostilities.” *Al Odah v. United States*, 62 F. Supp. 3d 101, 114 (D.D.C. 2014). While what constitutes “active hostilities” has never been clearly defined, Respondents have provided convincing examples of ongoing hostilities in

Afghanistan. Given this evidence, combined with the deference accorded the Executive's determination of when hostilities have ceased, the Court concludes that active hostilities continue in Afghanistan. Mr. Hamdullah's continued detention, therefore, is both authorized under the AUMF and does not violate the Third Geneva Convention.

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(2) Suleiman v. Obama

In *Suleiman v. Obama*, the detainee filed a habeas petition in December 2015, arguing he must be released because hostilities in Afghanistan have ended. The United States filed a classified motion to dismiss on February 5, 2016. Excerpts follow (with footnotes omitted) from the unclassified U.S. reply brief filed on April 28, 2016. The U.S. reply brief is available in full at <https://www.state.gov/s/l/c8183.htm>. The case was subsequently dismissed as moot after the detainee was transferred.

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Throughout the opposition brief, Petitioner argues that the Court should order his release because the President has said in speeches that the “war against the Taliban is over,” Pet’r’s Opp’n at 10 (emphasis added), or that the “combat mission in Afghanistan is over,” *id.* at 11 (emphasis added). The appropriate legal standard, however, is whether active hostilities are ongoing.

Article 118 of the Third Geneva Convention, which is entitled “Release and Repatriation of Prisoners of War at the Close of Hostilities[,]” states that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.” See Geneva Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 3406, Article 118 (emphasis added). Relying on this provision in construing the detention authority provided by the AUMF, the Supreme Court in *Hamdi v. Rumsfeld* explained that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.” 542 U.S. 507, 520 (plurality opinion) (citing Third Geneva Convention, art. 118).

Indeed, the Court of Appeals has applied the “active hostilities” standard in response to arguments by a Guantanamo Bay detainee that his law of war detention was no longer justified because the conflict in which he was captured had purportedly ended. In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the petitioner argued that he “must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended.” *Id.* at 874 (emphasis added). The Court of Appeals rejected that argument and held that “[t]he Geneva Conventions require release and repatriation only at the ‘cessation of active hostilities.’” *Id.* (quoting Third Geneva Convention, art. 118) (emphasis added). The Court of Appeals explained that “the Conventions use the term ‘active hostilities’ instead of the terms ‘conflict’ or ‘state of war’ found elsewhere in the document” and found that usage “significant,” concluding that “[t]he Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.” *Id.*

Following this precedent, every Judge on this Court who has considered the issue has concluded that active hostilities is the proper standard for evaluating the lawfulness of detention under the AUMF. Most recently, on March 29, 2016, Judge Kessler applied the active hostilities standard in denying a motion filed by a Guantanamo Bay detainee who sought release based on the purported end of hostilities. See *Razak v. Obama*, No. 05-CV-1601 (GK), 2016 WL 1270979, at \*5 (D.D.C. Mar. 29, 2016) (“the Court concludes that the appropriate standard is cessation of active hostilities”). This decision follows earlier decisions by Judges Lamberth and Kollar-Kotelly reaching the same conclusion. See *Al Warafi v. Obama*, No. 09-CV-2368 (RCL), 2015 WL 4600420, at \*2, 7 (D.D.C. July 30, 2015), vacated as moot, No. 15-5266 (D.C. Cir. Mar. 4, 2016); *Al-Kandari v. United States*, No. 15-CV-329 (CKK), Memorandum Opinion at 19-21 (D.D.C. Aug. 31, 2015) (Resp’ts’ Ex. 1), vacated as moot, No. 15-5268 (D.C. Cir. Mar. 4, 2016). Petitioner has provided no basis for this Court to deviate from the standard applied in these decisions.

Petitioner ignores this well-established precedent and asks the Court to adopt a new legal standard that is contrary to both law and common sense. But the end of a “combat mission” or “war” is not necessarily the same as an end of “active hostilities.” See *The Handbook of Humanitarian Law in Armed Conflicts* § 732 (Dieter Fleck ed., 1995) (explaining that “cessation of active hostilities” involves a situation where “the fighting has stopped”); Int’l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War*, art. 118 at 547 (J. Pictet ed., 1960) (release is only required when “the fighting is over”) (“Third Geneva Convention Commentary”).... Further, Petitioner’s proposed standard, in which release of enemy belligerents would be legally required before the end of the fighting, would undermine the “fundamental” purpose of law of war detention, which is “to prevent a combatant’s return to the battlefield.” *Hamdi*, 542 U.S. at 519; see *Third Geneva Convention Commentary* at 546-47 (“In time of war, the internment of captives is justified by a legitimate concern—to prevent military personnel from taking up arms once more against the captor State.”). Nothing in the commentary, history, or development of Article 118’s “active hostilities” standard suggests that it should be understood to require release of enemy belligerents prior to the end of fighting.

Petitioner claims that because he did not fight against U.S. forces, “there is no battle to which he could return” and his detention is inconsistent with the principles underlying law-of-war detention. ... But this argument overlooks the well-established principle that detention of enemy belligerents may last until the cessation of active hostilities, and that the purpose of that detention is to prevent return to the battlefield and not to a specific battle or previous engagement with particular forces. As this Court previously found, Petitioner traveled from Yemen to Afghanistan with assistance of the Taliban, stayed at Taliban guesthouses, and remained in the front lines with Taliban forces while in possession of a weapon. See *Sulayman*, 729 F. Supp. 2d at 44, 53. Petitioner’s continued detention is consistent with the purpose of law-of-war detention as it prevents him, at a minimum, from the rejoining the ranks of the Taliban forces that continue to engage in active hostilities against U.S. forces in Afghanistan. ...

Petitioner also incorrectly argues that the Court of Appeals decision in *Al-Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013), supports his view that release of enemy belligerents is required when the President declares that the “war,” as opposed to “active hostilities,” is over. ... *Al-Maqaleh* addressed whether the Court had jurisdiction over habeas corpus petitions filed by detainees held by the United States at Bagram Military Base in Afghanistan. See 738 F.3d at 328. In answering that question in the negative, the Court of Appeals evaluated the practical obstacles to resolving the petitions and concluded that “war-borne practical obstacles”

overwhelmingly weighed against extending habeas jurisdiction to detainees held in Afghanistan. *Id.* at 341. In reaching this conclusion, the Court of Appeals emphasized the fact that the “United States remains at war in Afghanistan” and cited well-established authority dating back to the 19th century that “[w]hether an armed conflict has ended is a question left exclusively to the political branches.” *Id.* The Court of Appeals had no occasion in that case to consider, and certainly did not address, the active hostilities standard or the point in time when release of enemy belligerents would be required under the law of war. Consequently, the fact that the Court of Appeals used the terms “war” and “armed conflict” in the context of describing the general legal principle that the political branches have the authority to say when armed conflicts end does not undermine *Al-Bihani*, *Hamdi*, or the other extensive authority Respondents have cited to support application of the active hostilities standard in the current context. The Court should reject Petitioner’s argument that *Al-Maqaleh*, a case addressing an entirely separate question, somehow controls this case or overrules the more specific authority from the detention context applying the active hostilities standard.

Additionally, Petitioner contends that he should be released because a “conflict of a different kind is now underway in Afghanistan” and the United States’ current mission in Afghanistan—Operation Freedom’s Sentinel—marked the end of the “relevant conflict” or “particular conflict” in which he was captured. See Pet’r’s Opp’n at 4-9 (quoting *Hamdi*, 542 U.S. at 518, 521). But by arguing that the terms “relevant conflict” or “particular conflict” as used in *Hamdi* apply to a particular military mission rather than active hostilities against al-Qa’ida, Taliban, and associated forces, Petitioner misconstrues the meaning of those terms and attributes greater meaning to these phrases than they can bear in context. As discussed previously, the *Hamdi* Plurality, in addressing the question of when release is required, cited the language from Article 118 to answer, “no longer than active hostilities.” 542 U.S. at 520. The Plurality’s later use of the phrases “particular conflict” and “relevant conflict” when discussing detention authority in the context of ongoing hostilities does not undermine that answer; rather, in context, those phrases primarily refer to the parties involved in the hostilities and, in all events, not to a particular military mission. *Id.* at 518 (explaining that “individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network,” are detainable “for the duration of the particular conflict in which they were captured”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-631 (2006) (discussing the “relevant conflict” by reference to the parties to the conflict, such as the United States, the Taliban, and al-Qa’ida). The “relevant conflict” here is the conflict against al-Qa’ida, Taliban, and associated forces, and active hostilities against those groups continue.

Indeed, as a common sense matter, there can be no merit to the contention that Petitioner should be released simply because the United States announced a transition of its mission in Afghanistan at the beginning of 2015, and correspondingly renamed the current military mission “Freedom’s Sentinel.” To be sure, the transition of the United States’ military mission in Afghanistan at the beginning of 2015 is a significant milestone, but it reflects just that, a transition, and not a cessation of active hostilities. Armed conflict is unpredictable, and the nature of hostilities can change dramatically in the course of any conflict, as evidenced by the increase in hostilities in Afghanistan during 2015. See Respt’s’ Mot. at 10-23; see also United Nations Report: The Situation in Afghanistan and its Implications for International Peace and Security at 4-6 (Mar. 7, 2016) (Exhibit 57) (stating that “the security situation [in Afghanistan] deteriorated further in 2015” and “Taliban activities continued at a rapid pace” between December 2015 and March 2016). Accordingly, it should be unsurprising that military missions

undergo transitions as they are adjusted to respond to current facts and circumstances, which is precisely what occurred at the beginning of 2015 when the United States transitioned to a support and counterterrorism mission in Afghanistan, in which active hostilities remain ongoing. To require the release of enemy belligerents at each transition point within an ongoing armed conflict would defy common sense and conflict with the purpose of law of war detention, which is “to prevent captured individuals from returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518.

In fact, Petitioner’s argument is the same one the Court of Appeals rejected in *Al-Bihani*. See 590 F.3d at 874 (rejecting detainee’s argument that “each successful campaign of a long war” required release because, if accepted, such a rule would be “a Pyrrhic prelude to defeat” and “would trigger an obligation to release Taliban fighters captured in earlier clashes” and result in “constantly refresh[ing] the ranks” of enemy forces”). Like Petitioner here, the petitioner in *Al-Bihani* argued that the conflict had reached a point that necessitated his release because the conflict “has allegedly ended.” *Id.* (“Al-Bihani contends the current hostilities are a different conflict, one against the Taliban reconstituted in a non-governmental form” and argues that release was required when the Taliban was removed as the governing power in Afghanistan). Petitioner here identifies a different alleged end point—the transition of the U.S. mission in 2015 to Operation Freedom’s Sentinel—but his argument suffers the same flaw the Court of Appeals identified in *Al-Bihani*: active hostilities have not ceased. The Court of Appeals rejected the attempt in that case to “draw such fine distinctions” regarding the point at which release is required under the laws of war and, instead, reaffirmed the longstanding rule that “release is only required when the fighting stops.” *Id.* As in *Al-Bihani*, Petitioner has merely identified a transition point in the armed conflict, not the end of active hostilities.

Further, in *Al-Kandari*, Judge Kollar-Kotelly considered and rejected the same argument regarding the “relevant conflict” language in *Hamdi* that Petitioner raises here. See *Al-Kandari*, Memorandum Opinion at 16 (“The Court rejects Petitioner’s argument that the relevant conflict is Operation Enduring Freedom.”). Agreeing with Respondents, Judge Kollar-Kotelly concluded that the “relevant conflict at issue in the instant action is the conflict in Afghanistan involving al-Qaeda, the Taliban, and its associated enemy forces.” *Id.* “As such, the fact that there has been a transition from Operation Enduring Freedom to Operation Freedom’s Sentinel does not necessarily signal an end of the ‘particular conflict.’” *Id.* at 16-17. This Court should follow the same approach in this case.

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(3) Davliatov v. Obama

In *Davliatov*, the detainee asserted that the government’s authority to detain him under the law of war had unraveled because the practical circumstances of the current conflict are unlike those of previous armed conflicts, and argued in addition that his detention is arbitrary and violates the AUMF and the Due Process Clause. Excerpts follow (with footnotes omitted) from the U.S. reply brief, which was filed on February 10, 2016. The public versions of the opening brief filed in 2015 and the reply brief are both available at <https://www.state.gov/s/l/c8183.htm>. The case was dismissed as moot on August 1, 2016, following the detainee’s transfer.

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### **I. Petitioner's Continued Detention Remains Consistent With The Laws Of War**

Binding precedent establishes that Petitioner's continued detention remains authorized by the AUMF as informed by the laws of war. Petitioner's attempts to distinguish or limit this precedent fail. Most notably, Petitioner cannot be considered a civilian under the laws of war, *Gherebi*, 609 F.Supp.2d at 65-66, but rather as part of enemy armed forces, he is properly detainable until the cessation of active hostilities, *Hamdi*, 542 U.S. at 521. Those hostilities remain ongoing. Similarly, Petitioner's contentions that the support of the traditional laws of war for his continued detention has "unraveled," and that the government has cherry-picked the laws of war upon which it relies, are not accurate. Accordingly, Petitioner's continued detention despite his long-standing designation for transfer remains fully authorized under the AUMF.

1. As the government has argued, binding precedent establishes that Petitioner's continued detention is fully consistent with the laws of war. Resps' Opp'n at 17-18. To reiterate briefly, the Court of Appeals has consistently held that an individual may be detained under the AUMF if he was part of al Qaeda, the Taliban, or associated forces at the time of his capture. *Uthman*, 637 F.3d at 401-402; *al-Bibani*, 590 F.3d at 872. The Supreme Court has held that the government may continue to lawfully detain such individuals under the AUMF, as informed by the laws of war, while active hostilities are ongoing. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.) (detention "for the duration of the particular conflict in which they were captured is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use"); see *id.* at 521 (AUMF includes the authority to detain for the duration of the relevant conflict, and ... is based on longstanding law-of-war principles."). Directly pertinent here, the Court of Appeals has held that a discretionary designation of a detainee for possible transfer by the Executive does not affect the legality [of] his continued detention under the AUMF as informed by the laws of war pending that transfer. *Almerfeddi*, 654 F.3d at 4 n. 3. Further, the level of threat a detainee may pose to the United States or its coalition partners if released—and the extent to which that threat may be mitigated by appropriate security assurances—does not affect the legality of his continued detention under the AUMF. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cjr. 2011) (question of whether a detainee would pose a risk to national security if released is irrelevant to whether he may continue to be detained under the AUMF).

Petitioner fits squarely within this precedent. First, the government has determined that he was a part of al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Accordingly, he is detainable under the AUMF. See, e.g. *Uthman*, 637 F.3d at 401-402. Second, hostilities in the conflict for which Petitioner is detained continue in Afghanistan against al Qaeda, the Taliban, and associated forces. Resps' Opp'n at 26-32. Consequently, he may continue to be detained until those hostilities end. *Hamdi*. 542 U.S. at 518 521; *al-Bihani*. 590 F.3d at 874. And third, although Petitioner has been designated for transfer, pursuant to *Almerfeddi* that designation does not alter the legality of his continued detention. 654 F.3d at 4 n.3. For these reasons alone, the Court should deny Petitioner's request for an order of release and dismiss his second habeas petition. *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district judges are obligated to apply controlling Circuit precedent until that precedent is overturned by the Court of Appeals sitting en banc or by the Supreme Court).

2. That the government's detention authority under the AUMF is informed by the laws of war provides no basis to disregard this precedent. Rather, Petitioner's continued detention despite his designation for transfer is fully consistent with the laws of war.

As the government explained, because Petitioner is an unprivileged enemy belligerent detained in a non-international armed conflict, he is entitled to the protections of Common Article Three of the Geneva Conventions, that is, to humane treatment. Resps' Opp'n at 24-25; see *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006) (noting that Common Article Three applies to Guantanamo Bay detainees through the AUMF). As the Supreme Court has explained, such detention is, "by universal agreement and practice, [an] important incident[] of war," the purpose of which is not to punish but merely "to prevent captured individuals from returning to the field of battle." *Hamdi*, 542 U. S. at 518. Nothing in Common Article Three prohibits detention until the cessation of hostilities, notwithstanding a detaining power's discretionary determination that it may be able to release a detainee before that time under appropriate conditions. See Resps' Opp'n at 22-26; see also *al-Bihani*, 590 F.3d at 874. Further, as with the Supreme Court's holding in *Hamdi*, the government's understanding and exercise of its detention authority—including its duration—is informed directly by the laws of war, specifically Article 118 of the Third Geneva Convention. Resps' Opp'n at 23-24; see *Hamdi*, 542 U.S. at 520 (citing GC III, art. 118). Although that provision, which requires the release of prisoners of war upon the cessation of active hostilities, is inapplicable as a matter of law to individuals, like Petitioner, who are detained in the context of a non-international armed conflict, it reflects the same rationale for detention that operates in both international and non-international armed conflict, namely to prevent the return of captured fighters to the battlefield.

Petitioner cannot escape this result by now suggesting that he should be considered a civilian and, so, that the Fourth Geneva Convention, rather than the Third, should inform the basis for his detention. Petr's Opp'n at 18-20. First, in *Gherebi v. Obama*, 609 F.Supp.2d 43 (D.D.C. 2009), this Court squarely rejected the very premise that Petitioner asserts here, namely that there are no "combatants" in non-international armed conflicts such as the one involved here, but only government forces and civilians. *Id.* at 62-66. The proper distinction for non-international armed conflicts is between enemy armed forces and civilians. *Id.* at 65-66. The Court noted that enemy armed forces are those parties and individuals in actual armed conflict with each other, which may include government forces on one side and intra-national rebels (in a civil war) or transnational fighters (in a conflict such as this) on the other. See *id.* at 66-67. Civilians, in contrast, are those who are not members of enemy armed forces (either formally or functionally by their actions). See *id.* The government detained Petitioner as part of enemy armed forces—al Qaeda, the Taliban, or associated forces—and he does not challenge the basis of his detention here. See Petr's Mot. at 15 (noting he does not concede but does not challenge the merits of his detention here). Accordingly, Petitioner cannot claim here to be a civilian.

To be sure, the Court of Appeals subsequently established the detention-authority standard applicable in the Guantanamo cases, rejecting any requirement, such as imposed in *Gherebi*, that an individual must be shown to be part of the "command structure" of enemy forces. See *Awad*, 608 F.3d at 11. But the Court of Appeals did not disturb this Court's understanding of the parties to this conflict, namely enemy armed forces and civilians. Rather, that understanding is fully consistent with the detention standard applicable in this Circuit, which permits the detention of individuals who are part of or substantially supporting al Qaeda, the Taliban, or associated forces. *Id.* Consequently, Petitioner's argument that he should be

considered a civilian under the laws of war should be rejected for the reasons explained in *Gherebi*.

And lastly, there is also no merit in Petitioner's contention that his detention should be assessed under the Fourth Geneva Convention because he does not qualify as a prisoner of war under the Third Geneva Convention. In holding that the AUMF authorizes detention until the end of hostilities, the Supreme Court in *Hamdi* specifically cited to Article 118 of the Third Geneva Convention, without regard to whether *Hamdi* was entitled to prisoner-of-war status. 542 U.S. at 520. Far from "cherry picking" international-armed-conflict principles, as Petitioner contends, Petr's Opp'n at 16, the government is adhering to Supreme Court precedent by looking to the Third Geneva Convention to inform its authority to detain Petitioner. Nor has the support of the traditional laws of war for Petitioner's continued detention "unraveled." See Petr's Opp'n at 14-15. First, the length of the current conflict is irrelevant to the legal analysis. The laws of war permit detention until the cessation of hostilities for both prisoners of war and unprivileged enemy combatants. Resps' Opp'n at 22-26 (noting that Petitioner's detention is consistent with the laws of war, including Common Article Three). The purpose of this continued detention is to prevent detained combatants from returning to the battlefield after their release. *Hamdi*, 542 U.S. at 518. Here, the conflict and hostilities for which Petitioner is detained continue, see Resps' Opp'n at 28-32 & n.18, so this rationale remains fully applicable. See *Ali*, 736 F.3d at 552 ("the Constitution allows detention of enemy combatants for the duration of hostilities" and "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention"). Further, that the end date of the current conflict is not known is also irrelevant: the lengths of all armed conflicts are indeterminate until the fighting stops.

Second, as for Petitioner's claim that the character of this conflict has changed—that the fighting now includes new enemies in new locations—the fact remains that hostilities continue against al Qaeda, the Taliban, and associated forces in Afghanistan. Resps' Opp'n at 26-32 & Exs. 5-8. (confirming that hostilities against al Qaeda and the Taliban continue in Afghanistan). So long as that remains true, this Court need not decide if the new opponents and locations undermine the government's detention authority vis-a-vis Petitioner.

Third, while the United States forces in Afghanistan have transitioned from a combat mission to one of support and counterterrorism, that transition does not change the one fact pertinent here: United States military forces continue to actively engage al Qaeda, Taliban, and associated forces in Afghanistan. *Id.* And though Petitioner does not "concede" that the conflict in which he is detained continues, he offers no evidence to rebut the substantial evidence offered by the government for the rather self-evident proposition that hostilities against al Qaeda, the Taliban, and associated forces have yet to abate in Afghanistan. Resps' Opp'n at 26-32 & Ex. 8. Indeed, no court to date has ruled otherwise. Resps' Opp'n at 18, 28. Thus, because hostilities against the relevant enemies continue, there is simply no question that the laws of war continue to support Petitioner's detention under the AUMF.

And lastly, Petitioner's accusation that the law of war principles informing detention authority under the AUMF in this Circuit have been "cherry pick[ed]," Pet'r Opp'n at 16, reflects no more than Petitioner's dissatisfaction with the decisions of this Court and the Court of Appeals concerning detention authority under the AUMF as informed by the laws of war.

Indeed, Petitioner acknowledges that the decisions of the Court of Appeals on these issues are contrary to his argument. *Id.* at 16, 19-20. Thus, rather than "cherry picking," the government has established that the laws of war simply do not support Petitioner's assertion that

his continued detention is unlawful.

## II. Petitioner's Continued Detention Does Not Violate The Due Process Clause

Petitioner's attempt to invoke the Due Process clause as a possible basis for this Court to order his release also remains unavailing. Petr's Opp'n at 6-10. First, binding circuit precedent establishes that Petitioner may claim no due-process rights under the Fifth Amendment in challenging his detention, let alone any that might authorize his release from detention. Second, even if he had such rights, his continued detention would not violate the Due Process Clause because Petitioner's detention during ongoing hostilities in the conflict in which he was captured is neither indefinite nor arbitrary. Accordingly, for either of the foregoing reasons, there is simply no need for the Court to reinterpret the government's detention authority under the AUMF, as Petitioner urges, to avoid a potential constitutional impediment. To the contrary, Petitioner's continuing detention pursuant to the AUMF remains constitutional.

1. As the government had argued, Resps.' Opp'n at 32-33, the binding law of this Circuit is that unprivileged enemy belligerents detained at Guantanamo Bay are not within the reach of the Fifth Amendment's Due Process Clause. See *Kiyemba I.* 555 F.3d at 1026. As with the binding precedent noted above regarding the validity of Petitioner's continued detention under the AUMF, see *supra* section 1.1, unless and until that decision is reversed by either the Court of Appeals sitting en banc or the Supreme Court, this Court is bound to follow that controlling precedent. *Torres*, 115 F.3d at 1036.

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2. In any event, Petitioner's detention is neither arbitrary nor indefinite under due-process principles. As Respondents made clear in their Opposition, Petitioner has been detained pursuant to the AUMF because he was part of or substantially supported al Qaeda, the Taliban, or associated forces. Resps' Opp'n at 4-5. Petitioner has chosen not to challenge that determination here, thereby conceding for purposes of this motion that his capture and detention were not arbitrary. Petr's Mot. at 15. More pertinently, that he remains detained despite the government's discretionary designation of him for transfer does not alter that conclusion. In claiming that his designation for transfer means that there is "no military rationale for detention," that his "detention [is] no longer an issue," or that no one thinks he should continue to be held, possibly for the duration of his life," Petr's Opp'n at 2, 14, & 15, Petitioner simply refuses to acknowledge that both his designations for transfer in 2008 and in 2009 were conditioned on negotiating appropriate security measures with the receiving country, measures designed to prevent a detainee's return to the battlefield. Resps' Opp'n at 20-21 (as to the 2008 designation, citing Ex. 4, Decl. of C. Williamson) & at 6-7 (as to 2009 designation, citing Final Report-Guantanamo Review Task Force (Jan. 22, 2010) at 17); see *Hamdi*, 542 U.S. at 518 (purpose for detaining combatants is to prevent their return to the battlefield). Of course, to date,

[REDACTED TEXT]

have even agreed to receive him, and thus the government must continue its efforts to find an appropriate transfer country. ... Accordingly, Petitioner's continued detention cannot be considered arbitrary.

Nor is Petitioner's continued detention unconstitutionally indefinite. Pursuant to *Hamdi* and the law of this Circuit, Petitioner's detention is bounded by the ultimate cessation of hostilities. 542 U.S. at 518. That limit, even though currently not determinable, renders his detention sufficiently definite to satisfy the Due Process Clause. See *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (holding that civil commitment statute did not violate Due Process because, although the end of an individual's commitment could not be calculated, statute required the release of the committed individuals once they no longer posed a threat).

Recently, on facts that mirror those here—continued detention of a detainee despite his approval for transfer by the Department of Defense in 2008 and again by the President's Guantanamo Review Task Force in 2009—Judge Lamberth squarely rejected arbitrariness and indefiniteness claims identical to those Petitioner puts forward here. See *al-Wirghi v. Obama*, 54 F.Supp.3d 44, 47 (D.D.C. 2014). Although the Court rested its decision on standing grounds, it nevertheless directly addressed both prongs of the due process claim asserted by Petitioner here, concluding (1) that the continued detention of the petitioner in the case was not indefinite because *Hamdi* authorizes detention under the AUMF until the end of hostilities and those hostilities continue, and (2) that the detention was not arbitrary because the government's discretionary decision to approve the petitioner for transfer had always remained conditioned on the receipt of appropriate security assurances from the receiving country. *Id.* The same result should obtain here.

Any doubts that Petitioner's continued detention is not unconstitutionally arbitrary or indefinite were definitively dispelled in *Hamdi*. In *Hamdi*, there was no question that the Due Process Clause applied, as the petitioner was a United States citizen detained within the country. 542 U.S. at 510. Nevertheless, the Supreme Court upheld the law-of-war detention of enemy armed forces under the AUMF pending the future end of hostilities. *Id.* at 521. In doing so, the Court specifically balanced *Hamdi*'s substantial liberty interest to be free from detention, but found it outweighed by the government's interest in ensuring he did not return to the battlefield against the United States. *Id.* at 53.

\* \* \* \*

**b. Former Detainees**

*Jawad v. Gates*, No. 15-5250, is a case brought by a former Guantanamo detainee after he was released for damages due to alleged mistreatment while he was in U.S. custody. The district court dismissed and *Jawad* appealed. The United States filed its appeal in the U.S. Court of Appeals for the D.C. Circuit on February 25, 2016. The U.S. brief is excerpted below and available in full at <https://www.state.gov/s/l/c8183.htm>.

\* \* \* \*

I. This Court should affirm the district court's judgment dismissing *Jawad*'s claims because [Military Commissions Act or] MCA Section 7(a) eliminates the courts' jurisdiction "to hear or consider any \* \* \* [non-habeas] action against the United States or its agents relating" to the "treatment" or "conditions of confinement" of any "alien" detained by the United States and

“determined by the United States to have been properly detained as an enemy combatant.” 28 U.S.C. § 2241(e)(2). Each of the claims in Jawad’s complaint “rather plainly” comes within that jurisdictional bar. *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012). Accordingly, MCA Section 7(a) “requires that [this Court] affirm the dismissal of the action.” *Id.*

Jawad’s contrary arguments are waived or lack merit. Jawad argues that the MCA, including its jurisdictional bar, does not apply to juveniles. Br. 12. But that is an argument Jawad failed to make in the district court, so it is waived. The argument also lacks merit. Jawad notes that an international convention to which the United States is a party requires member states to reintegrate juvenile soldiers. Br.16. And he appears to argue that the detention of a juvenile as an enemy combatant always violates that convention. Br. 15-16. For that reason, he argues, the MCA should not be interpreted to preclude his suit. *Id.* But even if Jawad’s interpretation of the convention were correct, that says nothing about whether Congress, in the MCA, foreclosed damages actions. And, in any event, Jawad’s belief that the treaty always precludes the detention of juveniles is inconsistent with the Executive Branch’s interpretation of the convention and that of the United Nations body that monitors the treaty’s implementation.

Jawad next argues that the MCA does not authorize military commissions to criminally try juveniles and, for that reason, the MCA’s jurisdictional bar does not apply to juveniles. Br. 16-20. That, however, is simply another version of an argument this Court already has rejected: that the MCA’s jurisdictional bar applies only to persons who are *properly* detained as enemy combatants. *See Al Janko v. Gates*, 741 F.3d 136, 144 (D.C. Cir. 2014). Instead, the jurisdictional bar is triggered when the Executive Branch determines that the alien’s detention is authorized, “without regard to the determination’s correctness.” *Id.*

Jawad further argues that the jurisdictional bar applies only to persons whom the United States has determined to be *unlawful* enemy combatants. Br. 21-25. Because the United States only determined him to be an “enemy combatant,” Jawad contends, he is free to bring suit. *Id.* That argument lacks any merit. It is flatly inconsistent with the unambiguous language of MCA Section 7(a), which nowhere contains the qualifier “unlawful.” And the argument is inconsistent with this Court’s determination that what triggers the jurisdictional bar is a determination by the United States of an alien’s “enemy-combatant status.” *Al Janko*, 741 F.3d at 144. Moreover, Congress considered and rejected the very interpretation Jawad now presses.

Jawad’s constitutional challenge to the MCA is plainly without merit. As this Court has recognized, Congress may preclude Guantanamo detainees from maintaining claims for money damages without running afoul of Article III. *See Al-Zahrani*, 669 F.3d at 319. That holding dooms both Jawad’s as-applied and facial constitutional challenges. Jawad’s bill-of-attainder challenge also fails because Jawad makes no attempt to show that MCA Section 7(a) has the characteristics of a bill of attainder. *See* Br. 31.

II. Alternatively, this Court may affirm the district court’s dismissal because Jawad’s first three claims are not cognizable under the [Federal Tort Claims Act or] FTCA and because his remaining causes of action fail to state a claim.

Under this Court’s precedent, there is no question that the United States properly substituted itself for the individual-capacity defendants as to Jawad’s first three claims, because those defendants were acting within the scope of their employment. *See, e.g., Allaithi v. Rumsfeld*, 753 F.3d 1327, 1332 (D.C. Cir. 2014). Jawad’s contention that the individual-capacity defendants were acting as rogue officials is inconsistent with Jawad’s complaint, which alleged that the officials used the “frequent flyer” program for punishment and control in addition to

intelligence gathering.

Because the United States was properly substituted for the individual-capacity defendants, the district court properly dismissed Jawad's first three claims as not cognizable under the FTCA. That statute excludes from the United States' waiver of sovereign immunity "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Even though the United States exercises "*de facto* sovereignty" over Guantanamo Bay, Cuba retains "legal and technical" sovereignty over that territory. *Boumediene v. Bush*, 553 U.S. 723, 754, 755 (2008). That is determinative for purposes of the FTCA's foreign-country exception, which applies to any "territory subject to the sovereignty of another nation." *United States v. Spelar*, 338 U.S. 217, 219 (1949). Jawad's first three claims are also barred because he did not file suit within the FTCA's six-month statute of limitations. 28 U.S.C. § 2401(b).

III. Jawad's fourth cause of action, asserted under the [Torture Victim Protection Act or] TVPA, fails to state a claim because that statute creates a right of action only against individuals acting under color of law "of any foreign nation." § 2(a)(1), 106 Stat. at 73. Jawad makes no attempt to demonstrate that the individual-capacity defendants acted under color of foreign law. Instead, he invites the Court to extend the application of the statute to officials acting pursuant to U.S. law. Br. 54. But Jawad's contention that the Constitution required the district court to rewrite the statute to extend it to U.S. officials is plainly without merit.

IV. Finally, Jawad's constitutional claims are foreclosed by Circuit precedent. This Court has held that aliens detained in Afghanistan and Guantanamo could not bring damages actions challenging their treatment because such suits could interfere with the United States' significant national-security and foreign-policy interests. *See Ali v. Rumsfeld*, 649 F.3d 762, 765-66, 773-74 (D.C. Cir. 2011) (Afghanistan); *Allaithi*, 753 F.3d at 1332, 1334 (Guantanamo).

Jawad largely ignores that precedent. Instead, he reiterates the very arguments that this Court previously considered and rejected. Br. 44-50. And with respect to the only new arguments that he makes, Jawad provides no explanation as to why his juvenile status is relevant to the special-factors inquiry. Moreover, Jawad does not explain how the international instruments he cites (which do not create judicially enforceable obligations, in any event), bear on the separate question of whether courts should recognize a claim for violation of a domestic constitutional right.

Even if special factors did not bar Jawad's fifth and sixth claims, Circuit precedent establishes that it was not clearly established that Jawad had any rights under the Fifth or Eighth Amendments when he was detained. *See Ali*, 649 F.3d at 771; *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (per curiam). Accordingly, the individual-capacity defendants enjoy qualified immunity from Jawad's fifth and sixth claims. *Rasul*, 563 F.3d at 529.

\* \* \* \*

The appeals court issued its opinion affirming the district court's dismissal on August 12, 2016. The decision is excerpted below.

\* \* \* \*

The relevant portion of section 7(a) of the 2006 MCA states:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any [non-habeas] action against the United States or its agents relating to any aspect of the detention,

transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2). By its clear terms, this provision strips federal courts of jurisdiction to hear most claims against the United States arising out of the detention of aliens like Jawad captured during the United States' invasion of Afghanistan in response to the attacks of September 11, 2001. Jawad acknowledges that he is an "alien" and that his lawsuit is an "action against the United States or its agents relating to... [his] detention,... treatment,... or conditions of confinement." *Id.* But he asserts that his lawsuit escapes the statute's jurisdictional bar because he has not "been determined by the United States to have been properly detained as an enemy combatant." *Id.*

Jawad concedes that a [Combatant Status Review Tribunal or] CSRT found that he was an "enemy combatant." J.A. 33. We have held that such a finding by a CSRT fully satisfies the section 7(a) requirement that an alien be determined by the United States to have been properly detained as an enemy combatant. *Al Janko*, 741 F.3d at 144-45 (citing *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317, 319 (D.C. Cir. 2012) and 28 U.S.C. § 2241(e)(2)). But Jawad offers several reasons why the CSRT finding does not do so here. Each of them fails.

Jawad first points to the government notice, filed in the habeas action, that it would "no longer treat" Jawad as "detainable." This statement, Jawad contends, was a "determination [that] he was *not* properly detained." Appellant's Br. 9 (emphasis added). According to Jawad, with this language, the government announced that it had rescinded the previous CSRT and [Administrative Review Board or] ARB determinations. As a result, he argues, section 7(a)'s bar does not extend to him.

We assume that Jawad is right, as a matter of law, that the government could override a prior determination that an alien had been "properly detained" by issuing a new determination to the contrary in habeas litigation. But, as a matter of fact, the government did not do so here. It never said that Jawad was *not* properly detained, only that the United States would no longer *treat* him as such. Notice of the United States, *Al Halmandy v. Obama*, No. 05-cv-2385 (D.D.C. July 24, 2009), J.A. 81-82 (describing its position as "a decision not to contest the writ"). The government's statement says nothing about the jurisdictional question raised by section 7(a): whether the United States had determined that Jawad was properly detained as an enemy combatant. *See Al Janko*, 741 F.3d at 144. That determination had already been made in Jawad's CSRT and ARB proceedings, and nothing in the government's habeas filing contradicted those earlier conclusions. This case would be much different and a closer call had the government conceded before the district court that Jawad had never been properly detained. But that is not the case here.

Jawad also argues that the initial CSRT determination that he was properly detained was "illegal and void" because "his capture, torture, and detention[] violated domestic and international law concerning treatment of juveniles accused of a crime." Appellant's Br. 20-21; *see id.* at 15-20 (citing the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, S. TREATY DOC. NO. 106-37A (ratified June 18, 2002); Uniform Code of Military Justice, 10 U.S.C. § 948b(c) (2006); and Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 *et seq.*). The United States asserts that Jawad forfeited or waived this argument by failing to raise it before the district court. But the United States takes too narrow a view of Jawad's position before the district court. There, he argued that section 7(a) did not divest the court of jurisdiction because his juvenile status "taint[ed]" the CSRT

determination and the United States “should never have taken custody of [Jawad]” due to his juvenile status. Mem. Opposing Mot. to Dismiss at 25-26, *Jawad v. Gates*, No. 14-cv-00811 (D.D.C. Apr. 20, 2015). This was adequate to preserve the argument on appeal.

On the merits, we conclude that even if we were to decide that an allegation that a CSRT was “illegal and void” bears on whether section 7(a)’s jurisdictional bar applies—a conclusion we need not, and do not, reach—Jawad’s argument fails for other reasons. Jawad has not shown that his CSRT determination ran afoul of any domestic or international law. He does not cite any provision in the Uniform Code of Military Justice or other domestic law that prohibits the detention of juvenile enemy combatants pursuant to the AUMF, much less explain how violations of any such provisions would “void” the CSRT’s determination. Nor does Jawad show how any alleged failure of the United States to comply with its treaty obligations would do so. In particular, Jawad relies on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which the United States ratified in 2002. That treaty requires signatories to “take all feasible measures to ensure” that child soldiers “recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service” and to provide, “when necessary, . . . all appropriate assistance for their physical and psychological recovery and their social reintegration.” Optional Protocol, art. 6(3). Jawad argues that the United States violated the Protocol’s requirement to provide rehabilitation and reintegration to detained juveniles. But Jawad never explains how these provisions would render his initial detention improper under the treaty, let alone why a violation of the treaty would “void” the CSRT’s determination.

Jawad argues as well that his juvenile status makes the jurisdictional bar of section 7(a) wholly inapplicable to his case because the “MCA lacks jurisdiction over minors.” Appellant’s Br. 16. Although it is not altogether clear what Jawad means by this, we understand him to be arguing that no provision of the MCA can apply to juveniles, leaving him free to bring his damages action. According to Jawad, it is “well-established that military tribunals lack jurisdiction over minors below the age of consent.” *Id.* at 17 (citing *United States v. Blanton*, 23 C.M.R. 128 (C.M.A. 1957) (holding that the “enlistment of a person under the statutory age is void so as to preclude trial by court-martial for an offense committed by him while still under such age”). Similarly, Jawad points to the Federal Juvenile Delinquency Act, which provides certain procedures for the prosecution and detention of juveniles in federal cases, and contends that the MCA lacks those protections. *See* 18 U.S.C. § 5031 *et seq.* But Jawad again sidesteps the relevant question. Nothing in those sources of law bears on whether Congress, through section 7(a), barred courts from hearing damages actions brought by juveniles determined to be properly detained as enemy combatants. The court-martial cases deal with whether military courts have jurisdiction to try juveniles. That has no relevance here because Jawad is not being tried by any military court. The Federal Juvenile Delinquency Act is equally immaterial. Even if its procedures for detaining and prosecuting juveniles were somehow applicable to detainees like Jawad, any argument based on such procedures relates only to Jawad’s merits claim about his treatment in detention. The Act is silent as to the question at issue here: whether juveniles detained under the AUMF are barred from filing damages actions in federal court.

Jawad next argues that section 7(a) is inapplicable here because the United States never determined that he was an *unlawful* enemy combatant. Although Jawad agrees that his CSRT and ARB determinations found him to be an enemy combatant, he maintains that section 7(a) should apply only to detainees who are determined to be *unlawful* enemy combatants because the 2006 MCA provides that military commissions have jurisdiction only over such combatants. 10 U.S.C.

§ 948d(a) (2006). According to Jawad, section 7(a) “may only bar claims by individuals over which the MCA has jurisdiction,” which is limited to *unlawful* enemy combatants. Appellant’s Br. 25.

But the plain language of section 7(a) does not require a finding of *unlawfulness*. Rather, the jurisdictional bar applies where a detainee has been determined to be an “enemy combatant.” 28 U.S.C. § 2241(e)(2). We will not “read[] a phrase into the statute when Congress has left it out.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Where, as here, the statutory text is clear, “[t]he plain meaning of legislation should be conclusive” unless it “compels an odd result.” *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (internal quotation marks omitted).

Nothing odd results from applying section 7(a)’s jurisdictional bar to suits by detainees who have been determined to be enemy combatants, but not only *unlawful* enemy combatants. To be sure, Congress conditioned the jurisdiction of military commissions on unlawful-enemy-combatant status in the 2006 MCA, 10 U.S.C. § 948d(a). Section 7(a), however, is not linked to the MCA’s grant of jurisdiction to military commissions. The bar is instead tied to the AUMF’s detention authority, which allows “the President to detain enemy combatants”—not solely unlawful ones. *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013). We affirmed this understanding in *Al Janko*, explaining that section 7(a) applies where the United States has made a determination “that the detainee meets the AUMF’s criteria for enemy-combatant status.” 741 F.3d at 144 (emphasis added). Because section 7(a) deals with the jurisdiction of federal courts over lawsuits by individuals determined to have been properly detained, section 7(a) understandably applies to enemy combatants—the category of combatants who may be properly detained under the AUMF—and is not limited to unlawful enemy combatants. In fact, Congress’s use of “unlawful” in the sections of the 2006 MCA that deal with military-commission jurisdiction, but not in section 7(a), further works against reading that term into the jurisdictional bar. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

Finally, Jawad raises several meritless constitutional claims. First, he contends that he is entitled to a damages remedy for “unconstitutional trespasses by the United States.” Appellant’s Br. 33. Our precedent, however, forecloses this position. We have held that monetary remedies are not constitutionally required “even in cases such as the present one, where damages are the sole remedy by which the rights of plaintiffs . . . might be vindicated.” *Al-Zahrani*, 669 F.3d at 320. Second, Jawad maintains that section 7(a) is unconstitutional on its face because its “broad elimination of jurisdiction” is “inconsistent with the plain language of Article III of the Constitution.” Appellant’s Br. 29-30. To succeed on a facial challenge, Jawad must show “that no set of circumstances exists under which [section 7(a)] would be valid, or that the statute lacks any plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations and quotation marks omitted). But our precedent again forecloses Jawad’s argument. As we have held, section 7(a) can constitutionally be applied to “*any* [non-habeas] detention-related claims, whether statutory or constitutional, brought by an alien detained by the United States and determined to have been properly detained as an enemy combatant.” *Al Janko*, 741 F.3d at 146. Jawad also urges that section 7(a) is a legislative act inflicting punishment without trial in violation of the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3. *See United States v. Lovett*, 328 U.S. 303, 315 (1946). A law is an unconstitutional bill of attainder if it “applies with

specificity” to a person or class and “imposes punishment.” *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998); Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177 (2011). Even assuming that section 7(a) meets the specificity requirement because it applies only to enemy combatants, Jawad advances no argument that the jurisdictional bar is a form of punishment. We will “not consider ‘asserted but unanalyzed’ arguments.” *Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)) (“[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” (quoting *Carducci*, 714 F.2d at 177)). And even if we did consider Jawad’s argument, “only the clearest proof could suffice to establish the unconstitutionality of a statute” on Bill of Attainder Clause grounds, *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 83 (1961), and his failure to provide such proof dooms his claim. See also *Hamad v. Gates*, 732 F.3d 990, 1004 (9th Cir. 2013) (concluding that section 7(a) does not qualify as a bill of attainder); *Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014) (same).

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## 5. Criminal Prosecutions and Other Proceedings

### *United States v. Hamidullin*

As discussed in *Digest 2015* at 785-95, the United States opposed Hamidullin’s motion to dismiss the indictment against him for his role in the November 29, 2009 attack on the Afghan Border Police (“ABP”) compound known as Camp Leyza. Hamidullin was tried and convicted after the court denied his motion to dismiss, agreeing with the U.S. argument that he was not entitled to protected status under the Geneva Convention Relative to the Treatment of Prisoners of War as a member of the Taliban or Haqqani Network. He appealed and the United States filed its brief in the U.S. Court of Appeals for the Fourth Circuit on June 21, 2016. *United States v. Hamidullin*, No. 15-4788. Excerpts follow from the U.S. brief, which is available in full at <https://www.state.gov/s/l/c8183.htm> The Court of Appeals heard argument in the case in December 2016.

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The United States argued below that Hamidullin’s combatant immunity claim failed for two essential reasons. First, at the time of the offenses the continued conflict against the Taliban in Afghanistan was not an international armed conflict under Article 2 of the [*Geneva Convention Relative to the Treatment of Prisoners of War* or] GPW, and therefore, the provisions of the GPW that reflect the doctrine of combatant immunity do not apply to the Taliban. Second, even if that were not the case, Hamidullin’s bid for “lawful combatant” status would fail as members of the Taliban and Taliban-affiliated groups do not qualify for prisoner-of-war status under Article 4 of the GPW.

The district court did not decide the first issue, and it ruled in favor of the United States on the second issue. Hamidullin's arguments fail, however, on both grounds. Moreover, Hamidullin's claim that he ought to have received a more individualized assessment of his combatant circumstances is unavailing both as a matter of law and fact.

1. The law of combatant immunity.

Lawful combatant immunity is a doctrine reflected in international law, including the customary international law of war. It "forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets." *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002); *see also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942). Belligerent acts committed by lawful combatants in an armed conflict generally "may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict." *Lindh*, 212 F. Supp. 2d at 553.

The concept of lawful combatant immunity has a long history preceding the GPW and is grounded in common law principles, early international conventions, statutes, and treatises. *See Instructions for the Government of the Armies of the United States in the Field*, Headquarters, United States Army, Gen. Order No. 100 (Apr. 24, 1863), *reprinted in The Laws of Armed Conflicts* 3 (3d ed. 1988) ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."); Col. William Winthrop, *Military Law and Precedents*, at 791 (2d ed. 1920) ("[T]he status of war justifies no violence against a prisoner of war as such, and subject him to no penal consequence of the mere fact that he is an enemy."); *Hague Convention Respecting the Laws and Customs of War on Land* ("Hague Convention"), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; 4 Brussels Declaration of 1874, Article IX, July 27, 1874, *reprinted in The Laws of Armed Conflicts* 25 (3d ed. 1988); *Manual of Military Law* 240 (British War Office 1914).

As noted by *Lindh*—and as agreed by both parties in this case—the combatant immunity doctrine is reflected in the provisions of the GPW. *See Lindh*, 212 F. Supp. 2d at 553. The United States is a party to the GPW and it therefore has the force of law in this case under the Supremacy Clause. *See* U.S. Const. art. VI, § 2.

The GPW sets forth certain principles with respect to the prosecution of persons entitled to prisoner-of-war status under the GPW:

Article 87: "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." and

Article 99: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."

GPW, arts. 87 and 99. Taken together, these Articles "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war." *Lindh*, 212 F. Supp. 2d at 553.

Although immunity based on lawful combatant status may be available as an affirmative defense to criminal prosecution in appropriate circumstances, this defense is not available to a defendant just because he believes that he has justly taken up arms in a conflict. *Lindh*, 212 F.

Supp. 2d at 554. Rather, this defense is available only to a defendant who can establish that he is a “lawful combatant” against the United States under the requisite criteria established in international law that is binding upon the United States—that is, “members of a regular or irregular armed force who fight on behalf of a state and comply with the requirements for lawful combatants.” *Id.* at 554. *See also Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1222 (USCMCR 2007).

Importantly, the burden of establishing the application of the combatant immunity defense is upon the defendant raising an affirmative defense. *See Lindh*, 212 F. Supp. 2d at 557 (holding “it is Lindh who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity” by showing that “the Taliban satisfied the four criteria required for lawful combatant status outlined by the GPW”); *id.* at 557 n.36 (noting that defendants bear the burden of proving affirmative defenses and citing in support Convention of 1929—conferred rights on alien enemies that could be vindicated “only through protests and intervention of protecting powers,” not through the courts). *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975), and *Smart v. Leeke*, 873 F.2d 1558, 1565 (4th Cir. 1989)).

On appeal, Hamidullin argues that under the GPW he is presumed to be entitled to prisoner of war (POW) status until he receives an Article 5 hearing from the military, which he asserts he never received. He argues that the United States therefore bore the burden below to prove that he was not entitled to POW status. . . . This argument fails for at least three reasons. First, the primary authority for this argument is Article 5 of the GPW, which provides, in relevant part, that

[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GPW art.5, ¶ 2. The condition precedent for Article 5 is “doubt” as to whether a person is entitled to the Article 4 protections. For the reasons described in detail below, when Hamidullin was captured, there really was no appreciable doubt as to whether the Taliban or their associates qualified as lawful combatants.

Second, Article 5 simply says the individual enjoys GPW protections until the person’s status is determined by a “competent tribunal.” Article 5 does not say which side bears the burden of production or persuasion when that tribunal convenes. Thus, even assuming Article 5 applies to this federal criminal prosecution—a point that is not at all evident and which the United States does not concede—it does not address which side bears the burden of proof, and the normal rules of the United States criminal process, which place the burden of production and persuasion for affirmative defenses on the defendant, would continue to govern.

Third, Hamidullin’s position conflicts with deeply entrenched law. “[I]t bears repeating that, at common law, the burden of proving ‘affirmative defenses—indeed, ‘all . . . circumstances of justification, excuse or alleviation’—rested on the defendant.’” *Dixon v. United States*, 548 U.S. 1, 8 (2006) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977); 4 W. Blackstone, Commentaries \*201). And this common-law rule “accords with the general evidentiary rule that ‘the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.’” *Id.* (quoting 2 J. Strong, MCCORMICK ON EVIDENCE

§ 337, p.415 (5th ed. 1999)). The Supreme Court has applied this rule to the defense of duress in federal criminal cases. *Id.* at 13-14. The same should apply here.

2. By 2009, hostilities in Afghanistan were non-international in nature.

The provisions of the GPW that have been interpreted as reflecting the principles of combatant immunity do not apply to the Taliban or the Haqqani Network in this case. Under GPW Article 2, the provisions of the Convention apply to “all cases of declared war or of any other *armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.” GPW, art.2, ¶ 1 (emphasis added). In other words, for the GPW Article 4 provisions defining the categories of persons who are entitled to be treated as prisoners of war to be triggered, there must first be an international armed conflict within the meaning of Article 2. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. 2009) (noting that Article 4 does not apply to the non-international armed conflict with al Qaeda). If there is no international armed conflict within the meaning of Article 2, then the provisions of Article 3, which govern conflicts not of an international character, address the treatment of captives.

Hamidullin does not claim that Article 3 provides for combatant immunity, nor could he. Regardless of the nature of the conflict in Afghanistan in 2001, by November 2009 the Taliban had been removed from power in Afghanistan for *eight years* and was not the government for Afghanistan (the GPW “High Contracting Party”). At the time of Hamidullin’s attack, there was no international conflict between the United States and Afghanistan. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (noting that the conflict with al Qaeda is a “conflict not of an international character”). Rather, the two powers, along with other States, were working together in a coalition directed at assisting the legitimate Afghan government to stop the Taliban’s unlawful attacks within the country’s borders. *See supra* at pp.6-7.

The International Committee of the Red Cross (“ICRC”), a non-governmental organization with expertise in interpreting the GPW, came to the same conclusion in 2007:

This conflict [against the Taliban] is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. *The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL* [International Humanitarian Law].

Int’l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 725 (2007) (emphasis added). *See also* Int’l Comm. Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 10 (2011)<sup>11</sup> (“As the armed conflict does not oppose two or more states, *i.e.* as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature). The applicable legal framework is Common Article 3 and customary IHL.”).

Under the GPW, if a conflict is not international in nature, detainees captured in the course of the conflict are entitled only to the limited humanitarian protections enumerated in Article 3. They are not entitled to the panoply of protections contained in the remaining articles of that Convention. This distinction is important here because the various provisions of the GPW that require a State to afford combatant immunity protections only apply during international armed conflict. *See* Int’l Comm. Red Cross, *International Humanitarian Law and the*

*Challenges of Contemporary Armed Conflicts*, at 726 (2007) (“only in international armed conflicts does IHL [International Humanitarian Law] provide combatant (and prisoner-of-war) status to members of the armed forces. The main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives.”) (emphasis in original). In contrast, individuals who fight for non-State armed groups non-international armed conflicts and are held under Article 3 are not entitled to combatant immunity. *See id.* at 728 (“Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict . . .”). Hamidullin below argued that the second paragraph of GPW Article 2 supports his claim to entitlement to its protections. It provides that the “Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” GPW, art. 2, ¶ 2. That provision, however, is not relevant as Afghanistan is not occupied under the laws of war; nor was it occupied at the time of Hamidullin’s offenses.

3. Even assuming the conflict in Afghanistan fell within Article 2 of the GPW in 2009, the defendant and his cohorts did not qualify as lawful combatants under Article 4.

Even assuming for the sake of argument that the conflict in Afghanistan was international in nature as of 2009, Hamidullin cannot meet the stringent requirements for claiming POW or lawful combatant status under GPW Article 4. Article 4 lists a number of categories of persons who may qualify for POW status, but only the first three are potentially relevant here. Article 4(A)(1) of the GPW provides POW status to “Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.” Article 4(A)(2) provides POW status to:

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; that of conducting their operations in accordance with the laws and customs of war.

Finally, Article 4(A)(3) provides POW status to “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”

After hearing the evidence adduced at the pretrial hearing, the district court concluded that the nature of Hamidullin’s fighting group was most appropriately analyzed under Article 4(A)(2). As the Court reasoned:

the Haqqani Network and Taliban fit most compatibly within Article 4(A)(2). These groups are not members of militias or volunteer corps forming part of the armed forces of a party to the conflict [i.e., Article 4(A)(1)]. Furthermore, they are not members of a regular armed force as contemplated by Article 4(A)(3).

JA 760-61. Based on the record established at the hearing, the district court found “that neither the Taliban nor the Haqqani Network fulfills the conditions of Article 4(A)(2).” JA 761 (finding that these groups lack a clearly defined command structure, lack a fixed distinctive sign

recognizable at a distance, employ concealed weapons in the form of suicide bombers, and “neither entity conducts their operations in accordance with the laws and customs of war”). The district court also concluded that these groups did not satisfy the criteria for POW status articulated in “any other provision of the GPW.” *Id.* For the reasons detailed below, the district court’s conclusion was correct.

It merits note at the outset that perhaps the principal source on which Hamidullin bases his lawful combatant arguments is a draft memorandum from the State Department Legal Advisor. Hamidullin Br. at 22-23, 24, 25, 26-27.<sup>14</sup> This draft memorandum’s analysis was based on the circumstances at the time it was composed (in and around 2001), and did not reflect the ultimate view of the Executive Branch. “On February 7, 2002, the White House announced the President’s decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to the GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions.” *Lindh*, 212 F. Supp. 2d at 554-55. *See* Memorandum of President George W. Bush at 2 (Feb. 7, 2002)<sup>15</sup> (“Based on facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”).

The United States does not argue that the President’s determination is dispositive of the issue. Indeed, the United States submitted its evidence to the district court for determination and to this Court for appellate review. But the President’s decision is important in at least two respects. First, it reflects the position of the Executive Branch and, as such, supersedes any contrary reasoning in the draft State Department memorandum on which Hamidullin relies so heavily. Second, the President’s determination that the Taliban did not qualify for lawful combatant status under the GPW is entitled to a degree of deference as a reasonable interpretation and application of the GPW to the Taliban by the Commander in Chief. *Lindh*, 212 F. Supp. 2d at 556 (noting that “courts have long held that treaty interpretations made by the Executive Branch are entitled to some degree of deference” and that the application of the GPW to the Taliban involves interpretation of the GPW); *id.* at 558 (concluding that the President’s interpretation of the GPW as it applies to Lindh as a member of the Taliban was entitled to deference as a reasonable interpretation of the treaty).<sup>16</sup> *See also* A.A.G. Jay S. Bybee, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, Opinions of the Office of Legal Counsel, at 3-9 (2002)<sup>17</sup> (hereinafter “Bybee, *Status of Taliban Forces*”) (concluding that Taliban forces were most naturally analyzed as a “militia” under Article 4(A)(2), that the President had reasonable grounds to conclude they did not meet the four criteria of Article 4(A)(2), and that the four Article 4(A)(2) factors were also understood to apply, and did apply, to the armed forces described in Articles 4(A)(1) and (A)(3)).

Though the President’s determination was made in 2002, none of the facts adduced at the motions hearing in this case suggest that events in the ensuing years have undermined the reasonableness of the President’s determination. If anything, the experience of these years ...only confirms the Taliban’s ineligibility for POW status.

i. The defendant and fellow fighters are most naturally analyzed under Article 4(A)(2), and they fail to meet those criteria.

As the district court concluded, the band of fighters with which Hamidullin was affiliated was, if anything, best understood to be one of the types of “other militias,” volunteer corps, or organized resistance movements referenced in Article 4(A)(2) of the GPW, as opposed to the types of groups referenced in Articles 4(A)(1) or (A)(3). Article 4(A)(2) appears to cast the

broadest and the only net that could include Hamidullin's group. But to qualify for lawful combatant status under Article 4(A)(2), the group must meet all four of the specified criteria in that subparagraph. The United States presented evidence at the pretrial hearing that the Taliban and Haqqani Network essentially failed to meet any of those criteria. As summarized above, *see supra* at p.32, the district court found that these groups lacked a command structure, made tactical decisions not to wear uniforms and to wear civilian clothing to blend into the population, employed suicide bombings and other forms of attack involving concealed weapons, and engaged in systematic violations of the laws of war, including the targeting of civilian populations for attack and retribution and the summary execution of captives.

Hamidullin, for his part, presented no evidence to the contrary. Indeed, Hamidullin's own expert and sole witness at the motions hearing testified that he made no claim that the Taliban satisfied the requirements of Article 4(A)(2). *See* JA 481 (Professor Paust: "I do not argue that they meet these criteria [referring to the Article 4(A)(2) criteria].").

Unsurprisingly, given the overwhelming and uncontroverted evidence that these groups did not comply with any of the criteria, the district court specifically found that the Taliban and Haqqani Network failed to meet the requirements of Article 4(A)(2). *See also Lindh*, 212 F. Supp. 2d at 558 (concluding that the Taliban falls far short when measured against the four GPW criteria for lawful combatant status). Hamidullin identifies no clear error with the district court's factual findings.

ii. The defendant does not qualify as a POW under either Article 4(A)(1) or (A)(3).

As the district court concluded, Hamidullin's fighting band does not fit into either of the categories of armed forces or regular armed forces that Articles 4(A)(1) and (A)(3), respectively, contemplate. Hamidullin nevertheless claims that he meets the criteria of at least the Article 4(A)(3) category because he was affiliated with the Taliban and the Taliban constituted the armed forces of Afghanistan, even in 2009. Hamidullin Br. at 24. For the reasons explained below, even assuming Hamidullin's fighting band is considered to be part of the Taliban itself, the Taliban fail to qualify for lawful combatant status under Articles 4(A)(1) or (A)(3).

Neither Articles 4(A)(1) or (A)(3) specify the four requisite factors of a fighting force that are delineated in Article 4(A)(2). But these Article 4(A)(2) criteria have long been understood to be the *minimum* defining characteristics of any lawful armed force and were well established in customary international law before being codified in the GPW in 1949. As such, they were understood to be basic criteria also applicable to the armed forces referenced in GPW Articles 4(A)(1) and (A)(3). *See Lindh*, 212 F. Supp. 2d at 557, n. 34; *Hague Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war."); *Manual of Military Law* 240 (British War Office 1914) ("It is taken for granted that all members of the army as a matter of course will comply with the four conditions [required for lawful combatant status]; should they, however, fail in this respect . . . they are liable to lose their special privileges of armed forces.").

Hamidullin claims that these requirements, which are specifically enumerated in GPW Article 4(A)(2), do not apply in determining whether a combatant qualifies as a prisoner of war under GPW Article 4(A)(3) as they are not expressly mentioned under that subsection. Hamidullin Br. at 24. *Lindh* considered and rejected that very argument and held that these

elements must be met for all the categories of armed forces covered by the GPW. As it explained, the argument:

ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force. Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a “regular armed force.” It would indeed be absurd for members of a so-called “regular armed force” to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war.

*Lindh*, 212 F. Supp. 2d at 557, n.35 (internal cross-reference omitted). *See also United States v. Arnaout*, 236 F. Supp. 2d 916, 917-18 (N.D. Ill. 2003) (quoting favorably *Lindh*'s conclusion that all armed forces and militias must meet the four criteria if their members are to receive combatant immunity); Bybee, *Status of Taliban Forces*, at 4-9 (concluding that the four Article 4(A)(2) factors apply to the forces in Articles 4(A)(1) and (A)(3) based on the history of the GPW and its interpretation by various commentators); JA 332, 340-41 (testimony of Colonel Parks).

This analysis is fully consistent with the interpretation of the ICRC. *See* Int'l Comm. Red Cross, *Commentary - Art. 4. Part I : General provisions*, at 62-63 (1960)18 (concluding that “These ‘regular armed forces’ [in Article 4(A)(3)] have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) [of Article 4(A)]: they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).”).

Because the four criteria listed in Article 4(A)(2) are fully applicable to Articles 4(A)(1) and (A)(3), Hamidullin failed to meet his burden to establish his eligibility for either of these other categories for the same reasons he failed to meet his burden of proving lawful combatant status under Article 4(A)(2). It bears repeating that Article 4(A)(3), on which Hamidullin primarily relies on appeal, refers to “regular armed forces” and there is no sense in which one could accurately describe Hamidullin’s makeshift band of militants as regular armed forces. Hamidullin argues that the rationale for Article 4(A)(3) was to avoid a situation where a party does not apply the GPW solely on political grounds, *i.e.*, does not accord POW status simply by virtue of not recognizing the legitimacy of the government backing the opposing forces. Hamidullin Br. at 25. But the Taliban are distinguishable from the various historical examples Hamidullin gathers. *See id.* at 25-27. First, while it is true that the United States has never recognized the Taliban as the legitimate government of Afghanistan, that position hardly reflects the unilateral political position of the United States. Of the roughly 200 sovereign nations of the world, only three recognized the Taliban as legitimate before September 11, 2001. For roughly eight years preceding the acts in this case, *no government in the world* recognized the Taliban as the government of Afghanistan, and they were not the *de facto* government of Afghanistan during that time. Second, even putting aside the Taliban’s universal lack of recognition at the time of the offense, a government-in-exile continuing the battle (as Hamidullin would

characterize the Taliban) must nevertheless field forces that comply with the laws of war, and as discussed above the Taliban fail that test in essentially every respect. It would indeed be an anomalous result if a government-in-exile were free to field forces that violated the four essential criteria of an armed force articulated in Article 4(A)(2), and nevertheless claim the benefits of Article 4 for its forces when they were captured.

**4. The defendant's arguments on appeal that he could have established combatant immunity based on an individualized determination are wrong as a matter of law and fact.**

Hamidullin argues that the district court failed to make an *individualized* assessment of his POW status. Hamidullin Br. at 19. Hamidullin argues that the district court's analysis looked too broadly at the Taliban as a whole without focusing sufficiently on his own conduct. A properly individualized assessment was important, he claims, "because the inquiry under article 4(A)(2) focuses on the specific 'militia or volunteer corps' to which Mr. Hamidullin belonged," and, as such "the fact that other members of the Taliban may fail to satisfy the conditions of article 4(a)(2)—and in particular engage in violations of the laws of war—is irrelevant." Hamidullin Br. at 23.

If the district court's analysis did not sufficiently consider Hamidullin's individual circumstances, the blame lies with Hamidullin himself. As noted above, it was Hamidullin's burden to prove his eligibility for combatant immunity: it was his motion to dismiss the indictment, and here combatant immunity is an affirmative defense on which the defendant bears the burden of proving all the elements. Hamidullin's single witness at the motions hearing introduced essentially no evidence regarding his own conduct, and the defense witness conceded that the Taliban did not meet the criteria of Article 4(A)(2). Hamidullin's argument was that he was entitled to combatant immunity *by virtue of his association with the Taliban*, and so naturally the district court analyzed the Taliban's eligibility as an organization. Hamidullin would fault the district court for failing to analyze evidence he never presented. Finally, as discussed further below, *see infra* at pp.44-47, what evidence was adduced at trial regarding Hamidullin and his band only strengthens the conclusion that Hamidullin was not associated with a lawful combatant group.

Regardless of Hamidullin's failings in this regard, the district court's analysis was appropriately focused on the organizations with which Hamidullin associated. Each of the potentially pertinent Article 4 categories refers to *organizations*. *See* GPW art.4(A)(1) (referring to the "armed forces of a Party to the conflict"); *id.* art. 4(A)(2) (referring to "militias" and "other volunteer corps"); *id.* art.4(A)(3) (referring to "regular armed forces"). The four criteria in Article 4(A)(2), which, as noted above, also apply to Articles 4(A)(1) and (A)(3), simply cannot be meaningfully assessed on a solely individual basis. *See id.* art.4(A)(2)(d) (requiring assessment of whether "*their* operations" (emphasis added) are conducted in accordance with laws and customs of war).

If a military force generally follows the criteria in Article 4, the fact that some individual members of that armed force may commit war crimes does not mean that the entire force is stripped of combatant immunity. Conversely, if an armed force consciously and systematically violates the laws of war as a matter of policy and practice, the fact that individual members of that force may not have personally committed a war crime does not mean those individuals are entitled to lawful combatant immunity. Here, the uncontroverted evidence before the district court was that the Taliban and Haqqani Network do not meet the Article 4 criteria, and therefore Hamidullin cannot claim combatant immunity by virtue of his association with them.

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**Cross References**

*Citizenship transmission on military bases*, **Chapter 1.A.3.**

*Terrorism*, **Chapter 3.B.1.**

*Abu Khatallah case*, **Chapter 4.C.1.**

*Meshal case regarding detention in counterterrorism context*, **Chapter 5.A.1.**

*Center for Biological Diversity v. Hagel*, **Chapter 5.C.2.**

*U.S. report on optional protocol on children in armed conflict*, **Chapter 6.C.1.a.**

*Children and armed conflict*, **Chapter 6.C.2.**

*ILC's work on protection of the environment in relation to armed conflict*, **Chapter 7.C.**

*IACHR competence to review claims under law of war*, **Chapter 7.D.1.e.**

*Terrorism sanctions*, **Chapter 16.A.6.**

*Sanctions relating to malicious activities in cyberspace*, **Chapter 16.A.11.**

*Arms Export Control Act and International Trafficking In Arms regulations*, **Chapter 16.B.**

*Syria*, **Chapter 17.B.2.**

*Protecting civilians during peacekeeping operations*, **Chapter 17.C.1.**

*Daesh and atrocities*, **Chapter 17.C.3.**

*Arms Trade Treaty*, **Chapter 19.E.**

## CHAPTER 19

### Arms Control, Disarmament, and Nonproliferation

#### A. GENERAL

On April 11, 2016, the State Department released the unclassified version of its report to Congress on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments, submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The report contains four parts. Part I addresses U.S. compliance with arms control, nonproliferation, and disarmament agreements and commitments. Part II discusses compliance by Russia and other Soviet successor states with treaties and agreements the United States concluded bilaterally with the Soviet Union or its successor states. Part III assesses compliance by other countries that are parties to multilateral agreements. Part IV covers other countries' adherence to international commitments, such as the Missile Technology Control Regime ("MTCR"). And Part V covers other countries' adherence to certain unilateral commitments. The 2016 report primarily covers the period from January 1, 2015 through December 31, 2015. The report is available at

<https://www.state.gov/t/avc/rls/rpt/2016/255651.htm>

#### B. NONPROLIFERATION

##### 1. Overview

On March 17, 2016, U.S. Undersecretary of State for Arms Control and International Security Rose Gottemoeller testified before the Senate Foreign Relations Committee on the U.S. nuclear agenda. Her remarks are excerpted below and available at [http://2009-](http://2009-2017.state.gov/t/us/2016/254831.htm)

[2017.state.gov/t/us/2016/254831.htm](http://2009-2017.state.gov/t/us/2016/254831.htm)

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We've taken steps to verifiably reduce the number of nuclear weapons that are deployed against us, as we continue to maintain a safe, secure and effective arsenal for as long as nuclear weapons exist.

I am glad to tell you that the New START Treaty, with the bipartisan support of this body, is providing predictability about the Russian nuclear arsenal at a time of continuing crisis and very poor relations with Moscow. The Treaty is thus manifestly in the interest of U.S. national security.

In this hearing, I will not further focus on arms reductions, but on the steps we have taken to protect against the further spread of nuclear weapons and the threat of nuclear terrorism.

Among those steps has been turning the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism into durable international institutions—increasing their membership and enhancing coordination to stop shipments of WMD and related items, as well as helping partner nations prevent dangerous nuclear materials from falling into the hands of criminals or terrorists. We have also helped to strengthen the International Atomic Energy Agency's (IAEA) safeguards system to ensure nuclear programs around the world are purely peaceful.

And earlier this year, the IAEA confirmed that Iran had completed its nuclear commitments to reach "Implementation Day" of [the] Joint Comprehensive Plan of Action (JCPOA) reached between the P5+1, the European Union, and Iran, closing off all of Iran's pathways to acquire enough fissile material for a nuclear weapon. As it is fully implemented, the agreement is healing a major wound in the global nonproliferation regime.

Yet the prospect of nuclear terrorism presents a very different challenge from proliferation by other countries. Terrorists do not make commitments, other than to destruction, and the black markets and smuggling networks that could link them with nuclear materials are not bound by recognized rules, norms, or borders. Given the destruction that terrorists could unleash with only one weapon, nuclear terrorism is the greatest threat to our national security.

In order to marshal unprecedented attention and efforts to address this threat, the Administration initiated the Nuclear Security Summit process in 2010, bringing together leaders from 50+ countries and four international organizations. The fourth and final of these Summits will be held March 31 and April 1 in Washington, D.C.

Through these Summits, the international community has strengthened the international organizations, institutions and multilateral legal instruments that make up the global nuclear security architecture.

Summit participants have also pledged to work together in building capabilities to prevent, detect, and respond to radiological and nuclear smuggling threats. We all recognize the urgent imperative of collective action to find, arrest, and prosecute nuclear smugglers and their networks, and recover any dangerous nuclear or radioactive materials that remain out of regulatory control.

At the 2016 Summit, leaders will highlight the accomplishments that have been made and commit to the further expansion and strengthening of the global nuclear security architecture.

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## 2. Non-Proliferation Treaty (“NPT”)

### a. P5 Conference

On September 14 -15, 2016, the five NPT nuclear weapons states met at the Seventh P5 Conference in Washington, DC to review their progress on disarmament and nonproliferation pursuant to the NPT. See September 13, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261795.htm>. On September 15, 2016, the governments of the five nuclear weapons states issued a joint statement, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261994.htm>.

\* \* \* \*

1. The P5 reaffirmed the ongoing relevance of all provisions of the Action Plan adopted by consensus at the 2010 NPT Review Conference that remains an indispensable roadmap for the implementation of all the three pillars of the NPT. The P5 took stock of the 2015 NPT Review Conference and discussed ways to enhance prospects for the 2020 NPT Review Cycle. The P5 look forward to working with all States Parties to the NPT to ensure a positive outcome to the 2020 NPT Review Cycle.

2. The P5 recognized the considerable progress made together through the P5 process since the first such conference in 2009 and reaffirmed the value of this format for fostering dialogue, transparency, and cooperation among Nuclear Weapons States (NWS) and with international partners. The development of a common reporting framework for the 2015 NPT Review cycle, the work of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) Experts Group, and the publishing of a Glossary of Key Nuclear Terms provide a sound foundation for further cooperative work. They resolved to continue working together through the P5 process to make further progress during the 2020 NPT Review Cycle.

3. The P5 reaffirmed that the NPT remains the cornerstone of the international nuclear nonproliferation regime, a framework for expanding the peaceful uses of nuclear energy amongst States Parties to the Treaty, and the foundation for the collective pursuit of nuclear disarmament. The P5 committed to working together and with other States Parties to strengthen in a balanced and effective manner each of the NPT’s mutually reinforcing pillars—disarmament, nonproliferation, and the peaceful uses of nuclear energy. The P5 reaffirmed that the preservation of the integrity of the NPT, achieving its universality and its strict implementation are essential to regional and international peace and security.

4. At their 2016 Conference, the P5 reaffirmed the shared goal of and commitment to nuclear disarmament and general and complete disarmament, as referenced in the preamble and provided for in Article VI of the NPT. ... The P5 all reaffirmed the importance of full compliance with existing, legally-binding arms control, nonproliferation, and disarmament agreements and obligations as an essential element of international peace and security.

5. The P5 expressed their deep concern with efforts to pursue approaches to nuclear disarmament that disregard the global strategic context. Such efforts will threaten the consensus-

based approach that has served for decades to strengthen the NPT regime and enhance the Treaty's contribution to international security and may negatively affect the prospects for consensus at future NPT Review Conferences. The P5 reiterated a call upon all members of the international community to engage in an open and constructive dialogue on nuclear disarmament, international security, and stability issues that is inclusive of all states and focused on practical measures leading to a world without nuclear weapons and other weapons of mass destruction.

6. The P5 reiterated their full support for the United Nations' disarmament machinery, including the Conference on Disarmament (CD), and the Disarmament Commission. While noting their disappointment at the long-standing lack of consensus on a Program of Work in the CD, the P5 acknowledged creative efforts to find a compromise during the 2016 session and discussed a number of proposals towards that end. In this regard, the P5 reaffirm their support and readiness to explore all of the options to get the CD back to work, taking into account all previous proposals and agreements amongst themselves and bearing in mind the 2010 NPT Action Plan.

7. The P5 reaffirmed that, as stated in UN Security Council Resolution 1887 (2009), the proliferation of weapons of mass destruction and their means of delivery constitutes a threat to international peace and security. They reaffirmed that all NPT States Parties must ensure strict compliance with their nonproliferation obligations under the NPT. The P5 remained deeply concerned by the challenge that non-compliance by States Parties poses to the integrity of the NPT and emphasize the role of the UN Security Council in determining if such situations constitute a threat to international peace and security. The P5 emphasized the Security Council's primary responsibility in addressing such threats. The P5 reiterated the importance of seeking peaceful and diplomatic solutions to the challenges facing the non-proliferation regime. They also noted the need to further strengthen the International Atomic Energy Agency (IAEA) safeguards system, including the universalization of the Additional Protocol.

8. They strongly condemned the January 6 and September 9, 2016 nuclear tests, and the continued ballistic missile tests and ballistic missile launches carried out by the Democratic People's Republic of Korea, in violation of its obligations pursuant to relevant UN Security Council resolutions and in contravention of its commitments under the September 19, 2005 Joint Statement of the Six-Party Talks. The P5 recalled the press statement of the UN Security Council on September 9, 2016. The P5 reiterated the importance of maintaining peace and stability on the Korean Peninsula and in North-East Asia at large. The P5 reaffirmed their commitment to the full implementation of the 2005 Joint Statement of the Six-Party Talks, and urged the DPRK to respond to diplomatic efforts aimed at the eventual resumption of the Six-Party Talks and achieving complete, verifiable, and irreversible denuclearization of the Korean Peninsula in a peaceful manner. They stressed the importance of working to reduce tensions in the Korean Peninsula.

9. They also welcomed and reaffirmed their commitment to the full implementation of the Joint Comprehensive Plan of Action (JCPOA) endorsed by the UN Security Council Resolution 2231. Successful implementation of this JCPOA will ensure that Iran's nuclear program is and remains exclusively peaceful and will enable Iran to fully enjoy its right to nuclear energy for peaceful purposes as recognized in the relevant articles of the NPT in line with its obligations therein. They called for full implementation of all commitments pursuant to the JCPOA. They expressed their strong support for the IAEA's essential and independent role.

10. The P5 noted that global stocks of nuclear weapons are now at their lowest point in over half a century as the result of unprecedented efforts on the part of nuclear weapon states. They further underlined the need to pursue further efforts in the sphere of nuclear disarmament and general and complete disarmament in accordance with the Preamble and Article VI of the NPT and in a way that promotes international security and stability and taking into account all factors that could affect strategic stability.

11. The P5 discussed global strategic stability and their respective nuclear doctrines. In their shared effort to strengthen international peace and security and to address further prospects for nuclear disarmament, they stressed their readiness to engage in frank and constructive dialogue that takes into account all factors that could affect global strategic stability. The P5 also decided to seek enhanced international understanding of the role of nuclear weapons in the overall international security environment.

12. The P5 noted that 2016 marks twenty years since the opening for signature of the CTBT, and reiterated their commitment in the 2010 NPT Review Conference Final Document to promote and take concrete steps toward early entry into force and universalization of the Treaty. They called upon all states to uphold national moratoria on conducting nuclear weapon test explosion or any other nuclear explosion pending entry-into-force of the CTBT. The P5 reviewed efforts to build and maintain the International Monitoring System (IMS), supported by the International Data Centre (IDC), as well as a strong On-site Inspection (OSI) regime.

13. The P5 reviewed various areas of cooperation and reaffirmed their shared commitment to broaden and deepen dialogue and cooperation. The P5 decided to undertake further activities on the Glossary of Key Nuclear Terms. The P5 also reaffirmed the value of continuing regular meetings of technical experts to promote completion of the CTBT's verification regime and enhance its effectiveness. The P5 also decided to support and encourage dialogue among academic experts and scientists on mutually agreed issues related to international security and stability, nuclear non-proliferation, nuclear disarmament and peaceful uses of nuclear energy. The P5 decided to pursue further interaction and dialogue with non-nuclear weapon States in various multilateral formats. They shared further information on their respective bilateral and multilateral experiences in verification and resolved to continue such exchanges.

14. The P5 reiterated their common understanding of the severe consequences of use of nuclear weapons. They underscored their resolve to prevent such an occurrence from happening. They further reaffirmed their commitment to existing security assurances regarding the use, or threat of use, of nuclear weapons and recalled their statements on negative and positive security assurances as noted in UN Security Council Resolution 984 (1995), and as revised since then. The P5 intend to continue to exchange views on the issue.

15. The P5 reaffirmed the protocols to existing Nuclear-Weapon-Free-Zone treaties as an important mechanism for providing legally binding negative security assurances and recalled their signature of the Protocol to the Central Asia Nuclear Weapon Free Zone Treaty in 2014 and their readiness to sign the protocol to the Southeast Asia Nuclear-Weapon-Free Zone at the soonest possible time. They reiterated the importance of the 1995 NPT Review Conference Resolution on the Middle East and underlined their readiness to undertake efforts, including with states in the region, aimed at its implementation. The P5 underscored the need for renewed engagement among the states in the region in order to convene an initial conference on a Middle East Zone free of all weapons of mass destruction and their means of delivery.

16. The P5 underscored their commitment to prevent nuclear terrorism and their support for measures to strengthen overall nuclear security. They recalled the series of Nuclear Security

Summits. Welcoming the entry into force of the Amendment to the Convention on the Physical Protection of Nuclear Material in May 2016, they renewed their support to the universalization of the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities as well as of the International Convention for the Suppression of Acts of Nuclear Terrorism. They reaffirmed their support for relevant international organizations such as the United Nations, IAEA, and INTERPOL as well as international initiatives such as the Global Initiative to Combat Nuclear Terrorism. They also further reaffirmed the central role of the IAEA in international cooperation in the area of nuclear security and expressed support for the international conference on nuclear security to be held in Vienna on December 5-9, 2016.

17. The P5 remain steadfast in their commitment to broaden access of NPT States Parties to peaceful uses of nuclear energy, and they reiterated the right of NPT States Parties to pursue the peaceful use of nuclear energy without discrimination and in conformity with their nonproliferation obligations and highest standards of nuclear safety and security. The P5 noted their extensive support for international cooperation, both bilaterally and multilaterally, on peaceful use, including the IAEA Technical Cooperation Program and multiple initiatives to strengthen IAEA programs in these areas as appropriate. They welcomed the progress in establishing the IAEA low-enriched uranium (LEU) bank in Kazakhstan and expressed their continuing support for the IAEA LEU Reserve in Angarsk (Russia), the American Assured Fuel Supply, and the UK Assurance of Supply of Enrichment Services. They affirmed that these initiatives pave the way for the assured access to nuclear fuel, which promote sustainable development and energy security and benefit all NPT States Parties.

18. The P5 welcomed France's plans to host the next Conference in 2017.

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**b. Litigation Involving Alleged NPT Breach**

As discussed in *Digest 2015* at 816-19, the district court granted the U.S. motion to dismiss a case brought by the Republic of the Marshall Islands alleging that the United States has breached its obligations under Article VI of the NPT. *Republic of the Marshall Islands v. United States*, No. 4:14-cv-01885-JSW (N.D. Cal.). On October 5, 2016, the International Court of Justice issued its judgment on the preliminary objections in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands v. United Kingdom). The ICJ upheld the objection to jurisdiction by the United Kingdom on the grounds that there was an absence of any dispute. The United States did not participate.

**3. Peaceful Uses Initiative**

On June 1, 2016, the State Department issued a fact sheet describing U.S. support for the UN Sustainable Development Goals through the IAEA Peaceful Uses Initiative. The fact sheet is excerpted below and available at <http://2009-2017.state.gov/t/isn/rls/fs/2016/258437.htm>

\* \* \* \*

The International Atomic Energy Agency (IAEA) established the Peaceful Uses Initiative (PUI) in 2010 with the help of the United States to raise extra-budgetary contributions to support Agency activities that promote peaceful uses of nuclear energy.

The PUI supports implementation of Article IV of the Nuclear Non-Proliferation Treaty (NPT). This provision requires NPT States Parties that are “in a position to do so” to “cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes.”

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Since 2010, the PUI has provided the IAEA with additional flexibility and resources for high priority IAEA Member State projects. These projects support international development in areas that include human health, water resource management, food security, environmental issues, nuclear power infrastructure development, and nuclear safety and security. The list of countries having benefited from PUI-supported IAEA projects has grown to more than 150 states worldwide.

U.S. PUI support contributes to the fulfillment of several of the SDGs. Examples include:

- Zero Hunger (SDG 2): U.S. PUI funds have helped IAEA efforts to improve food safety and quality, agricultural productivity, and capacities to combat animal diseases.
- Good Health and Well-Being (SDG 3): U.S. PUI funds have aided IAEA efforts to enhance human health education and training, infant and child nutrition, national capacities to combat cancer and Ebola, and nuclear medicine services.
- Clean Water (SDG 6): U.S. PUI funds have helped IAEA efforts to develop sustainable water resources using isotope hydrology and small-scale irrigation technologies.
- Affordable and Clean Energy (SDG 7): U.S. PUI funds have aided IAEA efforts to assist in nuclear power planning, infrastructure development, and nuclear safety.
- Industry, Innovation and Infrastructure (SDG 9): U.S. PUI funds have helped IAEA efforts to advance the development and application of radiation technologies.
- Climate Action (SDG 13): U.S. PUI funds have aided IAEA efforts to assess impacts of climate change on polar and mountainous regions and on marine ecosystem management.
- Life below Water (SDG 14): U.S. PUI funds have helped IAEA efforts to promote seafood safety, actions against ocean acidification, and assessments of radionuclides in the marine environment and of the impact of the Fukushima accident.
- Life on Land (SDG 15): U.S. PUI funds have aided IAEA efforts to enhance soil fertility management practices and the sustainable development of uranium resources.

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#### 4. Nuclear Security

##### a. Nuclear security treaties

On May 8, 2016, the amendment to the Convention on the Physical Protection of Nuclear Material (“CPPNM”) entered into force, following the deposit of the instrument of ratification by Nicaragua 30 days earlier, on April 8, 2016, bringing the total to the requisite 102 States Parties. See IAEA statement, available at

<https://www.iaea.org/newscenter/news/key-nuclear-security-agreement-to-enter-into-force-on-8-may>

On May 9, 2016, the State Department issued a press statement hailing the entry into force of the amendment to the CPPNM. The statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/05/257047.htm>

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Yesterday, the global community took a significant step forward in protecting the world’s nuclear material and preventing nuclear terrorism with the entry into force of the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM).

This Amendment strengthens the CPPNM by adding requirements for states party to the treaty to protect nuclear facilities and nuclear material in domestic use, storage, and transport—not just international transit. The Amendment also legally requires the 102 signatory states to maintain even stronger standards of nuclear security than did the original CPPNM.

Entry into force of the Amendment strengthens the global nuclear security architecture, which enables states to continue to safely and securely pursue peaceful uses of nuclear technology. We commend the International Atomic Energy Agency (IAEA) for its role as depositary for the Convention. We will continue to work with the IAEA to universalize the amended CPPNM, which now becomes known as the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities (CPP).

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##### b. Threat of nuclear terrorism

On March 24, 2016, the State Department issued as a media note the joint statement of the Global Initiative To Combat Nuclear Terrorism (“GICNT”) regarding the contributions of the GICNT to enhancing nuclear security. The joint statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/03/255126.htm>

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Since 2006, the Global Initiative to Combat Nuclear Terrorism (GICNT) has grown into a partnership of 86 nations and 5 official observers committed to strengthening global capacity to prevent, detect, and respond to nuclear terrorism. The GICNT continues to make valuable contributions to nuclear security, and has held nearly 80 multilateral activities that have demonstrated the GICNT's unique ability to bring together policy, technical, and operational experts to share models and best practices and enhance partners' capabilities to address difficult and emerging nuclear security challenges. We, the Co-Chairs of the GICNT (Russia and the United States), the past and present Implementation and Assessment Group (IAG) Coordinators (Spain, the Republic of Korea, and the Netherlands), leaders of the three IAG Working Groups (Morocco, Finland and Australia), and the Special Advisor to the IAG Coordinator for planning the GICNT's Tenth Anniversary Event in 2016 (United Kingdom), wish to inform the states in attendance at the 2016 U.S. Nuclear Security Summit, as well as states who are members of other international organizations and initiatives with nuclear security-related mandates, on progress made by the GICNT since the Nuclear Security Summit hosted by the Netherlands in The Hague in March 2014.

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At the annual IAG Meeting hosted by the Republic of Korea in July 2014, partners discussed the GICNT's Statement of Principles and developed proposed topics and themes for incorporation into the GICNT's strategic planning to build upon past work and address new or continuing nuclear security challenges. Partners' feedback contributed significantly to the development of the GICNT strategy for 2015-2017, and identified potential new focus areas, such as addressing challenges related to sustainability of expertise and promoting the exchange of best practices on legal and regulatory frameworks, for further consideration.

\* \* \* \*

The Nuclear Detection Working Group (NDWG) completed its Developing a Nuclear Detection Architecture series, which focuses on addressing challenges inherent to successful implementation and enhancement of national nuclear detection architectures. ...

The NDWG also developed the "Exercise Playbook"—a collection of realistic scenarios that illustrates key nuclear detection challenges. The "Exercise Playbook" is now available on the GIIP as a tool for helping partners to organize national-level exercises to promote practical implementation of nuclear detection best practices. The "Exercise Playbook" will also be utilized for developing future NDWG activities and may be further refined and updated over time to meet partners' evolving priorities and integrate other key nuclear security issues.

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The Nuclear Forensics Working Group (NFWG) completed Exchanging Nuclear Forensics Information: Benefits, Challenges and Resources, a GICNT best practices document that aims to increase awareness of the benefits and challenges of exchanging nuclear forensics information associated with a nuclear security event and identifies potential mechanisms for enabling information exchange. ...

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The Response and Mitigation Working Group (RMWG) completed Fundamentals for Establishing and Maintaining a Nuclear Security Response Framework: A GICNT Best Practice Guide, which provides a strategic-level reference and key considerations for the development of a national response framework for preparing to respond to and mitigate the impacts of a radiological or nuclear terrorism incident. ...

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In February 2016, the United Arab Emirates hosted the Nuclear Detection and Response Exercise “Falcon.” This 3-day workshop and tabletop exercise focused on key aspects of nuclear detection and response intended to promote and enhance interagency national coordination, regional cooperation, and information sharing. Building on the recommendations made at the 2015 Plenary Meeting, this exercise promoted key fundamentals of exercise design, implementation, and self-assessment, and identified and promoted a regional approach to addressing key nuclear security challenges.

Looking forward, the GICNT leadership remains committed to working with GICNT partner nations to develop and implement practical activities, such as experts meetings, workshops, exercises, and senior-level policy dialogues, that promote capacity-building across the areas of nuclear detection, forensics, and response and mitigation and to explore potential new areas of work that would benefit from GICNT focus. The GICNT leadership also remains fully committed to working with its five official observers to ensure that GICNT activities continue to complement and support their programs of work.

As the GICNT celebrates its 10<sup>th</sup> Anniversary since being launched by the United States and Russia in 2006, the Netherlands has agreed to host a High Level Anniversary Meeting in The Hague (Netherlands) on 15-16 June 2016. The aim is to provide a retrospective view, demonstrating the unique contributions of the GICNT to nuclear security since 2006, while also facilitating a forward-looking view and discussion, identifying nuclear security challenges over the next decade (2016-2026), and the actions GICNT may take to address these challenges.

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On June 16, 2016, the State Department issued as a media note the chairman’s summary at the GICNT 10<sup>th</sup> anniversary meeting. The media note is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/258593.htm>. Under Secretary of State Gottemoeller, and Mr. Mikhail Ulyanov of the Russian Federation Ministry of Foreign Affairs served as the U.S. and Russian Co-Chair representatives at the meeting, reading messages from President Barack Obama and President Vladimir Putin, respectively, to the GICNT partners.

## 5. UN Security Council Resolution 1540

In June, the UN Security Council held open consultations on the comprehensive review of the 1540 Committee. Ambassador Power addressed the session on June 20, 2016. Ambassador Power’s remarks are excerpted below and available at <http://2009-2017->

[usun.state.gov/remarks/7342](https://usun.state.gov/remarks/7342) On June 22, 2016, Ambassador Michele J. Sison, U.S. Deputy Representative to the UN, delivered remarks at the consultations, available at <https://2009-2017-usun.state.gov/remarks/7351>.

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When the Security Council adopted resolution 1540 in 2004, the use of sarin in 1995 by the Aum Shinrikyo cult and the September 11 attacks had already showed the world—again—that terrorists were willing to cause mass casualties, while the revelations about the A.Q. Khan network reminded us that criminals seek to profit from WMD proliferation. This confluence of events, among others, prompted the Security Council to develop a regime to close serious gaps in international law and practice through resolution 1540. Since 2004, the resolution has become a foundational instrument in the global nonproliferation architecture.

States on every continent have taken new measures to prohibit proliferation activities, secure WMD-related materials domestically, and adopt measures to prevent illicit trafficking in such items across borders. More than 40 international and regional organizations have incorporated elements of resolution 1540 into their daily work. Since 2004, in large part because of resolution 1540, the international community has provided funding, technical assistance, and capacity-building to states that need it most to implement their obligations.

Through the Committee's efforts, for the first time the world started to have a comprehensive understanding of what all states were doing to prevent WMD proliferation. The Committee also has helped states directly by identifying where gaps existed in national nonproliferation legal frameworks and in developing action plans to close them. Nonetheless—and I really want to stress this—the threat posed by the proliferation of weapons of mass destruction and their means of delivery has evolved in significant and dangerous ways: state and non-state actors are now using chemical weapons in the Middle East; nuclear and radioactive material has been stolen or appeared for sale on the black market; the bright promise of synthetic biology also comes with attendant perils; and the increasing availability of drones has the potential means of delivering biological, chemical, and radiological materials. This is a radically changed environment. We must take this into account as we devise new ways to revamp resolution 1540.

While most countries have taken many steps to implement their obligations under the resolution, persistent and important gaps remain. To start, we need to underscore the importance of resolution 1540 in the fight against WMD proliferation, especially where it involves terrorists, criminals, other non-state actors, and all of those who facilitate their dangerous endeavors. And here, I'd like to propose that we think about these negotiations in a new way by stretching our imaginations. Let us imagine a WMD attack in any one of our cities and use our consideration of such a notional horror to pinpoint the steps we must take now to prevent such an attack from ever happening. We have to stay one step ahead of those who seek new ways to proliferate the worst weapons and use them to kill people. Even states that have already taken measures to fulfill their resolution 1540 obligations cannot rest easy: committed proliferators will find new tactics to test even our best efforts. This means that we will need the 1540 Committee long after its current mandate expires in 2021, and we will need to commit ourselves to being dynamic, creative, and visionary. We also believe that the 1540 Committee should focus its efforts on where it can have

the most impact. This means analyzing trends and threats with the input of relevant bodies and focusing on obligations with persistently low levels of implementation, such as biosecurity, chemical security, countering proliferation finance, and controlling means of delivery. It also means greater attention by the Committee on specific regions that exhibit relatively low levels of implementation, including Africa, Latin America, and Southeast Asia.

The Committee should also support existing entities that investigate the non-state actors who are involved in WMD production and use, especially in light of information regarding ISIL's use of chemical weapons. We must ensure that the long arm of justice will be empowered to put proliferators, criminals, and terrorists behind bars. During these open consultations, the United States plans to present proposals to reenergize and improve efforts to implement resolution 1540. We have distributed a non-paper with concrete proposals and welcome your feedback. We also intend to listen and to learn. We believe that these open consultations give every relevant stakeholder a chance to have meaningful input into the recommendations that will come out of this Comprehensive Review. We greatly appreciate that the 1540 Committee has made an effort to include voices from civil society, academia, and the business community, as well as government regulators, parliamentarians, and diplomats. The Committee has used new media tools to reach out to new audiences, and it has even sought more youthful voices through a student essay contest. We need this creative and inclusive approach to tackle this global problem together.

We look forward to working with all of you during these consultations and in the coming months to thoroughly evaluate what more can be done to improve 1540. The measure of our impact is not what happens here in New York but in what we succeed in preventing in the real world. Let us keep that real world foremost in our minds in these critical negotiations.

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Ambassador Sison delivered further remarks on the comprehensive review of 1540 on August 23, 2016 at a Security Council open debate on nonproliferation. Her remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7405>

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Since 2004, Resolution 1540 has become the foundation of our global, non-state actor counter-proliferation architecture. It has helped prevent WMD proliferation and the abuse of legitimate trade and scientific cooperation for such purposes.

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While most countries have taken many steps to implement their obligations under the resolution, persistent and important gaps remain.

The United States has strongly supported a robust 2nd Comprehensive Review of UN Security Council Resolution 1540, due for completion at the end of this year. We greatly appreciate Spain's leadership throughout the review. We believe that 1540 is of fundamental importance to international security. In fact, the United States has taken the lead in looking for

ways to revitalize the resolution's framework. In our view, it is important for all countries to engage in this effort.

We have been an active participant throughout the Comprehensive Review, submitting 25 proposals during the 1540 Open Consultations in June. We believe these proposals will strengthen 1540 in the areas of implementation, assistance, cooperation, and outreach. For example, we have urged the 1540 Committee to share more openly the information that Member States provide about non-proliferation efforts; we also want to see the committee improve its communication plan to make the information more accessible to governments and to the public. This is especially relevant in today's discussion because we hope that with our combined efforts, we can work to make 1540 an even better vehicle for clamping down on evolving non-state actors and WMD threats.

\* \* \* \*

Finally, we fully understand the desire to do everything we can to combat the spread of chemical and biological weapons. But we believe proposals that call for the establishment of a new convention on the suppression of chemical and biological terrorism are misleading and are founded on the false premise that there are legal gaps in the existing international framework to combat the use of chemical and biological weapons by non-state actors.

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## 6. Country-Specific Issues

### a. *Democratic People's Republic of Korea ("DPRK" or "North Korea")*

See Chapter 16 for discussion of new UN Security Council resolutions and sanctions in 2016 regarding North Korea. On January 6, 2016, Secretary Kerry issued a press statement reacting to the most recent nuclear test conducted by North Korea. His statement is excerpted below and available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/01/250994.htm)

[2017.state.gov/secretary/remarks/2016/01/250994.htm](http://2009-2017.state.gov/secretary/remarks/2016/01/250994.htm).

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The United States and nations around the world have unequivocally condemned North Korea's latest nuclear test. This highly provocative act poses a grave threat to international peace and security and blatantly violates multiple U.N. Security Council resolutions.

As I am reiterating today in conversations with my counterparts overseas, the U.S. is committed to defending the American people and honoring our security commitments to our allies in the region. We do not and will not accept North Korea as a nuclear armed state, and actions such as this latest test only strengthen our resolve. We will continue to work closely with our partners on the U.N. Security Council and in the Six-Party Talks to take appropriate action.

We call on the North to end these provocations and choose a better path. North Korea will only achieve the security and development it claims to seek by living up to its international obligations and commitments.

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Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, also issued a statement on January 6, 2016 on the North Korean nuclear test.

Ambassador Power's statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7079>

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Today, the UN Security Council met to discuss the nuclear test carried out by North Korea—a highly provocative act that poses a grave threat to international peace and security. The test constitutes yet another violation of the DPRK's obligations under multiple Security Council resolutions, contravenes the DPRK's commitments under the September 2005 Joint Statement of the Six-Party Talks, and increases the risk of the proliferation of weapons of mass destruction.

North Korea is the only country in the world that has tested a nuclear weapon in the 21st century—not once, but, with yesterday's test, four times. It is also the only country in the world that routinely threatens other UN member states with nuclear attacks. And the test is just the latest of a series of violations we have witnessed in recent months, including artillery barrages and landmine attacks. These actions threaten the security of all of our nations.

The international community must impose real consequences for the regime's destabilizing actions, and respond with steadily increasing pressure. The Security Council has a key role to play in holding North Korea accountable by imposing a tough, comprehensive, and credible package of new sanctions, and by ensuring rigorous enforcement of the resolutions it has already adopted. The Security Council's commitment today to impose "further significant measures" in a new resolution marks an important step in that process.

North Korea has increasingly isolated itself and impoverished its people through its reckless pursuit of weapons of mass destruction. The United States remains fully committed to the peaceful denuclearization of the Korean peninsula. We will take all actions necessary to protect our security, defend our allies, and promote regional stability.

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On February 6, 2016, North Korea conducted a missile launch in violation of UN Security Council resolutions. Secretary Kerry condemned the missile launch in a

February 6 statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/02/252236.htm>, in which he said:

This is the second time in just over a month that the D.P.R.K. has chosen to conduct a major provocation, threatening not only the security of the Korean peninsula, but that of the region and the United States as well. We reaffirm our ironclad commitment to the defense of our allies, including the Republic of Korea and Japan. We will continue to work with our partners and members of the UN Security Council on significant measures to hold the D.P.R.K. to account.

The Security Council held consultations on February 7, 2016 regarding the missile launch by North Korea. Ambassador Power delivered remarks along with Ambassador Yoshikawa of Japan and Ambassador Oh of South Korea. Their remarks are available at <http://2009-2017-usun.state.gov/remarks/7121> and Ambassador Power's remarks are excerpted below.

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North Korea's launch yesterday using proscribed ballistic missile technology undermines regional stability and violates the DPRK's obligations under four separate Security Council resolutions, demonstrating yet again that the DPRK will continue to escalate tensions in the absence of a strong and forceful response from the international community.

The accelerated development of North Korea's nuclear and ballistic missile program poses a serious threat to international peace and security—to the peace and security not just of North Korea's neighbors, but the peace and security of the entire world.

Pyongyang claims it launched what it called a "peaceful earth observation satellite," but nobody is fooled: so-called space launch vehicles are the same technology as ballistic missiles, which are expressly prohibited by multiple Security Council resolutions.

Now some of you may be hearing the terms "provocative acts" and "provocations." These are almost euphemisms, I think, that have come to be used in the context of North Korea's advancing of its nuclear weapons program. But what North Korea is doing with each of these acts—these illegal acts—with each of these launches, is the launches themselves are advancing North Korea's capacity to advance its nuclear weapons program. They are not merely "provocations."

With each one of these actions, the DPRK moves one step closer to its declared goal of developing nuclear-tipped intercontinental ballistic missiles, and we cannot and will not allow this to happen.

We have been engaging in discussions with Security Council members on the appropriate response to the nuclear test that North Korea carried out now more than a month ago. These discussions are ongoing and it is clear that the Security Council must take decisive action, and to do so with urgency.

President Obama spoke with President Xi on Friday and in that call they agreed on the importance of a strong and united international response to North Korea's illegal actions—including through an impactful UN Security Council resolution.

Each of these provocations, each of these illegal actions, requires a robust response. Because of the DPRK's decisions and actions, we will ensure that the Security Council imposes serious consequences. DPRK's latest transgressions require our response to be even firmer.

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Further UN Security Council consultations on North Korea took place on August 3, 2016, one day after North Korea launched another ballistic missile. Ambassador Power and fellow Ambassadors Koro Bessho of Japan and Oh Joon of the Republic of

Korea addressed the press regarding the consultations. Their remarks are available at <http://2009-2017-usun.state.gov/remarks/7396> and Ambassador Power's remarks are excerpted below.

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...[S]ince that the last time we met here to discuss North Korea's actions in late June, North Korea has launched ballistic missiles on other occasions: on July 9 from a submarine, and two more on July 19.

And I just want to flag the rhetoric that accompanied the July 19 launch, which was extremely alarming, even by DPRK standards. The North Korean official news agency said those launches simulated pre-emptive nuclear strikes on South Korean ports and airfields hosting a U.S. presence, and that they were launched at the direct, personal order of Kim Jong Un.

And then last night, as you know, we confirmed North Korea launched two more ballistic missiles. The first missile failed. The second flew further than any other North Korean missile had flown this year, landing within ... 250 kilometers of Japan's west coast. I think my Japanese and Korean colleagues can speak movingly about what this means to and for the region and for the people in their countries, and I just want to stress the necessity of a strong and swift response from the Security Council. And a reminder that this missile landed incredibly closely to Japan, and this program and its continued advancement poses a threat that goes well beyond any particular country.

And that is what the Security Council has enshrined, most recently in March in Resolution 2270. These actions are a challenge to peace and security. They're a challenge to the founding instruments of the United Nations, which emphasize the importance of peace and security. And so we are going to continue to push for the full implementation of Resolution 2270. You all know we that did not expect an overnight result with a resolution that ambitious and that complex. And I will state here what I stated back at the time of the unanimous passage of that resolution, which is implementation and enforcement are everything. And enforcement means not only making sure that we crack down on anybody who is sanctions busting and evading, but also that when you get violations of our resolutions that the Council stands together on behalf of its own words and on behalf of international peace and security.

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Ambassador Power also addressed the media alongside the ambassadors for Japan and the Republic of Korea on September 6, 2016, following further Security Council consultations on North Korea in response to additional ballistic missile launches. Their remarks are available at <http://2009-2017-usun.state.gov/remarks/7414> and Ambassador Power's are excerpted below.

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...The United States, along with our Japanese and Korean colleagues, called these urgent consultations today to discuss the DPRK's most recent provocation: three medium-range ballistic missiles, launched nearly simultaneously, flying approximately 1,000 kilometers down-range and hitting within 300 kilometers of Japan's coast.

More importantly, we called these consultations because with each test, each violation of UN Security Council resolutions—and there have been 22 of them so far this year—the DPRK demonstrates further advancement of its ballistic missile program. This launch, which I would note took place while China was hosting the G-20 Summit, once again shows the DPRK's blatant disregard for its international obligations and its willingness to provoke and to threaten the international community with impunity.

The DPRK's missile tests help it to threaten the territory of even more countries in the region, whether through its land-based missiles or now via its recently tested submarine-launched ballistic missiles.

Once the DPRK has the capability to do so, we know what they intend to do with these missile systems, because they have told us. They are explicit: they intend to arm the systems with nuclear weapons. Kim Jong Un said this himself yesterday, according to the DPRK's official news agency.

In the face of this continuing threat, we stand united with our stalwart allies, the Republic of Korea and Japan. Our partnership with the ROK and Japan goes far beyond cooperation on the DPRK threat; we work constructively on a host of global issues, and we will continue to do so.

The Security Council must remain unequivocal and united in condemnation of these tests, and we must take action to enforce the words we put on paper—to enforce our resolutions.

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On September 9, 2016, Secretary Kerry issued a press statement on North Korea's latest nuclear test. The statement is excerpted below and available at <http://2009-2017.state.gov/secretary/remarks/2016/09/261710.htm>.

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The United States and nations around the world have condemned North Korea's September 9 nuclear test as a grave threat to regional security and to international peace and security. This action is as destabilizing as it is unlawful, flagrantly violating multiple UN Security Council Resolutions and the D.P.R.K.'s own commitments.

We remain committed to defending the American people and honoring our security commitments to our allies in the region. We are prepared to take whatever measures are necessary to ensure our alliances continue to defend against this growing threat to international peace and security. The United States remains steadfast in our defense commitments to our allies in the region, using all the capabilities at our disposal, including our extended deterrence commitments.

The United States intends to work with UN Security Council partners to take robust steps in response to this provocation. We expect our Six Party Partners to take necessary steps to ensure the D.P.R.K. regime understands there are consequences to its unlawful and dangerous actions.

The D.P.R.K.'s repeated and willful violations of its obligations under UN Security Council Resolutions, its belligerent and erratic threats, and web of illicit activities around the world indicate it has no interest in participating in global affairs as a responsible member of the international community.

We remain open to credible and authentic talks aimed at full and verifiable denuclearization of the D.P.R.K.. Sadly, the D.P.R.K. has chosen a different path and made clear it would not be a credible negotiating partner. North Korea will only achieve the security and development it claims to seek by living up to its international obligations and commitments.

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**b. Iran**

*(1) Joint Comprehensive Plan of Action*

In 2015, Iran and the P5+1 (the United States, China, France, Russia, and the UK, plus Germany), in coordination with the EU, reached an understanding on a Joint Comprehensive Plan of Action ("JCPOA") to address concerns over Iran's nuclear program. See *Digest 2015* at 833-50; see also discussion of sanctions actions taken pursuant to the JCPOA in Chapter 16.

January 16, 2016 was "Implementation Day" under the JCPOA. Secretary Kerry delivered remarks on the significance of Implementation Day on January 16, 2016, which are available at [http://2009-](http://2009-2017.state.gov/secretary/remarks/2016/01/251336.htm)

[2017.state.gov/secretary/remarks/2016/01/251336.htm](http://2009-2017.state.gov/secretary/remarks/2016/01/251336.htm) and excerpted below.

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This evening, we are really reminded once again of diplomacy's power to tackle significant challenges. And thanks to years of hard work and committed dialogue, we have made vital breakthroughs related to both the nuclear negotiation and a separate long-term diplomatic effort. I'm very happy to say that as we speak, we have received confirmation that five Americans who had been unjustly detained in Iran have been released from custody. And they should be on their way home to their families before long—shortly.

The President will have more to say about their release later. But I can tell you one thing: While the two tracks of negotiations were not directly related—and they were not—there is no question that the pace and the progress of the humanitarian talks accelerated in light of the relationships forged and the diplomatic channels unlocked over the course of the nuclear talks. And certainly in the time since we reached an agreement last July, there was a significant pickup in that dialogue.

We have also reached a critical and auspicious milestone on the nuclear issue as well. Today, more than four years after I first traveled to Oman at the request of President Obama to discreetly explore whether the kind of nuclear talks that we ultimately entered into with Iran were even possible, after more than two and a half years of intense multilateral negotiations, the International Atomic Energy Agency has now verified that Iran has honored its commitments to alter—and in fact, dismantle—much of its nuclear program in compliance with the agreement that we reached last July.

I want to thank the IAEA and Director Amano for their significant efforts in this regard, and I know that he will go tomorrow to Tehran to begin the process of the full implementation.

To get to this point, ladies and gentlemen, Iran has undertaken significant steps that many . . . people doubted would ever come to pass. And that should be recognized, even though the full measure of this achievement can only be realized by assuring continued full compliance in the coming years. In return for the steps that Iran has taken, the United States and the EU will immediately lift nuclear-related sanctions, expanding the horizon of opportunity for the Iranian people. And I have even tonight, before coming over here, signed a number of documents over those sanctions that the State Department has jurisdiction over in order to effect that lifting.

In the words of the agreement itself, today—January 16th, 2016—we have reached implementation day. Today marks the moment that the Iran nuclear agreement transitions from an ambitious set of promises on paper to measurable action in progress. Today, as a result of the actions taken since last July, the United States, our friends and allies in the Middle East, and the entire world are safer because the threat of a nuclear weapon has been reduced. Today we can confidently say that each of the pathways that Iran had toward enough fissile material for a nuclear weapon has been verifiably closed down.

That begins with the uranium path. Before the negotiations began, Iran was adding rapidly and without constraint to its stockpile of enriched uranium. As it committed to do back in July, Iran has now reduced that stockpile to less than 300 kilograms, sending the rest of it out on a ship which has gone to Russia to be processed there. That means that their current level of enriched uranium is 2 percent of what it was before we completed the agreement, and the rest is shipped out of the country.

Iran has also removed a full two thirds of its centrifuges from nuclear facilities, along with the infrastructure that supported them. They've literally taken it out, dismantled, stored. That includes nearly all of its advanced centrifuges. And the removed hardware is sealed up under around-the-clock monitoring by the IAEA. Iran has now ended all uranium enrichment at its Fordow facility, disconnected all related centrifuges, and removed all fissile material from the site.

The second path open to Iran was the plutonium path. Before we sat down at the negotiating table, Iran's heavy water reactor at Arak had the potential—when and if it became operational—to produce enough weapons-grade plutonium annually to fuel two nuclear weapons. Iran has now begun the process of modifying the entire Arak reactor so that it will only be used for peaceful purposes. It has removed the reactor's core and filled it with cement, ensuring that it can be never used again.

Finally, the third path—the most troubling path, in many respects—was the potential for Iran to pursue enough fissile material for a weapon covertly, using a facility not publicly declared. Now, before the talks started the IAEA did not have assured access to investigate locations at which undeclared nuclear activities might be carried out. It also lacked the ability to track uranium as it was mined, milled, and then turned into yellowcake. Today, the IAEA has put

in place every one of the extensive transparency and verification measures called for in the agreement. That means in addition to the 24/7 monitoring of all of Iran's declared facilities, the IAEA now has visibility and accountability of the entire supply chain that supports Iran's nuclear program, from start to finish—from uranium mines and mills to centrifuge manufacturing and operation.

So today, Iran would need far more than one covert facility in order to try to break out. It would need to develop an entire covert supply chain, from start to finish—which experts around the world agree is not possible without early detection.

As I said, the steps that Iran has taken to fully implement the nuclear agreement have fundamentally altered the country's nuclear program. Two years ago we assessed that Iran's breakout time, the amount of time it took to go from producing fissile—enriched uranium to have enough for one bomb—that amount of time has gone from two to three months, where it was; now, today we are confident that—based on the reductions in its stockpile, reductions in its centrifuges—it would take Iran at least a year to try to break out of the agreement, kick out the inspectors, accumulate the amount of fissile material needed for a single bomb.

And if Iran ever did decide to do that, because of the steps that are in this agreement, we would know it almost immediately, and we would have enough time to respond accordingly.

Let me underscore: Verification remains, as it always has been, the backbone of this agreement. We welcome that Iran has followed through on the promises that it made. It has kept its word. And we will continue to do the same. But we will also remain vigilant in verifying Iran's compliance every hour of every day in the years ahead.

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Secretary Kerry's official confirmation of the IAEA's verification of Iranian actions pursuant to the JCPOA was issued as a press statement on January 16, 2016, available at <http://2009-2017.state.gov/secretary/remarks/2016/01/251332.htm> and states:

I hereby confirm that the International Atomic Energy Agency has verified that Iran has fully implemented its required commitments as specified in Sections 15.1-15.11 of Annex V of the Joint Comprehensive Plan of Action (JCPOA). The U.S. sanctions-related commitments described in Sections 17.1-17.5 of Annex V of the JCPOA are now in effect.

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Ambassador Power also issued a statement on Implementation Day, describing the significance with respect to UN Security Council resolutions on Iran. Her statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7098>.

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With the arrival of “Implementation Day,” the provisions of the seven current Iran-related Security Council resolutions terminate, and the binding UN provisions imposed in UNSC Resolution 2231 enter into force. All UN Member States will be required to comply with these measures, which include restrictions on certain nuclear-related transfers, restrictions on conventional arms and ballistic missile-related activities, continued UN designations imposing asset freezes and travel bans, and cargo inspection provisions. These provisions will be in place for many years to come.

Going forward, the United States will continue working with international partners to make sure that Resolution 2231 is fully enforced. We will continue to intercept and seize Iranian arms exports in accordance with international law. We will continue to identify and obstruct shipments to Iran of prohibited ballistic missile-related items. And we will continue to hold Iran accountable for violations of UN Security Council resolutions.

The United States appreciates the international community’s collective efforts to make this day possible. We extend particular thanks to the International Atomic Energy Agency and its inspectors for their tireless work, and we call on them to ensure that Iran continues to fulfill its commitments under the JCPOA.

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On July 18, 2016, Ambassador Power addressed the Security Council after a briefing on Iran and implementation of Resolution 2231. Her remarks are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7374>.

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It has been one year since the United States, France, the United Kingdom, Germany, China, Russia, and the EU concluded a deal with Iran to ensure that Iran’s nuclear program is, and will remain, a peaceful one. Despite a long history of deep mistrust on both sides, commitments have been kept. Despite dire predictions to the contrary, the deal has held. That is a truly significant achievement. . . .

The United States acknowledges and welcomes Iran’s swift implementation of this historic deal, which has produced real, tangible change; change that, without question, has improved international peace and security, which is the primary purpose of this Council. We also recognize that negotiating this deal—and implementing it—has required overcoming great skepticism in some Iranian quarters. The world is safer because of this deal.

It has been six months since the IAEA’s verification that Iran completed its key nuclear-related commitments under the deal, and since the simultaneous lifting of UN, EU, and U.S. nuclear-related sanctions. While Member State implementation of JCPOA commitments is a subject for the Joint Commission rather than this Council, let me be clear that the United States, our P5+1 partners, and the EU have thus far fully and unequivocally implemented all our commitments under this deal, by lifting nuclear-related sanctions specified in the deal, and by providing clear and timely guidance to government and private sector partners about engagement with Iran that is now permitted.

Consistent with the terms of the deal, and directly resulting from the choices its leaders have made, the economic burden on the Iranian people has been eased. And the United States will continue to implement its commitments, in good faith and without exception, under the JCPOA.

Yet while it is undeniable that the deal has led to significant, verifiable progress in rolling back Iran's nuclear program, it is also true that Iran and other Member States have at times taken actions that, while not violations of the JCPOA, are inconsistent with Resolution 2231. The report released today by the Secretary-General documents a number of such actions. These include Iran's repeated ballistic missile launches, which this Council called upon Iran not to undertake. The report states that these launches have the "potential to increase tensions in the region." Iran does not hide these launches. The report also notes violations by Iran of Resolution 2231, such as arms transfers to other parts of the region, some of which have been interdicted. And the Secretary-General's report documents violations of asset freezes and travel restrictions applicable to Iranian entities designated by this Council, such as the participation of Iran's Defense Industries Organization in an arms exhibition in Iraq.

No one—and in that I would include UN Member States, the Security Council, and the Secretariat—should turn a blind eye to such actions. As we have said all along of this resolution—implementation is everything.

That means that when the resolution is violated, or actions are taken that are inconsistent with it, those actions must be documented and condemned. And it means that all Member States—especially the members of this Council, and the P5+1 countries, and Iran, who negotiated the deal—must do their part in implementing the resolution. That is why the United States commends the actions of the Royal Australian Navy and the French Navy, which intercepted and confiscated Iranian arms shipments on February 27, and March 20, respectively—and as the U.S. Navy did on March 28. And it means that this Council and the international community must call out Member States when they do not fulfill their responsibilities under this resolution.

The United States disagrees strongly with elements of this report, including that its content goes beyond the appropriate scope. We understand that Iran also disagrees strongly with parts of the report. For our part, while some have argued that, to be balanced, the report should give Iran a chance to express complaints about sanctions relief under the deal, the Security Council did not mandate the Secretariat to report on issues unrelated to implementation of Annex B of Resolution 2231. It was instead the Joint Commission that was carefully designed by the JCPOA participants to discuss and resolve any such implementation issues, and that is the appropriate channel to raise such concerns.

The United States has fully implemented all of our sanctions-related commitments under the deal—and we've responded to questions about them both through the Joint Commission and through extensive bilateral engagement with Iran. Even beyond fulfilling our JCPOA commitments, the United States has engaged with governments, businesses, and banks around the world that have questions about our changed sanctions environment.

To be clear: the deal has not resolved all of our differences with Iran. We continue to be profoundly concerned about human rights abuses that Iran commits against its own people, and about the instability Iran continues to fuel through its destabilizing activities in the region, including repeated threats against Israel.

But we are undoubtedly in a better place to address these and other challenges without the threat of a nuclear-armed Iran. And the lines of communication we developed with Iran over the course of our negotiations have already proven useful to engaging in other areas of vital interest, as occurred in January, when Iran detained ten U.S. sailors and two U.S. Naval vessels in the Persian Gulf. The sailors were released in less than a day—in no small part because Secretary Kerry and Foreign Minister Zarif are able to work constructively. Iran has joined the ISSG, which is trying to resolve the horrific conflict in Syria—a goal that would be impossible without all the countries that are involved in the conflict in Syria at the table.

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On December 21, 2016, the Joint Commission established under the JCPOA transmitted to the IAEA the decisions endorsed by the Joint Commission during 2016. The Joint Commission's decisions were disseminated as an information circular by the IAEA. INFCIRC/907. As explained in the information circular, the Joint Commission's decisions provide clarifications for Iran's implementation of its nuclear-related commitments under the JCPOA.

(2) *Ballistic Missile Program*

On March 11, 2016, Ambassador Power delivered a statement expressing U.S. concern about recent Iranian ballistic missile launches. The statement, available at <https://2009-2017-usun.state.gov/remarks/7181>, includes the following:

UN Security Council Resolution 2231 calls upon Iran not to undertake any launches of ballistic missiles designed to be capable of delivering a nuclear weapon. We will raise these dangerous launches directly at Council consultations, which we have called for, on Monday. These launches underscore the need to work with partners around the world to slow and degrade Iran's missile program. We will therefore continue to insist on full implementation of Resolution 2231, which expressly prohibits third-party support to Iran's ballistic missile program, as we also consider our appropriate national response.

c. *India*

On February 4, 2016, India presented its instrument of ratification of the Convention on Supplementary Compensation for Nuclear Damage ("CSC") to the IAEA. See February 4, 2016 IAEA press release, available at <https://www.iaea.org/newscenter/news/india-joins-convention-supplementary-compensation-nuclear-damage>. The IAEA describes the CSC as follows:

The CSC was adopted on 12 September 1997, together with the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, and entered into force on 15 April 2015. It aims at increasing the amount of compensation available in the event of a nuclear incident through public funds to be made available by the Contracting Parties on the basis of their installed nuclear capacity and UN rate of assessment. It also aims at establishing treaty relations among States that belong to the Vienna Convention on Civil Liability for Nuclear Damage, the Paris Convention on Third Party Liability in the Field of Nuclear Energy or neither of them, while leaving intact the 1988 Joint Protocol that establishes treaty relations among States that belong to the Vienna Convention or the Paris Convention.

India's declarations to the CSC are available at

[https://www.iaea.org/Publications/Documents/Conventions/supcomp\\_reserv.pdf](https://www.iaea.org/Publications/Documents/Conventions/supcomp_reserv.pdf) and include a declaration that its national laws comply with the annex to the CSC.

U.S. Secretary of Energy Ernest Moniz issued a statement responding to India's joining the CSC on February 4, which is available at [https://vienna.usmission.gov/a-](https://vienna.usmission.gov/a-statement-from-u-s-secretary-of-energy-ernest-moniz-on-india-joining-the-convention-on-supplementary-compensation-for-nuclear-damage-csc/)

[statement-from-u-s-secretary-of-energy-ernest-moniz-on-india-joining-the-convention-on-supplementary-compensation-for-nuclear-damage-csc/](https://vienna.usmission.gov/a-statement-from-u-s-secretary-of-energy-ernest-moniz-on-india-joining-the-convention-on-supplementary-compensation-for-nuclear-damage-csc/)

India's membership in the ...[CSC] is a crucial step toward facilitating the growth of safe, civilian nuclear energy in the world's second most populous country. In addition, India's membership is a major step towards the global liability regime called for by the IAEA's Nuclear Safety Action Plan to provide prompt compensation in the event of an accident and to establish a legal framework for commercial arrangements.

I welcome India to the CSC and look forward to their deployment of civil nuclear energy technologies to help provide reliable, low-cost power to millions of Indians. These efforts will help spur a low-carbon economy to combat climate change. Additionally, we are eager to work with India, and all CSC member countries, to facilitate the use of advanced nuclear technologies developed in the United States.

On June 1, India joined the Hague Code of Conduct against Ballistic Missile Proliferation ("HCOC"). See June 2, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/257907.htm>. The United States welcomed India as the 138<sup>th</sup> Subscribing State to the HCOC and repeated its call for countries not yet a party to join. The media note describes the HCOC as follows:

The HCOC is a voluntary mechanism that has built a broad international predisposition against ballistic missile proliferation and promotes transparency and confidence building, including through the Subscribing States' commitment to submit pre-launch notifications and annual declarations of their relevant

policies. India's subscription reinforces its support for international missile nonproliferation and will help increase transparency and strengthen security.

Later in June, India joined the Missile Technology Control Regime ("MTCR"). See June 27, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/06/259112.htm>. The media note describes the MTCR and the value in India's joining:

The MTCR is an informal and voluntary association of countries that seek to reduce the global missile proliferation threat, primarily by controlling exports of rocket and unmanned aerial vehicle systems capable of delivering weapons of mass destruction (WMD), and related equipment and technology. India possesses substantial missile-relevant technology and has excellent nonproliferation and export control credentials. Its accession bolsters substantially the Regime's effectiveness and objectives.

**d. Ukraine**

On January 19, 2016, Assistant Secretary of State Frank A. Rose participated in a ceremony reestablishing the Nuclear Risk Reduction Center ("NRRC") secure communication link between the governments of the United States and Ukraine. See January 19, 2016 State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/01/251423.htm>. Excerpts follow from the media note providing background on the reestablishment of the link.

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... This new 24/7 secure link is all the more important at a time when Russia has occupied sovereign Ukrainian territory. And it further signifies the U.S. commitment to Ukraine's success; Ukraine's aspirations are our aspirations and today's event further cements an already durable and growing partnership.

This link will support the implementation of certain notification requirements of arms control and confidence building agreements and commitments. Initially, the United States and Ukraine will exchange notifications related to the Intermediate-Range Nuclear Forces (INF) Treaty, however, the NRRC plans to use the link for additional notification requirements for other arms control and confidence-building agreements and commitments. The link can be used to transmit communications other than those expressly provided for under the proposed NRRC agreement—for example, to quickly and securely send messages of vital national importance in times of crisis.

The reestablishment of the NRRC-to-NRRC link has required a good deal of technical legwork. First, information technology specialists from the U.S. NRRC installed new hardware including encryption devices and software for the link in the Ukrainian Verification Department of the General Staff of the Armed Forces of Ukraine. Second, the team tested the equipment and provided training to ten Ukrainian military personnel. And our work is not yet complete. Over the next two years, our team will provide training to the Ukrainian NRRC for any technical staff or other users who may require it.

This is just one element of our larger investment in the security and success of Ukraine. A secure, direct bilateral link with Ukraine is extremely valuable to both parties, especially in today's fast-moving and saturated information environment.

We are proud of the role the NRRC-to-NRRC relationship plays in the United States' arms control agenda to support our mutual interests in the global security environment. We look forward to continued cooperation in our efforts to enhance strategic stability through secure information exchange.

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On April 7, 2016, Deputy Secretary of State Antony J. Blinken addressed the Innovation Forum Workshop at Stanford University on the topic of "The Hunt for Weapons of Mass Destruction." His remarks, excerpted below and available at <http://2009-2017.state.gov/s/d/2016d/255745.htm>, touched on the history of Ukraine forsaking its nuclear weapons.

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...when the Soviet Union dissolved, it left three successor states with nuclear weapons: Ukraine, Belarus, and Kazakhstan. And one of the great achievements of the Clinton administration in the early days was to get those countries to give up the nuclear weapons they inherited when the Soviet Union dissolved.

In the case of Ukraine, the reason we were able to do that is because Ukraine got a guarantee from the United States, the United Kingdom, and Russia to protect its territorial integrity and sovereignty. So if that agreement has been literally and figuratively torn apart by Russia's actions in Ukraine, what is that going to do for us as we're trying to convince other countries like North Korea to give up their weapons and that would understandably look for some basic security assurances. That is why it matters so much.

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**e. Norway**

On June 14, 2016, President Obama submitted to Congress for its review an Agreement for Cooperation between the Government of the United States of America and the Government of the Kingdom of Norway Concerning Peaceful Uses of Nuclear Energy. See June 14, 2016 State Department media note, available at <http://2009->

[2017.state.gov/r/pa/prs/ps/2016/06/258485.htm](http://2017.state.gov/r/pa/prs/ps/2016/06/258485.htm). Excerpts follow from the June 14 media note.

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Upon entry into force, following the statutorily required Congressional review, the Agreement (also called a 123 Agreement after the relevant section of the U.S. Atomic Energy Act) will establish the legal framework for the United States to engage in civil nuclear cooperation with Norway under agreed nonproliferation conditions.

This Agreement reflects the strength and breadth of the long-standing and strategic U.S.-Norway relationship. The Agreement will establish a firm foundation for mutually beneficial cooperation in civil nuclear energy in conformity with the highest standards of safety, security, and nonproliferation.

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## **C. ARMS CONTROL AND DISARMAMENT**

### **1. United Nations**

#### ***a. Disarmament Commission***

On April 4, 2016, U.S. Representative John A. Bravaco delivered remarks at the 2016 session of the UN Disarmament Commission. His remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7215>

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...[O]ur bilateral nuclear reduction efforts with the Russian Federation are an essential part of our comprehensive, full-spectrum approach to nuclear disarmament. The U.S. stockpile today is 85 percent lower than the Cold War high. Three years ago, in June 2013 in Berlin, President Obama stated the U.S. willingness to negotiate with Russia a reduction of up to one-third of our deployed strategic weapons from the level established in the New START Treaty. That offer is still on the table. Progress requires a willing partner and a conducive strategic environment.

In the multilateral realm, most recently at the Conference on Disarmament (CD), we have proposed a creative compromise to begin long-delayed negotiations on a global treaty banning the production of fissile material for use in nuclear weapons or other nuclear explosive devices. In any such CD negotiation, all issues would be on the table for discussion, and all national equities would be protected by the principle of consensus. An in-force Fissile Material Treaty and Comprehensive Nuclear-Test-Ban Treaty will impose quantitative and qualitative caps on nuclear weapon stockpiles, which in turn will help to set the foundation for the world without

nuclear weapons that all of us seek to establish. In making our latest fissile material proposal in the CD, we earnestly tried to take the stated concerns of all CD Member States into account. Our proposal has received strong support from many CD Member States, and also remains on the table.

Mr. Chairman, in pursuing nuclear disarmament, the United States embraces a realistic and practical approach. We can never separate disarmament from the global security environment or strategic stability considerations, or divorce it from our security commitments to friends and allies. Progress on nuclear disarmament will not be made by ignoring the security imperative of retaining a safe, secure, and effective nuclear deterrent for as long as nuclear weapons exist.

In seeking to build support for realistic and practical measures for nuclear disarmament, it is clear that more genuine dialogue between the nuclear-weapon States and non-nuclear-weapon States is needed.

This is one reason why in Prague in December 2014, Under Secretary of State Rose Gottemoeller announced a new initiative by the United States to form an International Partnership for Nuclear Disarmament Verification. The Partnership is composed of both nuclear-weapon States and non-nuclear-weapon States, and is being implemented in collaboration with the Nuclear Threat Initiative (NTI).

The Partnership builds on prior efforts, such as the U.K.-Norway Initiative, which began in 2007 by seeking practical solutions to future arms control and disarmament technical challenges. We thank both nations for their pioneering efforts in this exciting work.

The Partnership aims to build capacity in the field of nuclear disarmament verification, for without such capacity global nuclear disarmament will never be achieved. The Partnership is also furthering understanding of the complexities inherent in nuclear disarmament verification and monitoring. For example, under the New START Treaty, inspection activities are focused on delivery vehicles. But in a future agreement, we are likely to be focused on individual warheads, which is a new and difficult challenge. The Partnership offers international leadership by facilitating technical progress to address the challenges of nuclear disarmament verification.

Mr. Chairman, in March 2015, the Partners agreed to establish three working groups: one on monitoring and verification objectives; one on on-site inspections; and one examining technical challenges and solutions. The Partnership's three working groups met for the first time in Geneva in February to continue their work. In Geneva, more than 80 experts from 20 countries participated in the working group discussions. The working groups developed a simple scenario involving the dismantlement of a notional nuclear weapon, the related inspection of that dismantlement by a team of experts representing the interests of all participating States, and the related technologies that could support such an inspection. This scenario allows the three working groups to coordinate and focus their efforts and develop common understandings of the challenges and potential solutions associated with nuclear disarmament verification. The working groups' Terms of Reference, which provide the framework for these groups to continue to pursue their technical discussions and work, are posted in their entirety on the State Department's and NTI's websites.

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Mr. Chairman, in the end, our ability to make headway in this body will depend on how prepared delegations are to exhibit flexibility and practice compromise. Given past disappointments here, we are under no illusions about the challenges before us. We simply need

to keep trying and to try harder. The Disarmament Commission is an important element of the UN's existing multilateral disarmament machinery and is worthy of such efforts. The United States pledges to do all that it can to help find a viable way forward for the work of this Commission.

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**b. First Committee**

The UN General Assembly's First Committee adopted a resolution in October 2016, entitled "Taking forward multilateral nuclear disarmament negotiations." The resolution was subsequently adopted by the General Assembly on December 23, 2016. U.N. Doc. A/RES/71/258. The United States voted against the resolution. On October 14, 2016, during the First Committee's thematic discussion on nuclear weapons, Ambassador Robert Wood, U.S. Permanent Representative to the Conference on Disarmament, explained the U.S. position on the resolution, which proposes negotiations on a treaty to ban nuclear weapons. Ambassador Wood's remarks are excerpted below and available at <https://geneva.usmission.gov/2016/10/18/ambassador-wood-remarks-at-u-n-general-assembly-first-committee-thematic-discussion-on-nuclear-weapons/>

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On April 5, 2009, in Prague, President Obama stated the U.S. commitment "to seek the peace and security of a world without nuclear weapons" and to take concrete steps to that end. The United States remains as committed as ever to this goal and to making progress on nuclear disarmament. We have made tremendous progress in reducing the number of nuclear weapons over the last 50 years. Though some are dissatisfied with the pace of disarmament, we remain convinced that the pragmatic and consensus-based approach that has successfully brought us to this point remains the right one going forward.

Today, some states believe the time has come to abandon this pragmatic and consensus-based approach and instead pursue a radically different path that would simply declare a ban on nuclear weapons. We must evaluate this new approach using the same criteria that we apply to our current one. Will it improve global security and stability or undermine it? Will it build a coalition for disarmament or fracture the international community? Will it lead to real reductions in nuclear weapons or be a treaty for political, not practical effect? How can such an approach be verified? The United States has carefully applied these questions to the ban treaty concept and it fails to successfully meet the necessary criteria for success on four counts.

First, a treaty banning nuclear weapons will not lead to any further reductions because it will not include the states that possess nuclear weapons. Advocates of a ban treaty say it is open to all, but how can a state that relies on nuclear weapons for its security possibly join a negotiation meant to stigmatize and eliminate them.

Second, a ban treaty would undermine existing nonproliferation and disarmament regimes. It risks creating an unbridgeable divide between states, polarizing the political environment on nuclear disarmament, and effectively limiting any future prospect for achieving consensus, whether in the NPT review process, the UN, or the CD. This deepening divide could

impact other aspects of the NPT, including strengthening cooperation in the peaceful applications of nuclear energy or ideas to reinforce the nonproliferation pillar, contributing to the growing tendency to treat the treaty's three pillars as competing priorities rather than reinforcing interests. Rejecting security considerations related to nuclear weapons leaves no room for discussion on "effective measures" needed to sustain nuclear disarmament progress, thereby discouraging, not promoting, needed dialogue.

Third, verification regimes are one of the key components of successful nuclear disarmament and nonproliferation agreements. The ability to verify provides the confidence needed to make further reductions while maintaining regional and global security. The United States is working actively to address the very real challenges of verifying future arms control agreements including through the International Partnership for Nuclear Disarmament Verification, which includes both nuclear weapon states and non-nuclear weapon states. One thing that is clear today, however, is that we have not overcome the challenges or built the capacity needed to effectively verify a treaty banning all nuclear weapons.

Finally, a ban treaty runs the risk of undermining regional security. We cannot deny the reality that nuclear weapons continue to play a role in maintaining peace and stability in some parts of the world. We ignore that reality at our peril. This could further foster uncertainty in regions as states are forced to reevaluate their security environment. It is unrealistic to ask non-nuclear weapon states and nuclear weapon states alike to reject their current security arrangements without addressing the underlying security concerns that led them to seek such arrangements in the first place.

Some make a false assertion of a "legal gap" in implementation of the NPT; in crafting the Art VI obligation for "good faith negotiations," negotiators recognized they could not prescribe the modalities for eliminating nuclear weapons, given the need to account for prevailing security conditions. Successive agreements or unilateral steps to reduce nuclear arsenals and reliance on them have proven the wisdom of this approach.

The current challenge to nuclear disarmament is not a lack of legal instruments. The challenges to disarmament are a result of the political and security realities we presently face. The United States is ready to take additional steps including bilateral reductions with Russia and a treaty ending production of fissile material for use in nuclear weapons. Unfortunately, some states are currently unwilling to engage in further nuclear reductions, and others are increasing their arsenals. At the same time, violations of international norms and existing agreements are creating a more uncertain security environment and making the conditions for further reductions more difficult to achieve. A ban treaty will do nothing to address these underlying challenges.

For all of these reasons, the United States will vote "no" on any resolution establishing nuclear weapons ban treaty negotiations, and will not participate in the negotiations. We urge all others to do the same.

The world's nuclear weapons arsenals did not appear overnight and they will not be drawn down overnight. We cannot lose sight of the fact that while we might disagree on process, we all agree on the goal: the peace and security of a world without nuclear weapons. In this spirit, let us all rededicate ourselves to doing the hard work together to create the conditions to make real nuclear disarmament possible.

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Ambassador Wood also delivered remarks at the 71st Session of the General Assembly First Committee thematic discussion on other weapons of mass destruction on October 18, 2016. Ambassador Wood's remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7494>

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Mr. Chairman, colleagues, at the heart of the Chemical Weapons Convention, the CWC, is a solemn conviction: for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons through the implementation of the Convention. This commitment is coupled with the equally important pledge not to tolerate possession and use of such heinous weapons, be it by State or Non-State Actors. Use of chemical weapons by anyone, anywhere is a threat to all of us, and calls for a swift response. Inaction is unacceptable.

In August of 2013, the Asad regime in Syria launched a deadly chemical weapons attack with a nerve agent on the opposition-held suburbs of Damascus, killing over 1,000 people and injuring thousands more. Despite the overwhelming evidence of its continued use of chemical weapons, the regime continues to deny any involvement. Since its accession to the CWC following that horrific attack three years ago, the international community has collectively sought a full and accurate declaration by Syria of its chemical weapons program and its complete and verifiable destruction.

This past August, the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, JIM, established by UNSCR 2235, released its report finding that the Syrian military was responsible for two instances of confirmed CW use in Syria and that the so-called "Islamic State of Iraq and the Levant" or ISIL was responsible for one additional instance. The attacks attributed to the Syrian military involved barrel bombs dropped from helicopters that released toxic substances—most likely chlorine—in the opposition-controlled areas of Talmenes and Sarmin. The OPCW-UN JIM, an independent and expert international body, has drawn the same conclusions that the United States reached long ago: that the Syrian regime has systematically and repeatedly used chemical weapons against its people. It is now impossible to deny that the Syrian regime has repeatedly used toxic industrial chemicals as weapons in violation of the CWC and UN Security Council Resolution 2118.

Mr. Chairman, our course of action is clear. The international community must stand together to preserve the integrity and viability of the CWC and the international laws, norms, and standards against the use of chemical weapons. We must collectively condemn in the strongest possible terms the use of chemical weapons by the Syrian regime and ISIL and hold the perpetrators of such heinous attacks to account through all available mechanisms, including appropriate action in the OPCW and the United Nations Security Council. In parallel, we must insist that the Syrian regime address outstanding concerns about its chemical weapons declaration, which the OPCW has attempted for more than two long years to clarify without success due to the intransigence of the Syrian regime.

Mr. Chairman, Hungarian Ambassador Molnar, the distinguished President-designate of the upcoming 8th Review Conference of the Biological Weapons Convention, BWC, presented a Statement on behalf of the Foreign Minister of Hungary, and the Foreign Ministers of the three BWC Depositories, the Russian Federation, the United Kingdom and my country, the United

States. That statement underscores the importance our governments attach to the BWC and to taking decisions at the upcoming Review Conference to enhance its effectiveness.

The BWC Review Conference takes place at a sobering time. The continuing use of chemical weapons, the stated intentions of non-state actors to obtain BW, and a recent conviction, July 2015, in the UK of an individual attempting to acquire ricin are grim reminders that weapons already condemned by the international community are still used. The many benefits derived from advances in the life sciences also place biological weapon capabilities within reach of more State and non-State actors than ever before. The recent Ebola outbreak reminds us of how destructive disease can be, and of the importance of developing national and international capacity to detect and respond to outbreaks. States Parties should use the upcoming BWC Review Conference to confront these threats by taking stronger action, including through a more effective intersessional program, focusing on practical steps. The United States believes such steps should be taken in the areas of: robust national implementation measures and greater transparency; coordination among States Parties to respond to a suspicious outbreak or biological weapons attack; assessing potential impact on the BWC due to science and technology developments; and promoting and coordinating relevant international cooperation and capacity-building.

Strengthening the BWC in these areas depends on adapting the current intersessional process to include more focused expert work, more oversight of the process, and an ability for appropriate decision-making between Review Conferences. This would require more time and resources, but these extra resources would improve the BWC's ability to counter biological threats.

Mr. Chairman, the United States shares the concerns that have been expressed by other UN Member States regarding the threat of chemical and biological terrorism. These threats are real, and the United States is of the firm view that they should be addressed in the context of the existing international frameworks and the BWC Review Conference in November presents an opportunity to do so.

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## 2. Comprehensive Nuclear Test Ban Treaty

On June 13, 2016, Under Secretary Gottemoeller addressed the ministerial meeting of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in Vienna, Austria. Under Secretary Gottemoeller's statement is excerpted below and available at <http://2009-2017.state.gov/t/us/2016/258408.htm>.

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I am honored to be here representing the United States of America, as we commemorate the 20th anniversary of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and the establishment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization.

I would like to begin by reading a statement from President Barack Obama:

I send greetings to all those commemorating the 20th anniversary of the adoption of the Comprehensive Nuclear-Test-Ban Treaty (CTBT), and I am pleased to recognize the important contributions of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization over the past two decades.

Since the United States signed the CTBT in 1996, we have strengthened the nuclear nonproliferation regime and enhanced the security of our world. Though we have made great progress, the Treaty's full potential has not been fulfilled. We must remain steadfast in our support for the Treaty and for the critical work of the Preparatory Commission.

I am proud of the role the United States has played in negotiating this Treaty, and our continued support for the work of the PrepCom and its Provisional technical Secretariat to prepare for the effective implementation of the treaty. I commend your countries' continued contributions to this cause and urge all members of the PrepCom to make available the political, technical, and financial resources necessary to complete the Treaty's Verification regime.

A legally-binding prohibition on nuclear weapon test explosions or any other nuclear explosions is a meaningful step toward nuclear disarmament—a goal achievable once the CTBT enters into force. I wish you all the best for a successful Ministerial Meeting.

Ladies and Gentlemen, 53 years and 3 days ago, President John F. Kennedy called for a treaty outlawing all nuclear explosive tests. "The conclusion of such a treaty," he said, "would check the spiraling arms race in one of its most dangerous areas... the further spread of nuclear arms."

"Surely this goal," he said, "is sufficiently important to require our steady pursuit, yielding neither to the temptation to give up the whole effort nor the temptation to give up our insistence on vital and responsible safeguards."

Despite global tensions, despite the scientific barriers, despite the political divisiveness, we did not give up. The United States is proud of its role in the negotiation of a comprehensive ban on nuclear explosive testing and we were proud to be the first nation to sign the CTBT after it opened for signature in 1996.

The United States signed the CTBT because we recognized the potential of this Treaty to significantly strengthen the nuclear nonproliferation regime, thereby enhancing the security of our nation and every nation around the world.

As President Obama stated, the full potential of the CTBT remains unfulfilled, but the United States is steadfast in our support for the Treaty and for the critical work of the Preparatory Commission. Our dedication to the Treaty is demonstrated through unmatched monetary and technical support and our clear commitment to ensuring that the verification regime is completed, and functions as intended.

We hope that all of today's statements of support for the Treaty will be transformed into tangible resources. Every Signatory to the Treaty must support the work of the Preparatory Commission to complete the Treaty's verification regime and help enhance the effectiveness of the Provisional Technical Secretariat. We must all work to upgrade the International Data Centre (IDC) and ensure the completion of an effective On-Site Inspection capability.

Despite our clear support for the CTBT, the United States acknowledges that we have not completed our work on ratification and that our delay gives cover to other Annex 2 countries who have also failed to secure ratification of the Treaty.

That is why we are building support for this Treaty, state by state, and sometimes person by person, because we know that a global ban on nuclear explosive testing is good for our country. We are making it clear to the American public that our scientists and military experts agree that the CTBT is verifiable and we do not need to conduct explosive testing in order to maintain a safe, secure and effective nuclear stockpile.

I will not deny that this work is difficult and that we face domestic political obstacles. That does not change that fact that this Treaty is in our national security interest and so it is incumbent upon us to convince those that doubt this fact. We are certain that we have a good case to make. We will continue to make it. We will also continue to look for ways to affirm the political norm against testing nuclear weapons.

As we work through our process, I call upon all Annex 2 States to complete their own ratification processes. I also call upon those States to tell this community about your plans for ratification. Moving forward in a clear and transparent way is what we can all do to honor this anniversary and all the work that went into getting us here.

Ladies and Gentleman, 53 years and 3 days ago, the world was issued a challenge, and today we are closer than ever to bringing a global ban on nuclear explosive testing into force. We cannot and must not give up.

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On September 15, 2016, the Governments of China, France, the Russian Federation, the United Kingdom, and the United States (the NPT Nuclear-Weapons States) issued a joint statement on the CTBT. The joint statement follows, and was released as a State Department media note at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261993.htm)

[2017.state.gov/r/pa/prs/ps/2016/09/261993.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261993.htm)

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Our commitment to nuclear disarmament extends to efforts to bring the Comprehensive Nuclear-Test-Ban Treaty (CTBT) into force at an early date. We welcome that 183 States have signed the treaty and 166 States have ratified the Treaty, including several nuclear weapons States. We pledge to strive for the Treaty's early ratification and prompt entry into force and urge all states that have not done so to sign and ratify the treaty. We take this opportunity to reaffirm our own moratoria on nuclear weapons test explosions or any other nuclear explosions pending the CTBT's entry into force, as such moratoria are an example of responsible international behavior that contributes to international peace and stability, while stressing that such moratoria do not have the same permanent legally binding effect as entry into force. We call on other states to do likewise, recognizing that a nuclear-weapon test explosion or any other nuclear explosion would defeat the object and purpose of the CTBT.

The CTBT constrains the development and qualitative improvement of nuclear weapons and thereby provides an effective disarmament and nonproliferation measure. We further note that our nuclear stockpile maintenance and stewardship programs are consistent with NPT and CTBT objectives. We emphasize the very substantial efforts made in achieving the cessation of the nuclear arms race as called for in Article VI of the NPT and affirm our intention never to engage in such an arms race.

We are working closely with the Preparatory Commission for the CTBT Organization in Vienna on the development of the Treaty's verification regime, including its International Monitoring System, International Data Centre, and On-Site Inspection, while recognizing the high effectiveness and reliability of this regime to date, the Preparatory Commission is currently operating the IMS and IDC, and their respective means of communication, on a testing and provisional basis. We continue to contribute extensively to the development of the Treaty's on-site inspection element, supplying personnel, equipment, and research. This has been in addition to our long-standing efforts to reinforce the organization's detection capability through contributions in-kind, equipment transfers, and expert participation in Working Groups. We also call for all signatories to support efforts to complete the necessary preparation for the effective implementation of the CTBT's verification regime, on its entry into force.

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Secretary Kerry delivered remarks at a UN Security Council meeting on the CTBT on September 23, 2016. His remarks are excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7454>.

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Today, our countries have the opportunity to vote once again to sign onto, to reaffirm the CTBT's promise of a safer, more secure, and more peaceful planet. And the resolution that we have an opportunity to adopt this morning is a strong and necessary statement of our principles and promises as a global community. It reaffirms the de facto norm—I emphasize, a norm—in the world today against nuclear testing. It acknowledges the legitimate interests of states that fully and faithfully renounce nuclear weapons to receive assurances against the use of the threat of the use of nuclear weapons, and that those assurances will be upheld. It reinforces the Nuclear Nonproliferation Treaty and its disarmament goals, and it builds support for the international efforts to strengthen verification and monitoring systems. And it encourages nations to make the necessary preparations for the day when this treaty enters into force.

I want to emphasize, the resolution does not impose a legal prohibition on testing, nor does it compel any government to adopt new reporting requirements. But it does reinforce the core purposes and objectives of the CTBT itself: to diminish our reliance on nuclear devices, to reduce competition among nuclear powers, and to promote responsible disarmament.

Now, let me just add for a moment, next month in Reykjavik, the 30th anniversary of the Gorbachev-Reagan meeting will be celebrated, remembered. And I want everybody to think about where we were. I grew up in a world of hiding under my desk in school and being told to take cover and train for the possibility of a nuclear war, none of which would have done any

good, we know. And I can remember years in the Senate when I wanted to be on the Arms Control Observer Group, with luminaries such as Pat Moynihan and Ted Kennedy and John Warner and Sam Nunn, people who worked a lifetime to move towards responsible efforts here.

And through the years, we watched as the United States and the Soviet Union, the former Soviet Union, engaged in this arms race—tit for tat, each doing something that led the other to feel they had to respond, until we had 50,000 warheads facing at each other, until that moment of Reykjavik, when the two presidents came out and said this is insanity; we have to move in a different direction.

And ever since then, that's exactly what the world has been doing. We've moved in a different direction—from 50,000 warheads, we're now down to about 1,550. And we have proposed to move even further down. And you have brilliant people who spent a lifetime looking at this—a former Secretary of Defense Jim Schlesinger, former Secretary of State Henry Kissinger, Bill Perry, Sam Nunn—people that you wouldn't expect talking about the possibility of a world without nuclear weapons. And most recently, the United States and Iran spent two long years negotiating what everybody thought was the improbable—a nation that hadn't talked to—well, two nations that hadn't talked to each other since 1979 began a conversation in the room right in back of this chamber, the first time I came here for UNGA, and we turned that into a nation actually giving up a nuclear program and making it clear to the world it was willing to move away from the path of a nuclear weapon in order to make the world safer.

So two decades after this process began, there may be some who question the value of pursuing this treaty or investing in its adoption, because the world has changed dramatically. Almost every member of the United Nations has now renounced the option of testing and responsible governments everywhere are committed to reducing the dangers that are posed by nuclear materials and nuclear weapons.

Yet we have been reminded in recent weeks of the absolute necessity of supporting the CTBT. North Korea's latest nuclear test is a challenge to this council's leadership. It is a challenge to the norm that I just articulated. It is a challenge and a direct threat to international stability and peace. It is a dangerous and reckless act of provocation which we have to summon a determined and effective answer to.

Today, this morning, is an affirmation of our willingness to make that clear, to give that answer, to take a step that says we will not lose our commitment, we will remain committed to moving in the direction of ending the threat of nuclear war. Today is also a reminder of the value of the CTBT. The DPRK's actions and our response demonstrate the effectiveness of the International Monitoring system, of the International Data Center, of the broader verification and detection regime. And this entire episode has offered a stark reminder of why the infrastructure of this treaty is so vital and why adopting this resolution is so important.

My friends, our affirmative vote here is a sign of our unwavering commitment to a safer world in which nuclear technology is used solely for peaceful purposes and the risk of nuclear conflict is no more. I can tell you that we are engaged right now in a process in the United States Government with the Senate, where we have many new members who have not been part of this debate, where we're beginning a process of literally explaining and educating what the advances in technology do for us. In today's modern world of virtual capacity and of computerization and artificial intelligence, we don't need to blow up weapons to know what we can do.

We have the ability to do this, and I simply say to all that I can think of few greater gifts that we and our generation could give to the next than an affirmation that we will continue to

move away from the possibilities of nuclear weaponry. Our action today can give people everywhere that a world without nuclear weapons might actually be possible and that we're going to do everything responsible in our capacity to be able to make that day a reality.

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As referenced in Secretary Kerry's remarks, the UN Security Council took up a resolution on the CTBT and adopted resolution 2310 on September 23, 2016. The State Department issued a media note on resolution 2310, excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/262343.htm>

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The Department of State welcomes the adoption today of UN Security Council Resolution 2310 on support for continued moratoria on nuclear explosive testing and broad international support for the Comprehensive Nuclear-Test-Ban Treaty (CTBT), twenty years after the Treaty's opening for signature.

This Resolution is a strong and important statement of international support for the President's agenda to reduce nuclear dangers. It also encourages nations to make the necessary preparations for the day when the CTBT enters into force, and reinforces the Nuclear Non-Proliferation Treaty as a framework for achieving the peace and security of a world without nuclear weapons.

The Resolution does not impose legal prohibitions on testing. It does, however, reinforce the broader objectives of the CTBT itself, namely to diminish reliance on nuclear weapons; to reduce competition among nuclear powers; and to promote responsible nuclear disarmament.

The timeliness and importance of this resolution are underscored by the DPRK's latest nuclear test, a direct threat to international peace and security and a reminder of the value and absolute necessity of the CTBT.

The CTBT's International Monitoring System and International Data Centre rapidly detected the North Korean test, offering a stark reminder of why the infrastructure built to support this treaty is so vital and why passing this resolution is so important.

It is important to note that this Resolution is not a substitute for entry into force of the CTBT, which requires, among other things, ratification by the United States with the advice and consent of the U.S. Senate.

The Administration is committed to working with the Senate to build support for eventual ratification. In the meantime, this clear reaffirmation of the moratoria against nuclear explosive testing and support for the Treaty's verification infrastructure serves the U.S. national security interest.

For the full text of the Resolution or more information on the Comprehensive Nuclear-Test-Ban Treaty, visit [www.state.gov/ctbt](http://www.state.gov/ctbt)

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### 3. International Partnership for Nuclear Disarmament Verification

As discussed in *Digest 2014* at 824-25, and *Digest 2015* at 863-66, the United States advocated for and led the way in establishing the International Partnership for Nuclear Disarmament Verification (“IPNDV”). The IPNDV held plenary sessions in 2016 and its three working groups met in Geneva February 18-19 and 22-23. The State Department’s Bureau of Arms Control, Verification, and Compliance issued a media note about the working group meetings, excerpted below and available at <http://2009-2017.state.gov/t/avc/rls/2016/253944.htm>.

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More than 80 experts from 20 countries participated in the working group meetings discussing a variety of topics related to their work. The working groups focused on a scenario involving the dismantlement of a notional nuclear weapon, the related inspection of that dismantlement by a team consisting of nuclear weapon state and non-nuclear weapon state experts, and the related technologies that could support such an inspection. This scenario allows the three working groups to coordinate their efforts and develop common understandings of the challenges and potential solutions associated with nuclear disarmament verification.

- Working Group 1 considered verification objectives for the dismantlement phase of the nuclear weapons lifecycle, including the types of information and criteria needed to determine whether those objectives are being met, and the specific areas of expertise and resources required.
- Working Group 2 identified useful elements, drew lessons from a number of existing on-site inspection regimes, and began to assess the applicability of fundamental on-site inspection principles to possible future nuclear disarmament verification activities. The group began to explore the knowledge and training inspectors might require to do their jobs effectively and to manage on-site inspections to ensure they provide effective verification while meeting national safety, security and non-proliferation requirements.
- Working Group 3 began to discuss and identify solutions to the technical challenges related to nuclear warhead authentication, and monitored storage and the chain of custody required for monitoring warheads and warhead components. Seven countries provided briefings on 13 technologies, and work commenced to develop a matrix that identifies specific technology that would not reveal sensitive information for use in support of the dismantlement scenario developed by working Group 1.

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On March 21, 2016, Assistant Secretary Frank Rose delivered remarks at an IPNDV roundtable in Washington, D.C. His remarks are available at <http://2009-2017.state.gov/t/avc/rls/254908.htm>.

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In its first year, the Partnership has made significant progress.

Twenty-nine countries plus the European Union have participated so far, bringing to bear a wide range of expertise working to create an effective foundation for nuclear disarmament verification.

At the first IPNDV plenary in March 2015, Partners agreed to establish three working groups: one on monitoring and verification objectives; one on on-site inspections; and one examining technical challenges and solutions associated with verification.

To build on this work, the Partners met in Oslo from November 16-18 for our second Plenary. We heard from leading experts from all over the world on different arms control inspection regimes, the latest research on monitoring and verification, and the technical challenges associated with the verification of nuclear disarmament.

The key results from the Oslo plenary were threefold:

First, we agreed on the near-term scope of work for IPNDV. While there was discussion about the entire lifecycle of nuclear weapons, the Partnership will focus in the near term on monitoring and verification issues associated with warhead dismantlement.

Second, we reached agreement on the Terms of Reference for the three Working Groups.

Third, Partners agreed to hold the third IPNDV Plenary in Japan in June 2016.

The Partnership is not fundamentally about policy; it is about finding technical solutions to the practical challenges associated with monitoring and verifying nuclear disarmament. The agreed Terms of Reference, which are posted in their entirety on the State Department's and NTI's websites, provide the framework for these groups to begin their technical discussions and work.

The three working groups met last month in Geneva, and further refined the scope and process of their work.

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On July 1, 2016, Assistant Secretary Rose addressed the IPNDV plenary in Tokyo, Japan. His remarks are excerpted below and available at <http://2009-2017.state.gov/t/avc/rls/259457.htm>

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In his remarks in Hiroshima this past May, President Obama spoke about how science, technology, and the human capacity for innovation have yielded life-saving discoveries. Those same developments have, sadly, “also give(n) us an unmatched capacity for destruction.” It is the destructive force of nuclear weapons that informs the President’s desire to reduce the role and number of nuclear weapons in a way that promotes international security and stability.

To support these efforts, in December 2014, Under Secretary of State for Arms Control and International Security, Rose Gottemoeller announced that the U.S. government would establish an International Partnership for Nuclear Disarmament Verification (IPNDV) in cooperation with the Nuclear Threat Initiative (NTI). This first of its kind partnership pools technical expertise from Nuclear Weapon States and Non-nuclear Weapon States, creating a cooperative framework focused on building capacity among states in the field of nuclear

disarmament verification. 27 states in total, plus the European Union, are participating in the IPNDV.

First, the Partnership can improve and broaden Partners' understanding of the technical challenges of future nuclear disarmament verification; and second, the Partnership can facilitate progress to address those challenges.

President Obama's vision of a world without nuclear weapons is not one easily reached. Tackling verification challenges is just one component, but a critical component, of making progress in reducing the arsenals of nuclear armed countries. At the Peace Memorial in Hiroshima, President Obama spoke of creating the security conditions so that future generations will be spared the horrors of violent conflict and atomic warfare. To achieve this, it is essential that countries have the ability and the confidence to verify future arms control and disarmament agreements.

This is not new; effective verification is a key feature of any successful arms control agreement. However, the requirements for verification have and will continue to become more demanding as the numbers of weapons decrease and treaties become more complex. For example, the earliest bilateral U.S.-Soviet arms control treaties did not provide for any on-site inspection, let alone the type of intrusive inspection regimes seen today in the New START Treaty. Indeed, just fourteen lines of text in the New START Treaty are devoted to the central limits.

What gives the parties the confidence to meet those levels and what contributes to predictability and stability are all the processes and procedures that make up the more than 350 other pages of the Treaty. As the world draws down to lower numbers of nuclear weapons, it is very likely that future arms control treaties and agreements will need to provide for new and even more intrusive inspection provisions, including access to new types of facilities and new items subject to inspection, such as the nuclear warheads themselves.

So we need to understand the technical challenges we are sure to face in this endeavor. When looking for possible solutions, we know that the Nuclear Weapon States do not have a monopoly on good ideas. Non-nuclear Weapon States bring not only tremendous scientific and technical expertise, but also new ideas and enthusiasm. The Partnership brings together this collective expertise to better understand the challenges, develop possible solutions, and build confidence in the tools and technologies that will enable us to verify nuclear disarmament.

The United States sees this engagement as a long-term investment in building capacity and technical solutions towards nuclear disarmament.

It is in line with the goals of the Nuclear Nonproliferation Treaty (NPT) and the Action Plan from the 2010 NPT Review Conference. Let me stress that the Partnership is not fundamentally about policy; it is about understanding technical challenges and identifying possible solutions to the practical challenges associated with monitoring and verifying nuclear disarmament.

Solutions in this case involve more than just technology. Examining potential inspection procedures and protocols—hallmarks of today's arms control treaties and agreements—and the requisite training to employ them—is another challenge that the Partnership is tasked with confronting.

We understand that not everyone shares the U.S. approach to disarmament. We just have a difference of opinion. We believe there are no short-cuts to reaching a world without nuclear weapons. We also believe that initiatives like the Partnership can help us solve the technical

challenges associated with verification, the essential components of any meaningful bilateral or multilateral nuclear disarmament effort.

In doing so, we can make real and important progress toward our shared disarmament goals, free from the ebbs and flows of the political environment, while opening new lanes of multilateral cooperation to achieve those goals. With a force as destructive as nuclear weapons, all States have an interest to ensure that we have the right tools, technologies and procedures necessary to verify future reductions in nuclear arsenals and eventually their complete elimination.

This is why the work of the Partnership is so important. The IPNDV provides a forum for nuclear weapon states and non-nuclear weapons states that are serious about making tangible progress on disarmament to work together toward that common goal.

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#### 4. New START Treaty

February 5, 2016 was the fifth anniversary of the New START Treaty's entry into force. Secretary Kerry issued a press statement commemorating the anniversary, available at <https://2009-2017.state.gov/secretary/remarks/2016/02/252210.htm>. The Bureau of Arms Control, Verification, and Compliance issued a fact sheet on the anniversary, excerpted below and available at <https://2009-2017.state.gov/t/avc/rls/2016/252206.htm>.

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Since its entry into force (EIF) on February 5, 2011, the New START Treaty has provided for the safety and security of the United States and our Allies, while advancing mutual cooperation, transparency, and stability with the Russian Federation on strategic nuclear arms. New START enables the United States to verify information about Russia's strategic nuclear arsenal through on-site inspections at nuclear weapons facilities and by providing both sides access to each other's strategic nuclear delivery systems, warheads, and facilities. This builds confidence that obligations are being fulfilled, including meeting the Treaty's central limits, when they take effect in 2018.

##### Key Facts

Thirty years ago, U.S. and Soviet arsenals totaled more than 20,000 deployed strategic nuclear weapons. The United States and the Russian Federation undertook to each meet New START's central limits of 1,550 deployed warheads, 700 deployed strategic launchers and heavy bombers, and 800 deployed and non-deployed strategic launchers and heavy bombers by February 5, 2018.

Since EIF, the United States and Russia have:

- Sent and received through the Nuclear Risk Reduction Centers more than 10,300 notifications regarding the location, movement, and status of their strategic nuclear forces;

- Performed 10 data exchanges with a full accounting of exactly where weapons systems are located, whether they are out of their deployment or operational bases and gone to maintenance, or have been retired, giving us a comprehensive look into each other's strategic nuclear forces every six months;
- Conducted 180 on-site inspections (each party has an annual quota of 18 inspections); and,
- Completed 13 exhibitions to demonstrate distinguishing features and technical characteristics of new types of strategic offensive arms or demonstrate the results of a conversion of a strategic offensive arm subject to New START.

Further, the United States and Russia continue to meet twice each treaty year within the Treaty's Bilateral Consultative Commission (BCC) to discuss issues related to treaty implementation, with no interruption of work due to other global crises causing friction in the bilateral relationship. Several statements and agreements have been concluded in the BCC to continue the successful implementation of this Treaty. When the New START Treaty limits take effect in February 2018, U.S. and Russian forces will be capped at their lowest level since the 1950s, the first full decade of the nuclear age.

The Treaty also allows us the flexibility to modernize the U.S. nuclear deterrent and ensure its safety, security, and effectiveness without constraining U.S. missile defenses or long-range conventional strike development. For the duration of New START, the U.S. triad of ICBMs, SLBMs, and nuclear-capable heavy bombers will be maintained, keeping all Ohio-class strategic submarines in the force for the near term and "de-MIRVing" all Minuteman III ICBMs to a single warhead each to increase stability in a crisis. The Administration will continue to request funds to sustain and modernize the triad, including: continuing the Minuteman III life extension program; developing new technologies to replace the current fleet of Ohio-class SSBNs; investing to support upgrades to the B-2 stealth bomber; and, funding a new air-launched, long-range cruise missile and long-range bomber.

The successful implementation of New START continues to preserve stability and transparency between the two countries, and serves as a concrete step by both countries in their strategic relationship toward an eventual world without nuclear weapons. We look forward to continuing this important cooperation with the Russian Federation and commemorate our work to this point, while acknowledging the work yet to be done.

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On October 18, 2016, the Bilateral Consultative Commission concluded its 12<sup>th</sup> session under the New START Treaty. See State Department media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263267.htm>. As described in the media note, the sessions allow the U.S. and Russian delegations to "discuss practical issues related to the implementation of the Treaty."

## 5. INF Treaty

In November 2016, the Special Verification Commission under the INF Treaty held its 30<sup>th</sup> session in Geneva. See State Department November 16, 2016 media note, available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264375.htm>. Delegations from Belarus, Kazakhstan, Russia and Ukraine met with the U.S. delegation to discuss

compliance with the Treaty (the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles).

## 6. Open Skies Treaty

On June 6, 2016, the Bureau of Arms Control, Verification, and Compliance issued a fact sheet on the Open Skies Treaty, available at <http://2009-2017.state.gov/t/avc/rls/2016/258061.htm>. The fact sheet discusses key facts about the Treaty.

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Since the Treaty entered into force in 2002, the United States has flown nearly three-times as many flights annually over Russia as Russia flies over the United States. The annual Open Skies Treaty flight plans (2002-2016) show 196 bids by the United States over Russia and 71 bids by Russia over the United States. Further, the United States can request copies of the imagery from other State Parties' flights over Russia. Since 2002 there have been over 500 such flights by other States Parties over Russia.

...The Treaty's primary value is its role in building transparency and confidence, not intelligence gathering. Observation flights allow States Parties to avoid surprises in a cooperative way. The bilateral and multilateral engagement of military personnel in planning and executing week-long missions is important to building military-military confidence. The Treaty-mandated coordination that is part of every flight provides a unique opportunity to interact with our Allies and Russia and allows us a first-hand look over Russian territory.

Although the United States has significant imaging capability outside of the Treaty, there are significant parts of Russia best imaged by Treaty aircraft. The Treaty provides valuable information, especially for our Allies and partners that do not have the same imaging capabilities as the U.S.

...The Treaty outlines procedures for certification of sensors, including a range of technical steps necessary to ensure that a sensor/aircraft combination complies with the Treaty imagery resolution limits. The Certifying Party must provide highly detailed technical information on the aircraft and performance characteristics of the sensor/aircraft combination. During certification, the Certifying Party must allow full access to the aircraft and sensor for examination and collection of imagery data over calibration targets. Parties analyze this data to determine and certify the minimum altitude at which a sensor/aircraft combination may be operated during an observation flight.

...The Treaty limits all optical sensors, including electro-optical, to 30 centimeter resolution; a level that allows parties to distinguish between a tank and a truck. The images collected by Russia and others will be of similar quality to those available from commercial imagery sources like Google Earth. However, commercial sources may not have current images of locations of interest to the observing party. The United States and Russia receive identical copies of all imagery obtained during missions, which allows us to verify the source of the

images. U.S. escorts monitor every Russian mission over the United States to ensure the sensor performance is consistent with what was certified.

...The United States flew over the arctic and far-east regions of Russia in April 2016 and the most recent flight over Kaliningrad was by Poland in May 2016. Russia has placed certain altitude restrictions over Moscow; a distance limit of 500 kilometers over Kaliningrad, and refused overflights within 10 kilometers of part of its border with Georgia.

...Since 2002, the [Open Skies Consultative Commission or] OSCC, a consensus organization, has taken 166 decisions to clarify and improve implementation of the Treaty, including four in 2015 directly related to the use of electro-optical sensors on Open Skies aircraft. The 2016 Compliance Report notes that we continue to have serious compliance concerns with several actions taken by Russia, and these issues continue to be raised with Russia in the OSCC, as well as bilaterally.

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## **D. CHEMICAL AND BIOLOGICAL WEAPONS**

### **1. Chemical Weapons in Syria**

On July 12, 2016, Ambassador Kenneth D. Ward, Permanent Representative for the United States to the Organization for the Prohibition of Chemical Weapons (“OPCW”), addressed the Executive Council of the OPCW. Ambassador Ward’s statement, excerpted below and available at <https://www.opcw.org/?id=2623> primarily focuses on the use of chemical weapons in Syria.

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The greatest challenge this Council has ever faced is the continuing Syrian chemical weapons crisis. In September, it will be three years since the adoption of our historic decision on the destruction of Syrian chemical weapons. Years ago...the entire Syrian chemical weapons stockpile...should have been completely eliminated. Instead, the years since the Council’s decision have been marked by stymied efforts of the Declaration Assessment Team (DAT), tragic findings of CW use by the Fact-Finding Missions, and the necessary establishment of the OPCW-UN Joint Investigative Mechanism. Today, the Council has before it a truly alarming report from the Director-General on his recent consultations with Syria regarding its declaration. This Council must now confront and address the compelling body of evidence indicating that, regrettably, Syria has never truly accepted the obligations or the ideals of the Chemical Weapons Convention (CWC).

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The United States has carefully reviewed the reports of the Secretariat and the DAT. We believe the sampling results obtained by the Secretariat are indicative of production, weaponization, and storage of CW agent by the Syrian military that has never been acknowledged by the Syrian government. We, therefore, remain very concerned that CW agent and associated munitions, subject to declaration and destruction, have been illicitly retained by Syria.

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...The United States has submitted for the consideration of the Council a draft decision that expresses deep concern with the report of the Director-General on consultations with Syrian officials and on the many unresolved issues with the Syrian declaration of its CW program. We urge all members of the Council to support this draft decision, and we will make every effort to achieve its adoption by consensus during this session.

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On August 24, 2016, Ambassador Power delivered a statement on the report of the OPCW-UN Joint Investigative Mechanism ("JIM") on the use of chemical weapons in Syria. Her statement is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7406>.

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The United States welcomes the submission of the report of the OPCW-UN Joint Investigative Mechanism (JIM) on the use of chemical weapons in Syria. We are reviewing its findings very carefully. The report confirms that the Syrian regime is responsible for the repeated use of chemical weapons in Syria. Such use is a violation of UN Security Council Resolution 2118, a violation of Syria's obligations as a state party to the Chemical Weapons Convention (CWC), and a violation of well-established international standards and norms against chemical weapons use. The report also found that ISIL was responsible for the use of chemical weapons in Syria.

The JIM has been working to determine attribution for nine cases of confirmed chemical weapons use in Syria. The report reflects the JIM's final determination for three, concluding in one case the use of mustard gas by ISIL, and in two cases the use of modified industrial chlorine by the Syrian regime. We expect the JIM to continue its investigation into the remaining confirmed cases, as well as any other confirmed chemical weapons uses referred to the JIM by the OPCW Fact Finding Mission.

Importantly, an independent team of international experts has now confirmed a pattern of use of chemical weapons by the Syrian regime that mirrors numerous other confirmed cases of chemical weapons use across Syria, and countless other allegations of such use, including as recently as several weeks ago. This horrific and continuous use of chemical weapons by Syria represents the greatest challenge to the legitimacy of the CWC since it entered into force, and an affront to a century's worth of efforts to create and enforce an international norm against the use of chemical weapons.

The world has rejected the use of chemical weapons as a barbaric tool, repugnant to the conscience of mankind. In April of last year, members of the Security Council met with Dr. Mohamed Tennari, a Syrian Arab Red Crescent-affiliated physician who dealt with a chlorine attack in March 2015 in the town of Sarmin. He played for the Council the video of his team's attempt to resuscitate children after the gruesome attack. Members of the Security Council cannot claim ignorance of the devastating, inhumane effects of these weapons. Three years after the horrendous chemical weapons attack in the opposition held town of Ghouta, the international community must act to hold accountable those who act in defiance of such fundamental international norms. When anyone—from any government or from any terrorist group—so flagrantly violates the global ban on chemical weapons use without consequences, it sends the signal that impunity reigns and it gravely weakens the counter-proliferation regime from which all of us benefit.

It is essential that the members of the Security Council come together to ensure consequences for those who have used chemical weapons in Syria. It is essential that all state and non-state actors immediately cease any chemical weapons use. We strongly urge all States to support strong and swift action by the Security Council.

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On October 11, 2016, Ambassador Ward again addressed the Executive Council of the OPCW on the issue of chemical weapons use in Syria. OPCW Doc. No. EC-83/NAT.5. His statement is excerpted below and available at

<https://www.opcw.org/?id=2625>.

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Today, ...the entirety of my statement is devoted to the gravest challenge that our Convention and this Organisation have ever faced. The future of both will hinge on the actions that this Council takes, or fails to take, at this session.

The common bond at the very heart of the Chemical Weapons Convention is a simply stated, but truly enlightened, conviction. We have all pledged to renounce the possession and use of chemical weapons and, as important, not to tolerate those who possess or use such heinous weapons—be they governments or non-State actors. Indeed, the preamble to our Convention enshrines our shared determination, for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons through the implementation of the Convention.

This session of the Council is confronted with a truly extraordinary and, indeed, unprecedented crisis, as an independent team of international experts has determined that a State Party to the Convention—the Syrian Arab Republic—was responsible for two confirmed uses of chemical weapons against opposition-controlled areas in Syria. The OPCW-UN Joint Investigative Mechanism (JIM) was established in August 2015 by a unanimous decision of the United Nations Security Council, resolution 2235 (2015), to identify those involved in incidents of chemical weapons use in 2014 and 2015 confirmed by the OPCW Fact-Finding Mission.

These attacks by the Syrian military involved barrel bombs dropped from helicopters that released a toxic substance—most likely chlorine—in Talmenes on 21 April 2014, and Sarmin on

16 March 2015. As detailed in the Fact-Finding Mission reports and underscored in the JIM's report, helicopter-delivered, barrel bombs are the all too common signature in confirmed chemical weapons attacks in the spring of 2014 and the spring of 2015. It is now impossible to deny that the Syrian regime has repeatedly and systematically used toxic industrial chemicals in violation of the Chemical Weapons Convention and United Nations Security Council resolution 2118 (2013), and in defiance of this Council's decision of 27 September 2013.

The JIM is now completing its investigation of similar chlorine barrel-bomb attacks occurring in 2014 and 2015, and by the end of this month, the JIM may report additional findings regarding chemical weapons use by the Syrian Arab Republic.

The United States of America condemns in the strongest possible terms the Syrian regime's use of chemical weapons. We call upon the Secretariat and all States Parties to remain vigilant as new allegations of chemical weapons use in Syria have recently arisen and are now being actively investigated by the OPCW Fact-Finding Mission. The alarming prospects for continued chemical weapons use further underscores the dangers of Syria's refusal to fully declare its chemical weapons programme. As I warned at the July Council session, the United States of America remains very concerned with undeclared activities involving traditional chemical weapons—nerve agent and mustard gas—and their associated munitions. Syria's refusal to adequately address issues raised by the Technical Secretariat makes it impossible for the international community to have confidence that all of these prohibited materials have been declared and destroyed. Now, with the publication of the most recent JIM report, it is clear that Syria also has undeclared stocks of toxic industrial chemicals, associated barrel bombs, and production equipment—which it has used to support and perpetrate chemical weapons attacks.

How should the international community and this Council react to these blatant violations of the Convention and continuing threats to the people of Syria? What actions need to be taken? The international community has established an important legal framework to facilitate action to address this crisis—but renewed international will is urgently required to meet this grave challenge.

The Council will recall that, in September of 2013, in the wake of the horrific nerve agent attack in Ghouta on 21 August, the international community prudently viewed Syria's impending accession to the Chemical Weapons Convention with uneasy hope and cautious circumspection. A robust framework was established by the international community designed, on the one hand, to facilitate the destruction of Syria's chemical weapons programme but, on the other, to address any refusal by Syria to completely renounce possession and use of chemical weapons.

The international legal framework is interconnected, with important roles for both the Executive Council and the United Nations Security Council.

The first element of the international framework is the Chemical Weapons Convention itself, as buttressed by the Executive Council's decision of September 2013, which prohibits the possession and use of chemical weapons and which contains tools to address concerns about compliance with these fundamental prohibitions of the Convention.

The second element of the international framework is United Nations Security Council resolution 2118 (2013) which imposes binding legal obligations on Syria to “cooperate fully with all aspects of the implementation” of the 27 September 2013 Executive Council decision and, further, prohibits the possession and use of chemical weapons by Syria. In resolution 2118 (2013), the United Nations Security Council expressly decided that in the event of noncompliance with that resolution, including any use of chemical weapons by anyone in the

Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter. In establishing the JIM, the United Nations Security Council reaffirmed its decision to respond to violations of resolution 2118 (2013) under Chapter VII of the United Nations Charter.

In response to the findings of the JIM and in an effort to deter any future use of chemical weapons in Syria, both the United Nations Security Council and the OPCW Executive Council have essential roles in ensuring that the Syrian Arab Republic and the so-called “Islamic State of Iraq and the Levant” (or ISIL), as well as the individuals involved in these chemical weapons attacks, are all held accountable. As the JIM was established by the United Nations Security Council, it is appropriate that deliberations, now underway, be pursued there with a view to the expeditious adoption by the Security Council of a resolution setting out a strong set of enforcement actions.

However, United Nations Security Council action alone is not sufficient. Since Syria is a State Party to the Convention, the Executive Council must address this compliance crisis at this session—as must the Conference of the States Parties in November. The confirmed use by a State Party is the most serious challenge to the Convention and to the global norm against chemical weapons since the creation of the OPCW in 1997. This Council must act and do so decisively.

The United States of America has formally submitted a draft decision for consideration and adoption of the Council at this session. Let me summarise the key elements of this draft decision.

We must condemn in the strongest possible terms the use of chemical weapons by Syria and ISIL and, further, we must underscore our unwavering conviction that Syria and ISIL, as well as the individuals involved in these attacks, must be held accountable.

We must express grave concern at the failure of Syria to fully declare and destroy its chemical weapons programme and acknowledge the alarming implications of the Secretariat’s unsuccessful efforts, stymied over a two year period by Syrian officials, to verify that Syria has destroyed its chemical agent stockpile of mustard and nerve agent as well as precursor chemicals.

Additional verification measures must also be imposed on Syria. Having been found to have used chlorine as a chemical weapon, Syria is now required under the Convention to declare and destroy all chlorine stocks and any other stocks of toxic chemicals, including toxic industrial chemicals that it possesses for purposes prohibited by Article I of the Convention. Syria must also declare and destroy all associated munitions such as barrel bombs as well as the equipment and facilities used to produce these chemical weapons.

The United States of America will make every effort and work with all members of the Council to achieve a consensus decision. The use of chemical weapons by anyone anywhere is a threat to all of us, and we should respond with collective resolve. However, let me be clear—inaction by this Council is unacceptable to the United States of America as it would severely damage the credibility and effectiveness of this Organisation and the Chemical Weapons Convention and, indeed, the broader framework of arms control and non-proliferation, which benefits us all.

I would also like to underscore with grave concern that, in its third report, the JIM attributed responsibility to ISIL for the chemical weapons attack occurring in the Syrian town of Marea on 21 August 2015. As the Council is aware, the Government of Iraq investigated and confirmed similar chemical weapons attacks during this same time frame in the Kurdistan region of Iraq. ISIL’s repeated use of chemical weapons is in flagrant disregard of the international

norms and standards against such use. The United States of America condemns in the strongest possible terms ISIL's use of chemical weapons, and we have placed a high priority on destroying ISIL's chemical weapons capabilities. At this session, the Council should act decisively to strengthen the OPCW's response to the threat of chemical weapons use by non-State actors and adopt the draft decision presented to the Council at its July session.

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On October 22, 2016, Ambassador Power provided a statement on the Fourth Report of the OPCW-UN JIM. Her statement is excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7502>.

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We welcome the fourth report of the OPCW-UN Joint Investigative Mechanism (JIM) on chemical weapons (CW) use in Syria. We will review its findings carefully. In addition to the previous report's determination on three cases—concluding in one case the use of mustard gas by ISIL, and in two cases the use of modified industrial chlorine as a weapon by the Syrian regime—the latest report confirms yet again what we have known for nearly three years now, that the Syrian regime systematically uses toxic chemicals as weapons in violation of the Chemical Weapons Convention (CWC) and UN Security Council Resolution 2118.

For a second time, an independent team of international experts has reached this conclusion with respect to incidents that the OPCW Fact Finding Mission (FFM) has determined involved or likely involved the use of chemical weapons. These incidents fit a consistent pattern of other confirmed regime uses of chemical weapons across Syria.

The United States supports the JIM's call for accountability for those with effective control in the military units involved in these chemical weapons attacks. Over a hundred years, a global consensus emerged that the use of chemicals as weapons is an abhorrent, barbaric act. Should the international community fail to take action to hold accountable those responsible for confirmed use, we risk lasting damage to this international norm, which is critical to international peace and security. Other actors, seeking to terrorize innocents, will be watching to see how the international community responds at this time.

The United States thanks the members of the JIM for their thorough and credible accounting of chemical weapons use in Syria. We believe strongly that the work of the JIM should continue to shed light on other confirmed cases of CW use, including those recent allegations that have been made within the past two months and which the OPCW FFM is already investigating. It is important to note that, since the JIM's creation, we have seen a drastic decrease in the number of allegations of CW use in Syria, and we hope the OPCW-UN JIM will continue to serve as a deterrent to CW use.

We look forward to working with all members of the Security Council in the coming days on a way forward to continue to deter chemical weapons use, including through extending the instrumental work of the JIM, and ensuring appropriate accountability for the abhorrent use of chemical weapons against the Syrian people.

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On October 28, 2016, the State Department issued a press statement on the Fourth Report of the JIM, which is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/10/263771.htm>.

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A little over a year ago, the UN Security Council voted unanimously, through Resolution 2235 (2015) to establish the Joint Investigative Mechanism (JIM) to determine attribution of confirmed chemical weapon use in Syria. The JIM, an independent, neutral expert panel conducted a year-long investigation into nine instances of confirmed or likely use of chemicals as weapons in Syria in 2014 and 2015.

The fourth and latest report from the JIM, publicly released today, found that the Syrian Arab Armed Forces used a toxic chemical as a weapon in a third incident, adding to the previous JIM report's finding that the Syrian Arab Armed Forces used toxic chemicals as a weapon in two separate instances, in 2014 and 2015. Additionally, the JIM's third report, released in August 2016, found that Daesh used a chemical as a weapon, specifically mustard gas, in 2015.

In the course of its independent investigation, the JIM conducted hundreds of interviews, pored over thousands of documents, and analyzed forensic evidence. Taken together, the JIM's investigation corroborated what we have known for years: the Assad regime has systematically and repeatedly used chemical weapons against its own people. The Assad regime's abhorrent acts violate Syria's obligations under the Chemical Weapons Convention (CWC) and UN Security Council Resolution 2118 (2013).

The three incidents in which the JIM determined the Assad regime used chemical weapons all share the same terrifying signature—the use of helicopters to drop barrel bombs, filled with toxic chemicals, on civilian populations hundreds of feet below. In April 2015, doctors and first aid workers, who tended to civilians stricken by the effects of inhaling a toxic cloud of chlorine gas, briefed the UN Security Council with heart-wrenching testimonies about this attack and the devastation that has befallen so many civilians in Syria. The third report of the JIM found that Syrian forces had perpetrated this abhorrent attack in Sarmin in 2015, and again it found those forces responsible for a very similar attack in Talmenes in 2014. The fourth report of the JIM, discussed by the UN Security Council today, further names the Syrian Arab Armed Forces as the party to have used weaponized chlorine in Qmenas in 2015.

All those confirmed to have been involved in the use of chemical weapons in Syria must be held accountable. To date, however, a handful of countries continue to shield the Assad regime from the consequences of its own actions, even as evidence mounts of its confirmed use of chemical weapons. The time is now for Syria's regime to face real consequences for its actions. The international community must uphold the strength and legitimacy of international law in the face of the first confirmed uses of chemical weapons by a State Party to the CWC. Inaction is simply not an option. To that end, we are working within the OPCW and the UN Security Council to extend the instrumental work of the JIM and to send a clear message that the use of chemical weapons will not be tolerated.

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On November 17, 2016, the UN Security Council adopted Resolution 2319, renewing the mandate of the JIM for another year. The State Department welcomed the unanimous adoption of Resolution 2319 in a November 18, 2016 press statement, excerpted below and available at [http://2009-](http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264432.htm)

[2017.state.gov/r/pa/prs/ps/2016/11/264432.htm](http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264432.htm).

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Yesterday, the UN Security Council took an important step by renewing the mandate of the JIM—an independent, neutral expert panel—to enable it to build upon its instrumental work to date in identifying the party or parties responsible for the reprehensible use of chemical weapons in Syria. The third and fourth reports of the JIM, released August 24 and October 27, 2016, respectively, found that the Syrian Arab Armed Forces used a toxic chemical, likely chlorine, as a weapon in three separate instances in 2014 and 2015. Additionally, the JIM’s third report found that Da’esh used mustard gas as a chemical weapon in 2015.

The UN Security Council has heard directly from multiple eye-witnesses in Syria who recounted horrific descriptions—the sound of helicopters overhead, the dropping of barrel bombs, and the release of toxic gas leaving hundreds of innocents gasping for air. Even as the JIM continues its work to determine responsibility for CW uses, we must all send a clear message that the use of chemical weapons will be met with serious consequences. Such consequences are necessary to uphold and strengthen international law in the face of multiple confirmed uses of CW by Syria, a State Party to the Chemical Weapons Convention (CWC); they are necessary to deter any state or non-state actor from seeking to use CW; and they, too, are necessary to send a message on behalf of all victims of such deplorable weapons, if we hope to save others in Syria and anyone around world from falling victim to a similar, terrifying fate.

Yesterday’s adoption of UNSCR 2319 (2016) follows a landmark decision, on November 11, by the OPCW Executive Council in the Hague condemning the use of CW in Syria; expressing concern about identified gaps, inconsistencies, and discrepancies in Syria’s declaration to the CWC; and demanding that the Syrian regime comply fully with its obligations under the Convention. The OPCW Executive Council decision also underscores the international community’s resolve to demonstrate consequences for the clear violation of international law embodied in the confirmed multiple uses of CW by the Syrian Arab Armed Forces.

Taken together, these actions by the OPCW Executive Council and the UN Security Council demonstrate that the horrific use of chemical weapons anywhere, at any time, and by anyone will not be tolerated, and those responsible for their use will be held to account.

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Ambassador Power provided the U.S. explanation of vote on the resolution, which is excerpted below and available at [https://2009-2017-](https://2009-2017-usun.state.gov/remarks/7563)

[usun.state.gov/remarks/7563](https://2009-2017-usun.state.gov/remarks/7563).

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...[E]vidence suggests that the JIM is in fact helping to dissuade actors from using chemical weapons. And this is really important—in the 19 months before the JIM was established, there were more than 120 allegations of chemical weapons attacks. But in the 15 months after the JIM began its work, that number has dropped to approximately 35 alleged attacks. Let's be clear—one chemical weapons attack is one too many, and is completely unacceptable and worthy of our collective condemnation. We also know that there are other likely causes, as the Syrian regime has established a pattern of using chemical weapons when it is struggling using conventional means; Russia's entry into the war in September 2015 has given Damascus a significant battlefield edge. Perhaps that explains some of the drop in use. But there is no question that perpetrators who know—as they did before August 7, 2015, when the JIM was authorized—that they would never be identified—those perpetrators felt a greater sense of impunity than they must feel now. Even if the JIM makes only a small difference in keeping the parties from using chemical weapons, it would save lives, and help safeguard a crucial global norm, and that is well worth this Council's full and sustained support.

... [F]inally, there is so much investigative work left for the JIM to complete. The JIM has so far only been able to make attribution in four of the nine cases that were initially selected for investigation. And new potential cases continue to emerge. For example, there were numerous reports on August 10 and September 6 of this year that Assad regime helicopters dropped barrel bombs with toxic chemicals on neighborhoods in eastern Aleppo, sickening dozens of Syrians and killing at least five people. As long as the parties to the conflict in Syria use chemical weapons, and as long as previous cases can still be investigated, this Council needs to determine who is involved—and we need the JIM to do it.

But this Council's responsibilities don't end once we know the facts. We already know that the Assad regime and ISIL were involved in chemical attacks. The members of this Council now need to work together to make sure that those who use such gruesome weapons face consequences.

We, of course, have sharp differences in this Council when it comes to the conflict in Syria. That is clear. But the unanimous renewal of this mandate reflects one important principle that we share in common—our unequivocal, collective opposition to the use of chemical weapons. This principle led us to adopt resolution 2118 three years ago requiring Syria, whose regime had just carried out a horrific attack killing at least 1,400 people, to dismantle and destroy its chemical weapons program under international supervision. This principle led us to create the JIM, and it led us now to extend the JIM. And it is on the basis of this principle that we should continue to act to hold parties accountable for using chemical weapons against the Syrian people.

There is very little in the history of the Syrian conflict that the Security Council has been able to agree upon; chemical weapons are one such exception to the general rule of Council division. The fact that we can achieve agreement in this narrow but important domain should motivate us. It should motivate us to work harder to stop the slaughter of civilians by other means, and it should motivate us to achieve the political solution that has long eluded the people of Syria, who continue to be attacked in a savage manner to this very day. I thank you.

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## 2. Chemical Weapons in Libya

On July 22, 2016, Ambassador David Pressman, Alternate Representative to the UN for Special Political Affairs, delivered the U.S. explanation of vote on UN Security Council Resolution 2298 on eliminating chemical weapons in Libya. The explanation of vote is excerpted below and available at <http://2009-2017-usun.state.gov/remarks/7380>.

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... The United States strongly endorses the authorization of Member States to assist in the transfer and destruction of Libya's category two chemical weapons outside of Libya. We are pleased the Security Council was able to respond to the initiative of the Libyan Government of National Accord, working with the Organization for the Prohibition of Chemical Weapons and the international community, to facilitate the transfer and destruction of these chemicals.

It was imperative we act quickly in this instance to remove these chemicals in order to prevent possible capture and use by non-state actors. As such, we appreciate the United Kingdom's approach as penholder in presenting a clean and simple authorization for immediate action to address a threat to international peace and security.

These efforts will help ensure that the chemicals are safely and securely destroyed in a verifiable manner, and we are hopeful all members of the Security Council recognize the importance of undertaking this action in an expedited manner. We look forward to our continued work with the international community to ensure these category two chemical weapons are safely destroyed.

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On September 1, 2016, the State Department issued a statement on the OPCW-coordinated removal of chemical weapons precursors from Libya. The statement is excerpted below and available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/09/261535.htm>.

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Yesterday, the Director-General of the Organization for the Prohibition of Chemical Weapons (OPCW) announced a major milestone in the elimination of Libya's Qadhafi-era chemical weapons-related materials. On August 27, an international maritime operation coordinated by the OPCW and led by Denmark safely removed Libya's remaining chemical weapons precursors as authorized by United Nations Security Council Resolution 2298 and OPCW Executive Council decisions. These chemicals, which are common toxic industrial chemicals several stages from becoming chemical weapons agents, are now secure and will soon be destroyed in an environmentally safe and verifiable manner.

As noted by the White House, a team of international partners has worked to answer the Libyan Government of National Accord's request for assistance to remove these chemicals for destruction outside of Libya in order to eliminate the risk that they could fall into the hands of non-state actors. This very capable team was led by the OPCW, and included Canada, Denmark, Finland, France, Germany, Italy, Libya, Malta, Spain, the United Kingdom, and the United States.

We echo the gratitude expressed by the OPCW for the significant contributions of our generous partners in this endeavor, and we share the sentiment of the Director-General that this "international effort has achieved a major milestone in guaranteeing that these chemicals will not fall into the wrong hands."

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On November 10, 2016, Deputy Assistant Secretary of State Mallory Stewart spoke on a panel at the Center for Strategic and International Studies on the removal of Libyan chemical weapons stockpiles. Her statement provides details on the United States government's role in the chemical weapons removal and destruction operation. A video of the discussion is available at <https://www.csis.org/events/keeping-chemical-weapons-out-hands-terrorists>

### 3. Conference of States Parties to the Chemical Weapons Convention

Deputy Assistant Secretary Stewart addressed the Twenty-First Session of the Conference of the States Parties to the Chemical Weapons Convention on November 19, 2016. The statement, excerpted below, touches on use of chemical weapons in Syria, removal of chemical weapons from Libya, and other important topics. OPCW Doc. C-21/NAT.19.

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I am pleased to join you here today to continue our work together to strengthen the implementation of the Chemical Weapons Convention. As events have clearly illustrated since the Conference of States Parties last convened, the Convention and the Organisation for the Prohibition of Chemical Weapons remain as relevant and vital as ever. ...

I must address a number of issues today, but none is more crucial to the future of the Convention than addressing the confirmed use of chemicals as weapons in Syria, and working to deter and prevent State and non-State actors from using such weapons ever again. On November 11, the Executive Council:

- condemned in the strongest possible terms the use of chemical weapons by the Armed Forces of the Syrian government;
- called for accountability for all actors involved in the heinous use of chemical weapons by Syria; and
- imposed additional and necessary stringent verification measures on Syria. In taking its decision, the Council responded responsibly to the findings of the OPCW-United

Nations Joint Investigative Mechanism (JIM), which determined that the Syrian Arab Armed Forces used toxic chemicals as weapons in Syria in three separate attacks in 2014 and 2015. In the same decision, the Council condemned in the strongest possible terms the use of chemical weapons by the so-called “Islamic State of Iraq and the Levant”—also known as “Da’esh”—in one attack in Syria in 2015.

As we all agree, any use of chemical weapons is deeply abhorrent and cause for alarm. The use of chemical weapons by Da’esh is repugnant and an example of the growing threat of non-State actor use of chemical weapons. It underscores the importance for all States Parties to take affirmative steps to counter the threat through the effective implementation of national measures, consistent with obligations under Article VII of the Chemical Weapons Convention.

However, the crucial imperative to address the non-State actor threat should not distract from, nor diminish, the urgent need to address the principal challenge before the international community and this august body: the confirmed use of chemical weapons by Syria—a State Party to the Convention. Syria’s flagrant use of chemicals as weapons is a direct assault on the Convention. For the first time in the history of the Convention, we are facing the confirmed use of chemical weapons by a State Party. We cannot ignore this, and we must redouble our efforts to defend the integrity of our treaty and the international norm it embodies. When any international law is allowed to be blatantly and repeatedly violated with no consequences, all international law is weakened.

Moreover, the Syrian regime’s repeated use of chemical weapons, as reported by the JIM, further underscores the urgency that all States Parties must attach to fully addressing the gaps, inconsistencies, and discrepancies in Syria’s declaration. This is true for a number of reasons.

Firstly, there is already a long list of open issues associated with Syria’s declared chemical weapons programme and the JIM has confirmed Syrian Arab Armed Forces willingness to use chemical weapons. Additionally, the Convention is clear, that any chemical employed for its toxic properties in warfare is defined as a chemical weapon. We must now recognise the need for Syria to fully declare all of the materials and facilities associated with its production and use of chlorine barrel bombs. This requirement is all the more urgent in light of continuing credible reports of the use of chlorine barrel bombs by the Syrian regime, including as recently as this month.

Secondly, the presence of non-State actors in the region, who actively aspire to acquire chemical weapons, makes it even more critical that Syria completely declare and eliminate the remaining elements of its chemical weapons programme. There must be absolute transparency to confirm that nothing is left for anyone to use.

Against this backdrop, the United States commends the personnel of the OPCW Fact-Finding Mission for their courageous work to verify where chemical weapons have been used in Syria. The United States also commends the tireless efforts of the OPCW’s Declaration Assessment Team, which has the daunting task of verifying Syria’s chemical weapons declaration. That task is made all the more challenging in the face of continued dissemblance, delay, and defiance from Damascus.

Amid the alarming news coming out of Syria regarding chemical weapons use, and its sobering implications for the Convention, this past year we were pleased to collaborate with other States Parties and the Technical Secretariat in an effort that resoundingly reaffirmed the possibilities and great promise of the OPCW. I am referring to the removal of the remaining chemical weapons precursors from Libya for destruction. That effort stands as a shining example of what States Parties can accomplish together, transparently and efficiently, when we approach

difficult challenges with ingenuity, goodwill, and determination. On behalf of the United States, I warmly commend the efforts of the Libyan Government, the OPCW Technical Secretariat, and the many States Parties that contributed to this important success.

I am also pleased to report that the United States continues to make steady, measurable progress toward the complete elimination of our own stockpile. We remain fully committed to completing chemical weapons destruction as safely and as quickly as practicable, and consistent with our planned completion date. The United States has, as of 31 October this year, destroyed 24,952 metric tons, nearly 90 percent, of our declared Category 1 chemical weapons. More than 2.33 million munitions and containers have been destroyed, including 100 percent of our binary chemical weapons. With the successful commencement of operations at the Pueblo Chemical Agent-Destruction Pilot Plant on 7 September, United States' efforts to complete destruction of our remaining stockpile gained additional momentum. We look forward to welcoming members of the Executive Council to the United States in April 2017 to visit the Blue Grass Chemical Agent-Destruction Pilot Plant, which constitutes the final phase of the United States' chemical weapons destruction programme.

The United States is pleased again this year to co-sponsor the statement (C-21/NAT.3/Rev.2) highlighting the risks posed to the Convention by central nervous system-acting chemicals in law enforcement scenarios. In connection with such scenarios, these chemicals are often referenced by the misleading term "incapacitating agents". However, as the thirty-three co-sponsors to the statement remind us, central nervous system-acting chemicals cannot be used safely to incapacitate outside of a clinical setting. Instead, these chemicals lend themselves to the potential use as deadly chemical weapons. More specifically, there is growing concern that the development, production, acquisition, and stockpiling of these chemicals for supposed law enforcement purposes could constitute a "backdoor" to the re-emergence of chemical weapons possession and use. We believe this matter warrants further discussion and consideration by all States Parties, and we therefore continue to encourage all delegations that have not yet done so to put their views on this matter on the record. The United States commends Australia and Switzerland for spearheading this initiative. I can firmly state once again that the United States is not developing, producing, stockpiling, or using central nervous system-acting chemicals for law enforcement purposes, nor are we using riot control agents as a method of warfare.

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The OPCW will mark its twentieth anniversary next year. Over the past two decades, the hallmarks of this remarkable Organisation have been innovation, pragmatism, and impeccable credibility. Confronted by a dynamic and increasingly complex international system, the OPCW has risen to every challenge. This Organisation and the Convention that it serves deserve the strong support of all States Parties. Through our collective stewardship we can ensure that the OPCW will continue to play its indispensable and unique role in global security.

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#### 4. Biological Weapons Convention

The United States welcomed the accession of the Republic of Angola to the Biological Weapons Convention (“BWC”) on July 26, 2016 in a July 29, 2016 media note, available at <http://2009-2017.state.gov/t/isn/rls/prsrl/2016/260665.htm>. Angola became the 175th party to the BWC. Also in 2016, Liberia, Nepal and Guinea became States Parties to the BWC.

The foreign ministers of Hungary, the Russian Federation, the United Kingdom, and the United States issued a joint statement on the Biological Weapons Convention Review Conference on October 18, 2016, which is available at <https://2009-2017-usun.state.gov/remarks/7495>. The statement includes the following:

The Foreign Ministers look forward to the Eighth Review Conference of the Convention in November this year agreeing on substantive measures that will significantly strengthen the Convention and contribute in a measurable way to reducing the threat of biological agents being used as weapons. We are committed to work hard and constructively to this end, and we call upon all States Parties to approach the Conference in a similar spirit and come ready to take the necessary decisions to ensure that the Convention serves its purpose in an effective and sustainable manner.

Thomas M. Countryman, Acting Under Secretary of State for Arms Control and International Security, delivered remarks at the Eighth BWC Review in Geneva, Switzerland on November 7, 2016. His statement is excerpted below and available at <http://2009-2017.state.gov/t/us/2016/264154.htm>.

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Our march towards universalization of the Treaty continues. We welcome 12 new States Parties since the last Review Conference. With each accession, our world becomes safer. Still, major challenges remain.

Biological weapons have been used in the past, and there is clear and troubling evidence that terrorist groups, individuals, and states continue to pursue them. Advances in the life sciences and the increasing availability of materials, equipment, and knowledge, have placed biological weapons within reach of more actors than ever before.

This is why we must all make a concerted, sustained effort to support, and fund, and use the impressive array of tools we have developed to counter the threat posed by state and non-state actors.

Together, we can take decisive action to strengthen the Convention’s implementation, to enhance confidence in compliance, to develop capacity to respond to biological weapons use by state and non-state actors, and to enhance international cooperation.

I emphasize first that there is no substitute for effective national implementation, and many States Parties still have much work to do. One in four States Parties has not prohibited development or production of biological weapons in their domestic law; one in three has no prohibition on possession of biological weapons—or transfer of such weapons to others. And, despite the requirements of UN Security Council Resolution 1540 and the Terrorist Bombing Convention, one in eight States Parties has no legislation which criminalizes the use of biological weapons.

The United States has offered ideas to address this implementation deficit in our own Working Papers and in our joint proposal with India concerning Article III.

I stress second that we must acknowledge that some concerns exist about some States Parties' compliance with the Biological Weapons Convention.

In a national working paper, we have proposed ways to strengthen confidence, to improve the confidence-building measures and create a wider set of options for addressing inevitable questions about the operation of the Convention.

And third, while States Parties to the BWC are steadfast in their determination to prevent any use, we still must prepare for this horrific possibility.

One need only look to the OPCW-UN Joint Investigative Mechanism (JIM) Report on the use of chemical weapons by the Asad regime and ISIL to see that some states and non-state actors are still capable of such despicable acts.

This Conference should state unambiguously that use of biological weapons under any circumstance is unacceptable, that allegations of such use should be investigated promptly, and that those responsible for the use of such weapons will be held accountable.

States Parties should also take steps to enhance national and international capabilities to detect, investigate, and respond to the use of such weapons rapidly and effectively. This includes developing practical approaches to coordinate international assistance and response, recognizing it will not always be clear whether an outbreak is deliberate or natural.

In particular, we call upon all States Parties to affirm their willingness to provide access to an investigation team, consistent with safety and domestic legal constraints.

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On November 25, 2016, Ambassador Wood delivered the closing statement for the United States at the Eighth BWC Review Conference. His statement, excerpted below, is available at

[http://www.unog.ch/80256ee600585943.nsf/\(httpPages\)/57a6e253edfb1111c1257f39003ca243?OpenDocument&ExpandSection=9%2C3#\\_Section9](http://www.unog.ch/80256ee600585943.nsf/(httpPages)/57a6e253edfb1111c1257f39003ca243?OpenDocument&ExpandSection=9%2C3#_Section9)

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My delegation regrets that this Conference was unable to reach agreement on a substantive program of post-RevCon work.

We listened closely over the last three weeks, and we were optimistic that it would be possible to reach such an agreement. Many delegations called for a new, stronger intersessional program that would allow for substantive expert work and concrete action. Many delegations supported strengthening the Implementation Support Unit, and taking important steps in a variety

of areas, from S&T to international cooperation to national implementation to taking steps to realize the promise of Article VII for emergency assistance.

We could have done those things. We supported them, and were prepared to accept many things we did not support in the interests of a strong, consensus outcome:

- Some delegations wanted to use the intersessional process to discuss their aspirations for a verification protocol. We don't agree that this is a useful way ahead, but we made clear that we were prepared to engage in a discussion of the full range of proposals for strengthening this Convention.

- One delegation was particularly interested in creating a battalion of mobile biomedical units owned and operated by the BWC. We thought this was neither feasible nor a particularly effective approach, but we were prepared to give it prominence in a new intersessional program.

Our goal was to strengthen BWC States Parties' ability to cooperate and to take effective action together. In the face of arguments about giving MSPs decision-making authority, we again showed flexibility, and suggested that they could make recommendations instead. All we asked was that we hold the next Review Conference sooner than 2021, so we could take action on those recommendations. It was a simple idea: we need to move beyond the status quo if we are to meet the expectations of States Parties.

Mr. Chairman, my delegation has worked tirelessly in pursuit of a meaningful outcome to this Review Conference. When your proposal for a new ISP turned into a thicket of brackets yesterday, we stayed up all night, first talking with other delegates, and then drafting a compromise proposal, based on your text, that we believe nearly every delegation at this Conference could have accepted with only minor refinements. Many of you have seen it. Unfortunately, a few key delegations were unwilling to engage on it during the day.

We have participated in numerous consultations and meetings today to try to find a way ahead. These have been fruitless.

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Mr. Chairman, the document we have just adopted gives us a chance to find a way to move ahead over the next year—if we can reach consensus at the Meeting of States Parties in 2017. I have my doubts. This body—a body established by a treaty that aims to exclude completely the possibility of use of biological weapons by anyone—was unable to reach agreement on the simple principle that people who use biological weapons should be brought to justice.

This is our Convention. We spent the last four years working to promote common understanding and effective action, and this is where we are. I encourage all delegations to think about that over the coming months, and consider seriously how we should proceed.

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On November 30, 2016, the State Department issued a statement on the close of the Eighth BWC Review Conference. The statement is available at <http://2009-2017.state.gov/r/pa/prs/ps/2016/11/264647.htm> and excerpted below.

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For more than four decades, the Biological Weapons Convention has embodied international will against the use of disease as a weapon. No nation claims that biological weapons are legitimate or admits pursuing them, and we are all safer for it. This norm remains strong, as does the U.S. commitment to work with other nations to combat this threat, despite the less than satisfactory outcome of the Convention's Eighth Review Conference in Geneva last week.

The Conference was unable to reach agreement on a new, more ambitious work-plan for the next five years, a plan that was supported by the United States and the vast majority of other States Parties to the Convention. The United States sought agreement on a work-plan that would allow for more intensive expert work and for taking decisions more often than once every five years—goals we believe are widely shared.

While the United States does not support the need to negotiate a supplementary treaty, during the review conference, U.S. negotiators were supportive of creating a space in the post-RevCon work-plan for discussion of the full range of proposals to strengthen the Convention, which would have allowed proponents of a protocol to make their case.

Although the United States is disappointed that negotiators did not take this opportunity to strengthen the intersessional process, the lack of consensus on a program of work does not damage the international nonproliferation regime. Collaborative work to strengthen biosecurity, nonproliferation, and transparency will continue. For our part, the United States will continue to further strengthen a regime that is rightly credited with making the world a safer place.

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## E. ARMS TRADE TREATY

For background on the Arms Trade Treaty, see *Digest 2015* at 883-84, *Digest 2013* at 710-15, and *Digest 2012* at 674-79. On December 9, 2016, the President transmitted to the Senate for its advice and consent to ratification the Arms Trade Treaty, done at New York on April 2, 2013, and signed by the United States on September 25, 2013. The transmittal includes the report of the Secretary of State with respect to the Treaty, which contains a detailed article-by-article analysis of the Treaty. Excerpts follow from the President's message to the Senate, available at

<https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/message-senate-arms-trade-treaty>.

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The Treaty is designed to regulate the international trade in conventional arms—including small arms, tanks, combat aircraft, and warships—and to reduce the risk that international arms transfers will be used to commit atrocities, without impeding the legitimate arms trade. It will contribute to international peace and security, will strengthen the legitimate international trade in

conventional arms, and is fully consistent with rights of U.S. citizens (including those secured by the Second Amendment to the U.S. Constitution). United States national control systems and practices to regulate the international transfer of conventional arms already meet or exceed the requirements of the Treaty, and no further legislation is necessary to comply with the Treaty. A key goal of the Treaty is to persuade other States to adopt national control systems for the international transfer of conventional arms that are closer to our own high standards.

By providing a basis for insisting that other countries improve national control systems for the international transfer of conventional arms, the Treaty will help reduce the risk that international transfers of specific conventional arms and items will be abused to carry out the world's worst crimes, including genocide, crimes against humanity, and war crimes. It will be an important foundational tool in ongoing efforts to prevent the illicit proliferation of conventional weapons around the world, which creates instability and supports some of the world's most violent regimes, terrorists, and criminals. The Treaty commits States Parties to establish and maintain a national system for the international transfer of conventional arms and to implement provisions of the Treaty that establish common international standards for conducting the international trade in conventional arms in a responsible manner. The Treaty is an important first step in bringing other countries up towards our own high national standards that already meet or exceed those of the Treaty.

The Treaty will strengthen our security without undermining legitimate international trade in conventional arms. The Treaty reflects the realities of the global nature of the defense supply chain in today's world. It will benefit U.S. companies by requiring States Parties to apply a common set of standards in regulating the defense trade, which establishes a more level playing field for U.S. industry. Industry also will benefit from the international transparency required by the Treaty, allowing U.S. industry to be better informed in advance of the national regulations of countries with which it is engaged in trade. This will provide U.S. industry with a clearer view of the international trading arena, fostering its ability to make more competitive and responsible business decisions based on more refined strategic analyses of the risks, including risks of possible diversion or potential gaps in accountability for international arms transfers, and the associated mitigation measures to reduce such risks in a given market.

The Treaty explicitly reaffirms the sovereign right of each country to decide for itself, pursuant to its own constitutional and legal system, how to deal with conventional arms that are traded exclusively within its borders. It also recognizes that legitimate purposes and interests exist for both individuals and governments to own, transfer, and use conventional arms. The Treaty is fully consistent with the domestic rights of U.S. citizens, including those guaranteed under the U.S. Constitution.

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**Cross References**

*ATT transmitted to Senate*, **Chapter 4.A.2.**

*Meshal v. Higgenbotham*, **Chapter 5.A.1.**

*Cooper v. TEPCO (Fukushima nuclear accident)*, **Chapter 5.C.5.**

*Outer space*, **Chapter 12.B.**

*Iran sanctions*, **Chapter 16.A.1.**

*Syria sanctions*, **Chapter 16.A.2.**

*DPRK sanctions*, **Chapter 16.A.5.**

*Export controls*, **Chapter 16.B.**

*Syria*, **Chapter 17.B.2.**

*Conventional weapons*, **Chapter 18.B.**