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Contemporary Practice of the United States Relating to International Law


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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTINA DAUGIRDAS AND JULIAN DAVIS MORTENSON

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STATE JURISDICTION AND IMMUNITY

Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act
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On September 28, 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA), overriding a presidential veto for the first and only time during Obama's presidency.¹ The Act allows Americans to sue foreign states for playing a role in terrorist attacks on U.S. soil. While JASTA was written in general terms, it was drafted specifically to allow families of the victims of the 9/11 attacks to sue Saudi Arabia for its suspected role in those attacks.² The Act received widespread bipartisan support despite the administration's consistent stance that the Act would harm U.S. economic, diplomatic, and national security interests.

JASTA amends two statutes—the Foreign Sovereign Immunities Act (FSIA)³ and the Anti-Terrorism Act (ATA)⁴—to effectively overrule judicial constructions of those statutes that had foreclosed lawsuits against Saudi Arabia for its alleged support of the 9/11 attacks.

The FSIA establishes that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.”⁵ It also carves out a number of exceptions to such sovereign immunity, including an exception for noncommercial torts.⁶ This exception allows an American to sue a foreign state for damages if he or she is injured in the United States as the result of the tortious conduct of a foreign government, its officials, or its employees. In litigation against Saudi Arabia related to the 9/11 attacks, U.S. courts had interpreted this exception narrowly to apply only to tortious conduct occurring *entirely* within the United States.⁷ Under this interpretation, a foreign state that commits a tortious act resulting in injury or damage in the United States remains immune so long as part of the tortious conduct occurred outside the United States.⁸

JASTA expands what is known as the “terrorism exception” to the FSIA to implicitly overrule this judicial construction when it comes to acts of terrorism. Section 3 of the Act creates a cause of action for civil claims against foreign states (and their officials, employees, and agents)

¹ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016) (codified at 18 U.S.C. A. § 2333, 28 U.S.C.A. § 1605B, amending the Anti-Terrorism Act and the Foreign Sovereign Immunities Act, respectively), at <https://www.congress.gov/114/plaws/publ222/PLAW-114publ222.pdf> [hereinafter JASTA].

² See, e.g., Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SECURITY (Apr. 18, 2016), at <https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta>.

³ Foreign Sovereign Immunities Act, Pub. L. No. 94–583, 90 Stat. 2891 (1977) (codified at 28 U.S.C. §§ 1130, 1332(a)(4), 1391(f), 1441(d), 1602–1611(2012)) [hereinafter FSIA].

⁴ Anti-Terrorism Act, 18 U.S.C. § 2333 (2012) [hereinafter ATA].

⁵ FSIA, *supra* note 3, § 1604.

⁶ The noncommercial tort exception provides: “A foreign state shall not be immune . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . .” *Id.* § 1605(a)(5). Additional exceptions include those based on waivers, commercial activities, and State Department designations of state-sponsored terrorism. See *id.* § 1605(a)–(d), § 1605A.

⁷ See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 117 (2d. Cir. 2013).

⁸ *Id.*

for committing torts *anywhere in the world* that contribute to a terrorist attack carried out on U.S. soil.⁹ JASTA thus removes the geographic limitation on tort liability established by the courts, and allows Americans to sue foreign states for tortious conduct occurring abroad that causes injury or damage in the United States as the result of international terrorism. JASTA does not, however, authorize lawsuits against foreign states for acts of war or for torts based on omissions or negligence.¹⁰

Section 5 of JASTA establishes a mechanism by which the U.S. government can seek a stay of proceedings brought against a foreign state under Section 3, referenced above. “[I]f the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state,” the court may stay proceedings against that defendant for up to 180 days.¹¹ Once a stay is granted, the attorney general may request 180-day extensions, which the court must grant if the secretary of state recertifies the United States’ engagement in such “good faith discussions.”¹² JASTA does not limit the number of such extensions.

The other statute amended by JASTA—the ATA—establishes a cause of action for U.S. nationals to obtain treble damages from those responsible for injuries arising out of an act of international terrorism.¹³ Section 4 of JASTA adds a new provision to the ATA that explicitly allows ATA suits against individuals and entities under theories of secondary liability.¹⁴ Specifically, it recognizes liability for aiding and abetting, or conspiring to commit, an act of international terrorism that is planned, authorized, or executed by a designated foreign terrorist organization.¹⁵ This provision in effect overrules previous judicial decisions holding that the ATA does not encompass secondary liability.¹⁶ JASTA applies retroactively to actions involving injuries dating back to September 11, 2001.¹⁷

Both Democratic and Republican lawmakers sponsored JASTA.¹⁸ The legislation reflects bipartisan sympathy for the families of 9/11 victims who want to try Saudi Arabia in U.S.

⁹ Section 3, in pertinent part, reads: “A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case 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 of where the tortious act or acts of the foreign state occurred.” See JASTA, *supra* note 1, § 3(b).

¹⁰ *Id.* § 3(d).

¹¹ *Id.* § 5(c).

¹² *Id.* § 5(c)(2)(B)(ii).

¹³ ATA, *supra* note 4. Section 2333(a) provides: “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains . . .” *Id.*

¹⁴ See JASTA, *supra* note 1, § 4. JASTA does not expand the secondary-liability cause of action to foreign states. See *id.* § 4(d)(1) (limiting secondary liability to “persons” as defined in 1 U.S.C. § 1 (2012)).

¹⁵ *Id.* § 4.

¹⁶ See, e.g., *Rothstein v. UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008).

¹⁷ JASTA, *supra* note 1, § 7.

¹⁸ The bill, S. 2040, was cosponsored by Sens. Chuck Schumer, D-New York, and John Cornyn, R-Tex. See JASTA, *supra* note 1.

courts—and who are unsatisfied by the conclusion of the 9/11 Commission, which found “no evidence that the Saudi government as an institution or senior Saudi officials individually funded [Al Qaeda].”¹⁹

Despite widespread sympathy for the 9/11 victims and their families, the Obama administration opposed the measure, expressing concern about the possibility of unintended consequences.

Prior to the passage of the bill, the White House consistently objected to JASTA due to its dilution of foreign sovereign immunity and its global implications for U.S. economic, diplomatic, and national security interests. “The whole notion of sovereign immunity is at stake,” said White House Press Secretary Josh Earnest.²⁰ “[S]overeign immunity is something that protects the ability of the United States to work closely with countries all around the world. And walking back that principle would put the United States, our taxpayers and our service members and diplomats at risk.”²¹

One of the administration’s main concerns was that other countries would enact reciprocal measures and open their courts to similar claims against the United States and U.S. officials.²² As noted by President Obama in a letter to Senate Minority Leader Harry Reid, such lawsuits could have far-reaching repercussions: they could implicate Americans based on mere accusations of conduct violating foreign laws; they could lead to time-consuming discovery demands for sensitive intelligence information; and they could result in the attachment of U.S. government assets abroad.²³ Moreover, given the United States’ large international presence, the administration warned that reciprocal legislation would likely have a larger impact on U.S. interests than those of any other country.²⁴

The administration also worried that JASTA would remove decisions about foreign states’ involvement in terrorism—weighty decisions with serious diplomatic consequences—from the purview of the executive branch and delegate them instead to private litigants and courts. President Obama cautioned that such privatization could invite decisions that are inconsistent or based on incomplete information.²⁵ Prior to JASTA, only the secretary of state had the authority to abrogate a foreign state’s immunity arising from potential involvement

¹⁹ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 171 (2004), at <http://www.9-11commission.gov/report/911Report.pdf>. See also FBI 9/11 REVIEW COMM’N, THE FBI: PROTECTING THE HOMELAND IN THE 21ST CENTURY 101 (2015) (finding that “there is no new information to date that would alter the original findings of the 9/11 Commission regarding the individuals responsible for the 9/11 attacks or for supporting those responsible for the attacks”).

²⁰ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Apr. 18, 2016), at <https://www.whitehouse.gov/the-press-office/2016/04/18/press-briefing-press-secretary-josh-earnest-4182016> [hereinafter Apr. 18 Press Briefing].

²¹ *Id.*

²² See White House Press Release, Veto Message from the President – S.2040 (Sept. 23, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040> (“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.”) [hereinafter Obama Veto Message].

²³ Letter from Barack Obama, President of the United States, to Harry Reid, Minority Leader, U.S. Senate, at <https://docs.google.com/viewerng/viewer?url=http://big.assets.huffingtonpost.com/POTUSReidJASTA.pdf> [hereinafter Obama Letter].

²⁴ *Id.*

²⁵ *Id.*

in terrorism; the secretary did so by designating a foreign state as a “state sponsor of terrorism.”²⁶ According to the White House, upsetting this “well codified” process could undermine the government’s ability to effectively confront governments that sponsor terrorism and could erode cooperation from diplomatic partners who would be vulnerable to private allegations of terrorist-related activity.²⁷

After both houses of Congress passed the bill, President Obama exercised his veto and released a message that reiterated his primary concerns:

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.

...

Second, JASTA would upset longstanding international principles regarding sovereign immunity, putting in place rules that, if applied globally, . . . 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

...

Third, JASTA threatens to create complications in our relationships with even our closest partners. [By exposing them to potential 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.²⁸

Obama also noted that a number of U.S. allies and partners had expressed “serious concerns” about the law.²⁹ After Congress first passed the bill, the European Union urged the president to veto the legislation, based on its view that “JASTA would be in conflict with fundamental principles of international law and in particular the principles of State sovereign immunity.”³⁰ Saudi Arabia exerted significant lobbying efforts to try to stop the legislation and reportedly threatened to sell up to \$750 billion in U.S. assets that it thought could be vulnerable to attachment under JASTA judgments.³¹ Former members of the Bush, Clinton, and Obama administrations also spoke up, warning lawmakers that if JASTA was enacted,

²⁶ JASTA, *supra* note 1, §§ 1605A(a)(2), (h)(6). Currently, only Iran, Sudan, and Syria are designated as “state sponsors of terrorism.” U.S. Dep’t of State, State Sponsors of Terrorism, at <http://www.state.gov/j/ct/list/c14151.htm> (last visited Oct. 30, 2016).

²⁷ See White House Press Release, Press Briefing by Press Secretary Josh Earnest (Sept. 23, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/23/press-briefing-press-secretary-josh-earnest-9232016> [hereinafter Sept. 23 Press Briefing]; Obama Letter, *supra* note 23.

²⁸ Obama Veto Message, *supra* note 22.

²⁹ *Id.*

³⁰ Letter from the EU Delegation to the U.S. Dep’t of State (Sept. 19, 2016), at <https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf> [hereinafter EU Letter].

³¹ See, e.g., Julie Hirschfeld Davis, *Fight Between Saudis and 9/11 Families Escalates in Washington*, N.Y. TIMES (Sept. 21, 2016), at <http://www.nytimes.com/2016/09/22/us/politics/9-11-saudi-bill-veto-obama.html>; White House Press Release, Press Briefing by Press Secretary Josh Earnest (Sept. 26, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/26/press-briefing-press-secretary-josh-earnest-92616-0>; Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), at <http://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-of-economic-fallout-if-congress-passes-9-11-bill.html>.

“[o]ur national security interests, our capacity to fight terrorism and our leadership role in the world would be put in serious jeopardy” as well as “our relationship with one of our most important allies, Saudi Arabia.”³²

Despite these warnings, more than two-thirds of both the Senate and House voted to override Obama’s veto.³³ President Obama called the override a “political vote” and a “mistake” based on lawmakers’ fears of being “perceived as voting against 9/11 families right before an election.”³⁴ The enactment of the law had immediate effects: within two days, a 9/11 widower filed a federal lawsuit against the Kingdom of Saudi Arabia based on JASTA.³⁵

After JASTA was enacted, foreign governments again protested that JASTA violates international law. The Saudi Foreign Ministry stated, it “is of great concern to the community of nations that object to the erosion of the principle of sovereign immunity, which has governed international relations for hundreds of years.”³⁶ Russia’s Foreign Ministry described the law as evincing a “complete disregard for international law” and a “policy of extending [U.S.] jurisdiction to the entire world and ignoring the concept of state sovereignty”³⁷ The United Arab Emirates’ Foreign Ministry declared that JASTA is “contrary to general liability rules,” “not equal with the foundations and principles of relations among states, and represents a clear violation given its negative repercussions and dangerous precedents.”³⁸

Some international law scholars have also voiced concerns that JASTA violates international law by exceeding recognized and accepted exceptions to sovereign immunity under customary international law.³⁹ Other commentators have been more cautious about that conclusion,

³² Open Letter from William S. Cohen et al. to the President of the United States and Members of Congress, at http://www.al-monitor.com/pulse/files/live/sites/almonitor/files/documents/2016/letter_obama_congress_jasta.pdf. The letter was signed by a number of former national security officers, including William S. Cohen (former Secretary of Defense to President Clinton), Michael Mukasey (former Attorney General to President George W. Bush), and Rand Beers (former Homeland Security Adviser to President Obama). *Id.*

³³ The Senate voted 97–1 to override, and the House voted 348–77. See JASTA, *supra* note 1.

³⁴ Daniella Diaz, *Exclusive: Obama Says Congress Made a “Political Vote” Overriding His Veto of Saudi Lawsuit Bill*, CNN (Sept. 28, 2016), at <http://www.cnn.com/2016/09/28/politics/obama-override-veto-911-bill-cnn-presidential-town-hall>.

³⁵ See Complaint, *Desimone v. Kingdom of Saudi Arabia*, No. 1:16-cv-01944-ABJ (D.D.C. Sept. 30, 2016).

³⁶ Kingdom of Saudi Arabia Ministry of Foreign Affairs Press Release, Official at Ministry of Foreign Affairs: JASTA Great Concern to Community of Nations Objecting to Erosion of Principle of Sovereign Immunity (Sept. 30, 2016), at <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/news/MinistryNews/Pages/ArticleID201693001814440.aspx>.

³⁷ Ministry of Foreign Affairs of the Russ. Fed’n Press Release, Comment by the Information and Press Department on the US Passing the Justice Against Sponsors of Terrorism Act with Extraterritorial Jurisdiction (Sept. 30, 2016), at http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479122.

³⁸ U.A.E. Ministry of Foreign Affairs & Int’l Cooperation Press Release, UAE Voices Concerns Regarding US Congress Adoption of Justice Against Sponsors of Terrorism Act (Sept. 12, 2016), at <https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/12916-UAE.aspx>.

³⁹ See, e.g., S. 2040, Justice Against Sponsors of Terrorism Act: Hearing on S. 2040 Before the Subcomm. on the Constitution & Civil Justice, 114th Cong. (July 14, 2016) (statement of Paul B. Stephan), at <https://judiciary.house.gov/wp-content/uploads/2016/07/Stephan-Testimony-07142016.pdf> [hereinafter JASTA Testimony]; Curtis Bradley & Jack Goldsmith, Opinion, *Don’t Let Americans Sue Saudi Arabia*, N.Y. TIMES (Apr. 22, 2016), at <http://www.nytimes.com/2016/04/22/opinion/dont-let-americans-sue-saudi-arabia.html> (“A nation’s immunity from lawsuits in the courts of another nation is a fundamental tenet of international law. This tenet is based on the idea that equal sovereigns should not use their courts to sit in judgment of one another. Many nations have tacitly agreed to limit immunity in specified contexts, such as when they engage in certain commercial activities. But apart from those exceptions (or where a binding treaty or Security Council resolution otherwise dictates), international law continues to guarantee immunity, even for alleged egregious crimes.”).

noting that the imprecise boundaries of the recognized exception to sovereign immunity for some territorial torts could conceivably cover the circumstances contemplated by JASTA.⁴⁰

When asked directly whether JASTA violates international law, the White House press secretary sidestepped the question.⁴¹ He confirmed that, to his knowledge, it does not violate any international agreements, but he did not express an official opinion as to whether JASTA violates customary international law.⁴² He instead described sovereign immunity as a “legal concept . . . that countries around the world observe,” and said that “carving out exceptions” to it puts U.S. service members, diplomats, and companies at “legal risk.”⁴³ This response conforms with the administration’s other characterizations of sovereign immunity as a “foundational principle of international law” that JASTA threatens to “degrade” or “roll[] back.”⁴⁴

Immediately after the law’s passage, some members of Congress acknowledged potential downsides of the legislation.⁴⁵ Twenty-eight senators signed a letter asking JASTA’s sponsors to “mitigate th[e] unintended consequences” of the law.⁴⁶ The White House press secretary characterized this congressional response as “rapid-onset buyer’s remorse.”⁴⁷ In the weeks that followed, State Department representatives expressed their intention to engage with Congress in figuring out the best way to implement the new law.⁴⁸

⁴⁰ See William Dodge, *Does JASTA Violate International Law?*, JUST SECURITY (Sept. 30, 2016), at <https://www.justsecurity.org/33325/jasta-violate-international-law-2> (noting that Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Properties—which informs customary international law insofar as it evidences state practice and *opinio juris*—excludes sovereign immunity for proceedings related to death, personal injury or property damage that is, *inter alia*, attributable to another state and caused by an “act or omission [of that state, which] occurred *in whole or in part* in the territory” of the forum state (emphasis added)). *But see* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AJIL 194, 206 (2005) (stating that “it would read far too much into the consensus adoption of the convention to assert that the adoption of such exceptions in the convention as adopted renders unlawful under customary international law existing statutory provisions such as those in the Foreign Sovereign Immunities Act. . . . The issues remain controversial.”).

⁴¹ See Sept. 23 Press Briefing, *supra* note 27.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See White House Press Release, Press Briefing by Press Secretary Josh Earnest (Sept. 27, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/27/press-briefing-press-secretary-josh-earnest-92716>; White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 4, 2016), at <https://www.whitehouse.gov/the-press-office/2016/10/04/press-briefing-press-secretary-josh-earnest-1042016>; Apr. 18 Press Briefing, *supra* note 20.

⁴⁵ According to media reports, Senate Majority Leader Mitch McConnell (R-Ky.) said that “[i]t appears as if there may be some unintended ramifications of [JASTA],” and Speaker Paul Ryan (R-Wis.) said “I would like to think there may be some work to be done to protect our service members overseas from any kind of legal ensnarement that [could] occur . . . while still protecting the rights of the 9/11 victims” Seung Min Kim & Burgess Everett, *McConnell: Saudi 9/11 Law Could Have “Unintended Ramifications,”* POLITICO (Sept. 29, 2016), at <http://www.politico.com/story/2016/09/mitch-mcconnell-saudi-9-11-bill-228903>.

⁴⁶ Letter from Twenty-Eight Senators to John Cornyn, U.S. Senate, and Charles E. Schumer, U.S. Senate (Sept. 28, 2016), at http://www.corker.senate.gov/public/_cache/files/d8eee900-5ffc-4204-a4f1-8072c104d9c2/Bipartisan%20Senate%20JASTA%20Letter%20092816.pdf. See also Dara Lind & Dylan Matthews, *97 Senators Overrode an Obama Veto. Then 28 Sent an “Oops” Letter*, VOX (Sept. 28, 2016), at <http://www.vox.com/2016/9/28/13100314/vox-sentences-congress-veto-obama>.

⁴⁷ White House Press Release, Press Briefing by Press Secretary Josh Earnest and Secretary of Education King (Sept. 29, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/29/press-briefing-press-secretary-josh-earnest-and-secretary-education-king>.

⁴⁸ U.S. Dep’t of State, Daily Press Briefing (Oct. 21, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/10/263421.htm> (“Well, I think what the Secretary was referring to was that we’re going to continue to speak with members of Congress about our concerns over the law. Look, you’re right; it’s the law of the land, and we understand that and we

In late 2016, Senators John McCain and Lindsey Graham initiated an effort to amend JASTA.⁴⁹ They proposed a “modest” “caveat” to the law, such that

if you are suing based on a discretionary function of a government to form an alliance with somebody or to make a military decision or a political decision, the only time that government is liable is if they knowingly engage with a terrorist organization directly or indirectly, including financing.⁵⁰

According to Senator Graham, “[t]hat would send a signal to the world that we are not opening Pandora’s box.”⁵¹

Despite efforts by both the State Department and White House to work with Congress to mitigate potential negative consequences of the law,⁵² no amendment was passed during the lame-duck session. As Congress’ 2016 session neared its end, Secretary of State John Kerry said, “[w]e tried very hard to move on changing [JASTA] and we will continue to do that.”⁵³

As a candidate, President-elect Trump had expressed strong support for JASTA, reportedly describing President Obama’s veto as “one of the low points of his presidency” and saying that he would have approved the law if he were president.⁵⁴ While advocating for a JASTA amendment, Senators McCain and Graham acknowledged the possibility that the law might not be “fixed” prior to 2017 and insisted, “[w]e are not going to stop until we have this problem fixed because it is a real problem for people serving the United States in real time.”⁵⁵

U.S. Federal Court of Appeals Upholds United Nations’ Immunity in Case Related to Cholera in Haiti

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On October 9, 2013, a group of Haitian cholera victims and their survivors sued the United Nations, along with two UN officials and the United Nations Stabilization Mission in Haiti (MINUSTAH), in the U.S. District Court for the Southern District of New York.¹ The plaintiffs alleged that the United Nations had negligently and recklessly allowed peacekeepers from Nepal carrying cholera to enter Haiti in the wake of the 2010 earthquake without reasonable health screenings.² The suit further alleged that the United Nations had negligently maintained

obey the law and we will obey this law. There’s no dispute about that. But we still have concerns about it and many of our partners, some of whom are even in places like Europe, some of our closest allies, have lingering concerns about this. And so we’re going to continue to engage and discuss the law and its implementation going forward with members of Congress. But other than that, I don’t have any more specifics to offer.”)

⁴⁹ See 162 CONG. REC. S6611 (daily ed. Nov. 30, 2016).

⁵⁰ *Id.* (Statements of Sens. Graham and McCain).

⁵¹ *Id.* (Statement of Sen. Graham).

⁵² U.S. Dep’t of State, Daily Press Briefing (Dec. 1, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/12/264717.htm>; White House Press Release, Press Briefing by Press Secretary Josh Earnest (Dec. 1, 2016), at <http://www.whitehouse.gov/the-press-office/2016/12/01/press-briefing-press-secretary-josh-earnest-1212016>.

⁵³ U.S. Dep’t of State, Joint Press Availability with Saudi Arabian Foreign Minister Adel al-Jubeir (Dec. 18, 2016), at <http://www.state.gov/secretary/remarks/2016/12/265750.htm>.

⁵⁴ Mark Hensch, *Trump Slams Obama for ‘Shameful’ 9/11 Bill Veto*, THEHILL.COM (Sept. 23, 2016), at <http://thehill.com/blogs/ballot-box/presidential-races/297558-trump-rips-obama-for-shameful-9-11-veto>.

⁵⁵ See 162 CONG. REC. S6611, *supra* note 49 (Statements of Sens. Graham and McCain).

¹ Kristina Daugirdas & Julian Mortenson, *Contemporary Practice of the United States Relating*, 108 AJIL 819, 822 (2014).

² *Id.* at 822.

inadequate sanitation facilities.³ Finally, the petitioners alleged that the United Nations' refusal to accept responsibility for the outbreak had exacerbated the epidemic.⁴ According to the United Nations, by August 2016, nearly 800,000 people had become infected with cholera, and more than 9,000 had died of cholera.⁵

The United States submitted a statement of interest to the district court, arguing that the United Nations and all other defendants were immune from suit under the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN).⁶ Of note, the CPIUN requires the United Nations to "make provisions for appropriate modes of settlement" of certain categories of disputes.⁷ Pursuant to that provision, the plaintiffs had previously filed a petition for compensation with the secretary-general. The United Nations denied the petition on the grounds that the claims were "not receivable" under the CPIUN because "consideration of these claims would necessarily include a review of political and policy matters."⁸

On January 9, 2015, the District Court dismissed the plaintiff's claims for lack of subject matter jurisdiction:

The Charter of the United Nations ("UN Charter") states that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The CPIUN, which was adopted less than a year after the UN Charter, defines the UN's privileges and immunities in more detail. The CPIUN 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." Because the CPIUN is self-executing, this Court must enforce it despite the lack of implementing legislation from Congress.

The Second Circuit's decision in *Brzak v. United Nations* requires that Plaintiffs' suit against the UN be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3). In *Brzak*, the Second Circuit unequivocally held that "[a]s the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'" Here, no party contends that the UN has expressly waived its immunity. Accordingly, under the clear holding of *Brzak*, the

³ *Id.*

⁴ *Id.* at 823.

⁵ United Nations, Fact Sheet: Response to Cholera in Haiti, Aug. 2016, at <http://www.un.org/News/dh/info-cus/haiti/CholeraFactsheetAug2016.pdf>.

⁶ Daugirdas & Mortenson, *supra* note 1, at 823–26.

⁷ Convention on the Privileges and Immunities of the United Nations Art. VIII, sec. 29, Feb. 13, 1946, 1 UNTS 15 (requiring the United Nations to "make provisions for appropriate modes of settlement" of "[d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party" and "[d]isputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General").

⁸ Daugirdas & Mortenson, *supra* note 1, at 822, *citing* Letter from Patricia O'Brien, UN Under-Secretary-General for Legal Affairs to Brian Concannon, Attorney for the Haitian Cholera Victims (Feb. 21, 2013), at <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>. The UN secretary-general later provided a more expansive analysis in a response to inquiries from four UN special rapporteurs. *See* Letter from Pedro Medrano, Assistant Secretary-General and Senior Coordinator for Cholera Response, to Leilani Farha, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Nondiscrimination in this Context; Gustavo Gallón, Independent Expert on the Situation of Human Rights in Haiti; Dainius Pūras, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; and Catarina de Albuquerque, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, paras. 84–98, (Nov. 25, 2014), at [https://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_\(3.2014\).pdf](https://spdb.ohchr.org/hrdb/28th/Haiti_ASG_25.11.14_(3.2014).pdf).

UN is immune from Plaintiffs' suit. In addition, MINUSTAH, as a subsidiary body of the UN, is also immune from suit.⁹

The District Court also ruled that the immunity of the United Nations was not contingent on the availability of an alternative means of dispute resolution.¹⁰ Finally, the court held that the United Nations officials named in the suit were also immune.¹¹

The plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit.¹² While the decision from the three-judge panel was pending, 158 members of Congress signed a bipartisan letter from Michigan representative John Conyers Jr. expressing frustration with the United Nations' lack of accountability:¹³

We write to urge the State Department to immediately and unreservedly exercise its leadership to ensure that the United Nations (UN) take concrete steps to eliminate the cholera epidemic introduced to Haiti in 2010 by waste from a UN peacekeeper camp, and to comply with its legal and moral obligations to provide cholera victims with access to an effective remedy.

...

While the deaths, illness, and evidence of malfeasance mounted, UN Assistant Secretary-General Pedro Medrano Rojas, who met with Congress as the UN's point person for responding to the epidemic, left office in June 2015 and was not replaced. The UN continues to refuse to even discuss providing compensation for the losses incurred by those killed and sickened by the cholera it brought to Haiti, and there is no notable progress in its proclaimed efforts to provide the water and sanitation infrastructure necessary to control the cholera epidemic.

...

While we do not wish to take a position in the litigation, we are deeply concerned that the State Department's failure to take more leadership in the diplomatic realm might be perceived by our constituents and the world as a limited commitment to an accountable and credible UN.¹⁴

In response to this letter, a State Department spokesperson praised Representative Conyers' leadership and emphasized the United States' commitment to assisting Haiti in combating the cholera outbreak, highlighting the \$95 million the United States had already spent for treatment and prevention.¹⁵

Additionally, before the Second Circuit ruled, a report criticizing the United Nations' response to the cholera outbreak by the United Nations special rapporteur on extreme poverty and human rights, Philip Alston, was leaked to the press. An excerpt follows:¹⁶

⁹ *Georges v. United Nations*, 84 F.Supp.3d 246, 248–49 (S.D.N.Y. 2015) (internal citations omitted).

¹⁰ *Id.* at 249–50.

¹¹ *Id.* at 250.

¹² *Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016).

¹³ Rick Gladstone, *Lawmakers Urge John Kerry to Press U.N. for Haiti Cholera Response*, N.Y. TIMES (June 29, 2016), at <http://www.nytimes.com/2016/06/30/world/americas/haiti-cholera-john-kerry-congress.html>.

¹⁴ Office of Congressman John Conyers, Jr. Press Release, Reps. John Conyers and Mia Love Lead Bipartisan Group of More Than 150 Members of Congress in Calling for UN to Take Responsibility for Haiti Cholera Epidemic (June 29, 2016), at https://conyers.house.gov/sites/conyers.house.gov/files/06_29_16%20Kerry%20Haiti%20Cholera%20Letter%20Final.pdf.

¹⁵ U.S. Dep't of State Press Release, Daily Press Briefing (Aug. 3, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/08/260813.htm>.

¹⁶ Jonathan M. Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES (Aug. 17, 2016), at <http://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html>.

The scientific evidence now points overwhelmingly to the responsibility of the peacekeeping mission as the source of the outbreak. 9,145 persons have so far died and almost 780,000 have been infected. To date, the United Nations has denied responsibility for the outbreak, rejected all claims for compensation, refused to establish any procedure to resolve the resulting disputes, and has relied on a claim of absolute immunity in defending litigation brought by victims. This policy of abdicating responsibility relies on a claim of scientific uncertainty that is no longer sustainable and an unpublished legal opinion that the resulting claims are not “of a private law nature” and are thus not receivable. Based on what is known of the legal analysis, it is deeply flawed.

The UN’s policy is morally unconscionable, legally indefensible, and politically self-defeating. It is also entirely unnecessary. In practice, it jeopardizes the UN’s immunity by encouraging arguments calling for it to be reconsidered by national courts; it upholds a double standard according to which the UN insists that Member States respect human rights, while rejecting any such responsibility for itself; it leaves the UN vulnerable to eventual claims for damages and compensation in this and subsequent cases which are highly unlikely to be settled on terms that are manageable from the UN’s perspective; it provides highly combustible fuel for those who claim that UN peace-keeping operations trample on the rights of those being protected; and it undermines both the UN’s credibility and the integrity of the Office of the Secretary-General.¹⁷

Shortly after the report was sent to UN Secretary-General Ban Ki-moon, a deputy spokesperson for the secretary-general indicated that the United Nations planned to change its approach to the cholera outbreak in Haiti while maintaining its immunity from the lawsuit filed in New York.¹⁸ According to an email written by the spokesperson, “over the past year, the U.N. has become convinced that it needs to do much more regarding its own involvement in the initial outbreak and the suffering of those affected by cholera.”¹⁹ The spokesperson also indicated that a “new response will be presented publicly within the next two months, once it has been fully elaborated, agreed with the Haitian authorities and discussed with member states.”²⁰

The following day, the Second Circuit upheld the district court’s ruling.²¹ The Second Circuit rejected the plaintiffs’ argument that the United Nations’ immunity was contingent on its provision of an alternative dispute settlement mechanism:

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

¹⁷ Philip Alston’s *Draft Report on the U.N. and the Haiti Cholera Outbreak*, N.Y. TIMES (Aug. 19, 2016), at <http://www.nytimes.com/interactive/2016/08/19/magazine/document-Alston-Haiti-Cholera-Report.html>. For the final published version of the report, see Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Rep. of the Special Rapporteur on Extreme Poverty and Human Rights in Accordance with Human Rights Council Res. 26/3, UN Doc. A/71/40823 (Aug. 26, 2016).

¹⁸ Katz, *supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Georges*, 834 F.3d 88; see also Jonathan M. Katz, *U.S. Court Upholds United Nations’ Immunity in Cholera Suit*, N.Y. TIMES (Aug. 18, 2016), at <http://www.nytimes.com/2016/08/19/world/americas/united-nations-cholera-haiti.html>.

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.²²

The court then dismissed the material breach argument in light of its conclusion that the plaintiffs lacked standing to make that claim:

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.²³

Finally, the Court found that the plaintiffs’ arguments for right of access “[failed] to convince”:²⁴

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.²⁵

On August 19, 2016, the Office of the United Nations Secretary-General issued a statement in response to the Second Circuit’s ruling:

The Secretary-General deeply regrets the terrible suffering the people of Haiti have endured as a result of the cholera epidemic. The United Nations has a moral responsibility to the victims of the cholera epidemic and for supporting Haiti in overcoming the epidemic and building sound water, sanitation and health systems.

...

²² *Georges*, 834 F.3d at 93–94 (internal citations omitted).

²³ *Id.* at 97 (internal citations omitted).

²⁴ *Id.* at 98.

²⁵ *Id.* (internal citations omitted).

The Secretary-General is actively working to develop a package that would provide material assistance and support to those Haitians most directly affected by cholera. These efforts must include, as a central focus, the victims of the disease and their families. The United Nations also intends to intensify its support to reduce, and ultimately end, the transmission of cholera, improve access to care and treatment and address the longer-term issues of water, sanitation and health systems in Haiti.²⁶

In the months following the Second Circuit decision, the United Nations has provided some further information about its planned compensation plan.²⁷ The plan has two tracks: the first track aims to combat the cholera epidemic itself (by, for example, addressing the water infrastructure still needing repair from the 2010 earthquake);²⁸ “the second track aims to develop a framework proposal to Member States for material assistance to those Haitians most affected by cholera after the 2010 outbreak.”²⁹

Apart from its filings in the lawsuit against the United States, the Obama administration had been largely silent about the United Nations’ response to cholera in Haiti.³⁰ Nevertheless, in a statement before a committee of the UN General Assembly, Alston suggested that the United States had played an influential role in shaping the United Nations’ legal position:

[I]t seems relevant to note that the United States of America, which has a strong interest in this issue both as a close neighbor of Haiti and as the principal contributor to the UN’s peacekeeping budget, has itself never publicly stated its legal position on this issue, despite many requests that it do so. There is reason to believe that the position adopted by [the UN Office of Legal Affairs] in 2013 was consistent with views strongly pressed at the time by the United States. The reasoning behind the US position seems to be that the UN must follow American legal practice which generally takes the view that legal responsibility should never be accepted when it can possibly be avoided, because one never knows the consequences for subsequent litigation.³¹

At a press conference two days later, State Department Spokesperson John Kirby was asked about the United States’ role in shaping the United Nations’ legal position:

QUESTION: . . . [E]arlier this week, there was a UN expert speaking up at the UN in New York about Haiti and the cholera epidemic. And in his comments, he . . . hinted . . . that the reason the UN took the position that it took when people tried to get some accountability for the introduction of

²⁶ Secretary-General Press Statement, Statement Attributable to the Spokesman for the Secretary General on Haiti (Aug. 19, 2016), at <https://www.un.org/sg/en/content/sg/statement/2016-08-19/statement-attributable-spokesman-secretary-general-haiti>.

²⁷ *UN Deputy Chief Briefs Member States on New UN Approaches to Cholera Outbreak in Haiti*, UN NEWS CENTRE (Oct. 14, 2016), at <http://www.un.org/apps/news/story.asp?NewsID=55307#.WBQdLHiCwUV>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Samantha Power, the U.S. Ambassador to the United Nations, has not publicly commented on the United Nations’ role in the cholera crisis in Haiti. In March 2014, she posted a comment on Twitter: “More needed to combat cholera: Countries need to expand support for #Haiti’s efforts to treat those with cholera & improve sanitation.” See Samantha Power (@AmbassadorPower), TWITTER (Mar. 24, 2014), at <https://twitter.com/AmbassadorPower/status/448238784916643840>.

³¹ Statement by Professor Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, UN Responsibility for the Introduction of Cholera into Haiti, 71st Sess. of the General Assembly, Third Committee, Item 68 (b&c) (Oct. 25, 2016), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20794&LangID=E>.

cholera into Haiti was at the behest of the United States. Can you address that? Is that correct? Did you pressure or push the UN into not responding?

MR KIRBY: No, we did not. We have been very clear that we do not take a position on the validity of the underlying claims in this particular case. We do not take a position.

QUESTION: But you did take a position in favor of the United Nations, correct?

MR KIRBY: What we've said is we support efforts by the special rapporteur to give greater prominence to the plight of those living in extreme poverty. We have said before that we welcomed the secretary-general's acceptance of the UN's moral responsibility for the cholera outbreak and his recent statement expressing regret for the loss of life. We've also said that we recognize more must be done and we support the UN's ongoing efforts to design an assistance package to assist those most affected by cholera including in the wake of Hurricane Matthew. So we look forward to receiving the secretary-general's proposal for the provision of a package of assistance and support to Haitians most affected by the cholera. . . .

QUESTION: . . . I think Matt's fundamental question was: Did the U.S. Government at any time discourage the UN from taking responsibility, right? Was that fundamentally your question? . . .

MR KIRBY: I'm not aware that we discouraged them from taking responsibility. I said . . . we welcomed that— . . .

MR KIRBY: —the secretary-general said it was a moral responsibility.³² But with respect to the actual claims, we did not take a position on the validity of the underlying claims in this case.

QUESTION: . . . [C]ouldn't you discourage them from taking responsibility even if you don't take a position on the underlying claims? Look, you could say, "Look, I don't know who did this, but it's going to be bad if you take responsibility, so don't do that."

MR KIRBY: Well, I mean, could we have? I don't know. I suppose we could have. I'm not aware that we did. What I can tell you is we did not take a position on the underlying claims and we did welcome the secretary-general's actions and his comments on this matter going forward.³³

On December 1, Secretary-General Ban Ki-moon spoke about the United Nations' new approach to cholera in Haiti:

The United Nations deeply regrets the loss of life and suffering caused by the cholera outbreak in Haiti. On behalf of the United Nations, I want to say very clearly: we apologise to the Haitian people. We simply did not do enough with regard to the cholera outbreak and its spread in Haiti.

³² [Editors' note: In July 2014, the secretary-general stated his belief that "the international community, including the United Nations, has a moral responsibility to help the Haitian people stem the further spread of the cholera epidemic." He did not address the legal implications of this statement. Daugirdas & Mortenson, *supra* note 1, at 826.]

³³ U.S. Dep't of State Press Release, Daily Press Briefing (Oct. 27, 2016), at <http://www.state.gov/t/pa/prs/dpb/2016/10/263730.htm#HAITI>.

We are profoundly sorry for our role.

...

Our new approach to Haiti and cholera is founded on and follows two tracks. The assistance requested amounts to around \$400 million over two years divided between Track One and Track Two.

Track One consists of a substantially intensified effort to respond to, and reduce, the incidence of cholera in Haiti. Haitians clearly have told us that eliminating cholera must be priority number one. We would like to see improvements in people's access to care and treatment when sick, while also addressing the longer-term issues of water, sanitation and health systems.

Work on Track One is [well] under way. . . .

...

. . . [O]ur new approach includes a second track—Track 2—that focuses specifically on those Haitians most directly affected by cholera, their families and communities. . . . Track Two is a concrete expression of the regret of our Organization for the suffering so many Haitians have endured. On that basis, we propose to take a community approach that would provide a package of material assistance and support to those most severely impacted by cholera. The support would be based on priorities established in consultation with communities, victims and their families.

...

This support could take many forms, including projects to alleviate the impacts of cholera and strengthen capacity to address the conditions that increase cholera risk. It could also include projects reflecting community needs not directly related to cholera, such as education grants, micro-finance or other initiatives.

...

Some have urged that the package also include an individual component, such as the payment of money to the families of those who died of cholera. This approach would require identification of the deceased individuals and their family members. It would also require the certainty of sufficient funding to provide a meaningful fixed amount per cholera death.

We need to do further on-the-ground consultations, while acknowledging the difficulties involved. Additional evaluation is needed on whether and how the limitations of information on deaths from cholera, including the identities of the victims, can be addressed and on the challenges and costs associated with that effort.³⁴

Ban emphasized the need for adequate funding, and encouraged member states to contribute voluntary funds to the newly established United Nations Haiti Cholera Response Multi-Partner Trust Fund.³⁵

Ambassador Isobel Coleman, the U.S. Representative to the United Nations for UN Management and Reform, delivered informal remarks in response. An excerpt follows:

As the Secretary-General has movingly noted, cholera has had a devastating effect on the Haitian people since it was introduced in Haiti in 2010. Families have lost loved ones, caregivers, and breadwinners. No community has been untouched. There is a clear humanitarian imperative to respond to the epidemic in a robust and sustained manner.

³⁴ UN Secretary-General, Secretary-General's Remarks to the General Assembly on a New Approach to Address Cholera in Haiti (Dec. 1, 2016), at <https://www.un.org/sg/en/content/sg/statement/2016-12-01/secretary-generals-remarks-general-assembly-new-approach-address>; see also UN Secretary-General, A New Approach to Cholera in Haiti, U.N. Doc. A/71/620 (Nov. 25, 2016).

³⁵ *Id.*

...

There is also a clear ethical duty to respond to the cholera epidemic in Haiti. Not a single one of these cases should have occurred. For this reason, the United States welcomes the Secretary-General's acceptance of the UN's moral responsibility for the cholera outbreak and his statement last month in Haiti expressing regret for the resulting loss of life. While the UN and the international community have made strides in containing and preventing the further spread of the disease, the U.S. recognizes that more must be done and supports the UN's ongoing efforts to design an assistance package for those most affected by cholera.

...

We welcome the Secretary-General's apology today and the proposed new approach as meaningful symbols of atonement to the Haitian people, and important steps in restoring the credibility of the United Nations. And we look forward to working with the Secretary-General and his successor to ensure that this initiative has a positive and lasting impact for those most affected.³⁶

USE OF FORCE AND ARMS CONTROL

U.S.-Russian Agreements on Syria Break Down as the Syrian Conflict Continues doi:10.1017/ajil.2016.5

Starting in February 2016, the United States and Russia reached a series of agreements aimed at establishing a cessation of hostilities in the Syrian civil war and facilitating a political settlement of the underlying conflict. Although the agreements showed initial promise, various breakdowns led the United States to suspend bilateral communications with Russia regarding maintenance of the agreements by October 2016.

The United States and Russia have each used armed force during the civil war, mostly by conducting air strikes. Since September 2014, the United States has directed air strikes against Syrian positions of the Islamic State of Iraq and the Levant (ISIL).¹ Russia's air strikes began one year later at the request of Syria's president, Bashar al Assad.² Russia justified its air strikes as targeting terrorist groups and "actively promot[ing] the political process" of settling the conflict.³ While Russia's assistance has facilitated the Assad regime's expansion of territorial control, opposition groups continue to occupy large portions of the country.⁴

In October 2015, the United States and Russia convened meetings among a group of nations to discuss a potential ceasefire and political resolution to the Syrian

³⁶ United Nations, Ambassador Isobel Coleman, U.S. Representative to the UN for UN Management and Reform, U.S. Mission to the United Nations, Remarks at an Informal Briefing by the Secretary-General on the United Nations' New Approach to Cholera in Haiti (Dec. 1, 2016), at <https://usun.state.gov/remarks/7582>.

¹ Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 199, 203 (2015).

² See Ministry of Defence of the Russ. Fed'n Press Release, Russian Aviation Performed High-Accuracy Strikes Against International Terror Organization ISIS (Sept. 30, 2016), at http://eng.mil.ru/en/news_page/country/more.htm?id=12059172@egNews; see also Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Foreign Minister Sergey Lavrov's Remarks and Answers to Media Questions Following a Meeting with US Secretary of State John Kerry, New York, September 30, 2015 (Oct. 1, 2015), at http://www.mid.ru/en/web/guest/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1819477 [hereinafter Sergey Lavrov's Remarks].

³ See Sergey Lavrov's Remarks, *supra* note 2.

⁴ Office of the Director of National Intelligence, *Worldwide Threat Assessment of the US Intelligence Community* 17–18, 22–23 (Feb. 9, 2016), at https://www.dni.gov/files/documents/SASC_Unclassified_2016_ATA_SFR_FINAL.pdf.

conflict.⁵ Eventually, this group grew to include seventeen nations and representatives of the Arab League, the European Union, and the Organization of Islamic Cooperation.⁶ The United States and Russia formally co-chair the group, which is now called the International Syria Support Group (ISSG).⁷

On February 22, 2016, the United States and Russia, as co-chairs of the ISSG, agreed to a Cessation of Hostilities (COH),⁸ an international instrument directed at three goals: (1) limiting hostilities between the Syrian government and opposition groups; (2) permitting humanitarian aid to reach civilians; and (3) advancing a political settlement to the conflict.⁹ While ISIL and the Al Qaeda affiliated group al-Nusra¹⁰ were precluded from joining the agreement, the instrument invited all other opposition groups as well as the Armed Forces of the Syrian Arab Republic (Syrian Army) to agree to its terms.¹¹

The precise legal status of the instrument was at least initially ambiguous. At a press briefing to announce the undertaking, a State Department spokesperson stated that “it’s incumbent on [signatories] to live up to the obligations and to buy into the cessation of hostilities.”¹² Subsequent statements have indicated a political agreement. The day after he announced the conclusion of the agreement, Secretary of State John Kerry referred to the COH as “this proposed arrangement,”¹³ and subsequent iterations have been described by the State Department as “an arrangement, in the form of understandings.”¹⁴ Russian descriptions of the agreement have emphasized its importance, but have not labeled the COH a treaty.¹⁵

⁵ U.S. Dep’t of State Press Release, Joint Press Availability with Russian Foreign Minister Sergey Lavrov and UN Special Envoy Steffan de Mistura (Oct. 30, 2015), at <https://2009-2017.state.gov/secretary/remarks/2015/10/249019.htm>.

⁶ U.S. Dep’t of State Press Release, Statement of the International Syria Support Group (Feb. 11, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/02/252428.htm>.

⁷ *Id.*

⁸ U.S. Dep’t of State Press Release, Joint Statement of the United States and the Russian Federation, as Co-Chairs of the ISSG, on Cessation of Hostilities in Syria (Feb. 22, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/02/253115.htm> [hereinafter U.S.-Russia Joint Statement on COH].

⁹ *See id.*

¹⁰ Daugirdas & Mortenson, *supra* note 1, at 209. In July 2016, al-Nusra’s leader announced that the group would henceforth call itself “Jabhat Fath al Sham.” *See* U.S. Dep’t of State Press Release, State Department Amendments to the Terrorist Designation of al-Nusrah Front (Nov. 10, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/11/264230.htm>.

¹¹ U.S.-Russia Joint Statement on COH, *supra* note 8. (“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.”).

¹² U.S. Dep’t of State Press Release, Daily Press Briefing (Feb. 22, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/02/253123.htm>.

¹³ U.S. Dep’t of State Press Release, Remarks with Chinese Foreign Minister Wang Yi (Feb. 23, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/02/253164.htm>.

¹⁴ U.S. Dep’t of State, Fact Sheet on U.S.-Russia Arrangement on Reducing Violence in Syria (Sept. 9, 2016) [hereinafter U.S.-Russia Arrangement Fact Sheet].

¹⁵ *See, e.g.*, Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Foreign Minister Sergey Lavrov’s Remarks at the UN Security Council High-Level Briefing on the Situation in the Middle East and North Africa (Sept. 21, 2016), at http://www.mid.ru/en/web/guest/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/2458378 (“Russia and the United States as the ISSG co-chairs worked for over six months to coordinate concrete agreements”); *id.* (referring to coalition air strikes as a “blatant violation of the cessation of hostilities regime”); Pres. of Russia Press Release, Readout of Telephone Conversation with Federal Chancellor of Germany Angela Merkel (Sept. 29, 2016), at <http://en.kremlin.ru/events/president/news/52990> (“The President of Russia again stressed how important it is for the United States to fulfil its promises to ensure the separation of the so-called moderate opposition from terrorist groups.”).

As a matter of substance, the COH committed all signatories to accept parallel “responsibilities,” *mutatis mutandis*. It listed “[t]he responsibilities of the Syrian armed opposition” as follows:

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 2254,¹⁶ 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.¹⁷

In a separate paragraph, the COH then stated that signatory opposition groups would “observe[]” the abovementioned commitments, 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” also undertook a parallel set of “responsibilities”:¹⁸

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);

¹⁶ S.C. Res. 2254 (Dec. 18, 2015). Resolution 2254 asked the secretary-general to “convene representatives of the Syrian government and the opposition to engage in formal negotiations on a political transition process on an urgent basis.” *Id.*, para. 2. The Resolution also demands “that all parties immediately comply with their obligations under international law” and “[c]alls on the parties to immediately allow humanitarian agencies rapid, safe and unhindered access throughout Syria by most direct routes, [and to] allow immediate, humanitarian assistance to reach all people in need, in particular in all besieged and hard-to-reach areas.” *Id.*, paras. 12–13.

¹⁷ U.S.-Russia Joint Statement on COH, *supra* note 8.

¹⁸ *Id.*

- 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 United States and Russia established a communications hotline to prevent hostilities between the parties to the COH, and a Ceasefire Task Force was tasked with delineating the territory held by various groups and resolving allegations of noncompliance.¹⁹

At first, the COH succeeded in diminishing hostilities between the Syrian Army and opposition groups. In February and March 2016, United States officials repeatedly praised the COH. Secretary Kerry stated that the COH had led to an “80 to 90 percent reduction in the level of violence.”²⁰ Moreover, Kerry recognized that the deal had permitted

the delivery of emergency supplies to communities inside Syria . . . some of which had not seen assistance in years. More than 300 trucks have now provided aid to least 150,000 people—about one third of the almost half of a million people who are living in absolutely besieged or hard-to-reach areas.²¹

Nonetheless, the United States acknowledged that there were ongoing violations of the agreement. For example, Kerry accused the Assad regime of stealing humanitarian supplies and carrying out “[a]erial bombardments” against parties to the COH.²²

The United States and Russia attempted to bolster the COH with a follow-up agreement in March 2016.²³ The agreement established a standard operating procedure for the United States and Russia to monitor alleged violations of the COH.²⁴ Specifically, the agreement required the United States and Russia to exchange information concerning alleged breaches and required all parties to the COH to prioritize peaceful means of resolving disputes.²⁵ In addition, during a visit by Secretary Kerry to Moscow in March 2016, the United States and Russia agreed to bolster their humanitarian efforts under the COH. According to Secretary Kerry,

We agreed today that the United States and Russia would push for expanded humanitarian access in order to reach all parts of Syria, while at the same time preventing any party from interfering

¹⁹ *Id.* The United Nations Security Council endorsed the COH in Resolution 2268. S.C. Res. 2268 (Feb. 26, 2016). The resolution called on the parties to the COH to comply with international law, reduce hostilities, permit access to humanitarian aid, and engage in political negotiations for a final settlement. *Id.*, paras. 5–8. *See also* Samantha Power, U.S. Ambassador to the United Nations, Explanation of Vote at the Adoption of UN Security Council Resolution 2268 on the Cessation of Hostilities in Syria, Remarks Following UN Security Council Vote (Feb. 26, 2016), at <https://2009-2017-usun.state.gov/remarks/7156>.

²⁰ U.S. Dep’t of State Press Release, Joint Press Availability with French Foreign Minister Jean-Marc Ayrault, German Foreign Minister Frank-Walter Steinmeier, British Foreign Secretary Philip Hammond, EU High Representative Federica Mogherini, and Italian Foreign Minister Paolo Gentiloni (Mar. 13, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/03/254644.htm>.

²¹ *Id.*

²² *Id.*; *see also* U.S. Dep’t of State Press Release, Adherence to the Cessation of Hostilities (Mar. 11, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/03/254633.htm>.

²³ U.S. Dep’t of State, March 26 – U.S.-Russia Standard Operating Procedures to Support the Cessation of Hostilities (Sept. 9, 2016), at <https://2009-2017.state.gov/documents/organization/262413.pdf>.

²⁴ *Id.*

²⁵ *Id.*

with the deliveries of essential supplies. We agreed that the regime and the opposition need to begin releasing detainees, and they need to begin as soon as possible starting with those who are the most vulnerable. We agreed on a target schedule for establishing a framework for a political transition and also a draft constitution,²⁶ both of which we target by August.²⁷

After approximately one month of reduced hostilities, Russia and Syria announced an April offensive against rebels in Aleppo. U.S. Ambassador Samantha Power raised concerns that attacking Aleppo would undermine the COH:

And on the cessation of hostilities, we're very alarmed by the Syrian prime minister's public announcement that he and the Russian Federation are going to launch an offensive around Aleppo—that would be devastating for the people of Aleppo of course, but also to this intricate process where the cessation of hostilities, humanitarian access, and political negotiations are all related to one another.²⁸

After Russia and Syria began their offensive in Aleppo, U.S. officials stated that the campaign was inconsistent with the COH. On April 28, 2016, the United States condemned an attack against the al-Quds hospital in Aleppo, which the United States claimed “killed dozens of people, including children, patients, and medical personnel.”²⁹ Following the attack, Kerry stated:

The United Nations today assessed the situation in Aleppo to be catastrophic, and the regime's most recent offensive actions there—despite the cessation of hostilities—compound the violence and undermine the cessation of hostilities. Russia has an urgent responsibility to press the regime to fulfill its commitments under UNSCR 2254, including in particular to stop attacking civilians, medical facilities, and first responders, and to abide fully by the cessation of hostilities.³⁰

In addition to condemning the offensive in Aleppo, U.S. officials continued to raise concerns that the Assad regime was interfering with the delivery of humanitarian aid. Ambassador Power stated that in March the Assad regime confiscated at least 4.5 metric tons of humanitarian aid from UN convoys.³¹ Moreover, Power stated that because of “deliberate obstruction by the Syrian regime,” the United Nations in 2016 had “been permitted to reach just 249,000 people . . . out of 4.1 million—or a little more than six percent of those in hard to reach areas.”³²

²⁶ In November 2015, the ISSG called on Syria to establish “credible, inclusive and non-sectarian governance” and “[f]ree and fair elections . . . pursuant to [a] new constitution . . .” U.S. Dep't of State Press Release, Statement of the International Syria Support Group (Nov. 14, 2015), at <https://2009-2017.state.gov/r/pa/prs/ps/2015/11/249511.htm>. The ISSG additionally stated that the United Nations should supervise new elections consistent with “the highest international standards of transparency and accountability, with all Syrians, including the diaspora, eligible to participate.” *Id.* The ISSG echoed the Geneva Communiqué of 2012, which also called for a new constitution and inclusive government. Action Group for Syria Final Communiqué (June 30, 2012), at <http://www.un.org/News/dh/infocus/Syria/FinalCommuniquéActionGroupforSyria.pdf>.

²⁷ U.S. Dep't of State Press Release, Remarks with Russian Foreign Minister Sergey Lavrov (Mar. 24, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/03/255138.htm>.

²⁸ Samantha Power, U.S. Ambassador to the United Nations, Remarks Following UN Security Council Consultations on Syria (Apr. 12, 2016), at <https://2009-2017-usun.state.gov/remarks/7220> [hereinafter Power Remarks April 12].

²⁹ U.S. Dep't of State Press Release, Attack on al-Quds Hospital in Aleppo, Syria (Apr. 28, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/04/256697.htm>.

³⁰ *Id.*

³¹ Power Remarks April 12, *supra* note 28.

³² Samantha Power, U.S. Ambassador to the United Nations, Remarks at a UN Security Council Open Debate on the Middle East (Apr. 18, 2016), at <https://2009-2017-usun.state.gov/remarks/7231>.

The United States and Russia pursued several diplomatic efforts in May 2016 to repair the COH. On May 4, 2016, the United States and Russia agreed to specify explicitly that the agreement applied to Aleppo.³³ The State Department announced in a press release that:

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.³⁴

Moreover, on May 9, 2016, the United States and Russia reaffirmed their commitment to the COH and agreed to take several steps to reduce hostilities, enhance humanitarian assistance, and pursue a political settlement.³⁵ According to the agreement, Russia agreed to “work with the Syrian authorities to minimize aviation operations over areas that are predominantly inhabited by civilians or parties to the cessation.”³⁶ Moreover, the United States and Russia “reaffirm[ed] 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.”³⁷

Despite renewed diplomacy between the United States and Russia, violence in Syria worsened during the summer of 2016. In June 2016, Assad spoke before the Syrian parliament and stated that the Syrian Army would escalate its offensive in Aleppo to combat terrorist groups and to counter alleged interventions by Turkey.³⁸ Shortly thereafter, Russia announced that it would contribute air support for Syria's offensive in Aleppo and defended Assad's claim that the campaign would target terrorists. Russian Foreign Minister Sergey Lavrov stated that “[w]hat is now happening in Aleppo and around it—we warned the Americans about this in advance,” and “[t]he U.S. knows that we will be providing air support to the Syrian army to prevent territories from being seized by terrorists.”³⁹ Moreover, Lavrov stated that he informed Kerry that the United States “defaulted on its obligation to separate the opposition groups loyal to it from Jabhat al-Nusra” and that the United States had failed to comply with its promise “to prevent infiltrations of militants and weapons from Turkey.”⁴⁰

As Russia and Syria continued their campaign in Aleppo, the United States and Russia reached an arrangement on July 15, 2016, to shore up the COH and to coordinate attacks against ISIL.⁴¹ The parties stated that the agreement was

³³ U.S. Dep't of State Press Release, *Reaffirming the Cessation of Hostilities in Aleppo, Syria* (May 4, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/05/256865.htm>.

³⁴ *Id.*

³⁵ U.S. Dep't of State Press Release, *Joint Statement of the Russian Federation and the United States on Syria* (May 9, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/05/256998.htm>.

³⁶ *Id.*

³⁷ *Id.* Resolution 2254 “[c]alls on the parties to immediately allow humanitarian agencies rapid, safe and unhindered access throughout Syria by most direct routes, [and to] allow immediate, humanitarian assistance to reach all people in need, in particular in all besieged and hard-to-reach areas . . .” S.C. Res. 2254, *supra* note 16, para. 12.

³⁸ President Assad's Parliament Speech (June 7, 2016), at http://www.presidentassad.net/index.php?option=com_content&view=article&id=1529:president-assad-s-parliament-speech-june-7-2016&catid=323&Itemid=496.

³⁹ *Russia to Provide Active Support for Syrian Army to Prevent Terrorists from Seizing Aleppo*, TASS RUSS. NEWS AGENCY (June 6, 2016), at <http://tass.com/defense/880324>.

⁴⁰ *Id.*

⁴¹ U.S. Dep't of State Press Release, *Joint Press Availability with Russian Foreign Minister Sergey Lavrov* (July 15, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/07/260134.htm> [hereinafter Kerry Lavrov

designed to promote a political settlement of the Syrian conflict, and to allow Russia and the U.S. to work together to bring about the destruction of Nusra and Daesh . . . in the context of a strengthened COH with all COH parties adhering to COH terms.⁴²

In a press conference with Foreign Minister Lavrov announcing the deal, Secretary Kerry stated:

[T]he Assad regime has relentlessly continued indiscriminate attacks contrary to the agreements of the ISSG and the UN Security Council. But on the other side, the terrorist group Jabhat al-Nusra, the al-Qaida branch in Syria, has also launched its own offensives, sometimes with members of different oppositions joining with them.

And the result has been a cycle of excuses for continuing to fight each other, with a steady deterioration of a hard-fought-for cessation of hostilities in the process. And that has resulted in the killing of civilians, more refugees, more displaced persons, more radicalization, more terrorism, and ultimately an increasing sense of hopelessness among the people of Syria.⁴³

The agreement called for the United States and Russia to establish a Joint Implementation Center to “[s]hare intelligence and develop actionable targets for military action against Nusra in designated areas.”⁴⁴ The agreement stated that Syria would halt air missions in certain areas as the United States and Russia carried out coordinated attacks against ISIL and al-Nusra.⁴⁵

Despite the July 2016 agreement between the United States and Russia, violence in Aleppo continued to worsen throughout July and August. Russian and Syrian forces concentrated their attacks on eastern Aleppo where the rebel forces maintained control.⁴⁶ U.S. officials again argued that the Russian and Syrian offensive violated the COH. In a UN Security Council briefing on Syria, Ambassador Power criticized the Russian and Syrian offensive in Aleppo and stated that their actions had severely limited the delivery of humanitarian aid:

Eastern Aleppo is quickly falling victim to the Assad regime’s typical pattern of starve and surrender tactics. Over the last month, the Assad regime flagrantly violated the cessation of hostilities by attacking Aleppo. The regime and its supporters have cut off Castello Road, the only remaining supply route for more than 250,000 Syrians living in the eastern part of the city, severing their access to food, fuel, medicine, clean water, and other essential supplies. . . . [A]lternative options for delivering humanitarian aid are diminishing rapidly; airstrikes by the Assad regime and by Russia are making the use of other roads totally precarious.⁴⁷

Ambassador Power held Russia responsible for the deterioration of the COH and for the worsening humanitarian crisis. According to Power, “Russia, as a co-sponsor of the cessation of hostilities, must halt these attacks and persuade the regime to do the same. And they must ensure the reopening of the Castello Road.”⁴⁸ To improve the humanitarian crisis, Power

Press Availability July 15]; U.S. Dep’t of State, July 15 – Approach for Practical Russian-American Efforts Against Daesh and Jabhat al-Nusra and Strengthening the Cessation of Hostilities (Sept. 9, 2016), at <https://2009-2017.state.gov/documents/organization/262413.pdf> [hereinafter July 15 U.S.-Russia Agreement]; see also U.S.-Russia Arrangement Fact Sheet, *supra* note 14.

⁴² July 15 U.S.-Russia Agreement, *supra* note 41.

⁴³ Kerry Lavrov Press Availability July 15, *supra* note 41.

⁴⁴ July 15 U.S.-Russia Agreement, *supra* note 41, para. 4(a).

⁴⁵ *Id.*, para. 4(c–d).

⁴⁶ Samantha Power, U.S. Ambassador to the United Nations, Remarks at a UN Security Council Briefing on the Situation in Syria (July 25, 2016), at <https://2009-2017-usun.state.gov/remarks/7381>.

⁴⁷ *Id.*

⁴⁸ *Id.*

stated that, “Russia, the Assad regime, and other groups fighting around Aleppo should heed the UN’s call for a weekly 48 hour pause to allow for deliveries of essential supplies.”⁴⁹ Around August 8, rebel groups temporarily broke the siege of eastern Aleppo,⁵⁰ but Russia and Syria quickly responded with increased attacks.⁵¹

On September 9, 2016, the United States and Russia reached a new agreement to reaffirm the COH.⁵² In a press conference announcing the deal, Secretary Kerry stated that the United States hoped the arrangement would “reduce violence, ease suffering, and resume movement towards a negotiated peace and a political transition in Syria,” and that the deal represented a “more proscriptive and far-reaching approach” than the parties had taken in the past.⁵³

The new agreement integrated the previous arrangements that the United States and Russia had reached on February 22, March 26, and July 15, 2016.⁵⁴ It also contained several additional components. First, the deal required that the parties to the COH on Day D (September 12, 2016) “recommit to the CoH and honor its terms in full, as set forth in the February 22, 2016 Joint Declaration of the Russian Federation and the United States, for a 48 hour period.”⁵⁵ The agreement emphasized provisions of the original COH that called for ceasing hostilities, unimpeded access to humanitarian aid, and proportionate use of force in self-defense.⁵⁶ On day D+2, the agreement stated that “if the CoH in Syria has continued to hold to the mutual satisfaction of the Sides, they will extend it for a mutually agreed upon period of time.”⁵⁷ Second, the agreement contained special provisions to ensure humanitarian aid could reach Aleppo,⁵⁸ such as requiring forces to pull back from Castello Road.⁵⁹ Third, the agreement required the Syrian Army to cease air operations in designated areas where the opposition groups were present.⁶⁰ Fourth, if Syria complied with the prohibition on air operations, the agreement again called for a Joint Implementation Center between the United States and Russia to target ISIL and al-Nusra.⁶¹ In an annex, the September 9 agreement also stated that “[e]ach Side reserves the right to withdraw from this arrangement if they believe the terms have not been fulfilled.”⁶²

⁴⁹ *Id.*

⁵⁰ Samantha Power, U.S. Ambassador to the United Nations, Remarks at a UN Security Council Open Arria-Formula Meeting on Aleppo (Aug. 8, 2016), at <https://2009-2017-usun.state.gov/remarks/7397>.

⁵¹ U.S. Dep’t of State Press Release, Daily Press Briefing (Aug. 16, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/08/261082.htm>.

⁵² U.S.-Russia Arrangement Fact Sheet, *supra* note 14.

⁵³ U.S. Dep’t of State Press Release, Remarks with Russian Foreign Minister Sergey Lavrov and UN Special Envoy Steffan de Mistura at a Press Availability (Sept. 9, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/09/261722.htm>.

⁵⁴ See U.S. Dep’t of State, September 9 – U.S./Russian Arrangement Reducing Violence, Restoring Access, and Establishing the JIC (Sept. 9, 2016), at <https://2009-2017.state.gov/documents/organization/262413.pdf> [hereinafter U.S.-Russian Arrangement Reducing Violence, Restoring Access, and Establishing the JIC]; see also U.S.-Russia Arrangement Fact Sheet, *supra* note 14.

⁵⁵ U.S.-Russian Arrangement Reducing Violence, Restoring Access, and Establishing the JIC, *supra* note 54, para. 1.

⁵⁶ *Id.*

⁵⁷ *Id.*, para. 2.

⁵⁸ *Id.*, para. 3.

⁵⁹ *Id.*

⁶⁰ *Id.*, para. 4.

⁶¹ *Id.*, para. 5, ann.

⁶² *Id.* at ann.

Shortly after the United States and Russia agreed to further strengthen the COH, two controversial bombings jeopardized the agreement. First, the United States conducted an air strike on September 17 that killed approximately sixty Syrian Army soldiers in Dayr Az Zawr, Syria.⁶³ The U.S. Central Command stated that coalition forces believed that the strike was against ISIL and that “[t]he coalition airstrike was halted immediately when coalition officials were informed by Russian officials that it was possible the personnel and vehicles targeted were part of the Syrian military.”⁶⁴ Moreover, Central Command stated that “coalition members in the Combined Air Operations Center had earlier informed Russian counterparts of the upcoming strike” and that “[i]t is not uncommon for the Coalition Air Operations Center to confer with Russian officials as a professional courtesy and to deconflict Coalition and Russian aircraft, although such contact is not required by the current U.S.-Russia Memorandum of Understanding on safety of flight.”⁶⁵

Syrian and Russian officials condemned the U.S. attack. The Russian Foreign Ministry stated in a press release that “[t]he operations of coalition pilots, who, we hope, did not act on Washington’s orders, are on the verge of criminal negligence and are directly pandering to ISIS terrorists.”⁶⁶ Moreover, the statement accused U.S.-backed rebel groups of violating the COH by continuing to conduct attacks against Syrian forces, and it stated that “[w]e once again insistently urge Washington to exert the necessary pressure on US-patronised illegal paramilitary units and force them to unfailingly honour the ceasefire.”⁶⁷ Russia called an emergency meeting of the UN Security Council to address the incident, and Ambassador Power commented on the strike in a statement to press before the meeting.⁶⁸ Although Power acknowledged the strike and claimed that it was an error, she called the meeting “a stunt replete with moralism and grandstanding” and “uniquely cynical and hypocritical.”⁶⁹ Furthermore, Power faulted Russia for failing to convince Syria to honor the agreement by grounding its air force and by continuing to prevent humanitarian assistance from reaching those in need.⁷⁰

⁶³ U.S. Cent. Comm. Press Release, *Coalition Halts Airstrike in Progress Against Possible Syrian Military Position* (Sept. 17, 2016), at <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/947839/coalition-halts-airstrike-in-progress-against-possible-syrian-military-position> [hereinafter Cent. Comm. Press Release]; Ministry of Foreign Aff. of the Russ. Fed’n Press Release, *Comment by the Information and Press Department on U.S.-Led International Anti-ISIS Coalition’s Air Strike Against Syrian Government Forces’ Positions Near Deir ez-Zor* (Sept. 18, 2016), at http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2444527?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB [hereinafter Russian Foreign Ministry Statement on U.S. Attack Against Syrian Troops].

⁶⁴ Cent. Comm. Press Release, *supra* note 63.

⁶⁵ *Id.* The United States and Russia signed a memorandum of understanding on air safety in Syria on October 20, 2015. U.S. Dep’t of Defense Press Release, U.S., Russia Sign Memorandum on Air Safety in Syria (Oct. 20, 2015), at <http://www.defense.gov/News/Article/Article/624964/us-russia-sign-memorandum-on-air-safety-in-syria>.

⁶⁶ Russian Foreign Ministry Statement on U.S. Attack Against Syrian Troops, *supra* note 63.

⁶⁷ *Id.*; see also *Al-Jaafari: Terrorist War on Syria Disclosed Fragility of International Law*, SYRIAN ARAB NEWS AGENCY (Sept. 19, 2016), at <http://sana.sy/en/?p=88431>.

⁶⁸ Samantha Power, U.S. Ambassador to the United Nations, Remarks Before UN Security Council Consultations on Syria (Sept. 17, 2016), at <https://2009-2017-usun.state.gov/remarks/7437>.

⁶⁹ *Id.*

⁷⁰ *Id.*

Two days after the controversial U.S. bombing, a bombing destroyed a UN convoy delivering aid to the Aleppo region. According to the United Nations, the strike damaged eighteen out of thirty-one trucks in the convoy,⁷¹ which contained “vital food and medical assistance.”⁷² The Syrian Arab Red Crescent (SARC), which organized the convoy together with the United Nations, stated that “[a]round twenty civilians and one SARC staff member were killed, as they were unloading trucks”⁷³ UN Secretary-General Ban Ki-moon called the attack “sickening, savage, and apparently deliberate” and said that “[a]ccountability for crimes such as these is essential.”⁷⁴ In a statement, the UN Under-Secretary-General for Humanitarian Affairs said: “Let me be clear: if this callous attack is found to be a deliberate targeting of humanitarians, it would amount to a war crime. I call for an immediate, impartial and independent investigation into this deadly incident.”⁷⁵

While none of the combatants took responsibility for the attack, U.S. officials stated that it had been perpetrated by either Russia or Syria. In a press briefing, the White House press secretary stated that because the bombing was an air strike, “there only could have been two entities responsible, either the Syrian regime or the Russian government.”⁷⁶ The United States condemned the attack, and it reiterated earlier statements calling on Russia to honor the recent agreement by restraining Syria and by permitting deliveries of humanitarian aid. The State Department issued a press release stating that:

[f]or more than a week, we have urged Moscow to fulfill the commitments it made in Geneva to facilitate the unimpeded flow of humanitarian aid to the Syrian people. And for more than a week, the Syrian regime repeatedly denied entry to these UN convoys, preventing them from delivering urgent food, water and medical supplies to desperate Syrian citizens. Only today did the regime finally grant permits for some convoys to proceed.⁷⁷

The United States also issued a joint statement with France, Italy, Germany, the United Kingdom, and the High Representative of the European Union condemning the bombing.⁷⁸ The joint statement “call[ed] on Russia to take extraordinary steps to restore the credibility of

⁷¹ *UN Relief Agency Calls for Prompt Investigation into the Attack on Aid Convoy in Syria*, UN WEB TV (Sept. 20, 2016), at <http://webtv.un.org/meetings-events/watch/un-relief-agency-calls-for-prompt-investigation-into-the-attack-on-aid-convoy-in-syria/5134269761001>.

⁷² *Syria: UN Officials Condemn Attacks Against Aid Convoy and Warehouse in Rural Aleppo*, UN NEWS CENTRE (Sept. 20, 2016), at <http://www.un.org/apps/news/story.asp?NewsID=54969#.WB-X2OErKRss>.

⁷³ *Syria: Attack on Humanitarian Convoy Is an Attack on Humanity*, INT’L FED’N OF RED CROSS & RED CRESCENT SOCIETIES (Sept. 20, 2016), at <http://www.ifrc.org/en/news-and-media/press-releases/general/syria-attack-on-humanitarian-convoy-is-an-attack-on-humanity>.

⁷⁴ Ban Ki-moon, UN Secretary-General, Address to the General Assembly (Sept. 20, 2016), at <https://www.un.org/sg/en/content/sg/speeches/2016-09-20/address-general-assembly-bilingual-delivered-version>.

⁷⁵ Stephen O’Brien, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Statement on Convoy to Urum al-Kubra (Sept. 19, 2016), at https://docs.unocha.org/sites/dms/Documents/ERC_USG%20Stephen%20OBrien%20Statement%20on%20Urum%20al-Kubra,%20SYRIA%2019Sept16.pdf.

⁷⁶ White House Press Release, Press Briefing by Press Secretary Josh Earnest and Ben Rhodes (Sept. 20, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/20/press-briefing-press-secretary-josh-earnest-and-ben-rhodes>.

⁷⁷ U.S. Dep’t of State Press Release, Strike on Humanitarian Aid Convoy in Syria (Sept. 19, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/09/262151.htm>.

⁷⁸ U.S. Dep’t of State Press Release, Joint Statement on Syria by the Foreign Ministers of France, Italy, Germany, the United Kingdom, the United States, and the High Representative of the European Union (Sept. 24, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/09/262382.htm>.

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.”⁷⁹

Russian officials denied accusations that the Russian air force attacked the convoy, stating “with all responsibility that neither Russian, nor Syrian aviation has conducted any strikes against the UN humanitarian convoy on the southwestern outskirts of Aleppo.”⁸⁰ Russian Defense Ministry Spokesperson Igor Konashenkov suggested that opposition groups may have fired artillery at the convoy, or that the convoy may have caught fire.⁸¹ Konashenkov stated that “Everything shown on the video is the direct consequence that the cargo caught fire and this began in a strange way simultaneously with carrying out a massive offensive of militants in Aleppo.”⁸² Foreign Minister Lavrov also denied that Russia or Syria was responsible and instead suggested that the U.S.-led coalition might have conducted the attack. According to Lavrov, video footage of the scene showed “traces of aluminum dust, characteristic of ammunition used by Predator UAVs”⁸³ Moreover, Russia claimed that it complied with the COH by halting air strikes in agreed zones and by convincing Syria to pull back from Castello Road.⁸⁴ Russia accused the United States of failing to separate al-Nusra from moderate groups, failing to persuade the opposition to retreat from Castello Road, and failing to provide detailed coordinates of opposition locations.⁸⁵

On the same day as the attack on the UN convoy, the Syrian Army announced that the “effect of [the COH] truce regime . . . under the Russian-US agreement has ended.”⁸⁶ The Syrian Army claimed that armed terrorist groups had committed three hundred breaches of the COH in the week since September 12 and that the attacks had killed and injured tens of civilian and military personnel in Aleppo, Hama, and Quneitra.⁸⁷ Syria stated that it did its best to comply with the COH and that it exercised self-restraint in responding to attacks.⁸⁸

After Syria and Russia resumed attacks in Aleppo, the United States suspended bilateral communications with Russia to sustain the COH and canceled plans to establish the Joint Implementation Center.⁸⁹ The State Department explained the United States’ decision and

⁷⁹ *Id.*

⁸⁰ Ministry of Foreign Aff. of the Russ. Fed’n, Comment by the Information and Press Department on an Attack on a Humanitarian Convoy in Syria (Sept. 20, 2016), at http://www.mid.ru/en/web/guest/foreign_policy/international_safety/conflicts/-/asset_publisher/xIEMTQ3OvzA/content/id/2453130.

⁸¹ *Russia, Syria Did Not Deliver Strikes on UN Aid Convoy Near Aleppo—Ministry*, TASS RUSS. NEWS AGENCY (Sept. 20, 2016), at <http://tass.com/world/901003>.

⁸² *Id.*

⁸³ Ministry of Foreign Aff. of the Russ. Fed’n, Foreign Minister Sergey Lavrov’s Television Interview for the Pozdnyakov Programme on NTV, September 26, 2016 (Sept. 26, 2016), at http://www.mid.ru/en/web/guest/meropriyatiya_s_uchastiem_ministra/-/asset_publisher/xK1BhB2bUjd3/content/id/2470301.

⁸⁴ *Russian Defense Ministry Says US, Syrian Opposition Fail to Fulfil Geneva deal*, TASS RUSS. NEWS AGENCY (Sept. 19, 2016), at <http://tass.com/politics/900792>.

⁸⁵ *Id.*

⁸⁶ *Army General Command: Truce Effect Ended, Armed Terrorist Groups Didn’t Commit to Any of Its Terms*, SYRIAN ARAB NEWS AGENCY (Sept. 19, 2016), at <http://sana.sy/en/?p=88500>; see also *Syria Declares End of Ceasefire, US Seeks Clarification from Russia*, RT (Sept. 19, 2016), at <https://www.rt.com/news/359892-syria-ceasefire-over-army>.

⁸⁷ *Army General Command*, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ U.S. Dep’t of State Press Release, Suspension of Participation in Bilateral Channels with Russia Established to Sustain the Cessation of Hostilities in Syria (Oct. 3, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/262704.htm>.

accused Russia of failing to abide by the terms of the COH and its other international law obligations:

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.⁹⁰

Although the United States suspended bilateral discussions with Russia related to the COH, the White House stated that “the President directed his team to continue multilateral discussions with key nations with a vested interest in the region to encourage all sides to support a more durable and sustainable diminution of violence and, more broadly, a diplomatic resolution to the civil war.”⁹¹

On the same day that the United States suspended cooperation under the COH, Russia announced that it would suspend the Plutonium Disposal and Nuclear Management Agreement between the United States and Russia.⁹² The conflict in Syria continues.

Russia Suspends Bilateral Agreement with United States Disposal of Weapons-Grade Plutonium
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In October 2016, Russian President Vladimir Putin suspended the Plutonium Management and Disposition Agreement (PMDA), a bilateral treaty between Russia and the United States governing the disposal of surplus weapons-grade plutonium.¹ A Russian Foreign Ministry director explained that the decision was prompted by a “dramatic change in the situation . . . brought about by the unfriendly steps taken by the United States.”² He also cited “the United States’ obvious inability and unwillingness to honour its obligations . . .

⁹⁰ *Id.*

⁹¹ White House Press Release, Readout of the President’s National Security Council Meeting (Oct. 14, 2016), at <https://www.whitehouse.gov/the-press-office/2016/10/14/readout-presidents-national-security-council-meeting>.

⁹² President of Russ. Press Release, Draft Law Suspending the Russia-U.S. Plutonium Management and Disposition Agreement Submitted to the State Duma (Oct. 3, 2016), at <http://en.kremlin.ru/acts/news/53009>; see also U.S. Dep’t of State Press Release, Unofficial Composite Text of the United States-Russian Federation 2000 Plutonium Management and Disposition Agreement, as Amended, at <http://www.state.gov/documents/organization/213493.pdf>; Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 111 AJIL __ (2017).

¹ Ministry of Foreign Aff. of the Russ. Fed’n Press Release, Remarks by Mikhail Ulyanov, Director of the Foreign Ministry Department for Non-Proliferation and Arms Control and Representative of the Russian Federation at the First Committee of the 71st Session of the UNGA, New York, October 3, 2016 (Oct. 4, 2016), at http://www.mid.ru/en/general_assembly/-/asset_publisher/lrzZMhfoYRUj/content/id/2486599 [hereinafter Remarks by Mikhail Ulyanov].

² *Id.*

on time and in full.”³ The United States expressed disappointment at the suspension, arguing that continued implementation was in both states’ interests.

The United States and the Russian Federation initially signed the PMDA in 2000.⁴ As amended by protocols in 2006⁵ and 2010,⁶ the PMDA obliges each party to dispose of at least thirty-four metric tons of disposition plutonium and imposes certain requirements regarding the method of disposition.⁷ Of particular note for the present dispute, Article III (1) provides: “Disposition shall be by irradiation of disposition plutonium as fuel in nuclear reactors or any other methods that may be agreed by the Parties in writing.”⁸

The 2010 amendments entered into force following a July 2011 exchange of diplomatic notes between Secretary of State Hillary Clinton and Foreign Minister Sergey Lavrov.⁹ A State Department fact sheet described that milestone as

mark[ing] another significant step in both countries’ efforts to eliminate nuclear-weapon-grade materials and to reduce nuclear dangers. . . . The initial combined amount, 68 metric tons [of disposition plutonium], represents enough material for about 17,000 nuclear weapons, and the Agreement envisions disposition of more weapon-grade plutonium over time.¹⁰

Importantly, the agreement sought to make “arms reductions irreversible by . . . preventing the plutonium from ever being reused for weapons or any other military purpose.”¹¹ The agreement also addresses monitoring, inspections, and financial support.¹²

³ *Id.*

⁴ Unofficial Composite Text of the United States–Russian Federation 2000 Plutonium Management and Disposition Agreement, as Amended, U.S. Dep’t of State, at <http://www.state.gov/documents/organization/213493.pdf> [hereinafter Composite Text].

⁵ Protocol to the Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation, Sept. 15, 2006, TIAS No. 11-713.1.

⁶ Protocol to the Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated as No Longer Required for Defense Purposes and Related Cooperation, Apr. 13, 2010, TIAS No. 11-713.2 [hereinafter 2010 Protocol]; see also John R. Crook, Contemporary Practice of the United States, 104 AJIL 680 (2010).

⁷ Composite Text, *supra* note 4, Art. II(1). The PMDA defines “Disposition Plutonium” as “weapon-grade plutonium that has been (a) withdrawn from nuclear weapon programs, (b) designated as no longer required for defense purposes, and (c) declared in the Annex.” *Id.* Art. I(2).

⁸ Composite Text, *supra* note 4.

⁹ U.S. Dep’t of State Press Release, Entry into Force of the U.S.-Russian Agreement to Dispose of Excess Weapon-Grade Plutonium (July 13, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/07/168287.htm> [hereinafter July 13, 2011 Press Release].

¹⁰ *Id.*

¹¹ U.S. Dep’t of State Press Release, 2000 Plutonium Management and Disposition Agreement (Apr. 13, 2010), at <http://www.state.gov/r/pa/prs/ps/2010/04/140097.htm> [hereinafter PMDA Press Release]; see Composite Text, *supra* note 4 (“One of the key objectives of the Agreement . . . is to reduce irreversibly stockpiles of weapon-grade plutonium from each side’s nuclear weapons programs.”); see also *Plutonium Disposition Program*, NAT’L NUCLEAR SEC. ADMIN. (June 26, 2013), at <https://nnsa.energy.gov/mediaroom/factsheets/pudisposition> [hereinafter Plutonium Disposition Program] (“Weapon-grade plutonium and highly enriched uranium (HEU) are the critical ingredients for making a nuclear weapon. With the end of the Cold War, hundreds of tons of these materials were determined to be surplus to U.S. and Russian defense needs. Denying access to plutonium and HEU is the best way to prevent nuclear proliferation to rogue states and terrorist organizations. The most certain method to prevent these materials from falling into the wrong hands is to dispose of them.”).

¹² PMDA Press Release, *supra* note 11.

The agreement required disposition of plutonium to begin in 2018.¹³ As explained in a 2010 press release from the U.S. State Department,

[w]eapon-grade plutonium, unlike weapon-grade uranium, cannot be blended with other materials to make it unusable in weapons. But it can be fabricated into mixed oxide uranium-plutonium (MOX) fuel and irradiated in civil nuclear power reactors to produce electricity. This irradiation results in spent fuel, a form that is not usable for weapons or other military purposes and a form that the Protocol prohibits being changed any time in the future unless subject to agreed international monitoring measures and only for civil purposes.

The amended PMDA will provide that this weapon-grade plutonium be disposed by irradiating it in light water reactors in the United States and in fast-neutron reactors operating under certain nonproliferation conditions in the Russian Federation. The U.S. MOX fuel fabrication facility being constructed at the Department of Energy's Savannah River Site is planned to begin operation in 2016; Russia has already fabricated MOX fuel on a limited basis and is in the process of constructing/modifying fuel fabrication facilities capable of producing MOX fuel at levels required to meet the PMDA's disposition rate.¹⁴

The method planned for disposing of plutonium in the United States proved problematic, however. Construction of the Savannah River fuel fabrication facility far exceeded initial estimates for both budget and timeline.¹⁵ In addition, as uranium prices fell since 2010, so too did demand for MOX fuel.¹⁶ In February 2016, the Obama administration's budget request for the Department of Energy reflected a plan to terminate the Savannah River site; the budget request also sought \$15 million for "a dilute and dispose option that will disposition surplus U.S. weapon-grade plutonium by diluting it and disposing of it at a geologic repository at significantly lower cost and less time than the MOX option."¹⁷ On the day of the budget rollout, Secretary of Energy Ernest Moniz stressed that MOX is unaffordable and that fully funding the facility would require millions of dollars more annually:

The reality is the MOX program, with a lifetime cost certainly north of 30, probably 40, billion dollars with a need for an additional, say, half a billion dollars a year for decades just does not look to be affordable. The dilution approach . . . is surely technically less challenging and we believe is

¹³ July 13, 2011 Press Release, *supra* note 9.

¹⁴ PMDA Press Release, *supra* note 11; *see also* Crook, *supra* note 6, at 681.

¹⁵ Mike Eckel, *As Putin Swipes at U.S. Over Plutonium Disposal, Nuclear Cooperation Takes a Hit*, RADIOFREEEUROPE (Apr. 23, 2016), at <http://www.rferl.org/a/putin-swipes-us-plutonium-disposal/27692331.html>. In 2013, the National Nuclear Security Administration, which bears responsibility for disposition, described a lack of adequate funding for the MOX disposition it was supposed to undertake: "The current strategy to implement this agreement [the PMDA] in the United States involves the National Nuclear Security Administration (NNSA), under the Office of Fissile Materials Disposition, building a Mixed Oxide (MOX) Fuel Fabrication Facility, a capability to disassemble nuclear weapons pits and convert the resulting plutonium into a form suitable to be made into MOX fuel, and a Waste Solidification Building to handle the waste resulting from pit disassembly and MOX operations at the Savannah River Site (SRS). However, unanticipated cost increases for the MOX project and plutonium disposition program have prompted the Department to slow down the MOX project and other activities associated with the current plutonium disposition strategy while determining whether there are options to complete the mission more efficiently." Plutonium Disposition Program, *supra* note 11.

¹⁶ Eckel, *supra* note 15.

¹⁷ DEP'T OF ENERGY, DOE/CF-0125, FY 2017 CONGRESSIONAL BUDGET REQUEST: BUDGET IN BRIEF 6 (Feb. 2016); *see also* DEP'T OF ENERGY, DOE/CF-0119 vol. 1, FY 2017 CONGRESSIONAL BUDGET REQUEST: NATIONAL NUCLEAR SECURITY ADMINISTRATION (Feb. 2016). The dilute and dispose method "involves adding the plutonium to a nonradioactive substance, encasing it in glass or metal-can type containers or oil drums, and burying it at a federal waste site in New Mexico. Unlike with MOX, experts say this method could still allow for plutonium to be extracted some day and put back into weapons, though with difficulty." Eckel, *supra* note 15.

less than half the cost, even going forward. . . . I'm sure that we will have a lively discussion about this in the Congress.¹⁸

Putin publicly voiced his concerns about U.S. implementation of the agreement in April 2016. He said:

We signed this agreement and settled on the procedures for the material's destruction, agreed that this would be done on an industrial basis, which required the construction of special facilities. Russia fulfilled its obligations in this regard and built these facilities, but our American partners did not.

Moreover, only recently, they announced that they plan to dispose of their accumulated highly enriched nuclear fuel by using a method other than what we agreed on when we signed the corresponding agreement, but by diluting and storing it in certain containers. This means that they preserve what is known as the breakout potential, in other words it can be retrieved, reprocessed and converted into weapons-grade plutonium again. This is not what we agreed on. Now we will have to think about what to do about this and how to respond to this.¹⁹

The State Department denied that it was violating the PMDA,²⁰ arguing that while the agreement does specify disposition "by irradiation . . . as fuel in nuclear reactors," it also permits disposition by "any other methods that may be agreed by the Parties in writing."²¹ A State Department spokesperson explained:

What I can say is that since 2013 we've been in communication with Russia about the U.S. review of disposition methods and its results that's consistent with the U.S.-Russia Plutonium Management and Disposition Agreement. And this agreement essentially provides a path for the parties to consult and agree on disposition methods that do not involve irradiation in nuclear reactors.²²

Eric Lund, a spokesperson for the State Department's Bureau of International Security and Nonproliferation, indicated that the consultations to reach the necessary agreement would take place at some point in the future: "Accommodating any such new method of disposal . . . requires written agreement between the parties; we would expect such consultations on a separate agreement to begin at an appropriate later time."²³

¹⁸ *FY 2017 Budget Request: NNSA Up 2.9%; Showdown with South Carolina Delegation on MOX Looms*, AM. INST. OF PHYSICS (Feb. 18, 2016), at <https://www.aip.org/fyi/2016/fy-2017-budget-request-nnsa-29-showdown-south-carolina-delegation-mox-looms>.

¹⁹ President of Russ. Press Release, Truth and Justice Regional and Local Media Forum (Apr. 7, 2016), at <http://en.kremlin.ru/events/president/news/51685>.

²⁰ Eckel, *supra* note 15.

²¹ See 2010 Protocol, *supra* note 6, Art. III(1).

²² U.S. Dep't of State Press Release, Daily Press Briefing (Apr. 11, 2016), at <http://www.state.gov/t/pa/prs/dpb/2016/04/255708.htm>.

²³ Eckel, *supra* note 15. In June 2015, U.S. Secretary of Energy Ernest Moniz established a Plutonium Disposition Red Team "to assess options for the disposition of 34MT of surplus weapon-grade plutonium." The Team's Final Report, published in August of that year, warned that electing the cheaper "Dilute and Dispose" process, over continued support of MOX, would have political ramifications perhaps less positive than its practical consequences. "The review team . . . believes that the Dilute and Dispose approach meets the requirements for permanent disposition, but recognizes that this assertion will ultimately be subject to agreement with the Russians, and that the decision will be as much political as technical." However, it noted that "[t]he combination of evolving international circumstances and the fact that the U.S. has already accommodated a Russian national interest in a previous PMDA modification causes the Red Team to believe that the federal government has a reasonable position with which to enter PMDA negotiations." THOM MASON, FINAL REPORT OF THE PLUTONIUM DISPOSITION RED TEAM (2015), at <https://nnsa.energy.gov/sites/default/files/nnsa/inlinefiles/Pu-Disposition-Red-Team-Report-081315vFinal-SM.pdf>.

Over the following months, the U.S. Congress and the administration went back and forth over the future of the Savannah River site. Legislators—especially from South Carolina, where the site is located—supported the continuation of funding.²⁴ The administration continued to oppose it. In a June 2016 “Statement of Administration Policy,” the Executive Office of the President wrote:

The Administration strongly objects to continued construction of the Mixed Oxide (MOX) Fuel Fabrication Facility Even with a firm fixed-price contract for the MOX Fuel Fabrication Facility, numerous previous studies have confirmed that the alternative disposition method is expected to be significantly faster and less expensive The already-proven alternative method of disposition is expected to be significantly faster and less expensive than the MOX approach, has far lower risks, and will begin to move plutonium out of the State of South Carolina much sooner.²⁵

Although the Department of Energy requested \$270 million in funding for MOX—and the president supported that figure—the House’s National Defense Authorization Act for Fiscal Year 2017 allocated \$340 million to the project, roughly 20 percent more than requested.²⁶ (The version of that bill that was later enacted likewise authorized \$340 million.²⁷)

On October 3, 2016, Putin submitted a draft law to the State Duma that would suspend the PMDA.²⁸ Following the Duma’s approval, Putin signed it into law on October 31.²⁹ Russia’s Office of the President offered a detailed explanation for the legislation. In addition to citing planned changes in the United States’ methods for disposing of plutonium, that explanation referenced the U.S. military presence in Eastern Europe and U.S. sanctions:

Recently, the United States has attempted to revise its plutonium disposition strategy outlined in the 2010 Protocol and change its disposition methods. The US plans to dispose of its plutonium by burial instead of irradiation as stipulated by the Protocol. Even back when the Agreement was in development, Russian experts objected to such approach as not irreversible. The 2000 amendments provided for the major part of the American plutonium to be irradiated and only a small amount to be buried underground. The Protocol of April 13, 2010, completely discarded the possibility of burying plutonium, which was part of a compromise reached during the drafting of the Protocol.

²⁴ See, e.g., U.S. Senator Lindsey Graham Press Release, Graham Opposes Obama Budget and Obama Proposal on MOX Funding (Feb. 9, 2016), at <http://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=C5871C66-556D-474B-89E8-70031346BC68> (“The Obama Administration’s reckless proposal to terminate the MOX program, without a proven disposition plan in place, is both ill-conceived and dangerous. This isn’t the first time they have proposed halting the MOX program, but given the fact their time in office is running short, thankfully it is their last.”); Derrek Asberry, *Senate Committee Seeks \$340 Million for MOX*, POST & COURIER (May 12, 2016), at http://www.postandcourier.com/archives/senate-committee-seeks-m-for-mox/article_22ee8f50-0605-5bef-ab6e-2b504ece73ba.html; Mary Orndorff Troyan, *Congress Divided on MOX Funding*, GREENVILLE ONLINE (Apr. 13, 2016, 5:22 PM), at <http://www.greenvilleonline.com/story/news/politics/2016/04/13/congress-divided-mox-funding/82985230>.

²⁵ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S.2943—NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017 (2016).

²⁶ National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong., 1230–31, 1388 (2016).

²⁷ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016).

²⁸ President of Russ. Press Release, Draft Law Suspending the Russia-US Plutonium Management and Disposition Agreement Submitted to the State Duma (Oct. 3, 2016), at <http://en.kremlin.ru/acts/news/5300> [hereinafter Draft Law Submitted to State Duma].

²⁹ President of Russ. Press Release, Law Suspending Russian-US Plutonium Management and Disposition Agreement (PMDA) Signed (Oct. 31, 2016), at <http://en.kremlin.ru/acts/news/53167>.

It should be noted that to date, the US has not requested Russia's approval in order to change its plutonium disposition method.

After the Agreement and its protocols came in force, the United States took a number of steps resulting in a fundamental change in strategic stability.

Under the pretext of the crisis in Ukraine, the United States is building up its military presence in Eastern Europe, including the states that joined NATO after 2000—the year when the agreement was signed. In 2015 six new forward command posts were deployed in Bulgaria, Latvia, Poland, Romania and Estonia. Their main task is to ensure rapid transfer of large NATO troop contingents to Eastern Europe in the event that the order is given. Units of the US Armed Forces have been introduced in the Baltic states and the number of NATO aircraft based on their airfields has been increased. In Ukraine, American instructors are training militants from the Right Sector, which is banned in Russia.

Apart from actions aimed at changing the military-strategic balance, the United States is taking measures to weaken the Russian economy and violate the rights of Russian citizens. Thus, in 2012 the United States passed the so-called Sergei Magnitsky law in accordance with which Washington openly sought to protect economic crime in the Russian Federation. In 2014 Washington passed a law supporting the freedom of Ukraine, which allows it to interfere in the domestic affairs of Russia. In addition, in 2014 the United States introduced sanctions against the Russian Federation, some of its territories, as well as companies and individuals.³⁰

Mikhail Ulyanov, Director of the Foreign Ministry Department for Non-Proliferation and Arms Control, reiterated the above concerns and also provided more detail about Russian objections to the United States' plans regarding disposition methods:

In particular, the PMDA and the April 13, 2010 Protocol to it provide for the irradiation of disposition weapon-grade plutonium as fuel in nuclear reactors. This method was agreed upon to reduce irreversibly stockpiles of weapon-grade plutonium from each side's nuclear weapons programmes.

The Russian Federation has taken all the necessary measures to fulfil its obligations under the PMDA. It has created and brought to full power the BN-800 fast neutron reactor to irradiate disposition weapon-grade plutonium as fuel and completed the construction of a facility for the fabrication of mixed uranium-plutonium fuel.

At the same time, the United States has not implemented its obligations and it is unlikely that it will do so in the near future. The Savannah River facility for the fabrication of mixed uranium oxide-plutonium oxide (MOX) fuel is only two-thirds finished and the project has been suspended. The United States has not modified its reactors for the use of this fuel. Ultimately, US experts have concluded that the United States will need another 20 to 30 years to start disposing of weapon-grade plutonium in keeping with US-Russian agreements, whereas both countries were to begin disposition by 2018.

In this situation, the United States has decided, without consulting the Russian Federation, to dispose of its plutonium in a different manner—by mixing it with radioactive waste and burying it underground in rooms that have been excavated within a salt formation. This disposition was discussed during the drafting of the PMDA and was discarded as not irreversible. Therefore, the PMDA as amended by the 2010 Protocol does not stipulate the possibility of the underground burial of disposition plutonium.

³⁰ Draft Law Submitted to State Duma, *supra* note 28; see also Ministry of Foreign Aff. of the Russ. Fed'n Press Release, Comment by the Foreign Ministry on the Presidential Executive Order Suspending the Plutonium Management and Disposition Agreement (Oct. 3, 2016), at http://www.mid.ru/en/web/guest/kommentarii_-predstavitelya/-/asset_publisher/MCZ7HQUMdqBY/content/id/2485021 (reiterating these complaints).

Under the PMDA, the parties are to consult each other in advance of any change in their disposal methods. The United States has not officially notified Russia of its intention to use an alternative disposition method.

Despite this, the United States was unilaterally preparing to dispose of its plutonium in a manner that has been previously rejected. In particular, the US administration has indicated that it will terminate the MOX programme, based on the Fiscal Year 2017 Budget Request.

Considering that Russia has financed the bulk of its planned investment in the creation of facilities to dispose of plutonium in keeping with a method that was coordinated with its US partners, we are perplexed, to put it mildly, by US officials' statements on Washington's intention to save money by choosing an alternative disposal method.³¹

Separately, Ulyanov argued that the suspension is "fully in keeping with Article 62 of the 1969 Vienna Convention on the Law of Treaties."³² Article 62 provides, in relevant part:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty

. . .

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.³³

At a press briefing on October 3, Elizabeth Trudeau, Director of the State Department Press Office, commented on Russia's decision without addressing the Vienna Convention argument for suspension:

We regret Russia's decision to suspend this agreement unilaterally. The United States remains committed to the agreement. We believe it's in the best interests of both the United States and Russia as part of our efforts to secure nuclear materials and combat nuclear terrorism. I would note this is the latest in a series of steps by Russia to end longstanding cooperation on nuclear security and disarmament, including its decision to not participate in the 2016 Nuclear Security Summit, and its unwillingness to continue strategic arms control reductions.

I would also note it's disingenuous of Russia to cite the United States threat to strategic stability as a reason for this decision. The United States seeks a constructive dialogue with Russia on strategic issues, but it is Russia instead who continues to engage in destabilizing activities, and to suspend cooperation under existing agreements like this one that benefit international security.³⁴

³¹ Remarks by Mikhail Ulyanov, *supra* note 1.

³² *Id.*; see also Draft Law Submitted to State Duma, *supra* note 28 ("The actions taken by the United States fundamentally changed the circumstances in which the Agreement and its protocols were signed. Therefore, the suspension of the Agreement is a reciprocal measure by the Russian Federation and does not violate the 1969 Vienna Convention on the Law of Treaties. Importantly, the plutonium covered by the Agreement remains outside the nuclear weapons sphere, which attests to Russia's commitment to limiting nuclear arms.").

³³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

³⁴ U.S. Dep't of State Press Release, Daily Press Briefing (Oct. 3, 2016), at <https://www.state.gov/t/pa/prs/dpb/2016/10/262717.htm>.

At another briefing on the same day, Press Secretary Josh Earnest said:

This is an announcement that we were disappointed by. The decision by the Russians to unilaterally withdraw from this commitment is disappointing . . . The United States has been steadfast since 2011 in implementing our side of the bargain, and we would like to see the Russians continue to do the same thing.³⁵

In a subsequent briefing, Earnest emphasized that continued implementation was in the national interest of both parties:

[T]he United States believes that these are important priorities, and we're hopeful that agreements that were reached by the Russian government—or between the United States and Russian government that were rooted in each side's national interest will continue to be pursued, not just because of the explicit obligation that they have to pursue those agreements, but because of the clear national interest that they have in seeing those agreements thrive.³⁶

Along these same lines, State Department Deputy Spokesperson Mark C. Toner called the suspension a “real tragedy, because . . . it's in the interest of . . . both our countries to continue those efforts.”³⁷

The United States Makes Payment to Family of Italian Killed in CIA Air Strike
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In January 2015, a CIA drone killed an Italian aid worker named Giovanni Lo Porto during a strike on an Al Qaeda compound in the Pakistan-Afghanistan border region. In July 2016, the Obama Administration reached a settlement agreement with Lo Porto's family that included a payment by the United States of more than one million euros.

In early 2012, Lo Porto traveled to Pakistan for a job with an NGO that was helping to rebuild an area damaged by floods.¹ Soon after his arrival, Al Qaeda operatives kidnapped him.² Lo Porto's captors also held Dr. Warren Weinstein, an American working as a contractor for the U.S. Agency for International Development who had been kidnapped in 2011.³ Italian authorities reportedly told Lo Porto's family in December 2014 “that they were in contact with intermediaries and making progress on negotiations.”⁴

In January 2015, the United States bombed the compound where Lo Porto and Weinstein were being held. Both men were killed, along with Ahmed Farouq, a U.S. national and Al

³⁵ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 3, 2016), at <https://www.whitehouse.gov/the-press-office/2016/10/03/press-briefing-press-secretary-josh-earnest-1032016>.

³⁶ White House Press Release, Press Briefing by Press Secretary Josh Earnest (Oct. 5, 2016), at <https://www.whitehouse.gov/the-press-office/2016/10/05/press-briefing-press-secretary-josh-earnest-1052016>.

³⁷ U.S. Dep't of State Press Release, Daily Press Briefing (Oct. 5, 2016), at <https://www.state.gov/r/pa/prs/dpb/2016/10/262821.htm>.

¹ Peter Baker, *Obama Apologizes After Drone Kills American and Italian Held by Al Qaeda*, N.Y. TIMES (Apr. 23, 2015), at <http://www.nytimes.com/2015/04/24/world/asia/2-qaeda-hostages-were-accidentally-killed-in-us-raid-white-house-says.html>.

² Elisabetta Povoledo, *Giovanni Lo Porto Was Known as Aid Worker Drawn to Needy*, N.Y. TIMES (Apr. 23, 2015), at <http://www.nytimes.com/2015/04/24/world/europe/american-drone-strike-italian-aid-worker-giovanni-lo-porto.html>.

³ Baker, *supra* note 1.

⁴ Cora Currier, *One Year On, No Justice for Italian Hostage Killed in U.S. Drone Strike*, INTERCEPT (Mar. 15, 2016, 8:04 PM), at <https://theintercept.com/2016/03/15/one-year-on-no-justice-for-giovanni-lo-porto-italian-hostage-killed-in-us-drone-strike>.

Qaeda leader whose presence at the compound had not previously been known.⁵ As President Barack Obama later explained, the attack was based on “hundreds of hours of surveillance” that demonstrated the presence of Al Qaeda operatives.⁶ Obama also asserted that there had been no indication that the hostages or other civilians were present at the location.⁷

In the wake of the operation, U.S. intelligence professionals conducted a “battle damage assessment . . . to determine the results of the operation and whether . . . any[] civilian casualties occurred.”⁸ According to the White House, the intelligence community concluded “with a high degree of confidence that Dr. Weinstein had been killed in a U.S. government counterterrorism operation. The president was briefed by his national security team soon after that high-confidence assessment was completed.”⁹ On April 22, 2015, “members of the national security apparatus” officially informed Weinstein’s family that Weinstein had been killed during of a U.S. government counterterrorism operation.¹⁰ Obama called Italian Prime Minister Matteo Renzi personally to report Lo Porto’s killing;¹¹ the two had not discussed Lo Porto during Renzi’s visit to the White House the week before.¹²

In a public statement on April 23, Obama apologized for the killings:

As President and as Commander-in-Chief, I take full responsibility for all our counterterrorism operations, including the one that inadvertently took the lives of Warren and Giovanni. I profoundly regret what happened. On behalf of the United States government, I offer our deepest apologies to the families.¹³

As Press Secretary Josh Earnest subsequently explained, the president had not personally approved the strike:

The President did not specifically sign off on these two operations. There are policies and protocols in place for our counterterrorism professionals to make decisions about carrying out these kinds of operations based on a wide variety of things, including an assessment of near certainty that the target is an al Qaeda target and that civilians would not be harmed if the operation were carried out.¹⁴

The procedures outlined in this statement appear to align with a 2013 Presidential Policy Guidance paper which articulated “the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture

⁵ See White House Press Release, Press Briefing by Press Secretary Josh Earnest (Apr. 23, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/23/press-briefing-press-secretary-josh-earnest-4232015> [hereinafter April 23, 2015, Press Briefing].

⁶ White House Press Release, Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto (Apr. 23, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/23/statement-president-deaths-warren-weinstein-and-giovanni-lo-porto> [hereinafter Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto].

⁷ *Id.*

⁸ April 23, 2015, Press Briefing, *supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Baker, *supra* note 1; April 23, 2015, Press Briefing, *supra* note 5.

¹² White House Press Release, Press Briefing by Press Secretary Josh Earnest (Apr. 24, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/24/press-briefing-press-secretary-josh-earnest-4242015>.

¹³ Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto, *supra* note 6.

¹⁴ April 23, 2015, Press Briefing, *supra* note 5.

operations, against terrorist targets outside the United States and areas of active hostilities.”¹⁵ The rules set forth in that document only directly require presidential approval of a strike if “the proposed individual is a U.S person” or if “there is a lack of consensus among Principals regarding the nomination. . . .”¹⁶

In conjunction with his statement, Obama “directed that the existence of this operation be declassified and disclosed publicly.”¹⁷ He also emphasized that the battle damage assessment had concluded “that this operation was fully consistent with the guidelines under which [the U.S.] conduct[s] counterterrorism efforts in the region”¹⁸ Earnest likewise asserted that “the operation was lawful and conducted consistent with our counterterrorism policies,”¹⁹ and specifically that it had satisfied the government’s “near-certainty standard.” Earnest stated:

[Here,] that near-certainty standard applied to two things.

The first is near certainty that this was an al Qaeda compound that was used by al Qaeda leaders; that turned out to be true. That assessment did turn out to be correct. The other near-certainty assessment was that no civilians would be harmed if this operation were carried out. Unfortunately, that was not correct, and the operation led to this tragic, unintended consequence.²⁰

Earnest also emphasized that “we are conducting a thorough independent review to understand fully what happened and how we can prevent this type of tragic incident in the future.”²¹ During the press briefing, Earnest disclosed that the U.S. government planned to provide compensation to the families of Weinstein and Lo Porto, but provided no details.²²

Italian officials had mixed reactions to Obama’s announcement. Renzi told reporters that the kidnapers were ultimately responsible for the deaths of Weinstein and Lo Porto and praised Obama’s transparency.²³ The chair of the Italian Parliamentary Committee for the Intelligence and Security Services, however, said that Italy was not properly informed about the strike: “Was it against someone or against a generic target? . . . We want to know.”²⁴

In July, the Obama administration, via its embassy in Rome, reached an agreement to pay Lo Porto’s family nearly 1.2 million euros, though according to a press report, U.S. officials said that the actual sum was closer to 2.6 million euros.²⁵ The agreement is governed by Italian law, and stipulates:

¹⁵ Presidential Policy Guidance, Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), at https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [hereinafter Presidential Policy Guidelines]. See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 811 (2016).

¹⁶ Presidential Policy Guidelines, *supra* note 15.

¹⁷ Statement by the President on the Deaths of Warren Weinstein and Giovanni Lo Porto, *supra* note 6.

¹⁸ *Id.*

¹⁹ White House Press Release, Statement by the Press Secretary (Apr. 23, 2015), at <https://www.whitehouse.gov/the-press-office/2015/04/23/statement-press-secretary> [hereinafter Statement by the Press Secretary].

²⁰ April 23, 2015 Press Briefing, *supra* note 5.

²¹ Statement by the Press Secretary, *supra* note 19.

²² April 23, 2015 Press Briefing, *supra* note 5.

²³ See Baker, *supra* note 1; Will Dunham & Julia Edwards, *U.S. Strike Inadvertently Killed U.S., Italian Hostages; Obama Apologizes*, REUTERS (Apr. 23, 2015, 5:15 PM), at <http://www.reuters.com/article/us-usa-security-hostages-idUSKBNONE1MI20150423>.

²⁴ Baker, *supra* note 1.

²⁵ Under the agreement, “[t]he United States of America . . . propose[s] to donate as an ex gratia payment in the memory of Mr. Giovanni Lo Porto, born in Palermo, on June 23, 1977, deceased in Pakistan, the amount of Euros

This does not imply the consent by the United States of America to the exercise of jurisdiction of the Italian Courts in disputes, if any, directly or indirectly connected with this instrument. Nothing in this instrument implies a waiver to sovereign or personal immunity.²⁶

The embassy has not provided further details about the circumstances under which the agreement was concluded.²⁷

The payment reportedly marked the first of its kind “made by the US government to the family of a drone-strike victim killed outside a declared war zone.”²⁸ As of the date of publication, the U.S. government had not reached an agreement with the family of Warren Weinstein.²⁹

PRIVATE INTERNATIONAL LAW

United States Ratifies Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance
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The United States deposited its instrument of ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Convention)¹ in September 2016.² The Convention entered into force for the United States several months later.³ Ratification was facilitated by the passage of novel federal implementing legislation that—rather than directly mandating alterations to the domestic legal structure—created a financial incentive for states to change their child support laws. While the Idaho

1,185,092.10 . . . to [two members of Lo Porto’s family].” Instrument No. 1258, Proposal of Donation (July 8, 2016) at http://inchieste.repubblica.it/it/repubblica/rep-it/2016/09/15/news/morte_lo_porto_l_atto_di_donazione_degli_usa_alla_famiglia-147849038 [hereinafter U.S.-Italy Agreement]; Greg Miller & Greg Jaffe, *U.S. Agrees to Pay Nearly \$3 Million to Family of Italian Killed in CIA Strike*, WASH. POST (Sept. 16, 2016), at https://www.washingtonpost.com/world/national-security/us-agrees-to-pay-nearly-3-million-to-family-of-italian-killed-in-cia-strike/2016/09/16/5c213af6-7c1a-11e6-bd86-b7bbd53d2b5d_story.html. See also Stephanie Kirchaessner, *US to Pay €1m to Family of Italian Aid Worker Killed in Drone Strike*, GUARDIAN (Sept. 16, 2016), at <https://www.theguardian.com/us-news/2016/sep/16/us-to-pay-1m-euros-family-italian-giovanni-loporto-drone-strike>.

²⁶ U.S.-Italy Agreement, *supra* note 25, Art. 10.

²⁷ Kirchaessner, *supra* note 25.

²⁸ *Id.* (“Experts say it is already understood that the US offers condolence payments to the families of civilian casualties of airstrikes in Afghanistan and Iraq, but that the Lo Porto agreement stands out because he was killed in Pakistan and because documents show the US was directly involved in the payment.”).

²⁹ Miller & Jaffe, *supra* note 25.

¹ U.S. Dep’t of State Press Release, United States Deposits Its Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Sept. 7, 2016), at <http://www.state.gov/secretary/remarks/2016/09/261631.htm> [hereinafter remarks on Hague Convention Ratification]; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007 [hereinafter Hague Maintenance Convention]. President Barack Obama had previously signed the instrument of ratification on August 30, 2016. White House Press Release, Statement by NSC Spokesperson Ned Price on the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (Aug. 30, 2016), at <https://www.whitehouse.gov/the-press-office/2016/08/30/statement-nsc-spokesperson-ned-price-hague-convention-international> [hereinafter Price Statement].

² Remarks on Hague Convention Ratification, *supra* note 1.

³ *Id.*

legislature displayed some initial resistance, by early 2016 all fifty states had changed the relevant laws, enabling the submission of U.S. ratification.

According to a National Security Council spokesperson, the Convention “contains numerous groundbreaking provisions that, for the first time on a global scale, will establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases”⁴ U.S. Secretary of State John Kerry added:

The United States already has a comprehensive system to establish, recognize, and enforce domestic and international child support obligations. The Convention requires that all [parties] 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.⁵

The Office of Child Support Enforcement (OCSE)⁶ identified several key aspects of the Convention. First, it

will greatly speed up the enforcement of U.S. orders. It limits the circumstances under which a court can review and object to an order. It requires recognition of a U.S. order unless a respondent timely raises a challenge and it limits available objections that the respondent may raise to those similar to ones now allowed under U.S. law.⁷

Second,

[t]he Convention recognizes U.S. due process requirements. It allows a challenge to recognition of a foreign support order if there was a lack of notice and an opportunity for a hearing. It allows a challenge if the order does not comply with U.S. jurisdictional rules. And it allows a court to refuse recognition of an order if it is manifestly incompatible with public policy.⁸

Third, the Convention “requires [parties] to provide free legal assistance in child support cases,” something U.S. agencies are already required to do.⁹ Finally, “[t]he Convention provides standardized procedures and timeframes. Each [party] must follow certain procedures to recognize and enforce child support orders. They must meet certain timeframes for allowing a challenge to an order and for providing status updates.”¹⁰

The United States has supported the Convention since its inception. According to OCSE, “[t]he United States actively participated in the development of the Convention from the beginning of negotiations in 2003.”¹¹ The Convention was concluded on November 23,

⁴ Price Statement, *supra* note 1.

⁵ Remarks on Hague Convention Ratification, *supra* note 1.

⁶ OCSE is the federal agency responsible for overseeing the national child support program and helping state child support agencies manage state programs in compliance with federal law. *About the Office of Child Support Enforcement (OCSE)*, OFFICE OF CHILD SUPPORT ENFORCEMENT (last updated Aug. 18, 2016), at <http://www.acf.hhs.gov/css/about>.

⁷ OFF. CHILD SUPPORT ENF'T, U.S. RATIFICATION OF HAGUE CHILD SUPPORT CONVENTION, DCL-16-11 (2016), at <http://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention>; *see also* Hague Maintenance Convention, *supra* note 1, Arts. 23 (specifying procedure for recognizing and enforcing orders), 23(7) (describing exclusive grounds for challenging recognition or enforcement).

⁸ OFF. CHILD SUPPORT ENF'T, *supra* note 7; *see also* Hague Maintenance Convention, *supra* note 1, Arts. 20, 22, 23(7).

⁹ OFF. CHILD SUPPORT ENF'T, *supra* note 7; *see also* Hague Maintenance Convention, *supra* note 1, Art. 14.

¹⁰ OFF. CHILD SUPPORT ENF'T, *supra* note 7; *see also* Hague Maintenance Convention, *supra* note 1, Art. 23.

¹¹ OFF. CHILD SUPPORT ENF'T, *supra* note 7.

2007, and the United States was the first country to sign it a few weeks later.¹² In September 2008, then-President Bush recommended that the Senate consent to ratification “at the earliest possible date,” noting that entry into force of the Convention “would be in the interests of U.S. families, as it would enable them to receive child support owed by debtors abroad more quickly and reliably.”¹³

The Bush administration recommended two reservations to the Convention.¹⁴ The first proposed reservation related to certain portions of Article 20(1).¹⁵ Absent a reservation, these provisions would require the United States to recognize and enforce decisions made by judicial or administrative authorities of other states parties in the following cases: (1) where “the creditor was habitually resident in [that state] at the time proceedings were instituted;” (2) where “there has been agreement to the jurisdiction in writing by the parties,” except “in disputes relating to maintenance obligations in respect of children;” and (3) where “the decision [regarding maintenance obligations] was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.”¹⁶

The Bush administration objected to these provisions, for the following reasons: First, “[i]n order to satisfy [U.S.] due process standards, there must be a nexus between the debtor and the forum in order to give the forum jurisdiction over the debtor. In other words, it is the respondent’s (debtor’s) contacts with the forum, not the petitioner’s (creditor’s), that are determinative.”¹⁷ Second, [i]n the United States, the general state-law rule is that forum selection clauses in divorce, spousal support and child support cases are unenforceable if the chosen forum has no nexus with either party.¹⁸ Third,

[i]n the United States, a competent authority must have personal jurisdiction over the parties. The fact that a court has *in rem* jurisdiction over a marriage, for example, does not mean that the court has personal jurisdiction over the parties. Without the requisite minimum contacts for personal jurisdiction, a U.S. court cannot issue a valid order.¹⁹

The second reservation recommended by the administration related to a provision requiring the acceptance of certain communications in the French language.²⁰

¹² John R. Crook, *Contemporary Practice of the United States*, 102 AJIL 377 (2008); U.S. Dep’t of State Press Release, *Senate Approval of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* (Oct. 1, 2010), at <http://www.state.gov/secretary/20092013clinton/rm/2010/10/148555.htm> [hereinafter Oct. 1, 2010 Press Release].

¹³ SENATE CONSIDERATION OF TREATY DOC. 110–21, at iv (2008), at <https://www.congress.gov/110/cdoc/tdoc21/CDOC-110tdoc21.pdf>.

¹⁴ The Convention permits both reservations. *Hague Maintenance Convention*, *supra* note 1, Art. 62.

¹⁵ SENATE CONSIDERATION OF TREATY DOC. NO. 110–21, *supra* note 13, at xxvi.

¹⁶ *Hague Maintenance Convention*, *supra* note 1, Art. 20(1)(c), (e)–(f).

¹⁷ SENATE CONSIDERATION OF TREATY DOC. NO. 110–21, *supra* note 13, at xv.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ S. EXEC. REP. NO. 111–2, at 8 (Jan. 22, 2010), at <https://www.congress.gov/111/crpt/erpt2/CRPT-111erpt2.pdf>. The Convention requires parties to designate a Central Authority to “transmit and receive” applications for the recognition and enforcement of orders and “initiate or facilitate the institution of proceedings in respect of such applications.” *Hague Maintenance Convention*, *supra* note 1, Art. 6(1). On December 8, 2016, President Obama issued an executive order that designated the Department of Health and Human Services as the Central Authority of the United States for Purposes of the Convention. Executive Order No. 13752, 81 FED. REG. 90181 (Dec. 8, 2016).

On September 29, 2010, the Senate gave its advice and consent to ratify the Convention subject to the reservations recommended by the administration.²¹ The Senate added one further understanding introduced by Senator Jim DeMint.²² The preamble to the Convention recalls certain provisions of the UN Convention on the Rights of the Child, a human rights treaty to which the United States is not a party.²³ The understanding notes the United States nonparty status, and goes on to state: “[A] mention of the Convention [on the Rights of the Child] in the preamble of this Treaty does not create any obligations and does not affect or enhance the status of the Convention as a matter of United States or international law.”²⁴

The Senate also expressed its view that the Convention is not self-executing.²⁵ Accordingly, additional steps to implement the Convention were necessary prior to its ratification. During its consideration of the Convention, the Senate Foreign Relations Committee observed that

the Convention is largely consistent with current U.S. federal and state law and practice in the child support enforcement area. As a result, only minimal changes to U.S. law would be required to allow for implementation of the Convention. The requisite changes would be achieved through adoption of an amended version of [the Uniform Interstate Family Support Act (UIFSA)] by states and other relevant jurisdictions, as well as through conforming amendments to Title IV of the Social Security Act.²⁶

The Committee further stated that “the National Conference of Commissioners on Uniform State Laws . . . [had] approved model state implementing legislation for the Convention through proposed amendments to the UIFSA, referred to as UIFSA 2008.”²⁷ Those amendments “provide [d] guidelines and procedures for the registration, recognition, enforcement and modification [in state courts] of foreign support orders from countries that are parties to the Convention.”²⁸

²¹ Oct. 1, 2010 Press Release, *supra* note 12; *see also* S. Res. of Ratification, paras. 2, 4, 111th Cong., CONG. REC. S7719, S7720 (Sept. 29, 2010).

²² CONG. REC., *supra* note 21, at S7720.

²³ Hague Maintenance Convention, *supra* note 1, pmb1:

“Recalling that, in accordance with Articles 3 and 27 of the *United Nations Convention on the Rights of the Child* of 20 November 1989,

- in all actions concerning children the best interests of the child shall be a primary consideration,
- every child has a right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development,
- the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development, and
- States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent (s) or other responsible persons, in particular where such persons live in a State different from that of the child[.]”

²⁴ CONG. REC., *supra* note 21, at S7720.

²⁵ *Id.*

²⁶ S. EXEC. REP. NO. 111–2, *supra* note 20, at 6.

²⁷ *Id.* at 6–7. *See generally* UNIF. INTERSTATE FAM. SUPPORT ACT (UNIF. LAW COMM’N 2008).

²⁸ *The Uniform Interstate Family Support Act Amendments (2008): A Summary* 1, UNIF. LAW COMM’N, at <http://www.uniformlaws.org/shared/docs/interstate%20family%20support/UIFSA%202008%20Summary.pdf>; *see also* OFF. CHILD SUPPORT ENF’T, UNIFORM INTERSTATE FAMILY SUPPORT ACT (2008) AND HAGUE TREATY PROVISIONS

The Bush Administration submitted a legislative proposal to Congress to effectuate the necessary changes to federal law. In the absence of congressional action, the Obama Administration resubmitted the proposal in October 2009.²⁹

On September 29, 2014, President Obama signed the Preventing Sex Trafficking and Strengthening Families Act (the Act), which contained the implementing legislation for the Convention.³⁰ That legislation amended Section 466(f) of the Social Security Act, which governs the states' implementation of UIFSA.³¹ The amended act effectively requires all states to enact the UIFSA 2008 amendments by threatening to withhold federal funds for child support programs from states that fail to make the necessary changes.³²

This method of implementing the United States' treaty obligations is a novel one; OCSE explained the administration's approach as follows:

Child support enforcement in the United States has traditionally been the province of state and local jurisdictional authorities. . . .

Beginning in 1984, however, Congress determined that because of the tendency of parents to travel from state to state, and the fact that parents of a child often live in different states, it would be highly desirable to have a relatively few "mandatory state laws" that all states must enact. . . .

To assure enactment of these state laws, Congress tied funding for states' child support and welfare programs to the enactment of such legislation. . . .

Since 1992, states have used UIFSA to process interstate and international child support cases. In 1996, . . . it was mandated that all states enact UIFSA to improve inter-jurisdictional case processing.

Out of deference to the role of states as the locus of jurisdiction for child support and previous success using UIFSA to implement the interstate child support provisions of welfare reform, there was consensus . . . that UIFSA would be the appropriate vehicle to integrate the treaty into U.S. law. Implementation of the treaty through state law is more consistent with existing family law, as well as more efficient and effective, rather than through a federal law that would govern a segregated portion of international child support cases.³³

Shortly after the Act was passed, states began enacting legislation to implement the UIFSA 2008 amendments.³⁴

In Idaho, the legislation proved quite controversial. In March 2015, Idaho's House Judiciary, Rules and Administration Committee voted to table the bill that would implement the Convention, expressing concern that Idaho might be forced to carry out child support decisions

(2015), IM-15-01, at <http://www.acf.hhs.gov/css/resource/uniform-interstate-family-support-act-2008-and-hague-treaty-provisions> (summarizing differences between UIFSA 2008 and previous state law).

²⁹ S. EXEC. REP. NO. 111-2, *supra* note 20, at 7.

³⁰ See OFF. CHILD SUPPORT ENF'T, P.L. 113-183 UIFSA 2008 ENACTMENT, AT-14-11 (2014), at <http://www.acf.hhs.gov/css/resource/pl-113-183-uifsa-2008-enactment>; U.S. Dep't of State Press Release, President Obama Signs Implementing Legislation for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Sept. 30, 2014), at <http://www.state.gov/secretary/remarks/2014/09/232337.htm>.

³¹ See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, sec. 301(f), 128 Stat. 1919, 1944-45 (2014).

³² UNIF. LAW COMM'N, *supra* note 27, at 1; see also Pub. L. No. 113-183, sec. 301(f), 128 Stat. at 1944-45. See generally 42 U.S.C. § 655 (2016) (detailing payments of federal funds to states for child support programs).

³³ OFF. OF CHILD SUPPORT ENF'T, UIFSA Provisions *supra* note 28, at 1.

³⁴ Kirk Johnson, *Negotiated at The Hague, a Child Support Treaty Falters in Boise*, N.Y. TIMES (Apr. 21, 2015), at <http://www.nytimes.com/2015/04/22/us/negotiated-at-the-hague-a-child-support-treaty-falters-in-boise.html>.

that were based on Sharia law.³⁵ According to press reports, none of the states that are currently parties to the Convention is formally governed by Sharia law; in addition, the Idaho attorney general pointed out to the House Committee that the Idaho legislation would allow judges to reject cases that fail to meet the state's standards.³⁶ Because of the committee's decision, the bill did not proceed to the full state House of Representatives for a vote, and Idaho risked losing approximately \$46 million in federal funding.³⁷ The Idaho state legislature later changed course and approved the legislation in May 2015 after the governor called for a special session of the legislature to reconsider the UIFSA 2008 implementing legislation.³⁸ He noted that there was "a compelling public interest in maintaining Idaho's established child support program" and "a need for Idaho to operate in full compliance with the reciprocal interstate process as provided by [UIFSA]."³⁹ He also posted a draft version of the bill online because, he said, he "want[ed] every member of the Legislature to have a better understanding of what it does and does not do, and a fuller appreciation of what happens if we fail to act affirmatively."⁴⁰ Despite continued opposition, the state congress approved the legislation on May 16, 2015.⁴¹

Implementation in the remaining states did not provoke similar controversies. After New Jersey enacted the UIFSA 2008 amendments on March 23, 2016, all states and jurisdictions had implemented the legislation required for compliance with federal law and the Convention.⁴² Because "Article 7 of UIFSA becomes effective concurrently with the Convention," states "will begin to process cases with Convention countries under the requirements of the Convention and article 7 of . . . UIFSA" on January 1, 2017.⁴³

³⁵ See *id.*; Press Release, Idaho Gov. C.L. "Butch" Otter, Governor Expresses Concern about Child Support Implications (Mar. 15, 2015), at https://gov.idaho.gov/mediacenter/press/pr2015/2%20Feb/ps_2.html; Katie Zavadski, *GOP to GOP: 'Sharia Law' Fearmongering Helping Deadbeat Dads*, DAILY BEAST (Apr. 15, 2015, 4:00 PM), at <http://www.thedailybeast.com/articles/2015/04/15/gop-to-gop-sharia-law-fearmongering-helping-deadbeat-dads.html>.

³⁶ Associated Press, *Sharia, Foreign Treaty Controversy Stalling Idaho Child-Support Bill*, WASH. TIMES (Apr. 13, 2015), at <http://www.washingtontimes.com/news/2015/apr/13/sharia-controversy-stalling-idaho-child-support-bill>; see also Zavadski, *supra* note 35. The Attorney General appeared to reference a provision in the Idaho legislation that corresponds to Article 22(a) of the Convention, which provides that: "Recognition and enforcement of a decision may be refused if . . . recognition and enforcement of the decision is manifestly incompatible with the public policy ('*ordre public*') of the State addressed[.]" Hague Maintenance Convention, *supra* note 1.

³⁷ See Johnson, *supra* note 34. Idaho would also have "los[t] access to the federal database system and tools for enforcing \$205 million a year in child support payments to Idaho children." Press Release, Idaho Gov. C.L. "Butch" Otter, Governor Otter Calls Special Session of Idaho Legislature on Child Support (Apr. 29, 2015), at https://gov.idaho.gov/mediacenter/press/pr2015/2%20Feb/pr_24.html [hereinafter Otter Press Release].

³⁸ Otter Press Release, *supra* note 37; C.L. "BUTCH" OTTER, PROCLAMATION (Idaho 2015), at <https://gov.idaho.gov/mediacenter/Bills/ESP.pdf> [hereinafter Otter Proclamation]; see also Julie Turkewitz, *Idaho Approves Child Support Bill, Removing Treaty Roadblock*, N.Y. TIMES (May 18, 2015), at <http://www.nytimes.com/2015/05/19/us/idaho-approves-support-bill-removing-treaty-roadblock.html>.

³⁹ Otter Proclamation, *supra* note 38.

⁴⁰ Press Release, Idaho Gov. C.L. "Butch" Otter, Governor Otter Posts Draft Child Support Bill for Special Legislative Session Online (May 4, 2015), at https://gov.idaho.gov/mediacenter/press/pr2015/2%20Feb/pr_26.html.

⁴¹ See Turkewitz, *supra* note 38.

⁴² *UIFSA 2008 Amendments Enacted Nationwide*, UNIF. LAW COMM'N (Mar. 24, 2016), at <http://www.uniform-laws.org/NewsDetail.aspx?title=UIFSA%202008%20Amendments%20Enacted%20Nationwide>.

⁴³ OFF. CHILD SUPPORT ENF'T, PENDING EFFECTIVE DATE OF THE HAGUE CHILD SUPPORT CONVENTION AND RESOURCES, DCL-16-12 (2016), at <http://www.acf.hhs.gov/css/resource/pending-effective-date-of-the-hague-child-support-convention-and-resources>.