

U.S. Compliance with International Human Rights Law Obligations

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**A Stakeholder's Joint Report<sup>1</sup>**

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1. The International Human Rights Committee of the International Law Association, American Branch (“ABILA”) is dedicated to the dissemination of information and exchange of scholarly ideas relating to the status and development of international human rights law. ABILA was established in 1922 as the national branch for the United States of America of the International Law Association (“ILA”), which now has forty-five national and regional branches. The ILA, a nongovernmental organization headquartered in London and founded in 1873, has as its purpose the restatement and development of international law. The ILA has consultative status in the United Nations. This submission is on behalf of members of the ABILA International Human Rights Committee, Subcommittee on U.S. Compliance with International Human Rights Law, as well as members of other organizations of international lawyers listed in Endnote 1. It does not reflect the views of the International Law Association or ABILA, or any other institution with whom the authors are affiliated except the stakeholders on whose behalf it is submitted.

2. This report will cover four separate areas of U.S. compliance with its international human rights law obligations: (1) discrimination based on religion and national origin in immigration policy, (2) violations of the rights to life, security, health, and education through gun violence facilitated by the U.S. government, (3) attempts to undermine international criminal justice for U.S. human rights violators; and (4) the availability of remedies for human rights violations.

**I. Discrimination Based on Religion and National Origin in Immigration Policy**

3. In its 2010 UPR Review and again in the 2015 Review, the Council recommended that the United States reform its definition of discrimination to comport with its treaty obligations,<sup>7</sup> but the United States has adopted no complying measure. As long as U.S. law continues to tolerate government measures causing significantly discriminatory effects on vulnerable or minority groups, it is not in compliance with its human rights law obligations.

4. Since Donald Trump assumed office as President of the United States, the U.S. government has actively discriminated against and persecuted persons of the Muslim religion. Apart from the First Amendment and Equal Protection Clause of the Constitution, U.S. statutes prohibit the government from “substantially burden[ing]” a person’s exercise of religion except in furtherance of a compelling government interest. 42 U.S.C. § 2000bb-1. Nonetheless, beginning in fall 2015, Trump, as a Republican candidate for U.S. President, began expressing his intention to institute a “total and complete ban” on Muslims entering the United States. He repeatedly made public statements disparaging both Muslims and Arabs, equating both groups to terrorists as a class, and making false or unsubstantiated claims about the hostility of Muslims in the United States toward their country. He further suggested monitoring mosques in the United

States and proposed that the government force all Muslims in the United States to register as such.<sup>8</sup>

5. For example, Trump said in a television interview on 22 March 2016: “Frankly, we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.... You have to deal with the mosques, whether we like it or not, I mean, you know ... These attacks are not done by Swedish people. That I can tell you. We have to be smart. We have to look at the mosques and study what’s going on. There is a sick problem going on.”<sup>9</sup> At a campaign rally on 14 June 2016, he leveled another unsubstantiated accusation against Muslim Americans: “The children of Muslim American parents, they’re responsible for a growing number for whatever reason a growing number of terrorist attacks.”<sup>10</sup> In one public talk, he specifically stated he would discriminate against Muslims in favor of Christians in immigration policy for applicants from the Middle East.<sup>11</sup>

6. Almost immediately after assuming office, Trump issued an executive order halting the entry into the United States of all non-citizens from seven countries with almost entirely Muslim populations.<sup>12</sup> This order resulted in the immediate detention or turning back of many persons from these countries holding valid U.S. entry visas, including lawful permanent residents of the United States (of which there were 52,275 at the time), holders of valid student or work visas, and refugees seeking asylum. Trump offered no policy justification whatsoever for the choice of countries sanctioned or measures adopted. Trump and his advisers publicly admitted on several occasions that he was seeking a “Muslim ban” rather than a rational and well-founded measure for national security.<sup>13</sup>

7. In fact, studies from the U.S. Department of Homeland Security itself, as well as independent research institutions, had already shown that such a measure would have no effect on U.S. national security. These studies also showed that “extreme” vetting of immigrants and refugees from Muslim countries, which was the reason publicly given by the Trump Administration for the suspension of entry, would have no effect on national security.<sup>14</sup>

8. Trump eventually withdrew the executive order in the face of repeated losses in courts based *inter alia* on judicial findings of religious discrimination. For example, the U.S. Court of Appeals for the Fourth Circuit stated that the executive order: “in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination.”<sup>15</sup>

9. Trump then issued a proclamation making minor alterations to the ban and including a *post hoc* national security rationale.<sup>16</sup> This final proclamation restricts entry of nationals solely from overwhelmingly Muslim countries, with the symbolic inclusion of government officials from Venezuela and visa applicants from North Korea to mask its anti-Muslim animus.

10. This proclamation, too, was challenged. After repeating his losses in multiple federal trial and appellate courts, the U.S. Supreme Court upheld the ban.<sup>17</sup> The Court rejected the argument that the Proclamation violated the constitutional prohibition on discrimination based on religion. According to the Court, because the Proclamation is “facially neutral toward religion” and invokes “national security,”<sup>18</sup> any actual discriminatory motive or effect is irrelevant.<sup>19</sup>

Based on this position, the Court further disregarded all evidence of discriminatory motive by candidate and later President Trump.

11. In undertaking the analysis, the Court ignored the abundant evidence showing that the Proclamation had no rational relationship to national security. Instead, relying almost entirely on the President's assurance that he had "a legitimate national security interest" in mind, the Court deferred.<sup>20</sup> The Court chose not to address the issue of national origin discrimination, which is also generally illegal or unconstitutional in the United States.<sup>21</sup> The Court ignored all submissions and briefs relating to the inconsistency of the executive orders and proclamation with U.S. obligations under international human rights law. Indeed, the majority opinion treated these obligations as nonexistent.

12. The U.S. policy of discriminating against immigrants and refugees from Muslim countries violates numerous U.S. human rights obligations under international law. The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), which in article 2 requires states to respect and ensure all human rights in the Covenant without discrimination *inter alia* based on religion or national origin. The Human Rights Committee (HRC) interprets Article 2 to prohibit "any distinction, exclusion, restriction or preference which is based on" a prohibited ground, and which has "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing."

13. More generally, Article 26 of the ICCPR prohibits government discrimination, regardless of whether the measure violates a Covenant right. As interpreted by the HRC and consistent with its wording, this provision "prohibits discrimination in law or fact in any field regulated" by the government. Notably, unlike ICCPR Article 2, the equal protection provisions of ICCPR Article 26 lack Article 2's limitation to "all individuals within [the state party's] territory and subject to its jurisdiction." According to its plain terms, it thus prohibits government measures discriminating with respect to alien refugees and visa applicants not within the state's territory or subject to its jurisdiction.

14. The United States is also a party to the 1967 Additional Protocol to the 1951 Convention Relating to the Status of Refugees. This prohibits discrimination against refugees on the basis of race, religion or nationality in the application of its provisions, and it establishes the obligation of *nonrefoulement*, which prohibits Contracting States from returning refugees to territories where their life or freedom would be threatened on account of their identity. Following implementation of the first Executive Order and subsequently, asylum seekers from the listed countries who were present in the United States were expelled without an asylum hearing. For example, on January 28, 2018, a Syrian woman traveling to the United States from a third country was denied entry and forced to return to her port of origin. She was denied humanitarian parole, and her request for asylum based on her fear of persecution in Syria was denied without examination. She was then forced to sign a paper stating that she understood she had violated U.S. immigration law (a doubly false statement) and was compelled to return to the third country where she had no residency or right of entry.<sup>22</sup> In this case, as in many others, the United States government has violated the human rights of asylum seekers.

15. In the present case, the policy of the United States as announced in Proclamation No. 9645, which excludes individuals from the United States on the basis of their religion and national origin, violates both the rights of visa applicants and refugees to be free from discrimination based on religion and national origin; and the human right to family life (protected by ICCPR article 23) of American citizens seeking to be visited or reunited with family members from Muslim majority countries blocked by the Proclamation. As the HRC has explained, although aliens do not have a right to be present in a State party's territory,

in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>23</sup>

The evidence demonstrates that the Proclamation was the latest of several attempts of President Trump to institute a "Muslim ban," prohibiting entry to the United States to a group of people based on their religion and national origin. It therefore violates U.S. obligations under the ICCPR and CERD.

16. The statements of candidate and later President Trump, the highest-ranking government official in the United States, have created a hostile environment for Muslims to profess their faith publicly. Muslims in the United States have been deeply affected by remarks that associate them with terrorists and hostile attitudes toward the United States on the sole basis of their religion. In the wake of these statements, the incidence of hate crimes against those perceived to be Muslims has increased in the United States by at least 26% from before Trump began his campaign. One study found that assaults against Muslims rose during Trump's campaign to the highest in history (127 in 2016, as compared to an average of 48 per year since the attack on the World Trade Center in 2001).<sup>24</sup> The official policy of the United States is to disfavor and exclude Muslims, and this message has both degraded Muslim Americans and residents, and it has encouraged a climate among the U.S. public that is intolerant of and hostile to Muslims.

## **Recommendations**

1. Immediately withdraw Proclamation No. 9645 and reinstate immigration and asylum procedures for all individuals affected by the Proclamation;
2. Make a public statement condemning discrimination on the basis of religion and national origin, denouncing the President's past discriminatory statements, and affirming that the United States is obligated by international law and in its domestic law not to discriminate in its immigration and asylum policies;
3. Support anti-bias community programs to fight hate crimes, especially those targeting Arabs and Muslims.

## **II. Gun Violence and U.S. Human Rights Obligations**

17. In 2017, more than 173,500 people were shot, 39,700 of whom died, the largest number in decades.<sup>25</sup> The United States has a far higher rate of private gun deaths than any other developed country.<sup>26</sup> While constituting only 4.4% of the world's population, 42% of the world's

civilian-owned guns are in the United States. The experience of other countries and variations between U.S. states show that reasonable gun control measures could reduce this violence.<sup>27</sup> An average of one mass shooting occurs daily.<sup>28</sup> Mass shootings occur in U.S. neighborhoods, schools, offices, places of worship, theaters, and restaurants, and at festivals and concerts. School shootings are becoming more common, with an average of one weekly where someone was hurt or killed (excluding the shooter).<sup>29</sup> Mass school shootings are also increasing.<sup>30</sup> Roughly two-thirds of U.S. gun deaths are suicides.<sup>31</sup> More than half of U.S. suicides occur with a gun<sup>32</sup>—the most fatal method<sup>33</sup>—and rates of child firearm suicide are rising.<sup>34</sup> The presence of a gun in the home greatly increases the risk of death by suicide,<sup>35</sup> homicide,<sup>36</sup> and accidental death.<sup>37</sup>

18. Gun violence in the United States disproportionately affects racial minorities and women. Women in the United States are twenty-one times more likely to be killed with a gun than in other high-income countries,<sup>38</sup> often as a result of domestic violence. Although comprising only 14% of the U.S. population, African Americans represent 56.7% of U.S. gun homicide victims. The proliferation of Stand Your Ground laws facilitates impunity for the perpetrators of some of these killings, particularly when the victim is black and the shooter is white.<sup>39</sup> These laws also appear to be fueling an increase in firearm homicide rates.<sup>40</sup> Nearly 1000 people are fatally shot by police each year, with individuals of color and youth overrepresented.<sup>41</sup>

19. This violence creates negative psychological and mental harm for direct<sup>42</sup> and indirect<sup>43</sup> victims, has destructive developmental consequences for children,<sup>44</sup> and has fostered a general climate of fear that interferes with the enjoyment of fundamental human rights.

20. Gun violence implicates human rights contained in customary international law, as well as in treaties ratified by the United States. These rights include the rights to life, security of person, health, education, association and peaceful assembly, freedom of expression, opinion, and belief, to be free from ill-treatment, to be free from discrimination on the basis of gender or race, to practice one's religion without interference, and to participate in the cultural life of the community.

21. The U.S. government is obligated to protect its population. ICCPR Article 2.2 calls on States Parties “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant” and Article 2 of the Convention against Torture obligates States Parties to take affirmative measures, including “effective legislative, administrative, judicial or other measures” to prevent torture and ill-treatment. CERD Article 2.2 of calls on States Parties to adopt “special and concrete measures” to ensure that vulnerable racial groups and individuals have “the full and equal enjoyment of human rights and fundamental freedoms.”

22. Although more than 98% of U.S. shootings are carried out by private actors, the U.S. government may still be responsible. A State's responsibility to prevent harm caused by private actors has been repeatedly referenced by the Inter-American Commission on Human Rights (IACHR),<sup>45</sup> the Human Rights Committee (HRC),<sup>46</sup> the Committee on the Elimination of Racial Discrimination,<sup>47</sup> and the Committee against Torture,<sup>48</sup> as well as human rights courts.<sup>49</sup>

23. Numerous human rights bodies have also held that a State's obligation to protect *extends* to the prevention of harm inflicted by and to oneself, like suicide. The European Court of Human Rights,<sup>50</sup> IACHR,<sup>51</sup> and the HRC<sup>52</sup> have all found that "States should take adequate measures . . . to prevent suicides."<sup>53</sup>

24. A State's responsibility is engaged when the State *knows or ought to know* that a person is at risk or that violations have occurred and it fails to take reasonable measures.<sup>54</sup> As the HRC has explained, the State's obligation to protect against threats to the security of a person is especially engaged when faced with "patterns of violence against categories of victims such as . . . violence against women, including domestic violence."<sup>55</sup> Furthermore, States have a special responsibility to protect and prevent abuses "in all contexts of custody or control, for example, in . . . schools [and] institutions that engage in the care of children."<sup>56</sup>

25. The HRC has called upon States to "take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence."<sup>57</sup> These measures should include efforts to "reduce the proliferation of potentially lethal weapons to unauthorized individuals."<sup>58</sup> The Committee has further called on States to "protect their populations . . . against the risks posed by excessive availability of firearms."<sup>59</sup>

26. In recent years, the U.S. federal government has demonstrated an unwillingness to adopt legislation to reduce the level of U.S. gun violence. The last major federal gun control legislation was adopted over twenty years ago, and current regulations contain gaping loopholes. The Brady Handgun Violence Prevention Act,<sup>60</sup> adopted in 1993, mandates background checks for firearm purchases, but does not apply to sales that occur through private sellers, which account for 40% of all transactions.<sup>61</sup> Even for sales requiring a background check, federal law allows the transaction to be completed if the check is not finalized within three days. The Domestic Violence Offender Gun Ban of 1996 prohibits some individuals who have been convicted of a "misdemeanor crime of domestic violence" from buying firearms, but does *not* apply to dating partners who are not married, have not lived together, or who do not share a child, or to abusers who victimize family other than an intimate partner or child, nor does it require convicted abusers to forfeit guns already in their possession.<sup>62</sup> In 2004, Congress allowed the 1994 Federal Assault Weapons Ban<sup>63</sup> to expire, making it possible for private citizens to purchase assault rifles designed for committing mass killings at a distance.

27. Many of the measures enacted related to firearms have loosened regulations of the industry, created roadblocks for the agencies tasked with enforcing the laws, and blocked research that could protect the population. The Firearms Owners' Protection Act of 1986<sup>64</sup> prevents the government from maintaining a centralized database of gun dealer records and limits how many inspections the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) can conduct of a dealer's premises. Individuals who occasionally sell guns are outside the oversight of a regulatory body under the Gun Control Act of 1968.<sup>65</sup> The 2005 Protection of Lawful Commerce in Arms Act<sup>66</sup> protects the gun industry from liability in most tort actions and the Tiahrt Amendments,<sup>67</sup> first adopted in 2003, prohibit gun trace data from being admissible in civil lawsuits against gun sellers or manufacturers (including in proceedings to revoke a corrupt

dealer's license). The Tiahrt Amendments also prohibit the release of firearms trace data to cities and states, academic researchers, and litigants, prohibit the ATF from requiring firearms dealers to submit their inventories to law enforcement, and require the FBI to destroy records of approved gun purchasers within 24 hours. Firearms are exempted from safety regulations by the Consumer Product Safety Act,<sup>68</sup> meaning gun manufacturers operate without federal oversight as to how guns are designed or made. The 1996 Dickey Amendment<sup>69</sup> led to a near complete ban on federally-funded research related to firearms and gun violence, decreasing annual Centers for Disease Control and Prevention (CDC) funding for gun violence research by 96%.<sup>70</sup>

28. In the 2015 UPR, five recommendations related to gun violence. The U.S. government supported three of these: To “[r]atify the Arms Trade Treaty,”<sup>71</sup> to “eliminate gun violence,”<sup>72</sup> and to “[t]ake necessary measures to reduce gun violence.”<sup>73</sup> The government partially supported the recommendations to expand background checks for all firearm purchases<sup>74</sup> and to consider “legislation to enhance the verification of the records for all fire arms transfers and the revision of the laws that stipulate self-defence without limitations.”<sup>75</sup> The United States has taken no steps to implement these recommendations.

### **Recommendations:**

1. Adopt legislation requiring *all* gun owners to acquire a license and require a permit-to-purchase for all firearms. Licenses should be conditioned on a comprehensive background check, including mental health history, required safety training, and be renewed periodically. Permits should be valid for a limited period of time and restricted to the purchase of one firearm. Records of all gun purchases should be carefully maintained by a federal agency in a searchable database that allows for suspicious purchases to be flagged and for guns to be efficiently traced when used in crime.
2. Adopt laws to reduce gun violence, including safe-storage laws, red-flag bills, mandatory waiting periods, and age-limits for firearm purchases. Adopt a ban on assault-style semi-automatic rifles and high-capacity magazines. Revise the Lautenberg Amendment to prohibit *all* convicted abusers and stalkers from purchasing firearms and to require the forfeiture of firearms currently in their possession.
3. Fully fund and remove restrictions on agencies that oversee the firearm industry, enforce the laws, and conduct important research, including by repealing the Dickey Amendment, the Tiahrt Amendments, and the Protection of Lawful Commerce in Arms Act, and revising the Firearms Owners' Protection Act of 1986.
4. Require private gun owners to buy casualty insurance in case their gun is used, by themselves or others, for unlawful violence, to help compensate the victims of violence and their families.



### III. U.S. Attempts to Undermine International Criminal Justice

29. The United States has recently taken a number of steps to undermine the independent operations of the International Criminal Court (ICC) in violation of its obligations under international human rights law. These measures appear to have been taken as a direct consequence of the ICC Prosecutor's decision to open a preliminary investigation—and in 2017 to request the Chamber's authorization of a full investigation—into the situation in Afghanistan, which involves allegations of war crimes by U.S. armed forces and the Central Intelligence Agency (CIA).

30. U.S. actions aim to protect human rights violators by intimidating and impeding the Court. In April 2019, the ICC's Pre-Trial Chamber rejected the Prosecutor's request for an investigation in alleged crimes committed in Afghanistan.<sup>76</sup> This decision was made, in part, on account of the unlikelihood of a successful investigation due to a lack of cooperation, a likely reference to U.S. hostility. Although the Office of the Prosecutor was granted leave to appeal this decision on 17 September 2019,<sup>77</sup> it appears that the United States, at least temporarily, successfully suppressed the enforcement of internationally protected human rights.

31. Trump Administration officials have reviled the ICC, particularly to its examination of American service personnel and CIA operatives allegedly responsible for serious crimes in Afghanistan. U.S. officials argue that since the United States is not a Party to the ICC Statute, the Court cannot exercise jurisdiction over U.S. citizens, notwithstanding that the ICC Statute permits the Court to intervene where there are credible allegations of international crimes being committed by non-State Party citizens within the territory of a State Party, such as Afghanistan.

32. Following John Bolton's appointment as National Security Advisor, the United States has pursued a policy of active interference in the ICC's activities, including threatening Court officials with sanctions, to achieve its objective of avoiding ICC scrutiny of U.S. conduct in Afghanistan. U.S. officials have also consistently voiced objections to any investigation of Israel,<sup>78</sup> which has obvious implications for Palestine's referral into crimes committee in the West Bank and Gaza.

33. Notably, in a speech at the Federalist Society on 10 September 2018, John Bolton, speaking about the ICC, declared that the U.S. "will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court." He set out a plan of action which included: (1) responding "against the ICC and its personnel to the extent permitted by U.S. law," including banning its judges and prosecutors from entering the United States, "sanction[ing] their funds in the U.S. financial system", and "prosecut[ing] them in the U.S. criminal system" (and doing the same "for any company or state that assists an ICC investigation of Americans"); (2) "take note if any countries cooperate with ICC investigations of the United States and its allies," for the purposes of "setting U.S. foreign assistance, military assistance, and intelligence sharing levels"; and (3) potentially "taking steps in the UN Security Council to constrain the Court's sweeping powers, including ensuring that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute."<sup>79</sup>

34. John Bolton’s threats aim to subvert an on-going judicial process. As then-White House Press Secretary Sarah Sanders stated, the timing of his remarks was “[b]ecause they told us they were on the verge of making that decision, and we’re letting them know our position ahead of them making that decision.”<sup>80</sup>

35. U.S. Secretary of State Mike Pompeo followed up on these threats. In a speech at NATO headquarters in December 2018, Secretary Pompeo said the United States was taking “real action to stop rogue international courts, like the International Criminal Court, from trampling on our sovereignty...”, further warning that the United States “will take all necessary steps to protect our people, those of our NATO allies who fight alongside of us inside of Afghanistan from unjust prosecution.”<sup>81</sup> In March 2019, Secretary Pompeo announced “a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel,” including “persons who take or have taken action to request or further such an investigation”, further noting that these visa restrictions “may also be used to deter ICC efforts to pursue allied personnel, including Israelis, without allies’ consent.” In April 2019, it was confirmed that ICC Chief Prosecutor Fatou Bensouda’s U.S. visa had been revoked.<sup>82</sup>

36. Secretary Pompeo said these measures were “part of a continued effort to convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities and our allies’ activities in Afghanistan,”<sup>83</sup> suggesting an intention to influence the course of justice.

37. While the Court has stated that it will “continue to do its work undeterred,”<sup>84</sup> the decision not to authorize the Afghanistan investigation explicitly cites “changes within the relevant political landscape [...] in key States,”<sup>85</sup> which the Chamber believes “make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities.”<sup>86</sup>

38. U.S. officials have emphasized that the Chamber’s Afghanistan decision was a direct consequence of U.S. actions. For example, Secretary Pompeo noted: “The ICC’s decision follows the State Department’s 15 March announcement of visa restrictions on ICC personnel involved in any investigation of U.S. personnel, and I am glad the Court reconsidered its actions.”<sup>87</sup>

39. There are sufficiently credible allegations that U.S. military and CIA personnel violated human rights and committed war crimes in Afghanistan<sup>88</sup> to warrant an investigation and, if sufficient evidence is found, prosecution. However, the United States has chosen not to pursue these allegations consistent with its international human rights obligations.<sup>89</sup> The U.S. failure to do so may be a violation of several U.S. human rights obligations under treaties and customary international law, including ICCPR Articles 2(3) and 3, to protect human rights and provide effective remedy for violations, as well as Article 6, on the right to life, Article 7, on the right to be free from torture or cruel, inhuman, and degrading treatment, and Article 9, on the right to be free from arbitrary arrest and detention.

40. U.S. actions also appear to contravene UN norms on the independence of the judicial, the role of lawyers, and the role of prosecutors, found in the UN Basic Principles on the

Independence of the Judiciary (BPIJ),<sup>90</sup> the UN Basic Principles on the Role of Lawyers (BPRL),<sup>91</sup> and the UN Guidelines on the Role of Prosecutors.<sup>92</sup>

41. As noted by one observer, the Trump administration’s “persistent attacks on the legitimacy of the ICC as well as its actions—threatened or taken—interfere with the independence and effectiveness of the ICC’s judiciary both directly or indirectly, including by impacting the level of cooperation with the institution.”<sup>93</sup> U.S. interference, such as the visa restrictions, impacts the ability of legal professionals to carry out their duties. Furthermore, the interference of the United States in ongoing ICC proceedings deprives thousands of Afghan victims of justice, despite their State’s ratification of the ICC Treaty, and strips them of the ICC’s protection to which they are entitled. Given the importance of justice to peace, U.S. actions have also undermined the effectiveness of ICC interference to interrupt the ongoing commission of crimes in Afghan territory.

### **Recommendations**

1. Re-instate U.S. entry visas to Prosecutor Bensouda and all other affected ICC staff and effectively cooperate with the International Criminal Court.
2. The United States should conduct its own impartial, independent, and effective investigation into the serious allegations of criminality of U.S. actions in Afghanistan and elsewhere, consistent with international law.

## **IV. Inadequate Remedies for Violations of International Human Rights Law**

42. The obligation to provide effective remedies is essential to ensuring the legal and practical impact of other human rights. Article 2 of the ICCPR requires state parties to respect and ensure the rights therein without distinction based on any status, and requires states to “adopt such laws or other measures as may be necessary to give effect to the rights recognized” therein. That obligation includes ensuring that individuals whose rights are violated have an effective remedy (including but not limited to judicial remedies) and that those remedies are enforced.<sup>94</sup> The provision of remedies is also part of U.S. obligations to prevent and punish human rights abuses,<sup>95</sup> which includes using due diligence to protect against and provide remedies for rights violations by private actors.<sup>96</sup> International law allows reparations in diverse forms as appropriate, including changes to law and practices, but should be effective and accessible to victims.<sup>97</sup>

43. Although the implementation of human rights obligations can be taken under states’ unique constitutional systems, the United States remains responsible for implementing human rights protections and remedies at all levels of government.<sup>98</sup> Because the United States is not a party to optional protocols and procedures that would allow for petition to international bodies when human rights are violated, the effectiveness of domestic remedies is essential to effectuating its human rights obligations.

44. The United States has never passed comprehensive legislation to implement its human rights obligations, either under the treaties to which it is a party or customary international law. As noted by the Human Rights Committee in its 2014 concluding observations, the legal impact

of human rights treaties and the availability of remedies for violations are limited by the U.S. interpretation that human rights treaties are not “self-executing.”<sup>99</sup> Remedies are also restricted by the U.S. federal system, which limits the ability of governments at both state and federal levels to effectively implement human rights protections. Domestic legislation that attempts to prevent and protect individuals from violations still faces constitutional challenges. In 2018, for example, a federal court found a federal statutory criminal provision related to female genital mutilation (FGM) unconstitutional both because the prohibition and criminalization of FGM was not “rationally related” to implementation of the ICCPR (despite international and U.S. recognition that FGM is a serious human rights violation and form of gender based violence and discrimination<sup>100</sup>), and also because criminalization of the practice was not shown to be “substantially related to interstate commerce,” and therefore could not overcome the general presumption that the regulation of criminal activity is reserved for state control through the Tenth Amendment.<sup>101</sup> The U.S. Department of Justice accepted these rationales in declining to further defend the law, and recommended that Congress amend the law to create a nexus to interstate commerce (maintaining that the ICCPR did not provide authority for Congress to criminalize FGM).<sup>102</sup> This case highlights a two-pronged hurdle to ensuring remedies for human rights abuses in the United States: the abdication through federalism of responsibility for fully implementing provisions of the ICCPR into domestic law, and the court-interpreted supremacy of provisions of constitutional law (such as the Tenth Amendment) that prevent federal attempts to provide remedies for certain violations, especially judicial remedies.

45. Beyond general federalism concerns, other legal frameworks also render remedies elusive for human rights violations in the United States. When rights to non-discrimination and the right to life are violated by law enforcement and the criminal justice system, limited rights of action,<sup>103</sup> doctrines of qualified immunity<sup>104</sup> and limited criminal prosecutions or other accountability of violators continue to function as barriers for remedies.<sup>105</sup> The government has attempted to limit the use of “consent decrees,” which have been used to address systemic institutional violations, including discrimination in law enforcement.<sup>106</sup> These limited avenues for remedy and redress are especially troubling because these practices which have a discriminatory impact on certain communities.<sup>107</sup>

46. There is both positive and negative evidence in terms of accountability for torture within the U.S. domestic system. In recent years, federal court decisions have also restricted the availability of civil remedies for human rights violations through the Alien Tort Statute, finding that foreign corporations cannot be held liable in US courts and affirming that residence in the United States does not alone provide ground for jurisdiction under the ATS.<sup>108</sup> Notably, civil cases by private individuals have been successful in pursuing and establishing civil liability for torture in US domestic courts.<sup>109</sup> The United States has not, however, undertaken changes to law or pursued full investigations capable of establishing accountability for torture, or providing effective remedies for past abuses.<sup>110</sup> Indeed, as noted above, it has taken positive steps to exonerate and protect U.S. citizens accused of torture and other crimes against humanity in Afghanistan from international accountability.

47. Finally, the United States continues its decades long practice of failing to comply with its obligation to take positive measures to protect human rights, including the most fundamental, the right to life. No legislation requires the federal or state governments to take all necessary and

proportional measures to protect human rights from private violations, with only scattered and partial exceptions,<sup>111</sup> and the U.S. Supreme Court has repeatedly exonerated state actors from a duty to take even reasonable measures to protect human life, still less any other human right, even when they have a positive legal obligation to take protective measures.<sup>112</sup> The Court has based these holdings on the claim that the U.S. Constitution does not protect positive rights. International law does, however. Neither the U.S. Congress nor the state legislatures has acted to rectify the absence of fundamental positive protections for U.S. citizens and others under U.S. jurisdiction.

## Recommendations

1. Withdraw all reservations, understandings, and declarations to the ICCPR, CERD, and UNCAT that limit private causes of action in U.S. courts.
2. Adopt comprehensive federal legislation implementing U.S. obligations under human rights treaties to which it is a party, as well as customary international law binding on the United States, by conferring a private right of action for violation of the human rights guaranteed by international law, including provisions for effective remedies for victims of such violations.
3. Change U.S. laws and regulations to mandate that criminal prosecutors pursue full investigations capable of establishing accountability for torture.

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<sup>1</sup> Submitted on behalf of the following organizations: (1) International Law Association, American Branch, Subcommittee on U.S. Compliance with International Human Rights Law; (2) International Human Rights Law Institute, DePaul University College of Law; (3) Just Planet; and (4) Human Rights Research League.

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<sup>7</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/16/11, para. 92.63 (4 Jan. 2011), *adopted by* Human Rights Council, Decision 16/115, U.N. Doc. A/HRC/16/DEC/115 (Mar. 18, 2011); Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/30/12, para. 176.122 (20 July 2015), *adopted by* Human Rights Council, Decision 30/102, U.N. Doc. A/HRC/DEC/30/102 (14 Oct. 2015).

<sup>8</sup> *E.g.*, Jenna Johnson, *Donald Trump: Syrian refugees might be a terrorist army in disguise*, WASHINGTON POST, 30 Sept. 2015, at [https://www.washingtonpost.com/news/post-politics/wp/2015/09/30/donald-trump-syrian-refugees-might-be-a-terrorist-army-in-disguise/?utm\\_term=.b73710db3fec](https://www.washingtonpost.com/news/post-politics/wp/2015/09/30/donald-trump-syrian-refugees-might-be-a-terrorist-army-in-disguise/?utm_term=.b73710db3fec); Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, WASHINGTON POST, 21 Oct. 2015, at [https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/?utm\\_term=.d9dd91a3aa70](https://www.washingtonpost.com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/?utm_term=.d9dd91a3aa70); Phone Interview with Donald Trump, Morning Joe, MSNBC.com, 16 Nov. 2015, at <https://www.msnbc.com/morning-joe/watch/trump-we-must-watch-and-study-mosques-567563331864?v=raila>; Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS, 20 Nov. 2015, at <https://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716>; *Donald Trump MASSIVE Rally in Birmingham*, Right Side Broadcasting Network, 21 Nov. 2015, at <https://www.youtube.com/watch?v=kmPqV41bfC0>; *'This Week' Transcript: Donald Trump and Ben Carson*, ABC NEWS, 22 Nov. 2015, at <https://abcnews.go.com/Politics/week-transcript-donald-trump-ben-carson/story?id=35336008>

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- <sup>9</sup> *With All Due Respect*, BLOOMBERG TV, 23 Mar. 2016, at 28:46, at <https://www.bloomberg.com/news/videos/2016-03-23/with-all-due-respect-03-23-16>.
- <sup>10</sup> Candace Smith & John Santucci, *Donald Trump: Number of Muslim Immigrants Have 'Hostile Attitudes,'* ABC NEWS, 14 June 2016, at <https://abcnews.go.com/Politics/donald-trump-number-muslim-immigrants-hostile-attitudes/story?id=39844183>.
- <sup>11</sup> Carol Morello, *Trump signs order temporarily halting admission of refugees, promises priority for Christians*, 27 Jan. 2017, at [https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c\\_story.html?utm\\_term=.5a030fb3a7c4](https://www.washingtonpost.com/world/national-security/trump-approves-extreme-vetting-of-refugees-promises-priority-for-christians/2017/01/27/007021a2-e4c7-11e6-a547-5fb9411d332c_story.html?utm_term=.5a030fb3a7c4).
- <sup>12</sup> Executive Order 13769, Jan. 27, 2017.
- <sup>13</sup> See, e.g., Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says—and ordered a commission to do it 'legally,'* WASH. POST, 29 Jan. 2017, at [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.e9187b0a64a2](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.e9187b0a64a2).
- <sup>14</sup> Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO Institute Policy Analysis No. 798, 13 Sept. 2016, at 2; Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO Institute, 26 Jan. 2017, Figure 1; David J. Bier, *Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures*, CATO Institute Policy Analysis No. 838, 17 Apr. 2018, at 18.
- <sup>15</sup> *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017) (en banc).
- <sup>16</sup> Presidential Proclamation No. 9645 (24 Sept. 2017).
- <sup>17</sup> *Trump v. Hawaii*, 585 U.S. \_\_\_, 138 S. Ct. 2392 (2018).
- <sup>18</sup> *Id.*, slip op. at 20.
- <sup>19</sup> *Id.*, slip op. at 32.
- <sup>20</sup> *Id.*, slip op. at 36.
- <sup>21</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that aliens are entitled to equal protection of the laws under the Constitution's Fifth Amendment regardless of national origin); 42 U.S.C. § 2000d (prohibiting discrimination "on ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance.").
- <sup>22</sup> Ryan Devereaux, Murtaza Hussain & Alice Speri, *Trump's Muslim Ban Triggers Chaos, Heartbreak, and Resistance*, THE INTERCEPT, Jan. 29, 2017, at <https://theintercept.com/2017/01/29/trumps-muslim-ban-triggers-chaos-heartbreak-and-resistance/>.
- <sup>23</sup> HRC, General Comment No. 15, para. 5 (1986), U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).
- <sup>24</sup> Katayoun Kishi, *Assaults against Muslims in U.S. surpass 2001 levels*, Pew Research Ctr., 15 Nov. 2017, at <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.
- <sup>25</sup> CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), WIDE-RANGING ONLINE DATA FOR EPIDEMIOLOGIC RESEARCH (WONDER), *Underlying Cause of Death, Results: Firearm Deaths by Intent (1999-2017)*, <https://wonder.cdc.gov/controller/saved/D76/D48F344>.
- <sup>26</sup> For example, based on data from 2015, the United States has, per 100,000 persons, nearly twelve times as many gun deaths as Australia, eleven times as many as Germany, eight times as many as Israel, and twenty times as many as Spain. See SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, [www.gunpolicy.org](http://www.gunpolicy.org).
- <sup>27</sup> See generally REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS (Daniel W. Webster & Jon S. Vernick eds., 2013); Julian Santaella-Tenorio et al., *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REVIEWS 140 (2016).
- <sup>28</sup> As of 4 September 2019, there had been 2,214 mass shootings – defined as the shooting of “four or more people, excluding the shooter...at the same general time and location” – killing at least 2,494 people and wounding another 9,494 since the December 2012 Sandy Hook Elementary School shooting. See German Lopez et al., *After Sandy Hook We Said Never Again. and Then We Let 2,214 Mass Shootings Happen*, VOX, [www.vox.com/a/mass-shootings-sandy-hook](http://www.vox.com/a/mass-shootings-sandy-hook) (last visited 4 Sept. 2019).
- <sup>29</sup> *More Than 228,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST, [www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm\\_term=.6b0520326e58](http://www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm_term=.6b0520326e58) (last visited 4 Sept. 2019).

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- <sup>30</sup> More people have died or been injured in mass school shootings in the United States in the last 18 years than in the entire previous century. Antonis Katsiyannis et al., *Historical Examination of United States Intentional Mass School Shootings in the 20th and 21st Centuries: Implications for Students, Schools, and Society*, 27 J. CHILD & FAM. STUD. 2562 (2018).
- <sup>31</sup> Suicide was the tenth leading cause of death in the United States in 2017. CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), WEB-BASED INQUIRY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS), *10 Leading Causes of Death by Age Group, United States - 2017*, [https://www.cdc.gov/injury/images/lc-charts/leading-causes\\_of\\_death\\_by\\_age\\_group\\_2017\\_1100w850h.jpg](https://www.cdc.gov/injury/images/lc-charts/leading-causes_of_death_by_age_group_2017_1100w850h.jpg).
- <sup>32</sup> See Madeline Drexler, *Guns & Suicide: The Hidden Toll*, HARV. SCH. PUB. HEALTH MAGAZINE (Spring 2013).
- <sup>33</sup> 82.5% of attempted suicides with firearms result in death. See Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885, 1888 (Dec. 2000).
- <sup>34</sup> Rates of child firearm suicides increased 60% from 2007 to 2014. Katherine Fowler et al., *Childhood Firearm Injuries in the United States*, 140 AM. ACAD. PEDIATRICS 1 (2017).
- <sup>35</sup> The presence of a gun in the home increases an individual's risk of death by suicide. See Douglas J. Wiebe, *Homicide and Suicide Risks Associated With Guns in the Home: A National Case-Control Study*, 41 ANNALS OF EMERGENCY MED. 771, 780 (2003); Matthew Miller et al., *Firearm Availability and Suicide, Homicide, and Unintentional Firearm Deaths Among Women*, 79 J. URBAN HEALTH 26 (2002); Michael Siegel & Emily F. Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981–2013*, 106 AM. J. PUBLIC HEALTH 1316, 1317 (2016). Suicide rates tend to increase in correlation to gun ownership rates. See M. Miller & David Hemenway, *Guns and Suicide in the United States*, 359 N. ENGL. J. MED. 672 (2008); Justin Thomas Briggs & Alexander Tabarrok, *Firearms and Suicides in US States*, 37 INT'L REV. OF LAW & ECO. 180 (2014).
- <sup>36</sup> See Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417 (2004); Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1088-89 (1993); Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Guns in the Home: A National Case-Control Study*, 41 ANNALS EMERGENCY MED. 771, 780 (2003); Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003).
- <sup>37</sup> See Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713 (2003).
- <sup>38</sup> Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the other High-Income Countries*, 2015, 123 PREVENTATIVE MED. 20 (2019).
- <sup>39</sup> Race is a significant factor in whether a defendant charged with a homicide has a successful Stand Your Ground defense: studies have found that a killing is 281% more likely to be found justified under a Stand Your Ground law when the attacker is white and the victim is black. JOHN ROMAN, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA, URBAN INST. 9 (2013), [www.urban.org/UploadedPDF/412873-stand-your-ground.pdf](http://www.urban.org/UploadedPDF/412873-stand-your-ground.pdf). Defendants in Stand Your Ground cases are also twice as likely to be convicted if the victim is white as opposed to if the victim is black or Latino. See Nicole Ackermann et al., *Race, Law, and Health: Examination of 'Stand Your Ground' and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194, 194 (2015); Valerie Purdie-Vaughns & David R. Williams, *Stand-Your-Ground is Losing Ground for Racial Minorities' Health*, 147 SOCIAL SCI. & MED. 341 (2015).
- <sup>40</sup> A 2017 study showed that Florida's SYG law was associated with a 32% increase in firearm homicide and states with Stand Your Ground laws witnessed a 53% average increase in the justifiable homicide rate after the law's passage, compared to a 5% decline over the same period in states which did not enact the law. David K. Humphreys et al., *Evaluating the Impact of Florida's "Stand Your Ground" Self-Defense Law on Homicide and Suicide by Firearm: an Interrupted Time Series Study*, 177 JAMA INTERN MED. 44 (2017); NATIONAL URBAN LEAGUE, MAYORS AGAINST ILLEGAL GUNS & VOTEVETS.ORG, SHOOT FIRST: 'STAND YOUR GROUND' LAWS AND THEIR EFFECT ON VIOLENCE CRIME AND THE CRIMINAL JUSTICE SYSTEM (2013), <https://everytownresearch.org/documents/2015/04/shoot-first.pdf>.

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<sup>41</sup> *Fatal Force*, WASH. POST, [www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?noredirect=on&utm\\_term=.1d6a08acfd2e](http://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?noredirect=on&utm_term=.1d6a08acfd2e).

<sup>42</sup> Reese et al., *Screening for Traumatic Stress Among Survivors of Urban Trauma*, 73 J. TRAUMA ACUTE CARE SURG. 462 (2012).

<sup>43</sup> This is especially true for mass shootings. See e.g., Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE & ABUSE 62 (2017); James M. Shultz et al., *Multiple Vantage Points on the Mental Health Effects of Mass Shootings*, 16 CURRENT PSYCHIATRY REP. 469 (2014); Amanda M. Vicary & R. Chris Fraley, *Student Reactions to the Shootings at Virginia Tech and Northern Illinois University: Does Sharing Grief and Support Over the Internet Affect Recovery?* 35 PERSONALITY & SOC. PSYCHOL. BULL. 1555, 1559 (2010); Joseph R. Bardeen et al., *Emotion Regulation Difficulty as a Prospective Predictor of Posttraumatic Stress Symptoms Following a Mass Shooting*, 27 J. ANXIETY DISORDERS 188 (2013).

<sup>44</sup> See David Finkelhor et al., *Prevalence of Childhood Exposure to Violence, Crime, and Abuse: Results from the National Survey of Children's Exposure to Violence*, 169 JAMA PEDIATRICS 746, 751 (2015); David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, 2, NAT'L SURV. OF CHILDREN'S EXPOSURE TO VIOLENCE, U.S. DEP'T OF JUSTICE & CTR. FOR DISEASE CONTROL & PREVENTION (2009).

<sup>45</sup> Jessica Lenahan (Gonzalez) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69 rev., ¶ 128 (2011) (the State has an obligation to "prevent and respond to the actions of non-state actors and private persons").

<sup>46</sup> Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (States must protect "not just against violations . . . by its agents, but also against acts committed by private persons or entities").

<sup>47</sup> E.g., L.K. v. Netherlands, Communication No. 4/1991, U.N. Doc. CERD/C/42/D/4/1991 (16 Mar. 1993); A. YilmazDogan v. Netherlands, Communication No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1987).

<sup>48</sup> E.g., Hajrizi Dzemajl et al. v. Yugoslavia, Complaint No. 161/2000, Comm. Against Torture, ¶ 9.6, U.N. Doc. CAT/C/29/D/161/2000 (2 Dec. 2000). See also Comm. against Torture, Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), ¶ 6, U.N. Doc. CAT/C/51/4 (16 Dec. 2013) (the obligation to prevent applies in "contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm").

<sup>49</sup> E.g. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (29 July 1988) ("[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person . . . ) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required. . . ."); González et al. (Campo Algodonero) v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 181 (16 Nov. 2009).

<sup>50</sup> E.g., Renolde v. France, Application No. 5608/05, 24 Eur. Ct. H.R. (2008) (holding that French authorities violated the right to life of a prisoner by not preventing his suicide when there was a clear indication that he was endangered).

<sup>51</sup> E.g., Press Release: *IACHR Takes Case Involving Ecuador to the Inter-American Court of Human Rights*, OAS (13 Feb. 2019), [www.oas.org/en/iachr/media\\_center/PReleases/2019/032.asp](http://www.oas.org/en/iachr/media_center/PReleases/2019/032.asp) (reporting that the Court found the Ecuadorian State responsible for violations to the right to life resulting from the suicide of a teenage girl who was sexually abused by leadership at her school).

<sup>52</sup> E.g., Guillermo Ignacio Dermit Barbato et al. v. Uruguay, Communication No. 84/1981, U.N. Doc. CCPR/C/OP/2 (1990).

<sup>53</sup> Human Rights Comm., General Comment No. 36: on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 9, U.N. Doc. CCPR/C/GC/36 (2018).



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- <sup>54</sup> *E.g.*, Comm. Against Torture, General Comment No. 2, Implementation of art. 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008). (“where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed *by non-State officials or private actors* and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors . . . the State bears responsibility”).
- <sup>55</sup> Human Rights Comm., General Comment No. 35: Article 9 (Liberty and security of person), ¶ 9, U.N. Doc. CCPR/C/GC/35 (16 Dec. 2014).
- <sup>56</sup> Comm. Against Torture, General Comment No. 2, *supra* note 54, ¶ 15.
- <sup>57</sup> *Id.* ¶ 26.
- <sup>58</sup> *Id.* ¶ 21.
- <sup>59</sup> Human Rights Comm., General Comment No. 35, *supra* note 55, ¶ 9.
- <sup>60</sup> 18 U.S.C. §§ 921-924, 925A; 42 U.S.C. § 3759 (2012).
- <sup>61</sup> PHILIP J. COOK & JENS LUDWIG, U.S. DEP’T. OF JUST., NCJ 165476, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 6-7 (1997), [www.ncjrs.gov/pdffiles/165476.pdf](http://www.ncjrs.gov/pdffiles/165476.pdf).
- <sup>62</sup> 18 U.S.C. §922 (g)(9) (2018).
- <sup>63</sup> Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No 103-322, § 110102, 108 Stat.1796 (1994).
- <sup>64</sup> Firearms Owners’ Protection Act of 1986, 18 U.S.C. § 921 (1986).
- <sup>65</sup> 18 U.S.C. § 921 (2018). Any “person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms” is outside licensing requirements and can operate without adhering to important regulations mandated to other sellers.
- <sup>66</sup> 15 U.S.C. §§ 7901-7903 (2018).
- <sup>67</sup> Consolidated Appropriations Act 2010, Pub. L. No. 111-117, 123 Stat. 3128-3129 (2009).
- <sup>68</sup> 15 U.S.C. § 2052(a)(5)(E) (2012).
- <sup>69</sup> Omnibus Consolidated Appropriations Act (Dicky Amendment), Pub. L. No. 104-208, 110 Stat. 3009, 3009-244 (1997).
- <sup>70</sup> *See* EVERYTOWN FOR GUN SAFETY, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS, AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE (2013), <https://everytownresearch.org/documents/2015/04/access-denied.pdf>.
- <sup>71</sup> Human Rights Council, 2015 Report of the Working Group on the Universal Periodic Review: United States of America, *supra* note **Error! Bookmark not defined.**, ¶ 176.62, Recommendation by Trinidad and Tobago.
- <sup>72</sup> *Id.*, ¶ 176.231, Recommendation by Azerbaijan.
- <sup>73</sup> *Id.*, ¶ 176.232, Recommendation by Iceland.
- <sup>74</sup> *Id.*, ¶ 176.230, Recommendation by Ecuador.
- <sup>75</sup> *Id.*, ¶ 176.233, Recommendation by Peru.
- <sup>76</sup> Situation in the Islamic Republic of Afghanistan, *Decision Pursuant to Article 15 of the Rome Statute* (Pre-Trial Chamber II, 12 Apr. 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF).
- <sup>77</sup> Situation in the Islamic Republic of Afghanistan, *Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’*, (Pre-Trial Chamber II, 17 Sept. 2019, <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-62>).
- <sup>78</sup> *See, e.g.*, *Full text of John Bolton’s speech to the Federalist Society*, 10 Sept. 2018, at ALJAZEERA.COM, <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> (“ . . . today, reflecting congressional concerns with Palestinian attempts to prompt an ICC investigation of Israel, the

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State Department will announce the closure of the Palestine Liberation Organization office here in Washington, DC. . . . [W]e will not allow the ICC, or any other organisation, to constrain Israel's right to self-defence.”).

<sup>79</sup> *Id.*

<sup>80</sup> White House, *Press Briefing by Press Secretary Sarah Sanders and CEA Chairman Kevin Hassett*, 10 Sept. 2018, <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-cea-chairman-kevin-hassett-091018/>.

<sup>81</sup> U.S. Department of State, *Restoring the Role of the Nation-State in the Liberal International Order*, Remarks by Michael R. Pompeo, 4 Dec. 2018, <https://www.state.gov/restoring-the-role-of-the-nation-state-in-the-%20liberal-international-order-2/>.

<sup>82</sup> *US revokes ICC prosecutor's visa over Afghanistan inquiry*, 5 Apr. 2019, THE GUARDIAN, <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>.

<sup>83</sup> Dan De Luce & Abigail Williams, *Trump admin to ban entry of International Criminal Court investigators*, NBC NEWS <https://www.nbcnews.com/politics/white-house/trump-admin-ban-entry-international-criminal-court-investigators-n983766>.

<sup>84</sup> ICC Press Release, *The ICC will continue its independent and impartial work, undeterred*, ICC-CPI-20180912-PR1406 (12 Sept. 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406>.

<sup>85</sup> *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15, *supra* note 76, ¶ 94.

<sup>86</sup> *Id.*

<sup>87</sup> U.S. Department of State, *Unanimous Rejection of International Criminal Court Investigation*, Michael R. Pompeo 12 Apr. 2019, <https://www.state.gov/unanimous-rejection-of-international-criminal-court-%20investigation/>.

<sup>88</sup> See Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Declassification Revisions, 3 Dec. 2014, <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113s rpt288.pdf>.

<sup>89</sup> Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES, 30 Aug. 2012, <https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html> See also, Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan, *Public redacted version of "Request for authorisation of an investigation pursuant to article 15,"* ¶¶ 290-328, ICC No. 02/17 (20 Nov. 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF) (“there appears to have been no criminal investigation or prosecution of any person who devised, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques constituting torture, cruel treatment or outrages upon personal dignity, whether in relation to those that were formally authorised by the OLC or those that went beyond the scope of the legal guidance.” ¶ 328).

<sup>90</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary (6 Sept. 1985), endorsed by G.A. Res. 40/32 (29 Nov. 1985); G.A. Res. 40/146 (13 Dec. 1985) (particularly principles 2 and 3 related to the exclusive authority of the judiciary to determine cases without restrictions, improper influences, pressures, threats, or interferences and principle 4 on inappropriate or unwarranted interferences in the judicial process).

<sup>91</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers (7 Sept. 1990) (particularly principle 16 on the need for lawyers to perform their professional functions without intimidation, hindrance, harassment, or improper interference and to not suffer or be threatened with sanctions for any action taken in accordance with their professional duties, standards, and ethics).

<sup>92</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Guidelines on the Role of Prosecutors (7 Sept. 1990) (particularly Principle 4. which holds that States must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal, or other liability).

<sup>93</sup> Center for Constitutional Rights, *Complaint against the United States of America to the United Nations Special Rapporteur of the Human Rights Council on the Independence of Judges and Lawyers*, 5 June 2019,

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[https://ccrjustice.org/sites/default/files/attach/2019/06/5%20June%202019\\_Special%20Rapp%20letter%20ICC\\_final.pdf](https://ccrjustice.org/sites/default/files/attach/2019/06/5%20June%202019_Special%20Rapp%20letter%20ICC_final.pdf).

<sup>94</sup> International Covenant on Civil and Political Rights art. 2, 16 Dec. 1966, 999 U.N.T.S. 171. *See also*, Universal Declaration of Human Rights, G.B. Res. 217(III)A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, 10 Dec. 1984, 1465 U.N.T.S. 85; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, 21 Dec. 1965, 660 U.N.T.S. 195; U.N. Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004).

<sup>95</sup> *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2, 4, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide arts. 1, 4-6, Dec. 9, 1948, 78 U.N.T.S. 277; U.N. Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 17-18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 6, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>96</sup> *Jessica Lenahan (Gonzales) v. United States*, Case No. 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 164-170; U.N. Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8 U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004); U.N. Committee Against Torture, General Comment No. 2, ¶ 18, U.N. Doc. CAT/C/CG/2 (Jan. 24, 2008). For examples of the distinction, *see e.g.*, *United States v. Morrison*, 529 U.S. 598, 620-25 (2000); *Matter of A-B-*, Respondent, 27 I&N Dec. 316, 320 (A.G. 2018) (permanent injunction issued by *Grace v. Sessions*, No. 18-cv-01853 (D.D.C. Dec. 17, 2018)).

<sup>97</sup> U.N. Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 15-16, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004); Committee on the Elimination of Racial Discrimination, General Recommendation XXVI on Article 6 of the Convention (Mar. 24, 2000).

<sup>98</sup> U.N. Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (29 Mar. 2004). *See, e.g.*, U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Addendum, United States of America, ¶ 4, U.N. Doc. CCPR/C/81/Add.4 (24 Aug. 1994) (understanding on the federal system “is not a reservation and does not modify or limit the international obligations of the United States under the Covenant.”).

<sup>99</sup> U.N. Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4 U.N. Doc. CCPR/C/USA/CO/4 (23 Apr. 2014); *see also*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (recognizing that the United States understood the ICCPR to not be self-executing).

<sup>100</sup> *See, e.g.*, U.N. Committee Against Torture, General Comment No. 2, ¶ 18, U.N. Doc. CAT/C/CG/2 (24 Jan. 2008). *See also*, “U.S. Government Fact Sheet on Female Genital Mutilation or Cutting (FGM/C),” U.S. Dep’t of State, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fact-sheet-on-female-genital-mutilation-or-cutting.html>.

<sup>101</sup> *U.S. v. Nagarwala*, No. 17-cr-20274 (E.D. Mich., 20 Nov. 2018) (“even accepting the government’s contention that the criminal punishment of FGM is rationally related to the cited articles of the ICCPR, federalism concerns... prevent Congress from criminalizing FGM.”). Many states do not have laws criminalizing FGM. “*U.S. Laws Against FGM—State by State*”, EQUALITY NOW, [https://www.equalitynow.org/us\\_laws\\_against\\_fgm\\_state\\_by\\_state](https://www.equalitynow.org/us_laws_against_fgm_state_by_state).

<sup>102</sup> Letter from Noel J. Francisco, Solicitor General, U.S. Dep’t of Justice, to Sen. Dianne Feinstein, Committee on the Judiciary (Apr. 10, 2019), [https://www.justice.gov/oip/foia-library/osg-530d-letters/4\\_10\\_2019/download](https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download).

<sup>103</sup> *See, e.g.*, 42 U.S.C. § 14141 (no private right of action for “pattern or practice” of constitutional violations); 34 U.S.C. § 10228 (private right of action for discrimination permitted after exhaustion of administrative remedies).

<sup>104</sup> *See Kisela v. Huges*, 138 S. Ct. 1152 (2018) (Sotomayor, J. dissenting) (describing the Court’s *per curiam* opinion finding that a police officer was entitled to qualified immunity as “effectively treating qualified immunity as an absolute shield”); *Ziegler v. Abassi*, 137 S. Ct. 1843 (2017) (finding petitioners entitled to qualified immunity with respect to claims that they violated law prohibiting conspiracies to violate equal protection rights).

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<sup>105</sup> U.S. COMM’N ON CIVIL RIGHTS, POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 138 (2018); CONG. RESEARCH SERVICE, “POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS,” Report No. Report 7-5700, at 13-23 (30 Oct. 2015).

<sup>106</sup> Memo from Attorney General to Heads of Civil Litigating Components, United States Attorneys, “Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities” (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download> (citing “federalism concerns” among others); Katie Benner, “Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses,” N.Y. TIMES, 8 Nov. 2018, <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html>.

<sup>107</sup> Investigation of the Ferguson Police Department, United States Department of Justice Civil Rights Division 1-6 (4 Mar. 2015), at [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf); Investigation of the Baltimore Police Department, United States Department of Justice Civil Rights Division 3-11 (10 Aug. 2016), [http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>108</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018); *Warfaa v. Ali*, No. 14-1934, p. 16 (4<sup>th</sup> Cir. 2016).

<sup>109</sup> *See, e.g., Warfaa v. Ali*, 1:05-cv-701 (LMB/JFA) (E.D.V.A. May 21, 2019) (jury finding defendant liable for torture under the Torture Victims’ Protection Act); “Al Shimari v. CACI,” Ctr. For Constitutional Rights, <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>.

<sup>110</sup> Carol Rosenberg, “Guantánamo Case to Test Whether Torture Can Be Put on the Docket,” N.Y. TIMES, 25 June 2019 (“Mr. Khan and his legal team are pursuing a strategy in an effort to force the United States government to acknowledge what was done to him in a way it never has for any of the detainees who were subjected to torture — and to give him a measure of compensation for it.”); Scott Roehm, “For the Military Commissions, a Fork in the Road for Torture,” JUST SECURITY, 6 May 2019, <https://www.justsecurity.org/63945/for-the-military-commissions-a-fork-in-the-road-on-torture/>.

<sup>111</sup> For example, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

<sup>112</sup> *E.g., DeShaney v. Winnebago Cty. Dep’t of Soc. Serv.*, 489 U.S. 189 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).