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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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## GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

*United States Negotiates Prisoner Exchange to Secure Release of U.S. Soldier Held in Afghanistan*

On May 31, 2014, President Barack Obama announced that after being held in captivity in Afghanistan for nearly five years, Sergeant Bowe Bergdahl would return home.<sup>1</sup> Obama outlined the prisoner-exchange agreement that led to Bergdahl's release:

I'm also grateful for the tireless work of our diplomats, and for the cooperation of the government of Qatar in helping to secure Bowe's release. We've worked for several years to achieve this goal, and earlier this week I was able to personally thank the Emir of Qatar for his leadership in helping us get it done. As part of this effort, the United States is transferring five detainees from the prison in Guantanamo Bay to Qatar. The Qatari government has given us assurances that it will put in place measures to protect our national security.<sup>2</sup>

Describing the actual exchange, U.S. Secretary of Defense Chuck Hagel stated: "Fortunately, . . . no shots were fired. There was no violence. It went as well as we not only had expected and planned, but I think as well as it could have."<sup>3</sup>

Shortly after the president's announcement, questions arose about the original circumstances under which Bergdahl had been captured. Platoon members alleged that Bergdahl had voluntarily left his post because he was disillusioned with the Army and the war in Afghanistan.<sup>4</sup> Implicitly responding to these critiques, the chairman of the Joint Chiefs of Staff emphasized the military's ethos of "never leaving a fallen comrade behind" and noted that "[i]f there is wrongdoing, [Bergdahl] will be held accountable, and in the meantime, he is innocent until proven guilty."<sup>5</sup>

In the days that followed, more information became available about the Taliban detainees who were released from detention at Guantánamo Bay in exchange for Bergdahl. According to press reports, senior administration officials confirmed the names of the five Taliban detainees: Khair Ulla Said Wali Khairkhwa, Mullah Mohammad Fazl, Mullah Norullah Noori,

<sup>1</sup> White House Press Release, Statement by the President on the Release of Sergeant Bowe Bergdahl (May 31, 2014), at <http://www.whitehouse.gov/the-press-office/2014/05/31/statement-president-release-sergeant-bowe-bergdahl>; U.S. Dep't of Defense News Release No. NR-281-14, Statement from Secretary of Defense Chuck Hagel on the Return of Sgt. Bowe Bergdahl (May 31, 2014), at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16737>.

<sup>2</sup> White House Press Release, *supra* note 1; U.S. Dep't of Defense News Transcript, Media Availability with Secretary Hagel Enroute to Afghanistan (June 1, 2014), at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5443> ("Sgt. Bergdahl is a sergeant in the United States Army. He was a prisoner of war (POW). This was an exchange of prisoners. As secretary of defense, I authorized the five Taliban detainees to be released. They're on their way to Qatar now.").

<sup>3</sup> U.S. Dep't of Defense News Transcript, *supra* note 2.

<sup>4</sup> See, e.g., Eric Schmitt, Helene Cooper & Charlie Savage, *G.I.'s Vanishing Before Capture Angered His Unit*, N.Y. TIMES, June 3, 2014, at A1.

<sup>5</sup> Jim Garamone, *Embrace of Military Ethos Encourages Joint Chiefs Chairman*, AM. FORCES PRESS SERV., June 3, 2014, at <http://www.jcs.mil/Media/News/NewsDisplay/tabid/6800/Article/9117/embrace-of-military-ethos-encourages-joint-chiefs-chairman.aspx>; see also U.S. Dep't of Defense News Release, Statement by Secretary of the Army John McHugh on Sgt. Bowe Bergdahl (June 3, 2014), at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16744> ("Our first priority is ensuring Sgt. Bergdahl's health and beginning his reintegration process. . . . [T]he Army will then review this in a comprehensive, coordinated effort . . .").

Abdul Haq Wasiq, and Mohammad Nabi Omari.<sup>6</sup> Prior to their capture, each of the detainees had held a senior role within the Taliban.<sup>7</sup> A U.S. Department of State spokesperson described their status at Guantánamo as follows:

All of these five were eligible for review by the Periodic Review Board of Guantanamo Bay. So there are three buckets of people in Guantanamo that remain. There are those who are approved for transfer. That's 78. There are about 30 who have been referred for prosecution in some way. These five are in that middle bucket and were unlikely—might have been, but unlikely—to be added to the group that was going to be referred for prosecution. So it is quite likely that eventually, in line with our commitment to close Guantanamo Bay, they would be transferred.<sup>8</sup>

The following day, the spokesperson elaborated: “[L]ook, these were not good guys. I am in no way defending these men. But being mid- to high-level officials in a regime that's grotesque and horrific also doesn't mean they themselves directly pose a threat to the United States.”<sup>9</sup>

New details also emerged about the assurances the Qatari government provided before the release of the five detainees:

[W]e demanded a complete travel ban; we demanded certain security measures be put in place to substantially mitigate the threat that these individuals may pose to the U.S. and our interests. Those demands were met prior to doing this. Those demands were important to us. We wanted to make sure we negotiated for them.

. . . [They are not] under house arrest. It's possible someone will see them on the streets of Qatar. But those types of activities don't threaten our national security interests, and that's the standard here about substantially mitigating the threat that they will pose. We're confident in the Qataris that the restrictions agreed upon, and these individuals will be restricted from activities that pose a threat to our national security.<sup>10</sup>

These restrictions on the detainees are to be in place for one year.<sup>11</sup> According to the White House, “[T]he assurances were sufficient to allow the Secretary of Defense, Chuck Hagel, in coordination with the national security team, to determine that the threat posed by the detainees to the United States would be sufficiently mitigated and that the transfer was in the U.S. national security interest.”<sup>12</sup>

<sup>6</sup> *The Gitmo Detainees Swapped for Bergdahl: Who Are They?*, CNN.COM, May 31, 2014, at <http://www.cnn.com/2014/05/31/us/bergdahl-transferred-guantanamo-detainees>; see also Charlie Savage, *Taliban Talks Could Depend on Detainees*, N.Y. TIMES, June 21, 2013, at A1 (describing these five detainees as central to a previous round of negotiations).

<sup>7</sup> See Savage, *supra* note 6.

<sup>8</sup> U.S. Dep't of State Daily Press Briefing No. 98 (June 4, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/06/227099.htm#AFGHANISTAN>. The president established the Periodic Review Board in 2011 to “ensure that military detention of individuals now held at the U.S. Naval Station, Guantánamo Bay, Cuba . . . continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice.” Exec. Order No. 13,567 (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

<sup>9</sup> U.S. Dep't of State Daily Press Briefing No. 99 (June 5, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/06/227174.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> White House Press Release, Press Briefing by Press Secretary Jay Carney (June 2, 2014), at <http://www.whitehouse.gov/the-press-office/2014/06/02/press-briefing-press-secretary-jay-carney-060214>.

A federal statute regulates the release of detainees from Guantánamo. In particular, section 1035(b) of the 2014 National Defense Authorization Act (NDAA) authorizes the secretary of defense to release such detainees under specific conditions:

[T]he Secretary of Defense may transfer an individual detained at Guantanamo to the custody or control of the individual's country origin, or any other foreign country, only if the Secretary determines that—

(1) actions that have been or are planned to be taken will substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens United States or United States persons or interests; and

(2) the transfer is in the national security interest of the United States.<sup>13</sup>

Section 1035(d) of the NDAA, meanwhile, mandates that such a transfer may not take place unless the secretary of defense notifies “the appropriate committees of Congress” of such a transfer or release determination that has been made “not later than 30 days before the transfer or release.”<sup>14</sup>

When signing the 2014 NDAA into law, Obama noted in a signing statement that the advance-notice requirement could conflict with his constitutional authority: “Section 1035 does not . . . eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”<sup>15</sup>

While negotiations regarding Bergdahl's release were taking place back in 2013, the White House press secretary reported the possibility of an exchange:

We . . . expect the Taliban to raise the issue of their detainees in discussions that we have with them if those discussions take place. And at this time we've made no decisions about the transfer of detainees. And in accordance with law, we would be consulting with Congress should we make any decisions about that.<sup>16</sup>

As it turned out, however, the executive branch did not consult with or provide any advance notice to Congress about the detainees who were released in the prisoner exchange. Administration officials made both constitutional and statutory arguments to justify the lack of prior notice. The day after Bergdahl's release, Hagel explained that “this was an operation, I think as everyone recognizes that had to be very closely held. Only very, very few people knew about this operation. We did not want to jeopardize any leaks. We couldn't afford any leaks anywhere, for obvious reasons.”<sup>17</sup> Responding to a question about the NDAA notification requirement, he suggested that Obama had constitutional authority to release the detainees, notwithstanding the statutory requirement:

<sup>13</sup> National Defense Authorization Act for Fiscal Year 2014, §1035(b), Pub. L. No. 113-66, 127 Stat. 672 (2013).

<sup>14</sup> *Id.*, §1035(d).

<sup>15</sup> White House Press Release, Statement by the President on H.R. 3304 (Dec. 26, 2013), at <http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304>.

<sup>16</sup> White House Press Release, Press Briefing by Press Secretary Jay Carney (June 21, 2013), at <http://www.whitehouse.gov/the-press-office/2013/06/21/press-briefing-press-secretary-jay-carney-6212013>.

<sup>17</sup> U.S. Dep't of Defense News Transcript, *supra* note 2.

[W]e believe that the president of the United States is commander in chief, has the power and authority to make the decision that he did under Article II of the Constitution.

Now, that said, we believed that the information we had, the intelligence we had, was such that Sgt. Bergdahl's safety and health were both in jeopardy, and in particular . . . his health [was] deteriorating.

It was our judgment that if we could find an opening and move very quickly with that opening, that we needed to get him out of there, essentially to save his life.

I know President Obama feels very strongly about that. I do as well. He consulted with his National Security Council on this. We were unanimous that this was the responsible right thing to do.<sup>18</sup>

National Security Adviser Susan Rice echoed this conclusion, noting that "given the president's constitutional responsibilities, it was determined that it was necessary and appropriate not to adhere to the 30-day notification requirement, because it would have potentially meant that the opportunity to get Sergeant Bergdahl would have been lost."<sup>19</sup>

Two days later, the spokesperson for the National Security Council suggested that the notification requirement in the NDAA could be interpreted not to apply to the Bergdahl prisoner swap:

First, there was no question that the Secretary [of Defense] made the determinations required to transfer detainees under Section 1035(b) of the FY14 NDAA. Section 1035(b) states that the Secretary of Defense may transfer an individual detained at Guantanamo to a foreign country if the Secretary determines (1) that actions have or will be taken that substantially mitigate the risk that the individual will engage in activity that threatens the United States or U.S. persons or interests and (2) that the transfer is in the national security interest of the United States. The Secretary made those determinations.

With respect to the separate 30-day notification requirement in Section 1035(d), the Administration determined that the notification requirement should be construed not to apply to this unique set of circumstances, in which the transfer would secure the release of a captive U.S. soldier and the Secretary of Defense, acting on behalf of the President, has determined that providing notice as specified in the statute could endanger the soldier's life.

In these circumstances, delaying the transfer in order to provide the 30-day notice would interfere with the Executive's performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. soldiers. Because such interference would significantly alter the balance between Congress and the President, and could even raise constitutional concerns, we believe it is fair to conclude that Congress did not intend that the Administration would be barred from taking the action it did in these circumstances.

The President also has repeatedly expressed concerns regarding this notice requirement. For example, the President's FY14 NDAA signing statement indicated that "Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting

<sup>18</sup> *Id.*

<sup>19</sup> Candy Crowley Interview with U.S. Ambassador to United Nations Susan Rice (June 1, 2014), at <http://transcripts.cnn.com/TRANSCRIPTS/1406/01/sotu.01.html>.

negotiations with foreign countries regarding the circumstances of detainee transfers.” To the extent that the notice provision would apply in these unique circumstances, it would trigger the very separation of powers concerns that the President raised in his signing statement.

In these unique circumstances, in which the Secretary of Defense made the determinations required by Section 1035(b) and in light of the Secretary’s assessment that providing notice as specified in Section 1035(d) could endanger the soldier’s life, the Secretary of Defense’s failure to provide 30 days’ notice under Section 1035(d) was lawful.<sup>20</sup>

Yet some members of Congress and legal commentators reacted skeptically to these justifications for disregarding the NDAA’s notification requirement.<sup>21</sup>

On June 11, 2014, Hagel testified before the House Armed Services Committee. His testimony provided additional context about the negotiations of the agreement and the administration’s justification for disregarding the NDAA’s notification requirement:

In 2011, the Obama administration conducted talks with the Taliban on a detainee exchange involving the five Taliban detainees that were ultimately transferred after the release of Sergeant Bergdahl. These talks—which Congress was briefed on in November of 2011 and January of 2012—were broken off by the Taliban in March 2012. We have not had direct talks with the Taliban since this time. In September of 2013, the Government of Qatar offered to serve as an intermediary, and in November, we requested that the Taliban provide a new proof-of-life video of Sergeant Bergdahl.

In January of this year, we received the video, and it was disturbing. It showed a deterioration in his physical appearance and mental state compared to previous videos. The intelligence community carefully analyzed it and concluded that Sergeant Bergdahl’s health was poor and possibly declining.

This gave us growing urgency to act. In April, after briefly suspending engagement with us, the Taliban again signaled interest in indirect talks on an exchange. At that point, we intensified our discussions with Qatar about security assurances. On May 12th, we signed a Memorandum of Understanding with Qatar detailing the specific security measures that would be undertaken and enforced by them if any Taliban detainees were transferred to their custody.

Included in this MOU were specific risk mitigation measures and commitments from the Government of Qatar like travel restrictions, monitoring, information sharing, limitations on activities, as well as other measures which we will detail in the closed portion of this hearing . . . .

Soon after the Memorandum of Understanding was finalized, senior U.S. officials received a warning from the Qatari intermediaries that time was not on our side. This indicated that the risks to Sergeant Bergdahl’s safety were growing. We moved forward with indirect negotiations on how to carry out the exchange of five detainees, and agreed to the mechanics of the exchange on the morning of May 27th, following three days of intensive talks. That same day, the President received a personal commitment from the Amir of

<sup>20</sup> National Security Council, Statement by NSC Spokesperson Caitlin Hayden on the NDAA and the Transfer of Taliban Detainees from Guantanamo (June 3, 2014), at <https://www.documentcloud.org/documents/1180482-nsc-statement-on-30-day-transfer-notice-law.html>.

<sup>21</sup> See, e.g., Charlie Savage & David E. Sanger, *Prisoner Deal Puts President on Defensive*, N.Y. TIMES, June 4, 2014, at A1.

Qatar to uphold and enforce the security arrangements and the final decision was made to move forward with the exchange.

As the opportunity to obtain Sergeant Bergdahl's release became clearer, we grew increasingly concerned that any delay, or any leaks, could derail the deal and further endanger Sergeant Bergdahl. We were told by the Qataris that a leak would end the negotiations for Bergdahl's release. We also knew that he would be extremely vulnerable during any movement, and our military personnel conducting the hand-off would be exposed to a possible ambush or other deadly scenarios in very dangerous territory. And we had been given no information on where the hand-off would occur.

For all these reasons and more, the exchange needed to take place quickly, efficiently, and quietly. We believed this exchange was our last, best opportunity to free him.

After the exchange was set in motion, only 96 hours passed before Sergeant Bergdahl was in our hands. Throughout this period, there was great uncertainty about whether the deal would go forward. We did not know the general area of the hand-off until twenty-four hours before. We did not know the precise location until one hour before. And we did not know until the moment Sergeant Bergdahl was handed over safely to U.S. Special Operations Forces that the Taliban would hold up their end of the deal. So it wasn't until we recovered Bergdahl on May 31st that we moved ahead with the transfer of the five Guantanamo detainees.

....

... Our operation to save Sergeant Bergdahl's life was fully consistent with U.S. laws and our national security interests in at least five ways:

First, we complied with the National Defense Authorization Act of 2014 by determining that the risk the detainees posed to the United States, American citizens, and our interests was substantially mitigated and that the transfer was in the national security interests of the United States.

Second, we fulfilled our commitment to recover all military personnel held captive.

Third, we followed the precedent of past wartime prisoner exchanges, a practice in our country that dates back to the Revolutionary War and has occurred in most wars America has fought.

Fourth, because Sergeant Bergdahl was a detained combatant being held by an enemy force, and not a hostage, it was fully consistent with our long-standing policy not to offer concessions to hostage takers. The Taliban is our enemy, and we are engaged in an armed conflict with them.

Fifth, what we did was consistent with previous congressional briefings this administration provided in late 2011 and early 2012, reflecting our intent to conduct a transfer of this nature with these particular five individuals.

... Under these exceptional circumstances—a fleeting opportunity to protect the life of an American service member held captive and in danger—the national security team and the President agreed that we needed to act swiftly.

....

In the decision to rescue Sergeant Bergdahl, we complied with the law, and we did what we believed was in the best interests of our country, our military, and Sergeant Bergdahl.

The President has constitutional responsibilities and authorities to protect American citizens and members of our armed forces. That's what he did. America does not leave its soldiers behind. We made the right decision, and we did it for the right reasons—to bring home one of our people.<sup>22</sup>

#### INTERNATIONAL ORGANIZATIONS

##### *United States Refuses to Grant Visa to Iranian UN Envoy*

On April 11, 2014, the United States informed Iran and the United Nations that it would not grant a visa to Hamid Aboutalebi, a diplomat whom Iran had selected to serve as a new permanent representative to the United Nations.<sup>1</sup> Before beginning his diplomatic career, Aboutalebi had served as a translator for the Muslim Students Following the Imam's Line, the revolutionary Iranian group that seized the U.S. embassy in 1979.<sup>2</sup> Aboutalebi claimed that his involvement with the hostage crisis was rooted in “humanitarian motivations,” helping, for example, with “translation during a press conference when the female and black staffers of the embassy were released.”<sup>3</sup> He noted that he was absent during the seizure of the embassy and that his involvement only began when he “accompanied . . . the special representative of the Pope.”<sup>4</sup> The United States declined to describe its view of Aboutalebi's involvement in detail<sup>5</sup> but took the position that “given his role in the events of 1979, which clearly matter profoundly to the American people, it would be unacceptable for the United States to grant this visa.”<sup>6</sup>

Iran has argued that the United States' refusal to grant Aboutalebi's visa violates the United States' obligations under the 1947 United Nations Headquarters Agreement (Headquarters Agreement).<sup>7</sup> Article IV of the Headquarters Agreement provides, in relevant part:

<sup>22</sup> Secretary of Defense Chuck Hagel, Hearing on the Transfer of Detainees, House Armed Services Committee (June 11, 2014), at <http://docs.house.gov/meetings/AS/AS00/20140611/102314/HHRG-113-AS00-Wstate-HagelC-20140611.pdf>.

<sup>1</sup> White House Press Release, Press Briefing by Press Secretary Jay Carney (Apr. 11, 2014), at <http://www.whitehouse.gov/the-press-office/2014/04/11/daily-press-briefing-press-secretary-jay-carney-4112014>; U.S. Dep't of State Daily Press Briefing No. 64 (Apr. 11, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/04/224692.htm#IRAN>.

<sup>2</sup> Somini Sengupta & Thomas Erdbrink, *Iran's Choice for U.N. Post Fuels Tension with U.S.*, N.Y. TIMES, Apr. 3, 2014, at A6.

<sup>3</sup> Mahmoud Azizi, *Rohani's Special Achievement Is to Thwart Iranophobic Efforts*, KHABAR ONLINE, Mar. 14, 2014, at <http://english.khabaronline.ir/detail/186378/Hassan-Rouhani-Iranian-mission-to-the-United-Nations-/Politics/Politics>.

<sup>4</sup> *Id.*

<sup>5</sup> White House Press Release, *supra* note 1 (“[W]e don't as a rule get into too much detail about issuing visas and deliberations over visas.”); U.S. Dep't of State Daily Press Briefing No. 66 (Apr. 15, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/04/224860.htm#IRAN> (“[W]hile we're not going to get into any specifics of what we do or don't think he was involved in during the hostage crisis, he himself has said he was involved.”).

<sup>6</sup> U.S. Dep't of State Daily Press Briefing No. 66, *supra* note 5; *see also* U.S. Dep't of State Daily Press Briefing (Apr. 16, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/04/224885.htm#IRAN> (“[I]t's not appropriate for Iran to nominate someone to be their permanent representative, to live in the United States, who as involved with such searing events in U.S. history.”).

<sup>7</sup> Agreement Regarding the Headquarters of the United Nations, U.S.-UN, June 26, 1947, 61 Stat. 3416, 11 UNTS 11 (subsequently supplemented and amended) [hereinafter Headquarters Agreement]; Permanent Mission of the Islamic Republic of Iran to the UN Press Release, Statement by H. E. Mr. Gholamhossein Dehghani, Ambassador and Chargé d'Affaires of the Islamic Republic of Iran, Before the Committee on Relations with the Host Country (Apr. 22, 2014), at <http://iran-un.org/en/2014/04/22/22-april-2014> [hereinafter Dehghani Statement].

*Section 11*

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of . . . representatives of Members . . . of the United Nations [and other specified categories of persons] . . . .

*Section 12*

The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.

*Section 13*

(a) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that Section, they shall be granted without charge and as promptly as possible.

. . . .

(d) Except as provided above in this section . . . the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

. . . .

(f) The United Nations shall, subject to the foregoing provisions of this section, have the exclusive right to authorize or prohibit entry of persons . . . into the headquarters district and to prescribe the conditions under which persons may remain or reside there.<sup>8</sup>

The U.S. Department of State spokesperson acknowledged these obligations but also stated that, under U.S. law, individuals might nevertheless be deemed ineligible for a visa on account of security, terrorism, and foreign policy concerns:

[A]s the host nation of the United Nations, except for limited exceptions, the United States is generally obligated under Section 11 of the United Nations Headquarters Agreement not to impede the transit to and from the UN Headquarters. And that, of course, means admitting the chosen representatives of member-states into the United Nations—into the United States, excuse me—for the purposes of representing their country at the UN.

As you also know, all visas are of course evaluated in accordance with all applicable U.S. law and procedure. But broadly speaking, among other grounds, there are—they are not exempt from inadmissibility provisions in the Immigration and Nationality Act, Sections—to be specific—212(a)(3)(A), (B), and (C) for security and related grounds. And that includes security, terrorism, and foreign policy concerns. So there are a broad range of, broadly speaking, reasons that a visa could be deemed ineligible.<sup>9</sup>

As the Department of State indicated, the United States has on previous occasions asserted that it may, consistent with the Headquarters Agreement, decline to provide visas to certain individuals when they implicate the “security” of the United States.<sup>10</sup> But these denials have

<sup>8</sup> Headquarters Agreement, *supra* note 7, §§11–13.

<sup>9</sup> U.S. Dep’t of State Daily Press Briefing No. 62 (Apr. 9, 2014), at <http://www.state.gov/t/pa/prs/dpb/2014/04/224561.htm#IRAN>.

<sup>10</sup> *Id.*

been controversial, especially as applied to individuals who do not pose a current threat to the security of the United States.

When the U.S. Congress approved the Headquarters Agreement in 1947, it included the following statement in the joint resolution:

Sec. 6. Nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity . . . and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.<sup>11</sup>

Section 6 has formed the starting point for subsequent debates about the extent to which the United States, pursuant to the Headquarters Agreement, may refuse visas to particular individuals.

In 1953, the United States denied visas to representatives of two nongovernmental organizations that the UN Economic and Social Council had invited to attend certain General Assembly meetings.<sup>12</sup> The provisions of the Headquarters Agreement set out above applied to these individuals as well. Debates and negotiations followed. The United Nations legal counsel denied that Section 6 constituted a valid reservation to the Headquarters Agreement because it had never been made known to the General Assembly as such.<sup>13</sup> Reporting on negotiations between the United States and the United Nations, Secretary-General Dag Hammarskjöld stated: “From the United Nations point of view it should be recognized that a person should be excluded from the host country if there is clear and convincing evidence that he intends, in bad faith, to use his trip as a cover for activities against that country’s security.”<sup>14</sup> Hammarskjöld also explained that an understanding had been reached regarding the procedure to be used in future cases:

[This] procedure will . . . be based on three principles: (a) the decisions on the United States side will be taken at the highest levels with the guarantees against mistakes and possible arbitrariness that this implies; (b) the decisions will be taken in due time, so as to enable the United Nations to react and to consider the questions arising, while such considerations are still of immediate practical significance; (c) and finally, the Secretary-General will be supplied, to all possible extent, with the information and available evidence, so as to enable him to check whether or not he considers that the action planned is in accordance with the Headquarters Agreement or not. The procedure outlined does from a practical point of view present a basis on which I feel that it will be possible for me to safeguard the interests of the United Nations, while recognizing legitimate interests of the United States, and acting strictly on the basis of the Headquarters Agreement as it now stands.<sup>15</sup>

Henry Cabot Lodge Jr., the U.S. ambassador to the United Nations, reported to the U.S. Department of State that he had agreed to Hammarskjöld’s statement. Lodge noted that he “consider[s] this a satisfactory solution,” believes that “[the] position of [the United States] is

<sup>11</sup> 22 U.S.C. §287 note (2012).

<sup>12</sup> See 13 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 85 (1968).

<sup>13</sup> Memorandum by the Legal Department, Admission of Representatives of Non-Governmental Organizations Enjoying Consultative Status, UN Doc. E/2397 (Apr. 10, 1953).

<sup>14</sup> WHITEMAN, *supra* note 12, at 89.

<sup>15</sup> *Id.* at 90–91.

fully safeguarded,” and “believe[s] further that agreement between [the Secretary-General] and myself is such that we should experience no further serious difficulties.”<sup>16</sup>

In 1988, the United States denied a visa to Yasir Arafat, then chairman of the Palestine Liberation Organization (PLO), to attend a meeting of the General Assembly in New York on the grounds that “the PLO through certain of its elements has employed terrorism against Americans” and that “Mr. Arafat, as Chairman of the PLO, knows of, condones, and lends support to such acts; he therefore is an accessory to such terrorism.”<sup>17</sup> The United States justified the denial in part based on practice under the Headquarters Agreement:

United Nations practice confirms that the host country is not expected to accept the entry of every individual to the Headquarters District, but must retain the right to exclude the entry of individuals in certain limited cases. . . . This principle has been confirmed in recent United Nations practice. In 1981, we informed the United Nations that we could not accept the designation as a representative of Iran a deputy foreign minister who had been involved in the planning and attack on our embassy in Tehran. The United Nations was again informed in 1982, 1983, 1984, 1985, 1986, and 1988 that we would not accept the presence in the United States of individuals with a prominent role in the hostage incident and other acts of aggression against United States citizens which are a clear violation of international law. There was no objection to this United States position.<sup>18</sup>

This statement indicates that the United States has previously denied visas to individuals who, like Aboutaleb, were involved in the Tehran hostage crisis.

The United Nations legal counsel vociferously disputed the United States’ arguments in a statement that remains the most recent interpretation of the Headquarters Agreement published by the United Nations. An excerpt follows:

9. . . . The United States representative . . . [asserted] that United Nations practice confirms that the United States had the right to decline the issuance of visas and the United Nations had, on a number of occasions since 1954, acquiesced in such a practice.

10. For the record, I wish to state that the United Nations has not acquiesced in such a practice. It is true that, on certain occasions, the United States has declined to issue visas to representatives of States or to persons invited to the United Nations, and the United Nations has not insisted where the requesting State itself, for reasons of its own, did not pursue the matter. The United Nations legal position regarding the obligation of the host country to grant visas has at all times been perfectly clear to the host country, as was the United Nations position with respect to the so-called security reservation [as set forth in Section 6].

11. As to the reasons given by the host country in the present case, I would like to indicate, finally, that the statement of the Department of State does not make the point that the presence of Mr. Arafat, Chairman of the Executive Committee of the PLO, at the United Nations would *per se* in any way threaten the security of the United States. In other

<sup>16</sup> Telegram, The United States Representative at the United Nations (Lodge) to the Department of State (July 24, 1953), available at <https://history.state.gov/historicaldocuments/frus1952-54v03/d102>.

<sup>17</sup> U.S. Dep’t of State Press Release, Statement on the Visa Application of Yassir Arafat (Nov. 27, 1988), reprinted in 83 AJIL 253, 254 (1989).

<sup>18</sup> U.S. Dep’t of State Press Release, Statement by Patricia M. Byrne, U.S. Representative to the Committee on Relations with the Host Country (Nov. 28, 1988), cited in W. Michael Reisman, *The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion*, 83 AJIL 519, 523 (1989).

words, the host country did not allege that there was apprehension that Mr. Arafat, once in the United States, might engage in activities outside the scope of his official functions directed against the security of the host country. The reasoning given in the statement of the State Department [quoted above] does not meet the standard laid down in the talks between Secretary-General Hammarskjöld and the United States authorities . . . .<sup>19</sup>

The General Assembly subsequently adopted a resolution condemning Arafat's visa denial as a violation of the Headquarters Agreement.<sup>20</sup>

More recent diplomatic cables between the United States Mission to the United Nations (USUN) and the U.S. Department of State have described a *modus vivendi* with the United Nations regarding the visa issue. A cable from 2006 states:

Under a longstanding “*modus vivendi*” with the UN, it is understood that we can deny issuing a visa to an individual coming to the UN on official business provided that the Department, at the highest level, has decided that issuance would be inimical to our national security. Such a decision is reached by means of an action memorandum to the seventh floor.<sup>21</sup>

Another cable from 2009 describes another visa denial pursuant to the *modus vivendi* but does not explain the specific basis for the denial:

USUN called the Iranian Mission to inform them that the Department decided to deny a visa to Alireza Salari Sharifabadi, who has planned to attend the meetings on the World Financial and Economic Crisis from June 24–26 at UNHQ. The Mission made no comment. USUN also called the UN's Office of Legal Affairs (OLA), adding that the denial was made pursuant to the long standing *modus vivendi*. OLA was surprised that a decision to deny the visa was made almost a month after the end of the meeting that the applicant sought to attend.

. . . As the Department is aware, OLA considers visa denials and delays a serious problem. It supports the *modus vivendi* and does not challenge us when we invoke it, but the [United States government's] credibility is damaged when a visa is denied so long after the fact.<sup>22</sup>

In any event, Iran called the U.S. decision not to provide a visa to Aboutalebi “regrettable” and refused to withdraw his nomination.<sup>23</sup> Instead, Iran notified the secretary-general that it was filing a complaint with the UN Committee on Relations with the Host Country, headed

<sup>19</sup> Report of the Committee on Relations with the Host Country, Statement by the Legal Counsel Concerning the Determination by the Secretary of State of the United States of America on the Visa Application of Mr. Yasser Arafat, Made at the 136th Meeting of the Committee on Relations with the Host Country, on 28 November 1988, UN Doc A/C.6/43/7 (1988).

<sup>20</sup> GA Res. 43/48, para. 3 (Nov. 30, 1988).

<sup>21</sup> Diplomatic Cable No. USUN New York 1939, Processing of G Visas and Meeting U.S. Host Country Obligations (Oct. 11, 2006), available at [http://www.wikileaks.org/plusd/cables/06USUNNEWYORK1939\\_a.html](http://www.wikileaks.org/plusd/cables/06USUNNEWYORK1939_a.html). [Editors' note: The citation to the “seventh floor” is a reference to the handful of top-level officials, including the secretary of state, whose offices are located on the seventh floor of the U.S. Department of State.]

<sup>22</sup> Diplomatic Cable No. USUN New York 729, Denial of a Visa to a Member of the Iranian Foreign Ministry (July 29, 2009), available at <http://www.washingtonpost.com/wp-srv/special/world/wikileaks/cable33.html>.

<sup>23</sup> See Elaine Sciolino, *Lingering Power of Hostage Crisis Short-Circuits Iranian Nominee*, N.Y. TIMES, Apr. 13, 2014, at A8.

by Cyprus.<sup>24</sup> Iran asserted that the U.S. refusal to issue a visa was a “breach of [U.S.] legal obligations under international law and the Headquarters Agreement” and contravened “the United Nations Charter including principles of sovereign equality of states.”<sup>25</sup> At an emergency meeting of the Committee, the Iranian chargé d’affaires, Gholamhossein Dehghani, stated that the United States was “undermin[ing] the work of the United Nations system and impair[ing] the very foundations of multilateral diplomacy.”<sup>26</sup> The Committee discussed the issue in a private meeting and then tabled the issue, taking no further action on Iran’s letter.<sup>27</sup>

Before the United States confirmed that it would not provide a visa to Aboutalebi, the U.S. Congress enacted a new statute to support the denial.<sup>28</sup> The new statute built on a 1990 statute that requires the president to deny visas to representatives to the United Nations in specified circumstances:

The President shall use his authority, including the authorities contained in section 6 of the United Nations Headquarters Agreement Act . . . to deny any individual’s admission to the United States as a representative to the United Nations if the President determines that such individual has been found to have been engaged in espionage activities directed against the United States or its allies and may pose a threat to United States national security interests.<sup>29</sup>

The 1990 statute also provides discretion to the president to waive this requirement if he determines that “such a waiver is in the national security interests of the United States.”<sup>30</sup> President George H. W. Bush had issued a signing statement objecting to the denial of admission to the United States when he signed it into law. He wrote:

This . . . provision could constrain the exercise of my exclusive constitutional authority to receive within the United States certain foreign ambassadors to the United Nations. While espionage directed against the United States and its allies is a problem of the utmost gravity, curtailing by statute my constitutional discretion to receive or reject ambassadors is neither a permissible nor a practical solution. I therefore shall construe [this provision] to be advisory.<sup>31</sup>

<sup>24</sup> Letter from H. E. Ambassador Gholamhossein Dehghani to Secretary-General of the United Nations (Apr. 14, 2014), *available at* <http://iran-un.org/en/2014/04/14/14-april-2014>.

<sup>25</sup> Note Verbale No. 108 from the Permanent Mission of the Islamic Republic of Iran to the UN Permanent Mission of Cyprus to the United Nations (Apr. 14, 2014), *available at* <http://iran-un.org/en/2014/04/14/14-april-2014>.

<sup>26</sup> Dehghani Statement, *supra* note 7.

<sup>27</sup> Following the meeting, the chairman of the committee, Ambassador Nicholas Emiliou of Cyprus, said: “Among the issues that we dealt with was the issue of entry visas by the host country, where Iran and the United States presented their views on the well known incident concerning the denial of visa to the new Permanent Representative of Iran. There was a discussion with the participation of several delegations, and the Committee decided to remain seized of the issue and we will revert to it if necessary.” Permanent Mission of the Republic of Cyprus to the United Nations Press Release, Statement by Chair of UN Host Country Committee, Ambassador Nicholas Emiliou of Cyprus (Apr. 22, 2014), *available at* <http://www.cyprusun.org/?p=6390>.

<sup>28</sup> Act of Apr. 18, 2014, Pub. L. No. 113-100, 128 Stat. 1145 (2014).

<sup>29</sup> 8 U.S.C. §1102 note (2012) (setting forth the 1990 statute).

<sup>30</sup> *Id.*

<sup>31</sup> George Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Feb. 16, 1990), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=18165>.

Specifically referencing the Aboutalebi controversy, on April 1, 2014, Senator Ted Cruz of Texas introduced a bill to expand the 1990 law.<sup>32</sup> The bill would amend the existing statutory grounds for denial to include “engag[ing] in . . . a terrorist activity”<sup>33</sup> and would revise the definition of “terrorist activity” to include “[t]he seizing or detaining . . . [of] another individual” in order to compel certain acts.<sup>34</sup> The bill made its way quickly through Congress, passing the Senate on April 7 and the House on April 10.<sup>35</sup> On April 11, before the president signed the bill into law, the White House and Department of State announced that the administration had informed the United Nations and Iran that no visa would be issued to Aboutalebi. Regarding the legislation, the White House spokesperson said:

We certainly share the intent of the bill passed by Congress, as we have already told the U.N. and Iran that we will not issue a visa. We’ll review the legislation; we’re doing that now. And we will work to address any issues related to its utility and constitutionality. But we share the intent of the bill. The bill expands upon a 1990 law for which President George H.W. Bush issued a signing statement expressing constitutional concerns. And, obviously, we will be looking at this issue as part of our review. But as to the intent, we share it. And I think we have made clear in previous statements and today in my statement that we won’t be issuing a visa.<sup>36</sup>

On April 18, President Barack Obama signed the bill into law.<sup>37</sup> He did not issue a signing statement addressing its constitutionality.

In the wake of these events, rumors of alternative appointments began circulating in an Iranian newspaper.<sup>38</sup> However, an Iranian news agency subsequently reported that Iranian lawmakers were pressing their government to stick with Aboutalebi.<sup>39</sup>

#### INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

##### *Multilateral Naval Code of Conduct Aims to Prevent Unintended Conflict in Contested Areas of East and South China Seas*

On April 22, 2014, navy chiefs from twenty countries, including the United States, China, Japan, the Philippines, South Korea, and Vietnam, attended the Western Pacific Naval

<sup>32</sup> S. Res. 2195, 113th Cong. (2014) (enacted); *see also* Press Release, Sen. Ted Cruz, Sen. Cruz Introduces S. 2195 to Prevent Terrorists from Entering U.S. as U.N. Ambassadors (Apr. 1, 2014), at [http://www.cruz.senate.gov/?p=press\\_release&id=1083](http://www.cruz.senate.gov/?p=press_release&id=1083).

<sup>33</sup> 128 Stat. 1145.

<sup>34</sup> *Id.* (modifying, in part, 8 U.S.C. §1182(a)(3)(B)(iii)).

<sup>35</sup> *Id.*

<sup>36</sup> White House Press Release, *supra* note 1.

<sup>37</sup> *See* 128 Stat. 1145.

<sup>38</sup> Hanif Zarrabi-Kashani, *Headlines: Alternatives for U.N. Envoy, Iran’s Population Increase, & IAEA Set to Visit Iran*, BROOKINGS (Apr. 30, 2014), at <http://www.brookings.edu/blogs/iran-at-saban/posts/headlines-2014/04/30-who-will-replace-iran-un-envoy-hamid-aboutalebi>.

<sup>39</sup> *Iranian MP Urges Gov’t to Resist US Pressure over UN Envoy Pick*, TASNIM NEWS AGENCY, May 10, 2014, at <http://www.tasnimnews.com/English/Home/Single/365804>; *Iran Should Defy US Language of Force in UN Envoy Row, MP Says*, TASNIM NEWS AGENCY, May 8, 2014, at <http://www.tasnimnews.com/English/Home/Single/364052>; *MP Urges Gov’t to Avoid Illegal Concessions to US over Abutalebi*, TASNIM NEWS AGENCY, May 8, 2014, at <http://www.tasnimnews.com/English/Home/Single/363999>.

Symposium in Qingdao, China, and approved a nonbinding agreement setting forth rules governing unplanned encounters at sea.<sup>1</sup> The Code for Unplanned Encounters at Sea (CUES) “offers safety measures and a means to limit mutual interference, to limit uncertainty, and to facilitate communication when naval ships or naval aircraft encounter each other in an unplanned manner.”<sup>2</sup>

The agreement comes at a time of rising discord in the Pacific region. Tensions have escalated since China’s unilateral implementation in November 2013 of an air defense identification zone (ADIZ)<sup>3</sup> over a large swath of the East China Sea that contains a chain of islands that both China and Japan claim as their own territory.<sup>4</sup> The Japanese government purchased the islands—known as Senkaku in Japan and Diaoyu in China—from a private Japanese landowner in September of 2012. The new Chinese ADIZ also overlaps with South Korea’s own ADIZ, including the airspace above a submerged reef—known as Ieodo in South Korea and Suyan Rock in China—to which both countries lay claim.<sup>5</sup> South Korea responded by unilaterally expanding its ADIZ to include airspace in the East China Sea that is also claimed by Japan and China.<sup>6</sup> The South China Sea has likewise “been the subject of competing territorial and maritime claims for decades,” with sharp tensions resurfacing recently over the international legality of China’s “nine-dash line” assertion of maritime jurisdiction in the region.<sup>7</sup>

In response to this welter of counterclaims and regional tensions, CUES is intended to “offer[] a means by which navies may develop mutually rewarding international cooperation and transparency and provide leadership and broad-based involvement in establishing international standards in relation to the use of the sea.”<sup>8</sup> CUES lays out two protocols for communication among vessels and aircraft, one “by sound, light and flags (which, in reality, has already been agreed through the 1972 International Regulations for Preventing Collisions at

<sup>1</sup> Jeremy Page, *Pacific Navies Agree on Code of Conduct for Unplanned Encounters*, WALL ST. J., Apr. 22, 2014, at <http://online.wsj.com/news/articles/SB10001424052702304049904579517342779110078>; Western Pacific Naval Symposium (WPNS) Workshop 2014, Minutes, Enclosure 1 (Jan. 14–17, 2014), available at <http://img.mod.gov.cn/reports/201310/bzdd/site21/20140213/4437e6581cab14667a2734.pdf> (WPNS Workshop personnel attendance list) [hereinafter WPNS Workshop Minutes].

<sup>2</sup> WPNS Code for Unplanned Encounters at Sea, Version 1.0, §1.1.2 (Apr. 22, 2014), available at [http://www.tnial.mil.id/Portals/0/ANNOUNCEMENT/P\\_LAIN/DOKUMEN%20CUES%202014.pdf](http://www.tnial.mil.id/Portals/0/ANNOUNCEMENT/P_LAIN/DOKUMEN%20CUES%202014.pdf) [hereinafter CUES Agreement].

<sup>3</sup> Ministry of National Defense of the People’s Republic of China Press Release, East China Sea Air Defense Identification Zone (Nov. 23, 2013), at [http://eng.mod.gov.cn/Press/2013-11/23/content\\_4476180.htm](http://eng.mod.gov.cn/Press/2013-11/23/content_4476180.htm).

<sup>4</sup> Ministry of Foreign Affairs of Japan Press Release, Statement by the Minister for Foreign Affairs on Announcement on the “East China Sea Air Defense Identification Zone” by the Ministry of National Defense of the People’s Republic of China (Nov. 24, 2013), at [http://www.mofa.go.jp/press/release/press4e\\_000098.html](http://www.mofa.go.jp/press/release/press4e_000098.html); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 106, 106 (2014).

<sup>5</sup> Byung-Lyuen Kim, *MND Expresses Regret at Overlapped ADIZ*, MINISTRY OF NATIONAL DEFENSE OF THE REPUBLIC OF KOREA NEWS ZONE (Dec. 4, 2013), at [http://www.mnd.go.kr/user/boardList.action?command=view&page=1&boardId=O\\_47261&boardSeq=O\\_56323&mcCategoryId=&id=mnd\\_eng\\_030100000000](http://www.mnd.go.kr/user/boardList.action?command=view&page=1&boardId=O_47261&boardSeq=O_56323&mcCategoryId=&id=mnd_eng_030100000000).

<sup>6</sup> Choe Sang-Hun, *After China, South Korea to Expand Its Own Air Defense Zone*, N.Y. TIMES, Dec. 9, 2013, at A4.

<sup>7</sup> Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 331, 331 (2014).

<sup>8</sup> CUES Agreement, *supra* note 2, §1.1.1.

Sea (COLREGS) that applies to all vessels)” and the other “by radio (in English, with designated call-signs, and clear procedures for information exchange).”<sup>9</sup>

Because of the nonbinding nature of the agreement<sup>10</sup> and its apparent inapplicability to territorial waters,<sup>11</sup> some observers have suggested that it may not change naval behavior in any meaningful way or help resolve disputes over areas claimed by two or more nations.<sup>12</sup> Additionally, the agreement’s limited applicability to navies is particularly significant. The U.S. Department of Defense has suggested that China’s nonnaval entities, such as the China Maritime Surveillance and Fisheries Law Enforcement Command ships “were responsible for directly asserting Chinese sovereignty on a daily basis, while the [Chinese] navy maintained a more distant presence from the immediate vicinity of the contested waters.”<sup>13</sup>

Despite official optimism,<sup>14</sup> the true impact of the agreement has yet to be seen. One month after CUES was approved, Vietnam and China clashed after China brought a deep-water oil-drilling rig into an area described by Vietnam as “80 miles deep into Vietnam’s exclusive economic zone . . . [in alleged violation of] the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS).”<sup>15</sup> This action seriously escalated conflict between the two countries,<sup>16</sup> resulting in a “confrontation with Vietnamese ships, complaints from Hanoi, and street

<sup>9</sup> Christian Le Mière, *Managing Unplanned Encounters at Sea*, IISS MILITARY BALANCE BLOG (May 1, 2014), at <http://www.iiss.org/en/militarybalanceblog/blogsections/2014-3bea/april-7347/managing-unplanned-encounters-at-sea-087b>.

<sup>10</sup> CUES Agreement, *supra* note 2, §1.4.1 (“WPNS navies that choose to adopt CUES for naval cooperation do so on a voluntary and non-binding basis.”); *see also id.*, §1.1.1 (“The document is not legally binding; rather it’s a coordinated means of communication to maximise safety at sea.”).

<sup>11</sup> Although CUES does not specify an area of application, it explicitly “does not supersede . . . rules applicable under international agreements or treaties or international law.” *Id.*, §1.5.2; *see also* WPNS Workshop Minutes, *supra* note 1, para. 57 (discussing the limitations on territorial applicability imposed by CUES Agreement §1.5.2). Officials have therefore interpreted it to apply in exclusive economic zones (EEZs) and on the high seas, but *not* in territorial waters, since the UN Convention on the Law of the Sea preserves the right of member nations to regulate the activity of all foreign ships entering their territorial sea and limit their actions to “innocent passage.” *See* United Nations Convention on the Law of the Sea, Art. 21, *opened for signature* Dec. 10, 1982, 1833 UNTS 397; *see also* Ministry of National Defense of the People’s Republic of China Press Release, Senior Chinese Navy Official Hails 14th WPNS’ Achievements (Apr. 25, 2014), at [http://eng.mod.gov.cn/TopNews/2014-04/25/content\\_4505570.htm](http://eng.mod.gov.cn/TopNews/2014-04/25/content_4505570.htm) (citing remarks by PLAN Deputy Commander Ding Yiping, warning that “it is wrong . . . to . . . hamper China from protecting its legal rights in the East China Sea and the South China Sea by mistakenly reading the regulations”).

<sup>12</sup> *See* Le Mière, *supra* note 9.

<sup>13</sup> U.S. Dep’t of Defense, Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2014, at 38 (2014), at [http://www.defense.gov/pubs/2014\\_DoD\\_China\\_Report.pdf](http://www.defense.gov/pubs/2014_DoD_China_Report.pdf) (summarizing China’s approach to maritime security).

<sup>14</sup> *See, e.g.*, Martin Sieff, *China Challenges Call for South China Sea Code of Conduct*, ASIA PACIFIC DEFENSE FORUM (June 6, 2014), at [http://apdforum.com/en\\_GB/article/rmiap/articles/online/features/2014/06/06/code-conduct-debate](http://apdforum.com/en_GB/article/rmiap/articles/online/features/2014/06/06/code-conduct-debate) (noting that “PLA Navy commander Adm. Wu Shengli hailed the new CUE as a milestone”); U.S. Secretary of Defense Chuck Hagel, Address at the IISS Shangri-La Dialogue (May 31, 2014), at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1857> (describing the agreement as “an important naval safety protocol” and proof that “cooperation is possible”).

<sup>15</sup> Ha Kim Ngoc, Deputy Foreign Minister of Vietnam, Statement at the 17th Non-Aligned Movement Ministerial Meeting in Algiers (May 28, 2014), at <http://www.mofa.gov.vn/en/nr040807104143/nr040807105039/ns140529224422>.

<sup>16</sup> *See* Vietnam Sends Diplomatic Note Against China to UN Chief, VIETNAMNET BRIDGE (June 1, 2014), at <http://english.vietnamnet.vn/fms/government/103899/vietnam-sends-diplomatic-note-against-china-to-un-chief.html> (reproducing diplomatic note of May 4, 2014, from Vietnam’s Permanent Mission to the United Nations to Secretary-General Ban Ki-moon).

protests that turned into bloody anti-Chinese riots.”<sup>17</sup> China responded by sending a position paper to UN Secretary-General Ban Ki-moon for circulation to all General Assembly members, and China’s Ministry of Foreign Affairs published an official statement outlining its policy.<sup>18</sup> The U.S. Department of State issued a press statement citing China’s actions as “provocative” and “part of a broader pattern of Chinese behavior to advance its claims over disputed territory in a manner that undermines peace and stability in the region.”<sup>19</sup>

Representatives from Vietnam and China met a few weeks later on June 17, 2014; a press release from Vietnam’s Ministry of Foreign Affairs stated that Prime Minister Nguyen Tan Dung reiterated his nation’s position that “China’s actions seriously violated Viet Nam’s sovereignty, the agreements between the two countries’ leaders, international laws and the 1982 UNCLOS, . . . threatening peace and stability as well as maritime and aviation security and safety in the region . . . .”<sup>20</sup> The oil rig in question was moved a month later, with its operator announcing “the completion of drilling and exploration” activities<sup>21</sup> and a Chinese Foreign Ministry spokesman asserting that the relocation “is a normal offshore operation and has nothing to do with external factors.”<sup>22</sup> China had earlier reported plans to move a second oil rig even closer to Vietnam’s coast, although far from the more contentious disputed area near the Parcel Islands.<sup>23</sup> The U.S. Department of State voiced concerns over this and similar reports but noted that it lacked sufficient information about the intended locations and would therefore “hold back judgment until we know more.”<sup>24</sup>

### *Senate Approves Treaties to Regulate Fishing*

On April 3, 2014, the Senate approved three new fishing treaties as well as an amendment to a fourth fishing treaty. These agreements seek to address the problem of illegal, unreported, and unregulated (IUU) fishing and to conserve and manage fisheries in the North Pacific, South Pacific, and Northwest Atlantic.<sup>1</sup> The approved treaties are the Agreement on Port State

<sup>17</sup> Edith M. Lederer, *China Takes Dispute with Vietnam to U.N.*, ASSOCIATED PRESS, June 9, 2014, at <http://bigstory.ap.org/article/china-takes-dispute-vietnam-un>.

<sup>18</sup> Ministry of Foreign Affairs of the People’s Republic of China Press Release, *The Operation of the HYSY 981 Drilling Rig: Vietnam’s Provocation and China’s Position* (June 8, 2014), at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1163264.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1163264.shtml).

<sup>19</sup> U.S. Dep’t of State Press Statement, *Vietnam/China: Chinese Oil Rig Operations near the Parcel Islands* (May 7, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/05/225750.htm>.

<sup>20</sup> Embassy of the Socialist Republic of Vietnam in the Kingdom of Saudi Arabia Press Release, *Prime Minister Nguyen Tan Dung Meets with Chinese State Councilor Yang Jiechi* (June 18, 2014), at [http://www.vietnamembassy-arabsaudi.org/en/nr070521165843/nr070521170351/news\\_object\\_view?newsPath=/vnemb.vn/tin\\_hddn/ns140623160122](http://www.vietnamembassy-arabsaudi.org/en/nr070521165843/nr070521170351/news_object_view?newsPath=/vnemb.vn/tin_hddn/ns140623160122).

<sup>21</sup> *CNPC Ends Drilling off Xisha Islands*, XINHUA NEWS, July 16, 2014, at [http://news.xinhuanet.com/english/china/2014-07/16/c\\_126757274.htm](http://news.xinhuanet.com/english/china/2014-07/16/c_126757274.htm).

<sup>22</sup> *Relocation of Oil Rig Irrelevant: FM Spokesman*, XINHUA NEWS, July 18, 2014, at [http://news.xinhuanet.com/english/china/2014-07/18/c\\_126766856.htm](http://news.xinhuanet.com/english/china/2014-07/18/c_126766856.htm).

<sup>23</sup> Christopher Bodeen, *China Says Moving 2nd Oil Rig Closer to Vietnam*, ASSOCIATED PRESS, June 19, 2014, at <http://bigstory.ap.org/article/china-says-moving-2nd-rig-closer-vietnam>.

<sup>24</sup> U.S. Dep’t of State Daily Press Briefing, *Spokesperson Jen Psaki* (June 20, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/06/228103.htm#CHINA>.

<sup>1</sup> 160 CONG. REC. S2155, S2157–58 (daily ed. Apr. 3, 2014), available at <https://beta.congress.gov/crec/2014/04/03/CREC-2014-04-03.pdf>.

Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>2</sup> (Port State Measures Agreement); the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean<sup>3</sup> (NPFC Convention); the Convention on the Conservation and Management of the High Seas Fishery Resources in the South Pacific Ocean<sup>4</sup> (SPRFMO Convention); and the Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries<sup>5</sup> (NAFO Amendment).

The Senate's approval of these treaties is noteworthy in part because it has approved only one other multilateral treaty since the beginning of the Obama administration.<sup>6</sup> The Senate did not attach any reservations to any of the treaties, but it did declare that the three treaties and amendment are not self-executing.<sup>7</sup> Implementing legislation has been proposed for each agreement, but none has yet been enacted.<sup>8</sup> Given the United States' practice of not submitting instruments of ratification for non-self-executing treaties until implementing legislation is enacted,<sup>9</sup> it is unclear when the United States will become a party to these agreements.

*Port State Measures Agreement.* When the treaties were discussed on the Senate floor, the Port State Measures Agreement received the most attention. Senator Sheldon Whitehouse of Rhode Island emphasized the robust bipartisan support for the treaty's goal of combating IUU fishing, also known as "pirate fishing":

We have worked very hard in this caucus to find bipartisan common ground on issues that relate to the seas and to our oceans, and one of the areas we have worked on is the area that is described in the jargon as IUU fishing, which means illegal, unreported, and unregulated fishing. The better word for it, the clearer word for it, the more accurate word for it[,] is pirate fishing.

These are fishermen around the world who go to sea and they fish above legal limits, they fish out of season, they fish for catches they are not allowed to catch, they fish in waters they

<sup>2</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, *opened for signature* Nov. 22, 2009, S. TREATY DOC. NO. 112-4, *available at* <http://www.fao.org/fishery/topic/166283/en> [hereinafter Port State Measures Agreement].

<sup>3</sup> Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, *opened for signature* Apr. 1, 2012, S. TREATY DOC. NO. 113-2, *available at* [http://www.mofa.go.jp/policy/treaty/submit/session183/pdfs/agree-05\\_01.pdf](http://www.mofa.go.jp/policy/treaty/submit/session183/pdfs/agree-05_01.pdf) [hereinafter NPFC Convention].

<sup>4</sup> Convention on the Conservation and Management of the High Seas Fishery Resources in the South Pacific Ocean, *opened for signature* Feb. 1, 2010, S. TREATY DOC. NO. 113-1, *available at* <http://www.southpacificfmo.org/assets/Convention-and-Final-Act/2353205-v2-SPRFMOConvention-textscorrectedApril2010aftersignatureinFebruary2010forcertificationApril2010.pdf> (corrected version of Apr. 2010) [hereinafter SPRFMO Convention].

<sup>5</sup> Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, *adopted* Sept. 26, 2008, S. TREATY DOC. NO. 113-3, *available at* <http://www.nafo.int/about/frames/convention.html> [hereinafter NAFO Amendment].

<sup>6</sup> John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 158, 158 (2011) (noting ratification of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance); *see also U.S. Supreme Court Interprets Child Abduction Treaty*, this issue.

<sup>7</sup> 160 CONG. REC. S2158 (daily ed. Apr. 3, 2014), *available at* <https://beta.congress.gov/crec/2014/04/03/CREC-2014-04-03.pdf>.

<sup>8</sup> S. 267, 113th Cong. (2014), *available at* <https://beta.congress.gov/bill/113th-congress/senate-bill/267>; *see also* National Oceanic and Atmospheric Administration, News and Updates Archives: Implementing Legislation for International Fisheries Treaties Submitted to Congress (July 2014), *at* <http://www.legendary.noaa.gov/newsarchive.html>.

<sup>9</sup> Robert E. Dalton, *United States*, in NATIONAL TREATY LAW AND PRACTICE 765, 789 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005).

are not allowed to fish in, and then they come to shore and market their illicit product. When they do that, they hurt legitimate fishermen and they hurt American fishermen in two ways. First of all, fish migrate around the globe. If they are knocked down, damaged, and caught illegally in other areas, then the American fishery for that same species is hurt. The second is that depresses the global price for fish. These people can flood the market with illegal fish. That drops the price through the law of supply and demand, and now our American fishermen—who are fishing lawfully, who are abiding by the catch limits, who are fishing in the right seasons and places—suffer a disadvantage in the pricing when their fish get to market.

. . . Pirate fishing losses have been estimated at between \$10 billion and \$24 billion every year.<sup>10</sup>

The Port State Measures Agreement includes the following obligations to deter pirate fishing by restricting port entry to particular vessels and assisting developing states:

The Agreement requires Parties to designate ports to which foreign vessels may request entry and to require such vessels to provide advance notice for such requests. Parties are generally required to deny port entry to vessels known to have engaged in or supported IUU fishing, as well as to prohibit vessels in their ports from landing, transshipping, packaging, or processing fish where there is evidence the vessels engaged in or supported IUU fishing. Additionally, the Agreement includes commitments to assist developing States Parties to fulfill their obligations under it.<sup>11</sup>

The National Marine Fisheries Service further described how the Port State Measures Agreement would address pirate fishing by denying entry to ports and access to port services necessary for the sale of IUU fish:

Since all fish must come to port to enter into trade, preventing vessels carrying illegally harvested fish from accessing ports around the world is an effective way to prevent, deter and eliminate IUU fishing. Denying port entry and access to port services, and consequently preventing illegal seafood from entering trade, increases the costs associated with IUU fishing operations and removes the financial incentives for engaging in IUU fishing. Broad ratification of the Port State Measures Agreement by countries around the world will help eliminate “ports of convenience” that allow IUU fish to enter the stream of seafood commerce, after which it becomes increasingly difficult to identify as illegal product as it moves further from its original point of landing.<sup>12</sup>

The Port State Measures Agreement will enter into force after twenty-five states have submitted instruments of ratification, acceptance, approval, or accession.<sup>13</sup> So far, the European Union and nine states—Chile, Gabon, Myanmar, New Zealand, Norway, Oman, the Seychelles, Sri Lanka, and Uruguay—have done so.<sup>14</sup> In his testimony before the Senate Foreign

<sup>10</sup> 160 CONG. REC. S2155 (statement of Sen. Sheldon Whitehouse); *see also id.* (statement of Sen. Lisa Murkowski); *id.* at S2156–57 (statement of Sen. Mark Begich).

<sup>11</sup> Letter of Submittal from Hillary Rodham Clinton, U.S. Secretary of State, to President Barack Obama (Mar. 18, 2011), *in* S. TREATY DOC. No. 112-4, at V (2011), *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc4/pdf/CDOC-112tdoc4-pt1.pdf>.

<sup>12</sup> National Oceanic and Atmospheric Administration Fisheries Service, *Illegal Fishing: Not in Our Ports* (2011), *at* [http://www.nmfs.noaa.gov/ia/iuu/portstate\\_factsheet.pdf](http://www.nmfs.noaa.gov/ia/iuu/portstate_factsheet.pdf).

<sup>13</sup> Port State Measures Agreement, *supra* note 2, Art. 29.

<sup>14</sup> Port State Measures Agreement Status (Mar. 11, 2014), *available at* [http://www.fao.org/fileadmin/user\\_upload/legal/docs/5\\_037s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/5_037s-e.pdf).

Relations Committee, Ambassador David Balton emphasized that “the United States took a leadership role in the development of this agreement” and noted that “[t]imely ratification would again underscore the commitment of the United States to strengthening efforts at the global and national levels to detect, deter and eliminate IUU fishing.”<sup>15</sup>

*Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific (NPFC Convention)*. Balton also explained the NPFC Convention governing fisheries resources in the North Pacific—and the United States’ interests in being a party—as follows:

The NPFC Convention was adopted on February 24, 2012, signed by the United States on May 2, 2012, and transmitted to the Senate on April 22, 2013. Once in force, the Convention will establish the North Pacific Fisheries Commission (NPFC) through which the Parties will cooperate to ensure the long-term and sustainable use of fisheries in the Convention Area. U.S. accession to the Convention will protect and advance important and significant U.S. interests. In particular, the Convention Area includes areas of the high seas immediately adjacent to the U.S. Exclusive Economic Zone (EEZ) off Alaska, the Pacific west coast, Hawaii, and other U.S. territories and possessions in the North Pacific. Thus, U.S. accession is vital to ensuring that the United States has a strong voice in managing fishing activities outside the U.S. EEZ that could have a direct impact on resources within waters under U.S. jurisdiction. U.S. accession will also ensure that U.S. fishermen will have a legitimate right to participate in fisheries within the Convention Area on an equitable basis.

. . . [N]egotiations toward the NPFC Convention were initiated in response to the growing concern of the international community toward the impacts of certain deep sea fishing practices, taking place outside areas of national jurisdiction, on a range of unique and endemic deep-sea marine ecosystems including sea mounts, hydrothermal vents, deep sea and cold water coral communities, sponge fields, etc., collectively referred to as “vulnerable marine ecosystems.”<sup>16</sup>

The NPFC Convention will enter into force after four states become parties.<sup>17</sup> So far, only Japan has ratified the agreement.<sup>18</sup> However, it could enter into force in 2014 or early 2015 because “Canada, China, Korea and Russia are all actively working to conclude their domestic procedures for ratification.”<sup>19</sup>

*Convention on the Conservation and Management of the High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention)*. Balton explained that the United States has interests in participating in the SPRFMO Convention—even though the United States is not currently involved in fishing in the South Pacific—due to the area’s proximity to U.S. territories and the SPRFMO Convention’s ties to the NPFC Convention:

The Convention establishes the South Pacific Regional Fisheries Management Organization (SPRFMO) through which the Parties will cooperate to ensure the long-term and sustainable use of fisheries in the Convention Area. Although the United States currently has no fishing activity for fish stocks covered by the Convention, accession to the Convention

<sup>15</sup> Statement of Ambassador David A. Balton, Deputy Assistant Secretary for Oceans and Fisheries, U.S. Dep’t of State, Before the U.S. Senate Committee on Foreign Relations 7 (Feb. 12, 2014), *available at* [http://www.foreign.senate.gov/imo/media/doc/Balton\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Balton_Testimony.pdf) [hereinafter Balton Testimony].

<sup>16</sup> *Id.* at 2–3.

<sup>17</sup> NPFC Convention, *supra* note 3, Art. 25.

<sup>18</sup> Balton Testimony, *supra* note 15, at 4.

<sup>19</sup> *Id.*

will yield significant benefits to U.S. interests. The Convention Area includes areas of the high seas closest to the U.S. territory of American Samoa, and immediately adjacent to the U.S. exclusive economic zone off a number of U.S. Pacific possessions including Jarvis, Howland and Baker Islands, Kingman Reef and Palmyra Atoll. Here again, U.S. accession is vital to ensuring that the United States has a strong voice in managing fishing activities outside the U.S. EEZ that could have a direct impact on resources within waters under U.S. jurisdiction.

Moreover, to the extent that the NPFC and SPRFMO have comparable mandates for the North Pacific and South Pacific, respectively, the policies, practices and agreements established under SPRFMO may well find resonance in the NPFC. As a result, active U.S. participation in SPRFMO will ensure that the work of SPRFMO results in such policies, practices and agreements that would be acceptable to the United States in a broader context, including in the NPFC. Finally, as in the NPFC, U.S. accession to the SPRFMO Convention will ensure participatory rights for U.S. fishermen in fisheries within the Convention Area.<sup>20</sup>

The SPRFMO Convention entered into force on August 24, 2012, after eight states became parties,<sup>21</sup> and so will become binding on the United States following its ratification.<sup>22</sup> Balton encouraged such action:

The United States has participated in the first two meetings of the Commission as an observer. As a result, our ability to influence any decisions taken is significantly less than would be the case if the United States were a full member of the [SPRFMO] Commission. Ratification of the Convention will allow the United States to take its seat at the table with the other members of the Commission and have an equal voice in matters before the Commission.

*Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.* Finally, the Northwest Atlantic Fisheries Organization (NAFO) adopted an amendment to the agreement regulating fisheries in the Northwest Atlantic in 2007.<sup>23</sup> Balton described the rationale for approving the NAFO Amendment as promoting the management and improving the decision-making process for these fisheries:

The United States joined NAFO in 1995, and has participated actively since, assuming leadership positions and working to advance key principles of sustainable fisheries management. Although many NAFO stocks remain at levels too low to support fishing, others are finally showing signs of rebuilding under NAFO management. After working for many years to secure viable allocations, last year the United States was able to begin fisheries for some of these NAFO-managed high seas stocks.

Following international calls for regional fisheries to strengthen their effectiveness, NAFO launched a comprehensive reform process in 2005 intended to improve the way conservation and management measures are adopted, strengthen compliance and enforcement provisions, and revise its establishing Convention. The United States participated

<sup>20</sup> *Id.* at 4–5.

<sup>21</sup> SPRFMO Convention, *supra* note 4, Art. 38 (further noting that the eight states must include three coastal states and three noncoastal states).

<sup>22</sup> Balton Testimony, *supra* note 15, at 5.

<sup>23</sup> NAFO Amendment, *supra* note 5.

actively in this effort. Through it, we pushed to bring NAFO more in line with the principles of modern fisheries management and to address our particular concerns about catch allocations and fair participation.

The resulting comprehensive amendments met all of our priorities. They add additional rigor and transparency to the decision-making process, establish a dispute settlement procedure, improve the guiding language for allocating catches, formally incorporate key concepts including transparency and broader ecosystem considerations, and make the basis for calculating Contracting Parties' budget contributions more equitable.<sup>24</sup>

Balton noted that the revision to the budget formula is expected to reduce U.S. dues by almost one third.<sup>25</sup> The NAFO Amendment will enter into force once nine of NAFO's twelve member states have approved it.<sup>26</sup> So far, four states—Canada, Cuba, Norway, and the Russian Federation—and the European Union have done so. Three more states are expected to do so by the end of 2014.<sup>27</sup> Balton observed that “[s]peedy ratification may enable the United States to provide the last approval needed for the NAFO Amendments to take effect.”<sup>28</sup>

#### INTERNATIONAL ECONOMIC LAW

##### *United States Indicts Chinese Military Officers for Economic Espionage*

Five Chinese military officers were indicted in U.S. federal district court on May 1, 2014.<sup>1</sup> The U.S. Department of Justice alleged that the officers had been hacking U.S. businesses for eight years from a People's Liberation Army site in Shanghai.<sup>2</sup> The indictment marked the first time that state actors have been charged in a U.S. court for a cyberattack on private targets.<sup>3</sup> At a press conference, U.S. Attorney General Eric Holder said that the U.S. government “categorically denounces” economic espionage and “do[es] not collect intelligence to provide a competitive advantage to U.S. companies, or U.S. commercial sectors.”<sup>4</sup> He described the indictment as a “significant” case that “demands [an] aggressive response” and hoped that it would “serve as a wake-up call” on the threat posed by hackers.<sup>5</sup>

<sup>24</sup> Balton Testimony, *supra* note 15, at 6.

<sup>25</sup> *Id.*

<sup>26</sup> NAFO Amendment, *supra* note 5, Art. XXI (requiring “a three-fourth majority of the votes of all Contracting Parties”); NAFO, Contracting Parties (2014), at <http://www.nafo.int/about/frames/convention.html> (listing the twelve current contracting parties to NAFO).

<sup>27</sup> Balton Testimony, *supra* note 15, at 7.

<sup>28</sup> *Id.*

<sup>1</sup> Indictment, *United States v. Wang*, Criminal No. 14-118 (W.D. Pa. May 1, 2014), available at <http://www.justice.gov/iso/opa/resources/5122014519132358461949.pdf>.

<sup>2</sup> *Id.* at 1, 3, 4.

<sup>3</sup> U.S. Dep't of Justice Press Release No. 14-528, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), at <http://www.justice.gov/opa/pr/2014/May/14-ag-528.html> (quoting U.S. Attorney General Eric Holder as saying that this case alleges “economic espionage by members of the Chinese military and represents the first ever charges against a state actor for this type of hacking”).

<sup>4</sup> U.S. Dep't of Justice Press Release, Attorney General Eric Holder Speaks at the Press Conference Announcing U.S. Charges Against Five Military Hackers for Cyber Espionage (May 19, 2014), at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140519.html>.

<sup>5</sup> *Id.*

According to the indictment, the Chinese officers were affiliated with a signals intelligence division of the People's Liberation Army, known as Unit 61398, based in Shanghai.<sup>6</sup> This unit, housed in a nondescript office building in suburban Shanghai, was first publicly identified in February 2013 by a private computer security firm, although U.S. intelligence officials reportedly had been monitoring the unit for years.<sup>7</sup> According to press reports, widespread hacking attacks on corporate targets in the United States were traced back to the military offices in Shanghai and had provided the Chinese government with a wealth of proprietary business data and access to critical U.S. infrastructure.<sup>8</sup> The U.S. administration had announced in February 2013 several new "initiatives to combat cyberattacks on critical U.S. infrastructure and to stop the theft of trade secrets."<sup>9</sup>

In May 2014, the Department of Justice indictment charged the five Unit 61398 defendants with, inter alia, economic espionage and theft of trade secrets.<sup>10</sup> The indictment described in detail a series of hacking attacks between 2006 and 2014, primarily targeting companies with significant operations in the Pittsburgh area.<sup>11</sup> Prosecutors identified six key victims, including a nuclear power plant operator, a solar products manufacturer, steel and aluminum companies, a specialty metals manufacturer, and a union that had vocally opposed Chinese trade practices.<sup>12</sup> All six were engaged in partnerships or trade conflicts with Chinese businesses when they were attacked.<sup>13</sup> Three of the five Chinese officers were accused of executing the hacking attacks to steal emails and other data, while the remaining two played supporting roles by maintaining the infrastructure used to mask the origin of the attacks.<sup>14</sup>

The U.S. Department of State was notified of the charges in advance and communicated with the Chinese government.<sup>15</sup> After the indictment was unsealed, China declared that the U.S. action was "purely ungrounded and absurd" and "grossly violate[d] the basic norms governing international relations and jeopardize[d] China-US cooperation and mutual trust."<sup>16</sup> In response, the U.S. Department of State declared that it was "supportive" of the U.S. Department of Justice, noting that the indictment was "consistent with the concerns that we have expressed publicly many times about the actions of China as it relates to cyber security."<sup>17</sup> The

<sup>6</sup> See Indictment, *supra* note 1, at 3–4.

<sup>7</sup> David E. Sanger, David Barboza & Nicole Perlroth, *China's Army Seen as Tied to Hacking Against U.S.*, N.Y. TIMES, Feb. 19, 2013, at A1.

<sup>8</sup> *Id.*

<sup>9</sup> John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 447, 447 (2013); *see id.* at 447–49 (summarizing and reprinting new U.S. policies).

<sup>10</sup> Indictment, *supra* note 1. Specifically, the defendants were charged with violating various provisions of 18 U.S.C. §§1028A (identity theft), 1030 (computer fraud), 1831 (economic espionage), and 1832 (trade secrets).

<sup>11</sup> Indictment, *supra* note 1, at 3–8.

<sup>12</sup> *Id.* Respectively, these six victims are Westinghouse Electric Co.; U.S. subsidiaries of SolarWorld AG; United States Steel Corp.; Alcoa Inc.; Allegheny Technologies Inc.; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

<sup>13</sup> *Id.* at 13–27.

<sup>14</sup> *Id.* at 3–8.

<sup>15</sup> U.S. Dep't of State Daily Press Briefing No. 89 (May 20, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/05/226365.htm#CHINA>.

<sup>16</sup> Ministry of Foreign Affairs of the People's Republic of China Press Release, *China Reacts Strongly to US Announcement of Indictment Against Chinese Personnel* (May 19, 2014), at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1157487.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1157487.shtml) [hereinafter P.R.C. Ministry of Foreign Affairs Press Release].

<sup>17</sup> U.S. Dep't of State Daily Press Briefing No. 89, *supra* note 15.

Chinese Foreign Ministry also accused the United States of hypocrisy, asserting that “[l]arge amounts of publicly disclosed information show that relevant US institutions have been conducting cyber intrusion, wiretapping and surveillance against Chinese government departments, institutions, companies, universities and individuals.”<sup>18</sup> This claim was seen as an allusion to the disclosures made by former National Security Administration contractor Edward Snowden.<sup>19</sup> A U.S. Department of State spokeswoman countered that “[U.S.] intelligence activities are focused on the national security interests of the United States,”<sup>20</sup> unlike the commercial espionage alleged in the indictment.

As a direct result of the indictment, China unilaterally suspended the bilateral U.S.-China working group on cyber security, citing a “lack of sincerity on the part of the US to solve issues related to cyber security through dialogue and cooperation.”<sup>21</sup> The working group, part of the annual Strategic and Economic Dialogue between the United States and China, first convened in 2013 to enable “further discussions on international norms of state behavior in cyberspace.”<sup>22</sup> After the Chinese announcement, the U.S. Department of State said that it “regret[ed] China’s decision on the suspension of activities of the working group, but . . . continue[d] to believe that dialogue is an essential part of resolving these and other cyber security concerns.”<sup>23</sup> As the 2014 Strategic and Economic Dialogue approached, the United States made clear that it would continue to press the issue. U.S. Assistant Secretary of State for East Asian and Pacific Affairs Daniel R. Russel announced that the United States still planned to “discuss global challenges [including] cyber security” at the dialogue as part of a broader effort to “address[] U.S. concerns over the theft of intellectual property and trade secrets, including government-sponsored, cyber-enabled theft for the purpose of giving Chinese companies a competitive advantage.”<sup>24</sup> The U.S. ambassador to China, Max Baucus, echoed these remarks, explaining that “[c]yber-enabled theft of trade secrets by state actors in China has emerged as a major threat to our economic and thus national security.”<sup>25</sup>

The indictment is considered unlikely to result in the prosecution of the named defendants because the United States does not have an extradition treaty with China<sup>26</sup> and therefore has no practical means of bringing the accused officers within the personal jurisdiction of the U.S. courts.<sup>27</sup> Further, in the event that the officers were brought to the United States, they could

<sup>18</sup> P.R.C. Ministry of Foreign Affairs Press Release, *supra* note 16.

<sup>19</sup> See Jim Finkle, Joseph Menn & Aruna Viswanatha, *U.S. Accuses China of Cyber Spying on American Companies*, REUTERS, May 19, 2014, at <http://www.reuters.com/article/2014/05/19/us-cybercrime-usa-china-idUSBREA4I09420140519>.

<sup>20</sup> U.S. Dep’t of State Daily Press Briefing No. 88 (May 19, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/05/226307.htm#CHINA>; see also David E. Sanger, *With Spy Charges, U.S. Draws a Line That Few Others Recognize*, N.Y. TIMES, May 20, 2014, at A8 (discussing reactions to this claim).

<sup>21</sup> P.R.C. Ministry of Foreign Affairs Press Release, *supra* note 16.

<sup>22</sup> U.S. Dep’t of State Press Release No. 2013/0881, *U.S.-China Strategic and Economic Dialogue V Strategic Track Select Outcomes* (July 12, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/07/211862.htm>.

<sup>23</sup> U.S. Dep’t of State Daily Press Briefing No. 88, *supra* note 20.

<sup>24</sup> U.S. Dep’t of State Press Release, Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the Senate Foreign Relations Committee (June 25, 2014), at <http://www.state.gov/p/eap/rls/rm/2014/06/228415.htm>.

<sup>25</sup> Embassy of the United States, Beijing, China, Press Release, Ambassador Baucus’s Speech to the Business Community (June 25, 2014), at <http://beijing.usembassy-china.org.cn/2014ir/ambassador-baucuss-speech-to-the-business-community-june-25-beijing-china.html>.

<sup>26</sup> See 18 U.S.C. §3181 note (2012) (listing U.S. extradition treaties currently in force).

<sup>27</sup> See generally FED. R. CRIM. P. 43 (requiring defendant’s presence at court proceedings).

potentially raise an immunity defense because the alleged acts were performed on behalf of the Chinese government.<sup>28</sup> But any legal hurdles to prosecution may be beside the point, as the indictment was reported to be part of a broader strategy by the United States to draw attention to Chinese hacking rather than an effort to punish individual wrongdoers.<sup>29</sup> Assistant Attorney General for National Security John Carlin acknowledged that the indictment was a response to “Chinese government officials . . . publicly challenging [the United States] to provide hard evidence of their hacking that could stand up in court.”<sup>30</sup> When asked about the wisdom of provoking the Chinese when prosecution of the responsible individuals was unlikely, a spokesperson for the U.S. Department of State responded that the United States “expect[s] China to understand that these are a handful of individuals who have broken the law.”<sup>31</sup>

*U.S. Supreme Court Declines to Terminate Long-Running Efforts to Force Argentina to Pay Defaulted Sovereign Debt*

During the financial crisis of 2001, Argentina defaulted on its external sovereign debt. Over the course of the next decade, Argentina restructured most of that debt on terms less favorable to the creditors. While a majority of the bondholders agreed to the restructuring, some holdout creditors instead turned to domestic litigation and international arbitration in pursuit of recovery based on the full original amount, creating a wave of legal proceedings.<sup>1</sup> Two recent U.S. judicial decisions resulting from these efforts have created significant foreign-affairs precedent and appear to have triggered a dispute under international law as well.

*Supreme Court Rejects Argentina’s Sovereign Immunity Defense to Discovery.* Relying on a waiver of sovereign immunity contained in the original bonds, one creditor brought a series of successful actions to enforce Argentina’s obligations under the original debt instruments. With \$2.5 billion of judgments in hand, the creditor then embarked on the complicated process of searching for and attempting to attach various Argentine assets around the world.<sup>2</sup>

As part of that strategy, the creditor served subpoenas on two international banks located in the United States, seeking broad discovery of global information to “locate Argentina’s assets and accounts, learn how Argentina moves its assets through New York and around the world, and accurately identify the places and times when those assets might be subject to attachment and execution.”<sup>3</sup> The banks moved to quash the subpoenas under the Foreign Sovereign Immunities Act (FSIA).<sup>4</sup> The district court denied the motion to quash and granted the creditor’s motion to compel discovery, pending further negotiations between the parties regarding

<sup>28</sup> See also Chimène Keitner, *Foreign Official Immunity and the Chinese Cyberespionage Indictments*, OPINIO JURIS (May 21, 2014), at <http://opiniojuris.org/2014/05/21/guest-post-foreign-official-immunity-chinese-cyber-espionage-indictments>.

<sup>29</sup> See Ellen Nakashima, *Indictment of Chinese Hackers Part of Broad Strategy*, WASH. POST, May 23, 2014, at A8; see also Jack Goldsmith, *Why Did DOJ Indict the Chinese Military Officers?*, LAWFARE (May 20, 2014), at <http://www.lawfareblog.com/2014/05/why-did-doj-indict-the-chinese-military-officers>.

<sup>30</sup> U.S. Dep’t of Justice Press Release, Assistant Attorney General for National Security John Carlin Speaks at the Press Conference Announcing U.S. Charges Against Five Chinese Military Hackers for Cyber Espionage (May 19, 2014), at <http://www.justice.gov/nsd/opa/pr/speeches/2014/nsd-speech-140519.html>.

<sup>31</sup> U.S. Dep’t of State Daily Press Briefing No. 89, *supra* note 15.

<sup>1</sup> For more background on the Argentine debt saga, see John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 219 (2013) & 107 AJIL 930 (2013).

<sup>2</sup> *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 202–04 (2d Cir. 2012).

<sup>3</sup> *Id.* at 203.

<sup>4</sup> 28 U.S.C. §§1330, 1602–1611.

the scope of specific production requests.<sup>5</sup> The U.S. Court of Appeals for the Second Circuit affirmed, acknowledging that its decision created a circuit split.<sup>6</sup> The United States filed an amicus brief supporting the resulting petition for certiorari,<sup>7</sup> and the Supreme Court granted review.<sup>8</sup>

In the resulting decision of *Republic of Argentina v. NML Capital, Ltd.*, the Supreme Court held that the FSIA does not prevent this kind of third-party discovery in aid of execution.<sup>9</sup> The Court reasoned as follows:

The text of the Act confers on foreign states two kinds of immunity. First and most significant, “a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607.” § 1604. That provision is of no help to Argentina here: A foreign state may waive jurisdictional immunity, § 1605(a)(1), and in this case Argentina did so, see 695 F.3d, at 203. Consequently, the Act makes Argentina “liable in the same manner and to the same extent as a private individual under like circumstances.” § 1606.

The Act’s second immunity-conferring provision states that “the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter.” § 1609. The exceptions to this immunity defense (we will call it “execution immunity”) are narrower. “The property in the United States of a foreign state” is subject to attachment, arrest, or execution if (1) it is “used for a commercial activity in the United States,” § 1610(a), and (2) some other enumerated exception to immunity applies, such as the one allowing for waiver, see § 1610(a)(1)–(7). The Act goes on to confer a more robust execution immunity on designated international-organization property, § 1611(a), property of a foreign central bank, § 1611(b)(1), and “property of a foreign state . . . [that] is, or is intended to be, used in connection with a military activity” and is either “of a military character” or “under the control of a military authority or defense agency,” § 1611(b)(2).

That is the last of the Act’s immunity-granting sections. There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets. Argentina concedes that no part of the Act “expressly address[es] [postjudgment] discovery.” Brief for Petitioner 22. Quite right. . . . Far from containing the “plain statement” necessary to preclude application of federal discovery rules, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 539 (1987), the Act says not a word on the subject.<sup>10</sup>

The Court acknowledged that its “decision leaves open what Argentina thinks is a gap in the statute,”<sup>11</sup> asking:

<sup>5</sup> *EM Ltd.*, 695 F.3d at 204–05 (summarizing district court proceedings).

<sup>6</sup> *Id.* at 203, 209 (citing *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011)).

<sup>7</sup> Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250 (2014) (No. 12-842), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/12-842-Argentina-v.-NML1.pdf> (brief filed in December 2013).

<sup>8</sup> *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 895 (2014) (granting petition for writ of certiorari); see also *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 1870 (2014) (granting solicitor general’s subsequent motion to participate in oral argument as amicus curiae and for divided argument in the case).

<sup>9</sup> *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250 (2014). Justice Ruth Bader Ginsburg was the only dissenter. *Id.* at 2259 (Ginsburg, J., dissenting).

<sup>10</sup> *Id.* at 2256–57 (majority opinion) (footnote omitted).

<sup>11</sup> *Id.* at 2258.

Could the 1976 Congress really have meant not to protect foreign states from postjudgment discovery “clearinghouses”? The riddle is not ours to solve (if it can be solved at all). It is of course possible that, had Congress anticipated the rather unusual circumstances of this case (foreign sovereign waives immunity; foreign sovereign owes money under valid judgments; foreign sovereign does not pay and apparently has no executable assets in the United States), it would have added to the Act a sentence conferring categorical discovery-in-aid-of-execution immunity on a foreign state’s extraterritorial assets. Or, just as possible, it would have done no such thing. Either way, “[t]he question . . . is not what Congress ‘would have wanted’ but what Congress enacted in the FSIA.” *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).<sup>12</sup>

In rejecting the FSIA defense, the Court rejected amicus arguments from the United States government urging it “to consider the worrisome international-relations consequences of siding with the lower court.”<sup>13</sup> The United States government warned that “broad and intrusive inquiries into foreign sovereign financial holdings” could “disrupt[] the foreign state’s banking relationships” or even “delv[e] into a head of state’s bank accounts,” thereby “breed[ing] resentment” and creating “perceived affronts to foreign states” as well as a risk of “serious impediments to the United States’ bilateral relationships.”<sup>14</sup> The United States government emphasized in particular that district courts had “already relied on the Second Circuit’s decision in ordering general asset discovery against a foreign state itself.”<sup>15</sup>

The Supreme Court’s decision dismissed the U.S. government’s arguments:

Discovery orders as sweeping as this one, the Government warns, will cause “a substantial invasion of [foreign states’] sovereignty,” and will “[u]ndermin[e] international comity.” Worse, such orders might provoke “reciprocal adverse treatment of the United States in foreign courts,” and will “threaten harm to the United States’ foreign relations more generally.” These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.<sup>16</sup>

*Supreme Court Refuses to Review Order Prohibiting Argentina from Issuing Payments on Restructured Debt Without Issuing Comparable Payments to Holdout Bondholders.* Of perhaps greater immediate significance was a separate decision issued the same day as *Republic of Argentina v. NML Capital, Ltd.* in which the Supreme Court refused to review a lower court order that prohibits Argentina from issuing payments under the restructured debt plan without making proportionately equivalent payments to the holdout creditors.<sup>17</sup> While the United States

<sup>12</sup> *Id.* (footnote omitted).

<sup>13</sup> *Id.*; see also Brief for the United States as Amicus Curiae in Support of Petitioner on Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.* at 24–33, 134 S.Ct. 2250 (2014) (No. 12-842), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/12-842\\_pet\\_amcu\\_usa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-842_pet_amcu_usa.authcheckdam.pdf) (brief filed in March 2014).

<sup>14</sup> Brief for the United States, *supra* note 13, at 31.

<sup>15</sup> *Id.* at 11 n.5.

<sup>16</sup> 134 S.Ct. at 2258 (citations omitted).

<sup>17</sup> See *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2819 (2014) (denying petition for writ of certiorari in a separate but related case). In the underlying Second Circuit case, the court had explained the district court’s decision: “[W]henever Argentina pays a percentage of what is due on the [restructured debt], it must pay plaintiffs the same percentage of what is then due on the [original defaulted bonds].” *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013). For more background on this *pari passu* obligation, see Crook, *supra* note 1, at 930.

had supported Argentina's appeal of this injunction to the Second Circuit,<sup>18</sup> the United States did not file an amicus brief relating to this second petition for certiorari.

The Supreme Court's refusal to review the second case has had significant consequences. In an earlier briefing, Argentina had stated that it "lacks the financial resources to pay the holdouts in full . . . while also servicing its restructured debt" and would face "a serious and imminent risk of default" if forced to pay.<sup>19</sup> During oral argument at the Second Circuit, counsel representing Argentina had informed the panel that Argentina "'would not voluntarily obey' the district court's injunctions, even if those injunctions were upheld."<sup>20</sup> On June 29, Argentina made good on that threat,<sup>21</sup> issuing an official communiqué announcing that it had deposited a scheduled payment on the restructured debt obligations without providing for comparable payments to the holdout creditors—in apparent violation of the district court injunction.<sup>22</sup>

Argentina then warned that "[a]ny conduct aimed at hindering this payment to our creditors is tantamount to a violation of public international law."<sup>23</sup> In the Argentine government's view,

This sovereign decision on the part of the Argentine Republic serves as a warning to the United States about the consequences of its acts, in view of the international responsibility that falls on it with regard to decisions adopted by its judiciary, to the fiduciary agent, the financial institutions involved, the litigants, and [the district court judge] himself in respect of any judicial actions that we may avail ourselves of in order to legitimately assert our rights as members of the international community, the Organization of American States (Article 61), the United Nations Organization (Articles 2(1) and (4)), the Articles of Agreement establishing the International Monetary Fund (Article 4) before the Hague International Court as subjects of international law and also before the competent courts of the Argentine Republic.<sup>24</sup>

<sup>18</sup> See Brief for the United States of America as Amicus Curiae in Support of Reversal at 29–30, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105 et al.), available at <http://blogs.reuters.com/felix-salmon/files/2012/04/US-Br.pdf> (emphasizing "potential for affront" by foreign states, "friction in our foreign relations," and "adverse consequences for the treatment of the United States and its property abroad under principles of reciprocity"); Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing en Banc at 7–8, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013), available at <http://www.shearman.com/~/media/Files/Old%20Site%20Files/NMLCapitalvArgentina20121228BriefofUS.pdf> (similar). The subsequent Second Circuit opinion heading notes that some of the joined cases were dismissed as of October 26, 2012. *NML Capital, Ltd.*, 727 F.3d at 230.

<sup>19</sup> Reply Brief of Petitioner at 2, *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2819 (2014) (No. 13-1990), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/2014-05-27-Argentina-Cert-Reply-FINAL.pdf>.

<sup>20</sup> *NML Capital, Ltd.*, 727 F.3d at 238 (taking judicial notice that "Argentina's officials have [also] publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree").

<sup>21</sup> Peter Eavis, *Action by Argentina Seems to Defy Judge's Order on Bond Payments*, N.Y. TIMES, June 27, 2014, at B5.

<sup>22</sup> Argentina asserted that its payment was mandated by municipal law, since "failing to pay, while having the resources, and forcing the country into voluntary default, is not provided for by Argentine law, would be contrary to Argentina's public order and would constitute a clear violation of the debt prospectuses." Presidency of the Nation, Official Communiqué of the Argentine Government (June 29, 2014), at <http://embassyofargentina.us/embassyofargentina.us/en/informationcenter/officialcommuniqueoftheargentinesgovernment-argentinapays.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The communiqué concluded:

The Argentine Republic will meet its obligations, pay off its debts, and honour its commitments as it has been doing, in order to put an end to the ploy of presenting an absurd court decision with systemic effects at [the] international level as “technical default,” which is merely a sophisticated way of trying to bring us to our knees before global usurers.<sup>25</sup>

At hearings immediately following Argentina’s transfer of funds, the district court judge called the Argentine deposit—which had been made to Bank of New York Mellon as trustee for the restructured debt creditors—“illegal” and ordered the bank to return the money to Argentina.<sup>26</sup> On July 30, Standard & Poor’s issued a formal determination that Argentina had defaulted.<sup>27</sup> It was soon announced that settlement negotiations had collapsed and that Argentina would make no further payment before the end of the predefault grace period.<sup>28</sup>

#### INTERNATIONAL HUMAN RIGHTS

##### *United States Condemns Uganda’s Antigay Law as Violating Human Rights*

In February 2014, Uganda enacted the “Anti-Homosexuality Act, 2014.”<sup>1</sup> The new Act went considerably further in regulating conduct than the antigay legislation that was already on the books in Uganda.<sup>2</sup> “The offence of homosexuality”—which includes the act of “touch[ing] another person with the intention of committing the act of homosexuality”—was made punishable by “imprisonment for life,”<sup>3</sup> and any “attempt to commit homosexuality” was made punishable by “imprisonment for seven years.”<sup>4</sup> The new law also criminalized the “promotion of homosexuality,” including all “attempts to promote or in any way abet[] homosexuality and related practices,” with a maximum punishment of imprisonment for seven years.<sup>5</sup> Same-sex marriage was made punishable by life imprisonment.<sup>6</sup>

<sup>25</sup> *Id.*

<sup>26</sup> Vivianne Rodrigues & Luc Cohen, *Argentina’s Payment Illegal, Says US District Judge*, FIN. TIMES, June 27, 2014, at <http://www.ft.com/intl/cms/s/0/f4f417ce-fe15-11e3-bd0e-00144feab7de.html#axzz39kLBws6h>; William Alden, *Argentina’s Bond Payment Is Rebuffed by U.S. Judge*, N.Y. TIMES, June 28, 2014, at B6; Order, NML Capital, Ltd. v. Republic of Argentina, No. 1:08-cv-06978-TPG (S.D.N.Y. Aug. 6, 2014) (final order entered prohibiting transfer of funds to creditors). For technical reasons, the judge permitted a one-time payment on a subset of the bonds. Ken Parks, *U.S. Judge Approves One-Time Argentina Payment on Some Bonds*, WALL ST. J., July 29, 2014, at <http://blogs.wsj.com/law/2014/07/29/u-s-judge-approves-one-time-argentina-payment-on-some-bonds>. [Editors’ note: The order from the district court was issued after the cut-off date for this edition of the CPUS, but, for completeness, reference to it has been added during production.]

<sup>27</sup> Alexandra Stevenson, *S.&P. Says Argentina Has Defaulted*, N.Y. TIMES, July 30, 2014, at <http://dealbook.nytimes.com/2014/07/30/s-p-says-argentina-has-defaulted>.

<sup>28</sup> Nicole Hong, Taos Turner & Matt Day, *Argentina Default Imminent as Talks Collapse*, WALL ST. J., July 31, 2014, at <http://online.wsj.com/articles/argentina-bonds-rise-to-multiyear-highs-on-prospect-of-deal-1406728458>.

<sup>1</sup> Anti-Homosexuality Act, 2014: An Act to Prohibit Any Form of Sexual Relations Between Persons of the Same Sex; Prohibit the Promotion or Recognition of Such Relations and to Provide for Other Related Matters (2014) (Uganda), available at [http://www.justice.gov/eoir/vll/country/foreign\\_law/uganda/anti-homosexuality\\_bill2014.pdf](http://www.justice.gov/eoir/vll/country/foreign_law/uganda/anti-homosexuality_bill2014.pdf) [hereinafter 2014 Act].

<sup>2</sup> PENAL CODE §145 (Uganda).

<sup>3</sup> 2014 Act, *supra* note 1, §2.

<sup>4</sup> *Id.*, §4.

<sup>5</sup> *Id.*, §13.

<sup>6</sup> *Id.*, §12. A domestic legal challenge was brought against the law on the grounds that the act is in “contravention of the right to equality before the law without any discrimination and the right to privacy guaranteed

David Bahati, a member of the Ugandan Parliament and the sponsor of the bill, explained that he believed that “homosexuality was a ‘behaviour that can be learned and can be unlearned’” and that it is “‘just bad behaviour that should not be allowed in our society.’”<sup>7</sup> Ugandan President Yoweri Museveni said the law was needed to keep “‘arrogant and careless Western groups’ [from] seeking to recruit young Ugandan children into homosexuality,” adding that “[t]here’s now an attempt at social imperialism, to impose social values.”<sup>8</sup> Museveni also noted, however, that he “encourage[s] the US government to help us by working with our scientists to study whether, indeed, there are people who are born homosexual.”<sup>9</sup>

Invoking “universal human rights,” President Barack Obama condemned the legislation:

[T]he United States has consistently stood for the protection of fundamental freedoms and universal human rights. We believe that people everywhere should be treated equally, with dignity and respect . . . .

. . . The Anti-Homosexuality Bill in Uganda, once law, will be more than an affront and a danger to the gay community in Uganda. It will also be a step backward for all Ugandans and reflect poorly on Uganda’s commitment to protecting the human rights of its people. It also will mark a serious setback for all those around the world who share a commitment to freedom, justice and equal rights.

As we have conveyed to President Museveni, enacting this legislation will complicate our valued relationship with Uganda. At a time when, tragically, we are seeing an increase in reports of violence and harassment targeting members of the LGBT community from Russia to Nigeria, I salute all those in Uganda and around the world who remain committed to respecting the human rights and fundamental human dignity of all persons.<sup>10</sup>

Secretary of State John Kerry spoke out in similar terms, equating the legal situation to “1930s Germany or . . . 1950s, ’60s apartheid South Africa”<sup>11</sup> and personally telephoning Museveni to reiterate that the law “complicates the U.S. relationship with Uganda.”<sup>12</sup> Kerry

under . . . the Constitution of the Republic of Uganda.” Complaint, para. 12, *Oloka-Onyango v. Att’y Gen.*, Const. Petition No. 08 (Mar. 11, 2014) (Uganda), available at <http://iglhrc.org/sites/default/files/Uganda%20Anti%20Homosexuality%20Act%20Petition%20No.%200008%20of%202014.pdf>. That litigation is ongoing.

<sup>7</sup> *Ugandan President Yoweri Museveni Signs Anti-gay Bill*, BBC NEWS AFRICA, Feb. 24, 2014, at <http://www.bbc.com/news/world-africa-26320102> [*hereinafter* BBC NEWS AFRICA].

<sup>8</sup> Sudarsan Raghavan, *Ugandan Leader Signs Harsh Anti-gay Bill Despite Warning from Obama Administration*, WASH. POST, Feb. 24, 2014, at [http://www.washingtonpost.com/world/africa/ugandan-leader-signs-harsh-anti-gay-bill-despite-warning-from-obama-administration/2014/02/24/88486066-9d63-11e3-878c-65222df220eb\\_story.html](http://www.washingtonpost.com/world/africa/ugandan-leader-signs-harsh-anti-gay-bill-despite-warning-from-obama-administration/2014/02/24/88486066-9d63-11e3-878c-65222df220eb_story.html).

<sup>9</sup> BBC NEWS AFRICA, *supra* note 7 (with Museveni further noting that “[w]hen that is proved, we can review this legislation”). The U.S. Department of State considered sending a group of experts to Uganda to take Museveni up on this invitation. The trip has not yet taken place. U.S. Dep’t of State Daily Press Briefing (Mar. 19, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/03/223707.htm>.

<sup>10</sup> White House Press Release, Statement by the President on the Anti-Homosexuality Bill in Uganda (Feb. 16, 2014), at <http://www.whitehouse.gov/the-press-office/2014/02/16/statement-president-anti-homosexuality-bill-uganda>.

<sup>11</sup> Michael R. Gordon, *Kerry Condemns Uganda’s Antigay Law*, N.Y. TIMES, Feb. 27, 2014, at A8.

<sup>12</sup> U.S. Dep’t of State Press Statement, Readout of Secretary Kerry’s Call with Ugandan President Museveni (Feb. 28, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/02/222729.htm>.

also noted that the legislation was “bigger than just Uganda,” stating that there were seventy-eight other countries that “have these laws that are just contrary to human rights and contrary to human nature.”<sup>13</sup>

Other Western countries and organizations reacted to the new law by cutting funding to Uganda. Within a few days of the bill’s passage, the World Bank postponed a \$90 million loan,<sup>14</sup> and Denmark, the Netherlands, and Norway canceled planned aid of more than \$15 million.<sup>15</sup> In mid-March the United States followed suit. The Obama administration cut \$6.4 million in funding set to go to the Inter-Religious Council of Uganda because of the organization’s role in lobbying for the bill.<sup>16</sup> And the Centers for Disease Control “suspended an agreement that allowed the US government to fully or partially pay for the salaries of 87 employees of the Ministry of Health’s AIDS Control Programme,” citing “questions” about “what researchers, health workers and others may do under the law,” given its “provisions against ‘promoti[ng]’ and abetting homosexuality.”<sup>17</sup>

The United States executive branch continues to maintain that the Ugandan law violates basic human rights, emphasizing that “LGBT rights are human rights, and human rights are LGBT rights.”<sup>18</sup> In June, the Obama administration announced a travel ban for “certain Ugandan officials involved in serious human rights abuses, including against LGBT individuals.”<sup>19</sup> The administration also terminated support for Uganda’s community policing program, redirected financial support for the Ugandan Ministry of Health to nongovernmental partners, and canceled a military aviation exercise that was to take place in Uganda in conjunction with other East African countries.<sup>20</sup> The White House emphasized its goal of “working with both governmental and non-governmental partners to end discrimination against LGBT people in Uganda and around the world—a struggle central to the United States’ commitment to promoting human rights.”<sup>21</sup>

On August 1, 2014, the Constitutional Court of Uganda struck down the Act, holding that it had been passed by the Parliament without a proper quorum.<sup>22</sup> It remains to be seen whether

<sup>13</sup> Gordon, *supra* note 11.

<sup>14</sup> *World Bank Postpones \$90m Uganda Loan over Anti-gay Law*, BBC NEWS AFRICA, Feb. 28, 2014, at <http://www.bbc.com/news/world-africa-26378230>; see also Jim Yong Kim, Op-Ed, *Discrimination by Law Carries a High Price*, WASH. POST, Feb. 28, 2014, at [http://www.washingtonpost.com/opinions/jim-yong-kim-the-high-costs-of-institutional-discrimination/2014/02/27/8cd37ad0-9fc5-11e3-b8d8-94577ff66b28\\_story.html](http://www.washingtonpost.com/opinions/jim-yong-kim-the-high-costs-of-institutional-discrimination/2014/02/27/8cd37ad0-9fc5-11e3-b8d8-94577ff66b28_story.html) (op-ed by World Bank president arguing that “[l]egislation restricting sexual rights . . . can hurt a country’s competitiveness by discouraging multinational companies from investing or locating their activities in those nations”).

<sup>15</sup> Nicholas Bariyo, *Europeans Stop Uganda Aid After Antigay Law*, WALL. ST. J., Feb. 25, 2014, at <http://online.wsj.com/news/articles/SB10001424052702304834704579404943830788778>.

<sup>16</sup> Helene Cooper, *Uganda’s Anti-Gay Law Complicates U.S. Aid in Rebel Hunt*, N.Y. TIMES, Mar. 25, 2014, at A4 (but noting that the group will still receive \$2.3 million in aid).

<sup>17</sup> *Briefing: Punitive Aid Cuts Disrupt Healthcare in Uganda*, IRIN HUMANITARIAN NEWS & ANALYSIS, Apr. 2, 2014, at <http://www.irinnews.org/report/99878/briefing-punitive-aid-cuts-disrupt-healthcare-in-uganda>.

<sup>18</sup> John Kerry, Secretary of State, Remarks at GLIFAA Pride Event (June 19, 2014), at <http://www.state.gov/secretary/remarks/2014/06/228045.htm>.

<sup>19</sup> Grant Harris & Stephen Pomper, *Further U.S. Efforts to Protect Human Rights in Uganda*, WHITE HOUSE BLOG (June 19, 2014), at <http://www.whitehouse.gov/blog/2014/06/19/further-us-efforts-protect-human-rights-uganda>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Oloka-Onyango v. Att’y Gen.*, Const. Pet. No. 8 of 2014, [2014] UGCC 14 (Const. Ct. Uganda Aug. 1, 2014), available at <http://www.ulii.org/ug/judgment/constitutional-court/2014/14>; see also Jeffrey Gettleman, *Uganda Anti-Gay Law Struck Down by Court*, N.Y. TIMES, Aug. 2, 2014, at A4 (quoting a U.S. Department of State

the government will appeal that decision to the Supreme Court of Uganda or whether the Parliament will simply pass the statute again.<sup>23</sup> Foreign pressure has not yet persuaded Ugandan politicians, at least publicly, to reconsider the underlying policy, with one Ugandan spokesman reportedly using a homophobic slur in responding that “[t]he West can keep their ‘aid’ . . . . We shall still develop without it.”<sup>24</sup> Privately, however, a Ugandan senior government official told one journalist that the results have been “dire” and that there was indeed “a crisis,” noting that the “government has been forced to review its priorities and make readjustments as donors have withheld aid.”<sup>25</sup>

#### INTERNATIONAL CRIMINAL LAW

##### *President Barack Obama Certifies That U.S. Peacekeepers in Mali Are Immune from ICC Jurisdiction*

As part of the ongoing United Nations peacekeeping effort in Mali, the United States is providing “up to 10 military staff officers” as well as “training and critical equipment such as vehicles and communications gear to African peacekeepers and police.”<sup>1</sup> Before agreeing to contribute U.S. troops to the peacekeeping force in Mali, and consistent with the requirements of the 2002 American Servicemembers’ Protection Act (ASPA),<sup>2</sup> President Barack Obama certified that these troops were without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC).

The peacekeeping force is the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). The Security Council established MINUSMA in April 2013. Three months earlier, Islamist forces had launched an offensive, seized territory in northern Mali, and began advancing to the south.<sup>3</sup> With the aid of military forces from France and neighboring African countries, the Malian government was able to restore government control of most major northern cities and towns by the end of January 2013, but serious security challenges remained.<sup>4</sup> MINUSMA’s mandate includes stabilizing key population centers, supporting the reestablishment of state authority throughout the country, and supporting the implementation of an agreed transitional road map towards the full restoration of constitutional

official as responding to the decision by stating that “[w]e will consider what steps may be necessary to respond appropriately to this new development.” [Editors’ note: The ruling from the Ugandan Constitutional Court on August 1, 2014, was issued after the cut-off date for this edition of the CPUS, but, for completeness, reference to it has been added during production.]

<sup>23</sup> Gettleman, *supra* note 22.

<sup>24</sup> *Everything You Need to Know About Africa’s Anti-gay Crackdown*, THE WEEK, Mar. 30, 2014, at <http://theweek.com/article/index/258826>.

<sup>25</sup> *Briefing*, *supra* note 17.

<sup>1</sup> Alicia Van Der Veen, *U.S. Support for UN Peacekeeping in Mali*, DIPNOTE: U.S. DEPARTMENT OF STATE OFFICIAL BLOG (Mar. 10, 2014), at <https://blogs.state.gov/stories/2014/03/10/us-support-un-peacekeeping-mali>.

<sup>2</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§2001–2015, 116 Stat. 820 (2002) (codified at 22 U.S.C. §§7421–7433) (2002 American Servicemembers’ Protection Act) [hereinafter ASPA].

<sup>3</sup> Adam Nossiter & Eric Schmitt, *France Battling Islamists in Mali*, N.Y. TIMES, Jan. 12, 2013, at A1.

<sup>4</sup> MINUSMA: United Nations Stabilization Mission in Mali, at <http://www.un.org/en/peacekeeping/missions/minusma/background.shtml>.

order and democratic governance in Mali.<sup>5</sup> (The previous government in Mali had been overthrown in a coup d'état in 2012; by 2013 Mali was being governed by transitional authorities pursuant to a framework agreement negotiated under the auspices of the Economic Community of West African States.<sup>6</sup>)

The ASPA reflects concerns about the exposure of U.S. military members to the ICC's jurisdiction that date back to the negotiations of the Rome Statute that established the ICC.<sup>7</sup> Even though the United States is not a party to the Rome Statute, it is possible for U.S. citizens, including those participating in peacekeeping missions, to be subject to the ICC's jurisdiction. The ICC's jurisdiction extends to cases where the conduct in question occurred on the territory of a state that is a party to the Rome Statute without regard to the nationality of the individual, provided that additional jurisdictional and admissibility criteria are satisfied.<sup>8</sup> The United States has taken various steps to try to eliminate the possibility that U.S. nationals might be prosecuted by the ICC.<sup>9</sup> Among other efforts, the United States negotiated at least one hundred bilateral immunity agreements in which the other state party agreed not to transfer members of the U.S. armed forces to the ICC without the United States' consent.<sup>10</sup>

The ASPA sought to encourage these bilateral immunity agreements by barring any U.S. military assistance to states that ratified the Rome Statute unless certain exceptions applied; one of those exceptions was negotiation of a bilateral immunity agreement with the United States.<sup>11</sup> Pursuant to the ASPA, the United States eliminated military assistance to states—including Mali—that declined to negotiate bilateral immunity agreements after becoming parties to the Rome Statute.<sup>12</sup> (Mali submitted its instrument of ratification to the Rome Statute in 2000.<sup>13</sup>) The provision prohibiting military assistance was later repealed,<sup>14</sup> but the ASPA provision requiring certification related to participation in peacekeeping forces remains in effect.<sup>15</sup>

On January 31, 2014, Obama issued the following certification concerning U.S. participation in MINUSMA:

<sup>5</sup> SC Res. 2100, para. 16 (Apr. 25, 2013).

<sup>6</sup> MINUSMA, *supra* note 4.

<sup>7</sup> See, e.g., David J. Scheffer, *The United States and the International Criminal Court*, 93 AJIL 12, 18–19 (1999).

<sup>8</sup> Rome Statute of the International Criminal Court, Art. 12(2)(a), July 17, 1998, 2187 UNTS 90. These additional admissibility criteria reflect the principle of complementarity. See *id.*, Art. 17(a)(1) (noting that cases are inadmissible if being investigated or prosecuted by a state which has jurisdiction over it).

<sup>9</sup> SC Res. 1422 (July 12, 2002), renewed as SC Res. 1487 (June 12, 2003); Sean D. Murphy, *Contemporary Practice of the United States*, 96 AJIL 725 (2002) & 97 AJIL 710 (2003).

<sup>10</sup> Sean D. Murphy, *Contemporary Practice of the United States*, 97 AJIL 200 (2003); John R. Crook, *Contemporary Practice of the United States*, 99 AJIL 719 (2005).

<sup>11</sup> Sean D. Murphy, *Contemporary Practice of the United States*, 96 AJIL 975, 976 (2002).

<sup>12</sup> Mark Mazzetti, *U.S. Cuts in Africa Aid Hurt War on Terror and Increase China's Influence, Officials Say*, N.Y. TIMES, July 23, 2006, at <http://query.nytimes.com/gst/fullpage.html?res=9E02E6DC143FF930A15754C0A9609C8B63>.

<sup>13</sup> At [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/mali.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/mali.aspx).

<sup>14</sup> See John R. Crook, *Contemporary Practice of the United States*, 101 AJIL 213 (2007).

<sup>15</sup> On January 10, 2012, for example, President Barack Obama submitted a certification regarding U.S. participation in the United Nations Mission in South Sudan, certifying that “members of the U.S. Armed Forces participating in the United Nations Mission in South Sudan are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC) because the Republic of South Sudan is not a party to the ICC and has not invoked the jurisdiction of the ICC pursuant to Article 12 of the Rome Statute.” 77 Fed. Reg. 3371 (Jan. 24, 2012).

By the authority vested in me as President by the Constitution and the laws of the United States of America, and consistent with section 2005 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7424), concerning the participation of members of the Armed Forces of the United States in certain United Nations peacekeeping and peace enforcement operations, I hereby certify that members of the U.S. Armed Forces participating in the United Nations Multidimensional Integrated Stabilization Mission in Mali are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC) because the Republic of Mali has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the ICC from proceeding against members of the Armed Forces of the United States present in that country.<sup>16</sup>

The international agreement cited in the president's memorandum regarding MINUSMA is not one of the bilateral agreements negotiated specifically to preclude transfer of U.S. armed forces personnel to the ICC. Rather, the agreement cited in the memorandum is a status-of-forces agreement concluded through an exchange of notes that actually predates the conclusion of the Rome Statute negotiations. The note from the United States, dated July 30, 1997, made a proposal that was subsequently accepted by Mali. The note provides in relevant part:

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Government of Mali and has the honor to refer to recent discussions between representatives of our two governments regarding issues related to U.S. military personnel and civilian employees of the U.S. Department of Defense who may be temporarily present in Mali in connection with the African Crisis Response Initiative Mobile Training Team visit *and other activities as may be agreed upon by our two governments*.<sup>17</sup>

As a result of these discussions, the Embassy has the honor to propose that such personnel be accorded the equivalent status to that accorded to Administrative and Technical Staff of the United States Embassy under the Vienna Convention on Diplomatic Relations of April 18, 1961, and that they may enter and exit Mali with United States identification and with collective movement or individual travel orders.<sup>18</sup>

Under the Vienna Convention on Diplomatic Relations, administrative and technical staff enjoy immunity from arrest, detention, and criminal jurisdiction, as well as immunity from civil and administrative jurisdiction for acts performed in the course of their duties.<sup>19</sup>

By relying on this agreement with Mali to avoid the ICC's jurisdiction, the United States can avoid some of the objections that had been raised to the ICC-specific bilateral immunity agreements. Those agreements were typically framed as being negotiated pursuant to Article 98 of the Rome Statute.<sup>20</sup> Article 98(2) provides:

<sup>16</sup> White House Press Statement, Presidential Memorandum—Certification Concerning U.S. Participation in the United Nations Multidimensional (Jan. 31, 2014), at <http://www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-certification-concerning-us-participation-united>.

<sup>17</sup> [Editors' note: Presumably the United States and Mali reached such an agreement regarding the U.S. forces participating in MINUSMA.]

<sup>18</sup> Agreement Regarding Status of U.S. Military Personnel and Civilian Employees of the Department of Defense in Connection with the African Crisis Response Initiative, Sept. 30, 1997, U.S.-Mali, Hein's No. KAV 5574, Temp. State Dept. No. 04-597 (emphasis added) [hereinafter U.S.-Mali Agreement].

<sup>19</sup> Vienna Convention on Diplomatic Relations, Arts. 29, 31, 37(2), Apr. 18, 1961, 23 UST 3227, 500 UNTS 95.

<sup>20</sup> See, e.g., Murphy, *supra* note 10, at 201–03.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>21</sup>

Relying on the Rome Statute's drafting history, some have argued that Article 98 precludes the negotiation of *new* agreements because it serves the limited role of avoiding legal conflicts that might arise with status-of-forces agreements that predate the establishment of the ICC.<sup>22</sup> Others have argued that negotiating new agreements specifically to avoid the ICC's jurisdiction undermines the object and purpose of the Rome Statute.<sup>23</sup> Still others have criticized bilateral immunity agreements because they extend "not only to U.S. nationals on official business but also to U.S. citizens present in the State for business or personal reasons, as well as employees, including contractors regardless of nationality."<sup>24</sup> These objections do not apply to the Mali agreement, which is a status-of-forces agreement that predates the establishment of the ICC and is limited to U.S. military personnel and civilian employees of the U.S. Department of Defense.<sup>25</sup>

#### USE OF FORCE AND ARMS CONTROL

##### *United States' Legal Justification for Drone Strike on Anwar al-Awlaki Released*

In June 2014, the U.S. Court of Appeals for the Second Circuit ordered the U.S. Department of Justice to release a classified memorandum that had served as advance legal authorization for the killing of American citizen Anwar al-Awlaki by drone strike in Yemen on September 30, 2011.<sup>1</sup> Dated July 16, 2010, the forty-one-page memorandum—the now-public version of which has been heavily redacted—contains an extensive analysis of domestic U.S. and international law constraints on the decision to kill al-Awlaki.<sup>2</sup>

The memorandum relied heavily on the proposition that the Authorization for the Use of Military Force (AUMF), as a matter of U.S. law, authorized the killing of al-Awlaki:<sup>3</sup>

<sup>21</sup> Rome Statute, *supra* note 8, Art. 98(2).

<sup>22</sup> Report of an Independent Task Force Convened by the American Society of International Law: U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement 9 n.64, 35 (2009), *available at* <http://www.amicc.org/docs/ASIL%20ICC%20Report.pdf>.

<sup>23</sup> *See, e.g., id.* at 32, 35; Murphy, *supra* note 10, at 202–03.

<sup>24</sup> Report of an Independent Task Force, *supra* note 22, at 36.

<sup>25</sup> U.S.-Mali Agreement, *supra* note 18.

<sup>1</sup> *New York Times Co. v. U.S. Dep't of Justice*, 2014 U.S. App. LEXIS 11731 (2d Cir. June 23, 2014), *amended*, 2014 U.S. App. LEXIS 13035 (July 10, 2014) (Freedom of Information Act suit); *see also* Greg Miller, *Legal Memo Backing Drone Strike That Killed American Anwar al-Awlaki Is Released*, WASH. POST, June 23, 2014, *at* [http://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1\\_story.html](http://www.washingtonpost.com/world/national-security/legal-memo-backing-drone-strike-is-released/2014/06/23/1f48dd16-faec-11e3-8176-f2c941cf35f1_story.html). In 2013, the Department of Justice had released a much shorter white paper addressing some of the same issues. *See* John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 462, 462 (2013).

<sup>2</sup> David J. Barron, Acting Assistant Attorney General, Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aul-qi (July 16, 2010), *available at* <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf>.

<sup>3</sup> The statutory-authorization analysis was critical to the memorandum's central conclusion that U.S. forces would not expose themselves to federal criminal liability for killing al-Awlaki. *Id.* at 12 (arguing that, for example,

[W]e note as an initial matter that [the Department of Defense (DoD)] would undertake the operation pursuant to Executive war powers that Congress has expressly authorized. By authorizing the use of force against “organizations” that planned, authorized, and committed the September 11th attacks, Congress clearly authorized the President’s use of “necessary and appropriate force” against al-Qaida forces, because al-Qaida carried out the September 11th attacks. *See* Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224, §2(a) (2001) (providing that the President may “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”). And, as we have explained [in a redacted section of the memorandum], a decision-maker could reasonably conclude that this leader of [al-Qaida in the Arabian Peninsula (AQAP)] forces is part of al-Qaida forces. Alternatively, and as we have further explained [in another redacted section of the memorandum], the AUMF applies with respect to forces “associated with” al-Qaida that are engaged in hostilities against the U.S. or its coalition partners, and a decision-maker could reasonably conclude that the AQAP forces of which al-Aulaqi is a leader are “associated with” al Qaida forces for purposes of the AUMF. On either view, DoD would carry out its contemplated operation against a leader of an organization that is within the scope of the AUMF, and therefore DoD would in that respect be operating in accord with a grant of statutory authority.

Based upon the facts represented to us, moreover, the target of the contemplated operation has engaged in conduct as part of that organization that brings him within the scope of the AUMF. High-level government officials have concluded, on the basis of al-Aulaqi’s activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a “continued and imminent threat” of violence to United States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans from his base of operations in Yemen. The contemplated DoD operation, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.<sup>4</sup>

The memorandum also asserted that al-Awlaki’s American citizenship did not alter the application of the statute to his case:

Al-Aulaqi is a United States citizen, however, and so we must also consider whether his citizenship precludes the AUMF from serving as the source of lawful authority for the contemplated DoD operation. There is no precedent directly addressing the question in circumstances such as those present here; but the Supreme Court has recognized that, because military detention of enemy forces is “by ‘universal agreement and practice,’ [an] ‘important incident[] of war,’” *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) . . . , the AUMF authorized the President to detain a member of Taliban forces who

the criminal prohibition on “[f]oreign murder of United States nationals” is subject to a “public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances”); *see also id.* at 20 (summarizing the memorandum’s conclusion that “a public authority justification . . . would be available because the operation would constitute the ‘lawful conduct of war’—a well established variant of the public authority justification”).

<sup>4</sup> *Id.* at 21 (footnotes and citation omitted).

was captured abroad in an armed conflict against the United States on a traditional battlefield. In addition, the Court held in *Hamdi* that this authorization applied even though the Taliban member in question was a U.S. citizen. Furthermore, lower federal courts have relied upon *Hamdi* to conclude that the AUMF authorizes DoD to detain individuals who are part of al-Qaida even if they are apprehended and transferred to U.S. custody while not on a traditional battlefield.

In light of these precedents, we believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization. The use of lethal force against such enemy forces, like military detention, is an "important incident of war." And thus, just as the AUMF authorizes the military detention of a U.S. citizen captured abroad who is part of an armed force within the scope of the AUMF, it also authorizes the use of "necessary and appropriate" lethal force against a U.S. citizen who has joined such an armed force.<sup>5</sup>

The memorandum then argued that killing al-Awlaki was consistent with international law, a conclusion that was also relevant to its interpretation of the AUMF:

In determining whether the contemplated DoD operation would constitute the "lawful conduct of war," we next consider whether that operation would comply with the international law rules to which it would be subject—a question that also bears on whether the operation would be authorized by the AUMF. See Response for Petition for Rehearing and Rehearing En Banc, *Al Behan v. Obama*, No. 09-5051 at 7 (D.C. Cir.) (May 13, 2010) (AUMF "should be construed, if possible, as consistent with international law") (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains")); see also *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (customary international law is "law that (we must assume) Congress ordinarily seeks to follow"). Based on the combination of facts presented to us, we conclude that DoD would carry out its operations as part of the non-international armed conflict between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. 548 U.S. 557, 628–31 (2006). . . .

Here, unlike in *Hamdan*, the contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida. To be sure, *Hamdan* did not directly address the geographic scope of the non-international armed conflict between the United States and al-Qaida that the Court recognized, other than to implicitly hold that it extended to Afghanistan . . . . The Court did, however, specifically reject the argument that non-international armed conflicts are necessarily limited to internal conflicts. The Common Article 3 term "conflict not of an international character," the Court explained, bears its "literal meaning"—namely, that it is a conflict that "does not involve a clash between nations." *Id.* at 630 . . . . The

<sup>5</sup> *Id.* at 22–23 (some citations omitted).

Court explained that . . . the nature of the conflict depends at least in part on the status of the parties, rather than simply on the locations in which they fight . . . .

Invoking the principle that for purposes of international law an armed conflict generally exists only when there is “protracted armed violence between governmental authorities and armed groups,” Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1AR72, ¶ 70 (ICTY App. Chamber Oct. 2, 1995) (“*Tadic* Jurisdictional Decision”), some commentators have suggested that the conflict between the United States and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. See, e.g., Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857–59 (2009); see also Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 54, at 18 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) (acknowledging that a non-international armed conflict can be transnational and “often does” exist “across State borders,” but explaining that the duration and intensity of attacks in a particular nation [are] also among the “cumulative factors that must be considered for the objective existence of an armed conflict”). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this issue, we must look to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.

In looking for such guidance, we have not come across any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. See John R. Stevenson, Legal Adviser, Department of State, *United States Military Action in Cambodia: Questions of International Law* (address before the Hammarskjöld Forum of the Association of the Bar of the City of New York, May 28, 1970), in 3 *The Vietnam War and International Law: The Widening Context* 23, 28–30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Nor do we see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of non-international armed conflict. Rather, we think the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case. Such an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.

We also find some support for this view in an argument the United States made to the International Criminal Tribunal for Yugoslavia (ICTY) in 1995. To be sure, the United States was there confronting a question, and a conflict, quite distinct from those we address here. Nonetheless, in that case the United States argued that in determining *which* body of humanitarian law applies in a particular conflict, “the conflict must be considered as a

whole,” and that “it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules.” Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, Case No. IT-94-1AR72 (ICTY App. Chamber) at 27–28 (July 1995) (“U.S. *Tadic* Submission”). Likewise, the court in *Tadic*—although not addressing a conflict that was transnational in the way the U.S. conflict with al-Qaida is—also concluded that although “the definition of ‘armed conflict’ varies depending on whether the hostilities are international or internal . . . the scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.” *Tadic* Jurisdictional Decision ¶ 67 (emphasis added); see also International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 18 (2003) (asserting that in order to assess whether an armed conflict exists it is necessary to determine “whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense”). Although the basic approach that the United States proposed in *Tadic*, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view, that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application. And that same consideration, reflected in *Hamdan* itself . . . , suggests a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.

For present purposes, in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD’s operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. Specifically, DoD proposes to target a leader of AQAP, an organized enemy force that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. [Citations to redacted section of the brief.] Moreover, DoD would conduct the operation in Yemen, where, according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. [Citations to redacted section of the brief.] Taken together, these facts support the conclusion that the DoD operation would be part of the non-international armed conflict the Court recognized in *Hamdan*.<sup>6</sup>

The memorandum specifically rejected claims that international law prohibited the status-based targeting of al-Awlaki:

Several of the Guantánamo habeas petitioners, as well as some commentators, have argued that in a non-international conflict of this sort, the laws of war and/or the AUMF do not permit the United States to treat persons who are part of al-Qaida as analogous to members of an enemy’s armed forces in a traditional international armed conflict, but that

<sup>6</sup> *Id.* at 23–27 (footnotes and citations omitted).

the United States instead must treat all such persons as civilians, which (they contend) would permit targeting those persons only when they are directly participating in hostilities. . . . Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 58, at 19 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) (“*Report of the Special Rapporteur*”) (reasoning that because “[u]nder the international humanitarian law] applicable to non-international armed conflict, there is no such thing as a ‘combatant’”—i.e., a non-state actor entitled to the combatant’s privilege—it follows that “States are permitted to attack only civilians who ‘directly participate in hostilities’”). Primarily for the reasons that Judge Walton comprehensively examined in the *Gherebi* case, see 609 F. Supp. 2d at 62–69, we do not think this is the proper understanding of the laws of war in a non-international armed conflict, or of Congress’s authorization under the AUMF. *Cf. also* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28, 34 (2009) (even if an individual is otherwise a “citizen” for purposes of the laws of war, a member of a non-state armed group can be subject to targeting by virtue of having assumed a “continuous combat function” on behalf of that group); Alston, *supra*, ¶ 65, at 30–31 (acknowledging that under the ICRC view, if armed group members take on a continuous command function, they can be targeted anywhere and at any time); *infra* at 37–38 (explaining that al-Aulaqi is continually and “actively” participating in hostilities and thus not protected by Common Article 3 of the Geneva Conventions).<sup>7</sup>

After discussing its expectation that any operation directed at al-Awlaki would comply with applicable targeting restrictions,<sup>8</sup> the memorandum stated:

In light of all these circumstances, we believe DoD’s contemplated operation against al-Aulaqi would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress’s authorization to use “necessary and appropriate force” against al-Qaida. In consequence, the operation should be understood to constitute the lawful conduct of war . . . .<sup>9</sup>

The memorandum ended with a much shorter section explaining that the killing of al-Awlaki would not violate the U.S. Constitution. Heavily redacted, this section of the memorandum dealt with constitutional considerations under both the Due Process Clause and the Fourth Amendment. For the Due Process Clause, the memorandum appears to have applied the *Mathews v. Eldridge* balancing test as endorsed by the *Hamdi* plurality. See *Hamdi*, 542 U.S. at 529 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In finding *Mathews v. Eldridge* satisfied, the memorandum appears to have relied principally on two reported facts: (1) that “a decision-maker could reasonably decide that the threat posed by al-Aulaqi’s activities to United States persons is ‘continued’ and ‘imminent,’”<sup>10</sup> and (2) that “an operation . . . to capture al-Aulaqi in Yemen would be infeasible at this time.”<sup>11</sup> As for Fourth Amendment

<sup>7</sup> *Id.* at 22 n.28; see also *id.* at 37–38 (concluding for similar reasons that the War Crimes Act, 18 U.S.C. §2241, would not apply).

<sup>8</sup> *Id.* at 27–30.

<sup>9</sup> *Id.* at 30.

<sup>10</sup> *Id.* at 39.

<sup>11</sup> *Id.* at 40–41.

seizure restrictions, the memorandum concluded that the killing of al-Awlaki would be “reasonable” for reasons substantially similar to those discussed in the AUMF analysis.<sup>12</sup>

*Asserting Self-Defense, United States Seizes Suspect in Benghazi Mission Attack*

On June 17, United States forces conducted a raid into Libyan territory to capture the suspected ringleader of the 2012 attacks on the U.S. Mission in Benghazi, Libya:

With drones hovering overhead, about two dozen Delta Force commandos and two or three F.B.I. agents descended on the outskirts of Benghazi just after midnight local time on Monday; grabbed the suspect, Ahmed Abu Khattala; stuffed him into a vehicle and raced away, according to officials briefed on the operation. No shots were fired, and the suspect was spirited out of Libya to a United States Navy warship in the Mediterranean.<sup>1</sup>

United States Ambassador Samantha Power wrote a four-paragraph letter to the president of the UN Security Council, acknowledging that “the United States of America has taken action in Libya to capture Ahmed Abu Khattalah, a senior leader of [a] Libyan militant group.”<sup>2</sup> Power’s letter offered the following justification under international law:

As is well known, the U.S. Temporary Mission Facility and Annex in Benghazi, Libya were attacked in September 2012, and the U.S. Ambassador to Libya and three other Americans were killed. Following a painstaking investigation, the U.S. Government ascertained that Ahmed Abu Khattalah was a key figure in those armed attacks. The investigation also determined that he continued to plan further armed attacks against U.S. persons.

The measures we have taken to capture Abu Khattalah in Libya were therefore necessary to prevent such armed attacks, and were taken in accordance with the United States’ inherent right of self-defense. We are reporting these measures to the Security Council in accordance with Article 51 of the Charter of the United Nations.<sup>3</sup>

On the same day, the White House issued a press release in which President Barack Obama emphasized that “[s]ince the deadly attacks on our facilities in Benghazi, I have made it a priority to find and bring to justice those responsible for the deaths of four brave Americans. . . . With this operation, the United States has once again demonstrated that we will do whatever it takes to see that justice is done when people harm Americans.”<sup>4</sup> Despite some domestic pressure to hold Khattalah pursuant to the laws of war, the Obama administration emphasized from its first announcement of the capture that “Abu Khattalah will be presented to a United States Federal Court for criminal prosecution.”<sup>5</sup> After being brought to the United States,

<sup>12</sup> *Id.* at 41.

<sup>1</sup> Michael S. Schmidt, Peter Baker & Eric Schmitt, *U.S. Seizes Suspect in Deadly Assault in Benghazi in '12*, N.Y. TIMES, June 18, 2014, at A1.

<sup>2</sup> Letter from U.S. Ambassador Samantha Power to Security Council President Vitaly Churkin (June 17, 2014), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1201215/power-letter-to-un-about-khattala.pdf>.

<sup>3</sup> *Id.*; see also UN Charter, Art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .”).

<sup>4</sup> White House Press Statement, Statement by the President on the Apprehension of Ahmed Abu Khatallah (June 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/06/17/statement-president-apprehension-ahmed-abu-khatallah>.

<sup>5</sup> Letter from U.S. Ambassador Samantha Power, *supra* note 2.

Abu Khattalah was indeed arraigned in Washington, D.C., where he is now being held without bail pending a criminal trial on one count of conspiring to provide material support and resources to terrorists that resulted in death.<sup>6</sup>

#### PRIVATE INTERNATIONAL LAW

##### *U.S. Supreme Court Interprets Child Abduction Treaty*

In *Lozano v. Montoya Alvarez*, decided March 5, 2014, the U.S. Supreme Court issued its third decision in five years interpreting the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention).<sup>1</sup> The Hague Convention sets out a standard for determining when a child who has been wrongfully removed or retained in violation of a parent's custodial rights will be returned to his or her previous home. Article 12 provides that when "a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith," unless narrow exceptions specified elsewhere in the Convention apply.<sup>2</sup> The instructions shift if more than one year has passed; in that situation, the relevant judicial or administrative authority "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."<sup>3</sup> In *Lozano*, the Supreme Court held that these instructions regarding the first year are not subject to equitable tolling.<sup>4</sup>

The case concerns the daughter of Diana Lucia Montoya Alvarez and Manuel Jose Lozano. Until she turned three, the daughter and her parents lived in London. Asserting that she had been subject to emotional and physical abuse and expressing concern about her daughter, Montoya Alvarez left for a women's shelter, where she and her daughter lived for seven months. They then traveled to New York and moved in with Montoya Alvarez's sister Maria and her family. Lozano did not know where they had gone, and his initial attempts to locate Montoya Alvarez and his daughter were unsuccessful. Using procedures established by the Hague Convention, Lozano eventually learned that they were in the United States. Sixteen months after Montoya Alvarez and her daughter left the United Kingdom, Lozano filed a petition for return of the child pursuant to the Hague Convention.<sup>5</sup>

Lozano argued that the one-year period in Article 12 should be equitably tolled during the period that Montoya Alvarez concealed the child. That is, he argued that his daughter should be returned to the United Kingdom "forthwith" and that the U.S. court hearing his Hague Convention claim should not consider whether his daughter had "settled" in her "new environment," even though she had been away from the United Kingdom for more than one year.<sup>6</sup>

<sup>6</sup> Michael S. Schmidt, *Benghazi Attack Suspect Ordered Held Until Trial*, N.Y. TIMES, July 3, 2014, at A11.

<sup>1</sup> *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014); Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, TIAS No. 11,670, 1343 UNTS 98 [hereinafter Hague Convention]; *see also* Chafin v. Chafin, 133 S.Ct. 1017 (2013); John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 471 (2013); *Abbott v. Abbott*, 560 U.S. 1 (2010); John R. Crook, *Contemporary Practice of the United States*, 104 AJIL 525 (2010).

<sup>2</sup> Hague Convention, *supra* note 1, Art. 12.

<sup>3</sup> *Id.*

<sup>4</sup> *Lozano*, 134 S.Ct. at 1228.

<sup>5</sup> *Id.* at 1229–31.

<sup>6</sup> *Id.* at 1231.

Writing for a unanimous Court, Justice Clarence Thomas explained that “[a]s a general matter, equitable tolling pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.”<sup>7</sup> When interpreting federal statutes of limitations, the Court continued, American courts presume that Congress intended to incorporate equitable tolling “because equitable tolling is part of the established backdrop of American law.”<sup>8</sup>

However, in the Court’s view, the “established backdrop” of treaties is a different story. “Even if a background principle is relevant to the interpretation of federal statutes,” wrote the Court, “it has no proper role in the interpretation of treaties unless that principle is shared by the parties [to the agreement].”<sup>9</sup> Citing the rejection of equitable tolling by the intermediate courts of appeals in other states parties to the treaty, the Court found no indication that the Hague Convention had been drafted against a similar background principle of equitable tolling.<sup>10</sup> Nor is Article 12 the kind of provision to which equitable tolling usually applies, according to the Court: it is not a statute of limitations:

[E]xpiration of the 1-year period in Article 12 does not eliminate the remedy the Convention affords the left-behind parent—namely, the return of the child. Before one year has elapsed, Article 12 provides that the court “shall order the return of the child forthwith.” But even after that period has expired, the court “shall also order the return of the child, unless it is demonstrated that the child is now settled.” The continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent. Rather than establishing any certainty about the respective rights of the parties, the expiration of the 1-year period opens the door to consideration of a third party’s interests, *i.e.*, the child’s interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, we decline to treat the 1-year period as a statute of limitations.<sup>11</sup>

The Court also saw reason to believe that the drafters of the Hague Convention had taken account of the possibility that the abducting parent might conceal the child’s location:

[T]he practical effect of the tolling that Lozano requests would be to delay the commencement of the 1-year period until the left-behind parent discovers the child’s location. Commencing the 1-year period upon discovery is the obvious alternative to the commencement date the drafters actually adopted because the subject of the Hague Convention, child abduction, is naturally associated with the sort of concealment that might justify equitable tolling under other circumstances. Given that the drafters did not adopt that alternative, the natural implication is that they did not intend the 1-year period to commence on that later date.<sup>12</sup>

The Court rejected Lozano’s arguments that equitable tolling is necessary to fulfill the Hague Convention’s purposes and deter child abductions:

<sup>7</sup> *Id.* at 1231–32 (citation omitted).

<sup>8</sup> *Id.* at 1232 (citation omitted).

<sup>9</sup> *Id.* at 1233 (citation omitted).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1234–35 (citations and footnotes omitted).

<sup>12</sup> *Id.* at 1235 (citations omitted).

We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child's interest in choosing to remain, Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy. The same is true of the child's interest in settlement.

Nor is it true that an abducting parent who conceals a child's whereabouts will necessarily profit by running out the clock on the 1-year period. American courts have found as a factual matter that steps taken to promote concealment can also prevent the stable attachments that make a child "settled."<sup>13</sup>

Finally, the Court disagreed with Lozano's claim that equitable tolling principles constitute "other law" that U.S. courts should apply to his case according to Article 34 of the Convention.<sup>14</sup> Article 34 states that, except to the extent that the Hague Convention takes priority over an earlier agreement regarding the protection of minors, "the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or *other law* of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained."<sup>15</sup> Maintaining that Lozano's contention "mistakes the nature of equitable tolling as this Court has applied it," the Court affirmed that it applies equitable tolling not "as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose," but "only if we determine that the treaty drafters so intended."<sup>16</sup>

The Court's conclusion regarding equitable tolling largely tracks the analysis from an amicus brief submitted by the executive branch, although the Court did not accord the government's position any formal weight. The Court stated in a footnote that it "d[id] not decide" an additional issue addressed in the government's brief—whether the Hague Convention confers equitable discretion on courts to order the return of a child even if the court determines that the child is "settled" within the meaning of Article 12.<sup>17</sup> The government argued that Article 12 did confer such discretion on courts:

[E]ven when a year has passed and the child is now settled in her new environment, the Convention does not affirmatively *prohibit* return. Rather, against the background assumption favoring return, . . . Article 12 permits (but does not require) the return of a child who is settled if the court determines that equity warrants return. . . .

. . . .

. . . The court could ultimately conclude that the abducting parent's conduct in concealing the child's whereabouts, and other equitable factors, justify returning the child to the country of her habitual residence.<sup>18</sup>

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> *Id.* at 1236.

<sup>15</sup> Hague Convention, *supra* note 1, Art. 34 (emphasis added).

<sup>16</sup> *Lozano*, 134 S.Ct. at 1236 (citations omitted).

<sup>17</sup> *Id.* at 1234 n.5.

<sup>18</sup> Brief for the United States as Amicus Curiae Supporting Respondent at 21–24, *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014) (No. 12-820) (citations omitted), *available at* <http://www.state.gov/documents/organization/226394.pdf>.

The government's amicus brief acknowledged that its views on the equitable tolling question had recently changed:

In response to a 2006 questionnaire from the Hague Conference on Private International Law, the State Department noted that statutes of limitations are often assumed to permit equitable tolling and reported five decisions in which American courts had tolled Article 12's one-year period. . . . The State Department described this as "a positive trend" that prevents abducting parents from being "rewarded for evading identification" and left-behind parents from being "penalized for the other parent's successful concealment," and stated that "it supports the concept of equitable tolling of the one-year filing deadline in order to prevent creating an incentive for a taking parent to conceal the whereabouts of a child." The State Department thus endorsed the concept of "equitable tolling" as it had been applied in the lower-court decisions, as a means of enabling courts to take into account concealment and other equitable factors in determining the ultimate disposition of return petitions. Upon broader examination of the issues in connection with its participation in this case as amicus curiae in the court of appeals, the Department concluded that "equitable discretion," and not "equitable tolling," is the appropriate legal framework for consideration by courts of concealment and other factors bearing on return.<sup>19</sup>

Justice Samuel Alito, joined by Justices Stephen Breyer and Sonia Sotomayor, wrote a concurrence noting that "the State Department's interpretation of treaties 'is entitled to great weight'" and endorsing the government's "equitable discretion" argument.<sup>20</sup> An excerpt follows:

The fact that, after one year, a child's need for stability requires a court to take into account the child's attachment to the new country does not mean that such attachment becomes the *only* factor worth considering when evaluating a petition for return.

Nothing in Article 12 prohibits courts from taking other factors into account. To the contrary, the Convention explicitly permits them to do so. Article 18 provides that "[t]he provisions of this Chapter [including Article 12] do not limit the power of a judicial or administrative authority to order the return of the child at any time." A court thus has power to order the child's return in the exercise of its sound discretion even where Article 12's obligation to order such return no longer applies.

....

. . . [Lozano] argues that, as a result of our decision, the United States will become an abduction haven, with parents concealing their children here until Article 12's 1-year period has run and then claiming their children have become settled and hence ineligible for return. But such inequitable conduct would weigh heavily in favor of returning a child even if she has become settled. Given the courts' discretion to order return in response to concealment, I do not believe the Court's decision today risks incentivizing parents to flee with their children to this country and conceal them.

Equitable discretion is also a far better tool than equitable tolling with which to address the dangers of concealment. Equitable tolling would require return *every* time the abducting parent conceals the child and thereby prevents the non-abducting parent from filing a return petition within a year, regardless of how settled in the new country the child has become. Thus, on petitioner's view, a court would be bound to return a 14-year-old child

<sup>19</sup> *Id.* at 20 n.5.

<sup>20</sup> *Lozano*, 134 S.Ct. at 1238.

who was brought to the United States shortly after birth and had been concealed here ever since. By contrast, when a court exercises its equitable discretion, it may consider other factors in addition to concealment. While concealment is a significant factor and should weigh heavily in a court's analysis, in appropriate cases it can be overcome by circumstances such as the extended length of the child's residence in this country, any strong ties the child has formed here, and the child's attenuated connections to his or her former country.<sup>21</sup>

<sup>21</sup> *Id.* at 1237–39 (citations omitted).