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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 Objects to Russia's Continued Violations of Ukraine's Territorial Sovereignty, Including by Convoys Purporting to Provide Humanitarian Aid

Throughout the late summer and fall of 2014, the United States continued to object to Russia's violations of Ukraine's territorial integrity and support for separatists in eastern Ukraine.¹ These violations included the purported provision of humanitarian aid from Russia to Ukraine without the consent of the Ukrainian government in Kyiv.

On August 5, 2014, U.S. Ambassador Rosemary DiCarlo, deputy permanent representative to the United Nations, acknowledged that such aid was badly needed in eastern Ukraine when she stated:

As a result of ongoing violence in eastern Ukraine, thousands of Ukrainians have had to flee their homes. Many have been subjected to harassment, arbitrary detentions and killing at the hands of Russia-supported separatists. The general environment of insecurity and instability has contributed to a growing number of internally displaced persons inside Ukraine, and those seeking refuge outside of Ukraine.

To address this serious situation, the government and people of Ukraine have undertaken important steps to provide humanitarian assistance to internally displaced persons throughout the country. We commend the quick response of the Ukrainian government in the areas recently liberated from separatists' control. Electricity and water services are coming back on, pensions are being paid again, and rebuilding has already begun.

For those who have not yet been able to return home, a rapid, coordinated effort by Ukraine and the international humanitarian community is essential to identify and respond to the urgent needs of the most vulnerable. To that end, we encourage Ukraine to coordinate quickly a comprehensive IDP [internally displaced persons] registration system, ensure the harmonization of assistance efforts, and assist in disseminating information on registration procedures and services.

Doing so will allow for the targeted delivery of assistance, to which international donors can more effectively respond. It will also pave the way for a calibrated response to the unique needs of IDPs. We commend the United Nations for mobilizing so quickly to support the government of Ukraine's efforts. Regarding Russia's call for a humanitarian mission in Ukraine, UN agencies and NGOs are already on the ground carrying out assessment missions and are providing assistance to vulnerable, conflict-affected persons, particularly those in liberated areas. These organizations are standing by and are ready to provide more assistance to conflict areas if permitted greater access and security guarantees by Russia-backed separatists.²

That same month, the International Committee of the Red Cross (ICRC) announced an expansion of its humanitarian aid initiative in eastern Ukraine, noting that "[h]undreds of

¹ For earlier coverage of this topic, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 784 (2014).

² Ambassador Rosemary DiCarlo, U.S. Deputy Permanent Representative to the United Nations, Remarks at a UN Security Council Briefing on Ukraine (Aug. 5, 2014), at <http://ukraine.usembassy.gov/statements/dicarlo1-ukraine-08052014.html>.

thousands of people are reportedly now displaced both inside the country and in Russia. The living conditions of the resident population are also worsening.”³

The ICRC announced on August 15, 2014, that Ukraine and Russia had both dispatched aid convoys to eastern Ukraine and had “asked the ICRC to facilitate delivery.”⁴ Within a few days, the ICRC, Ukraine, and Russia had agreed to conditions of delivery,⁵ which included Ukrainian customs checks, confirmation by both Ukraine and Russia of the strictly humanitarian nature of their respective cargo, and ICRC staff presence and distribution.⁶

On August 22, a convoy of Russian trucks entered Ukraine. According to the Organization for Security and Cooperation in Europe (OSCE) Observer Mission in Donetsk:

On 22 August, a total of 227 Russian trucks crossed the Donetsk BCP [border crossing point] into Ukraine. Out of the total number of vehicles, 37 were inspected jointly by the Russian Federation, the Ukrainian officers and the ICRC. On the morning of the departure, the ICRC had not received assurances that the way would be secure and therefore decided to wait further. However, the Russian trucks started their movement to Ukraine without the ICRC. The first 37 inspected trucks crossed and were followed by 190 trucks that had not been inspected.⁷

National Security Council (NSC) Spokesperson Caitlin Hayden described the incident as a violation of international law:

Today, in violation of its previous commitments and international law, Russian military vehicles painted to look like civilian trucks forced their way into Ukraine. While a small number of these vehicles were inspected by Ukrainian customs officials, most of the vehicles have not been inspected by anyone but Russia. We condemn this action by Russia, for which it will bear additional consequences.

The Ukrainian government and the international community have repeatedly made clear that this convoy would constitute a humanitarian mission only if expressly agreed to by the Ukrainian government and only if the aid was inspected, escorted and distributed by the [ICRC]. We can confirm that the ICRC is not escorting the vehicles and has no role in managing the mission, a condition that all parties had agreed would be required. Under the agreed terms, the mission should have been accomplished by sending a small number

³ Int’l Comm. of the Red Cross [ICRC], Press Release No. 14/140, Ukraine: Situation Deteriorating in East (Aug. 8, 2014), at <https://www.icrc.org/eng/resources/documents/news-release/2014/08-08-ukraine-humanitarian-situation-deteriorates-east.htm>.

⁴ ICRC, Press Release No. 14/143, Ukraine: Preparations Under Way for Large-Scale Aid Delivery (Aug. 15, 2014), at <https://www.icrc.org/eng/resources/documents/news-release/2014/08-15-ukraine-large-scale-delivery.htm>.

⁵ ICRC, Press Release No. 14/147, Ukraine: Urgent Need for Aid in Lugansk (Aug. 21, 2014), available at <https://www.icrc.org/eng/resources/documents/news-release/2014/08-21-ukraine-lugansk-urgent-needs-aid.htm>.

⁶ *Id.*

⁷ Org. for Sec. and Cooperation in Eur. [OSCE], *Report of Acting Chief Observer Paul Picard to the OSCE Permanent Council for the Period 30 July to 30 September 2014*, Sept. 30, 2014, at 3, available at http://photos.state.gov/libraries/osce/242783/misc_pdfs/Report_Picard.pdf [hereinafter Sept. 30 OSCE Report]; see also Statement Dated 22 August 2014 of the Ministry of Foreign Affairs of Ukraine in Connection with the Illegal Crossing of the State Border of Ukraine by the Russian Convoy, in letter dated Aug. 22, 2014, from the Chargé d’affaires a.i. of the Permanent Mission of Ukraine to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/612 (Aug. 22, 2014) (noting that “[a]lthough the border and customs services of Ukraine had already started clearance of the Russian convoy, in the morning, Ukrainian officials were blocked by the Russian forces and detached from the inspection of the rest of the trucks in the column, despite previous agreements and the fact that they had been invited into the territory of Russia”).

of inspected trucks in to drop their supplies and return to Russia within 24 hours by the same approved route by which they entered. That is not what is taking place. As we and governments around the world have said all along, Russia has no right to send vehicles, persons, or cargo of any kind into Ukraine, whether under the guise of humanitarian convoys or any other pretext, without the express permission of the government of Ukraine

At the same time as Russian vehicles violate Ukraine's sovereignty, Russia maintains a sizable military force on the Ukrainian border capable of invading Ukraine on very short notice. It has repeatedly fired into Ukrainian territory, and has sent an ever-increasing stream of military equipment and fighters into Ukraine. As a result, the international community has been profoundly concerned that Russia's actions today are nothing but a pretext for further Russian escalation of the conflict. We recall that Russia denied its military was occupying Crimea until it later admitted its military role and attempted to annex this part of Ukraine.

Russia's decision today to send in its vehicles and personnel without the ICRC and without the express permission of the Ukrainian authorities only amplifies international concerns about Russia's true intentions. It is important to remember that Russia is purporting to alleviate a humanitarian situation which Russia itself created—a situation that has caused the deaths of thousands, including 300 innocent passengers of flight MH17. If Russia really wants to ease the humanitarian situation in eastern Ukraine, it could do so today by halting its supply of weapons, equipment, and fighters to its proxies. This is a flagrant violation of Ukraine's sovereignty and territorial integrity by Russia. Russia must remove its vehicles and its personnel from the territory of Ukraine immediately.⁸

This crossing marked the first of at least four reported illegal entries by Russian convoys over the next few months.⁹

On September 5, after more than a month of face-to-face negotiations with Russian-backed separatists, the Trilateral Contact Group—composed of senior representatives of Russia, Ukraine, and the OSCE—brokered a ceasefire agreement in Minsk.¹⁰ The resulting agreement, known as the “Minsk Protocol,” was signed by the Group and two separatist representatives,¹¹ with the goal of ending months of escalating combat between Ukrainian forces and Russian-backed separatists in southeast Ukraine.¹² The twelve-point agreement included the following provisions:

⁸ Press Release, Office of the Press Sec'y, The White House, Statement by NSC Spokesperson Caitlin Hayden on Russian Convoy in Ukraine (Aug. 22, 2014), at <http://www.whitehouse.gov/the-press-office/2014/08/22/statement-nsc-spokesperson-caitlin-hayden-russian-convoy-ukraine> [hereinafter Aug. 22 White House Press Release].

⁹ Ambassador Daniel Baer, U.S. Embassy to Kyiv, United States Mission to the OSCE on Russian “Humanitarian” Convoy Sent to Ukraine (Nov. 3, 2014), at <http://ukraine.usembassy.gov/statements/osce-ukraine-11032014-1.html> [hereinafter Nov. 3 Statement by Ambassador Daniel Baer].

¹⁰ See Press Release, OSCE, Chairperson-in-Office Welcomes Minsk Agreement, Assures President Poroshenko of OSCE Support (Sept. 5, 2014), at <http://www.osce.org/cio/123245>. [hereinafter OSCE Welcomes Minsk Agreement] (describing OSCE's chairperson's response to the signing of the agreement); Press Release, OSCE, Press Statement by the Trilateral Contact Group (July 31, 2014), at <http://www.osce.org/home/122142> (marking the start of the Group's ceasefire negotiations with separatists); Press Release, OSCE, Press Statement by the Trilateral Contact Group (Sept. 2, 2014), at <http://www.osce.org/home/123124> (identifying the members of the Group and elements “for securing a mutually-agreed and sustainable cease-fire”).

¹¹ Press Release, Ukrainian Mission to the European Union, Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk, 05/09/2014) (Sept. 8, 2014), at <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/27596-protocol-on-the-results-of-consultations-of-the-trilateral-contact-group-minsk-05092014> [hereinafter Minsk Protocol]. For the original in Russian, see OSCE, *Protocol on the Results of Consultations of the Trilateral Contact Group, Signed in Minsk, 5 September 2014* (Sept. 5, 2014), at <http://www.osce.org/home/123257>.

¹² OSCE Welcomes Minsk Agreement, *supra* note 10.

4. Ensure permanent monitoring on the Ukrainian-Russian state border and verification by the OSCE, together with the creation of a security area in the border regions of Ukraine and the Russian Federation. . . .
8. Adopt measures aimed at improving the humanitarian situation in Donbass [a region of southeastern Ukraine]. . . .
10. Remove unlawful military formations, military hardware, as well as militants and mercenaries from the territory of Ukraine.¹³

Shortly thereafter, on September 12 and 13, a second Russian convoy—again described by the Russian government as providing humanitarian aid—entered Ukraine without full inspection.¹⁴ According to the OSCE Observer Mission:

On 12–13 September, the second Russian convoy, consisting of 216 trucks, arrived at the BCP. The first 36 trucks were checked by the Russian border guard and customs services. In the morning, the convoy started its movement into Ukraine. 180 trucks were not inspected. Throughout the procedure, the ICRC and the Ukrainian officials (staying across the fence of the BCP) did not participate. All the trucks returned to the Russian Federation in the afternoon.¹⁵

On September 19, Russia, Ukraine, and the separatists agreed to a “memorandum on the fulfillment of the [Minsk] protocol based on the results of consultations of the trilateral contact group . . . about the steps towards implementation of the peace plan.”¹⁶ In that memorandum, the three parties agreed to the following:

3. There is a ban on the use of all types of weapons and any form of offensive action
9. All foreign militarized formations, military equipment and militants and mercenaries are to exit the territory of Ukraine under OSCE monitoring.¹⁷

At a UN Security Council meeting the same day, U.S. Ambassador Samantha Power reiterated that:

[Russia] must grant Ukraine control over its own border. Russia and the groups it backs must create an environment that allows the Organization for Security and Cooperation in Europe to fulfill its monitoring and verification mandate.¹⁸

A third Russian convoy reportedly entered Ukraine on September 20, but OSCE monitors at Donetsk were unable to verify either its existence or entry.¹⁹ The OSCE Observer Mission wrote:

¹³ Minsk Protocol, *supra* note 11.

¹⁴ Sept. 30 OSCE Report, *supra* note 7, at 4.

¹⁵ *Id.*

¹⁶ *English-Language Translation of the Sept. 19 Cease-Fire Memorandum in Minsk*, KYIV POST, Sept. 22, 2014, available at <http://www.kyivpost.com/content/ukraine/english-language-translation-of-the-sept-5-cease-fire-memorandum-in-minsk-365460.html> [hereinafter Sept. 19 Minsk Memorandum]. (Editors’ note: This is the *Kyiv Post*’s unofficial translation. For the original in Russian, see *Memorandum of September 19 2014 Outlining the Parameters for the Implementation of Commitments of the Minsk Protocol of 5 September 2014*, ORG. FOR SEC. AND CO-OPERATION IN EUR., Sept. 5, 2014, available at <http://www.osce.org/home/123806>).

¹⁷ Sept. 19 Minsk Memorandum, *supra* note 16.

¹⁸ 7269th Meeting of the Security Council, UN Doc. S/PV.7269, at 17 (Sept. 19, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7269.

¹⁹ Sept. 30 OSCE Report, *supra* note 7, at 4.

On 20 September, the press reported that a third convoy had crossed the border into Ukraine. Some media reported that it had gone through the Donetsk BCP as the previous ones had, but the OM [Observer Mission] did not observe it. According to the press, that convoy had crossed through another BCP (Matveev-Kurgan) and had gone to the city of Donetsk in Ukraine. For that reason, the OM could not provide any further information.²⁰

On September 24, President Barack Obama issued a memo that granted the U.S. Department of State the authority to send up to \$20 million in “nonlethal” assistance to Ukraine.²¹ The memo also permitted the Department of State to “direct the drawdown of up to \$5 million in defense articles and services of the Department of Defense and military education and training to provide immediate military assistance for the Government of Ukraine, to aid their efforts to respond to the current crisis.”²² In an address to the General Assembly the same day, Obama remarked:

Here are the facts. After the people of Ukraine mobilized popular protests and calls for reform, their corrupt president fled. Against the will of the government in Kyiv, Crimea was annexed. Russia poured arms into eastern Ukraine, fueling violent separatists and a conflict that has killed thousands. When a civilian airliner was shot down from areas that these proxies controlled, they refused to allow access to the crash for days. When Ukraine started to reassert control over its territory, Russia gave up the pretense of merely supporting the separatists, and moved troops across the border.²³

As of October 8, 2014, the United States’ “defensive security assistance” to Ukraine totaled \$116 million since the conflict began.²⁴ Such assistance included items such as body armor, night vision goggles, armored vehicles, food, medical supplies, and counter-mortar radar equipment and training.²⁵

On October 23, in a letter to the Security Council, Ukraine outlined the steps the three Minsk Protocol parties had taken—or not—to comply with the agreement.²⁶ As to Provision 8, “[i]mprovement of humanitarian conditions in Donbas,” the letter stated:

In August and September, Russia sent three “humanitarian aid convoys” that broke through the border of Ukraine without the consent of and inspection by the Ukrainian authorities and without the coordination of the International Committee of the Red Cross. The content of all three convoys remains largely unknown, as does their impact on the humanitarian conditions in Donbas.²⁷

²⁰ *Id.*

²¹ Memorandum from President Obama to the Sec’y of State (Sept. 24, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/24/presidential-memorandum-assistance-ukraine>.

²² *Id.*

²³ Barack Obama, Address to the United Nations General Assembly (Sept. 24, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-address-united-nations-general-assembly>.

²⁴ Press Release, U.S. Embassy to Kyiv, U.S. Security Assistance to Ukraine Continues (Oct. 8, 2014), at <http://ukraine.usembassy.gov/press-releases/us-assistance-10082014.html>.

²⁵ *Id.*

²⁶ Chargé d’affaires a.i. of the Permanent Mission of Ukraine to the UN, Letter dated Oct. 23, 2014 from the Chargé d’affaires a.i. addressed to the President of the Security Council, UN Doc. S/2014/755, at 7 (Oct. 23, 2014), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/755 (contrasting steps taken by Ukraine to comply with the agreement with a litany of violations by Russia and the Russia-backed separatists).

²⁷ *Id.*

The next day, U.S. Ambassador David Pressman expressed continuing concern that Russia was not respecting Ukraine's international border:

There has been much focus in recent days on the lines demarcating the ceasefire, but let us not forget a more important line, the international border. Indeed, in the Minsk agreement of 5 September, point number 4 of the 12 calls for permanent monitoring of the Ukrainian-Russian State border and verification of it by the OSCE. The Government of Ukraine recently submitted a plan to provide for that monitoring, restore Ukrainian control on its side of the border, prevent the illegal movement of personnel and matériel across the border and create a security zone free of weapons in the areas adjacent to the border in Ukraine and the Russian Federation. But Russia has not engaged on this plan, neither have the separatists, and Russia has refused to expand OSCE monitoring along the border.

Until a full monitoring mission is in place on the international border, supplies and equipment will continue to flow from Russia to the separatists, and separatists will continue to cross back and forth at will. President Putin said in Milan that he would not discuss OSCE monitoring of the border until the residents of the Donbas are secure. In fact, the reverse is true. The residents of Donbas will not be secure until the OSCE is monitoring the border. Ukraine's sovereignty must be restored over the entirety of its border with Russia.

....

We have identified a path to peace. That path has been agreed to by the parties in Minsk. It has concrete, verifiable commitments, and all must be implemented. Ukraine has taken real steps to fulfill its commitments, while Russia and the separatist[s] it backs have not. We call on them to act immediately to implement the obligations they undertook, and we call on them to do so now.²⁸

At the same meeting, Lithuania and the United Kingdom were the only states to address directly the issue of Russia's "humanitarian aid" convoys. Sir Mark Lyall Grant, ambassador and permanent representative of the U.K. mission to the United Nations in New York, stated:

The humanitarian situation in the areas controlled by the armed separatist groups remain[s] precarious and will become even more serious as winter approaches. But the sending of convoys into Ukraine by Russia without the agreement of the Government of Ukraine and in breach of Ukraine's sovereignty is a provocative act and must not be repeated. Humanitarian assistance is necessary, but it must be provided in an international effort coordinated by the appropriate agencies and with the agreement of the Government of Ukraine. If Russia wants to help improve the lives of civilians living in east Ukraine, it should immediately withdraw its remaining military forces from Ukraine, stop its flow of weapons to the separatists and instead help to restore Ukrainian sovereignty and to secure a political solution to the crisis.²⁹

Ambassador Raimonda Murmokaitė of Lithuania added:

Let us not forget that in August and September, Russia sent three unchecked humanitarian aid convoys into Ukraine in clear breach of Ukraine's sovereignty, without inspection by the Ukrainian authorities and without coordination with the International Committee of the Red Cross. Notably, immediately after the entry of those mystery convoys, the rebels

²⁸ 7287th Meeting of the Security Council, UN Doc. S/PV.7287, at 10 (Oct. 24, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7287.

²⁹ *Id.* at 7.

were quick to regain ground and reverse Ukraine's successes in clearing the area of illegal armed groups.³⁰

In response, Ambassador Vitaly Churkin, Russia's permanent representative to the United Nations, characterized Russia-Ukraine conflict as "the internal Ukrainian crisis, which has basically been transformed into a civil war."³¹ He called the conflict the product of "crude external interference that led to a coup d'etat."³² To justify aid convoys' forced entries, he cited a range of humanitarian concerns:

What are we seeing today? Today in Kyiv and in Brussels, as a matter of fact, everyone has returned to the issue we should have started with—delaying the association agreement with the EU, which the ousted President Yanukovich had sought to postpone. The cost of delaying that decision for almost a year is thousands of lives, almost a million refugees and internally displaced persons, a destroyed economy and a civil war, and the very severe situation being endured by civilians in the Donetsk and Luhansk regions, to whom we will continue to provide urgent humanitarian assistance. We are ready to cooperate with the Ukrainian authorities and with the International Committee of the Red Cross to that end, but we will accept no obstruction, whatever the hypocrites may say.

....

[O]ur concern about Ukraine arises from the growth of neo-Nazi sentiment there, encouraged by authorities in Kyiv.

....

A report of the United Nations human rights monitoring mission in Ukraine was mentioned today. Unfortunately, once again, the report is very far from being objective. In fact, it was the Kyiv authorities that invited the [Russian aid] mission in, and they have been guiding its activities. Nevertheless, certain facts that do not favour the Kyiv authorities cannot be ignored.

One can't ignore the violations of the norms of international humanitarian law committed by the Kyiv security forces, blatant facts that include the disappearance of people, killings, looting, extortion and arbitrary detentions, all of which have been carried out by the Ukrainian military and other battalions under the control of the Kyiv authorities, specifically, the Aidar, Azov, Dnepr, Kyiv-1 and Kyiv-2 battalions.

At the same time, ordinary Ukrainians are being harshly detained under the pretext that they have been involved in terrorism. There is an alarming and growing number of civilian victims, including children, as the result of indiscriminate artillery fire in densely populated areas, as well as the use of heavy weapons, prohibited munitions, including cluster bombs and phosphorus munitions, and tactical rockets. There has been a lack of progress in the investigation into the deaths of people on the "Maidan" and the tragedies in Odessa and Mariupol, as well as attempts to meddle with or conceal evidence.³³

Several days later, on November 3, U.S. Ambassador David Baer decried a fourth purported Russian aid convoy to Ukraine stating:

³⁰ *Id.* at 8.

³¹ *Id.* at 19.

³² *Id.*

³³ *Id.* at 19–21.

The United States . . . strongly condemns Russia's brazen violation of Ukraine's sovereignty and territorial integrity when it for the fourth time sent a white truck "humanitarian" convoy without Ukraine's consent or inspection.

Just as we have expressed our concern over the previous convoys, we express outrage over this continued escalatory act.

[T]here are many problems that we face that are truly hard. This is not hard. There are ways to express genuine humanitarian concern without violating international law or humanitarian principles. The fact that Moscow does not avail itself of these and pursue a legitimate route reflects poorly on Moscow's motives.³⁴

On November 12, at the third Security Council meeting since Russian convoys began entering Ukraine, Power summarized the United States' stance as follows:

This is the Security Council's twenty-sixth meeting on the current crisis in Ukraine. If our message and the message of other countries today on the deteriorating situation in eastern Ukraine sounds familiar, it is for good reason. For while the situation has evolved, the root of the problem remains the same: Russia's flagrant violation of Ukraine's sovereignty and territorial integrity. Time and again, Russia has made commitments and then failed to live up to them, and subsequently offered explanations to the Council that it knows are untrue.

. . . .

At Minsk, all sides committed to permitting the OSCE to monitor and verify the ceasefire. Yet Russian-backed separatists have fired on OSCE monitoring drones and used jamming signals to interfere with its team members' electronics using equipment supplied by Moscow. At Minsk, all sides agreed to permanent monitoring at the Ukrainian-Russian State border and the creation of a security zone along the border. Yet Russia has done nothing to restore Ukrainian Government control over the international border. Russia has refused to press separatists to allow the OSCE access to the border, and Russia continues to flout Ukrainian air space with its helicopters and unmanned aerial vehicles. It also continues to send so-called humanitarian convoys—convoys it will not allow Ukrainian customs authorities or international monitors to search.

. . . .

We remain prepared to roll back sanctions if the fighting stops, the border is closed, the foreign forces and equipment are withdrawn and hostages are released. . . . The problem is, as it has long been throughout this crisis, you cannot reach a political solution if only one side is committed to forging it, and you cannot effectively implement a road map with parties who, like the Russians and the separatists they back, so consistently fail to keep their word.

. . . .

³⁴ Nov. 3 Statement by Ambassador Daniel Baer, *supra* note 9; *see also* Ambassador Daniel Baer, U.S. Embassy to Kyiv, United States Mission to the OSCE: Ongoing Violations of OSCE Principles and Commitments by the Russian Federation and the Situation in Ukraine (Oct. 30, 2014), *at* <http://ukraine.usembassy.gov/statements/osce-ukraine-10302014.html> ("[W]e are concerned to hear reports that Russia plans to send another convoy to Ukraine without consent of the Ukrainian government and not in line with ICRC procedures. As with the three previous Russian convoys, neither the Ukrainian government nor the international community have any idea what will be in the trucks, who will be driving them, and what they will be taking in and out of Ukraine. We urge Russia to work through international and humanitarian organizations to administer aid, in accordance with international standards.").

What we can do—what we must do—is keep ratcheting up the pressure on Russia until it abides by Minsk and chooses the path of de-escalation. Russia’s actions in Ukraine are a threat not only to the countries in Russia’s immediate vicinity but also to the international order.³⁵

Russian Ambassador Alexander Pankin responded:

In the Russian language the word “truth” exists only in the singular. It has no plural, unlike the word “lie,” and in the context of that silenced truth, it would seem logical that the strengthened rebel positions the OSCE monitors have seen are in areas that are under constant attack by the [Ukrainian] armed forces. Apparently Kyiv’s fear of the rebel forces is so great that in order to justify their failures and [Ukraine’s] massive deployment of people and equipment to the front, we are once again hearing loud assertions about Russia sending weapons and members of its regular army. In the Western capitals and through NATO they are shouting pronouncements about virtual deployment of convoys and fighters from Russian territory. But no one is presenting any real facts to confirm such assertions, because this is all empty talk and the usual propagandistic lies.

. . . .

We believe that the full, thorough compliance of the parties to the conflict with the Minsk agreement is essential. In that regard, the first major issue is establishing a genuine ceasefire that both sides would observe responsibly. No less important, however, are the elements of the agreements concerning the decentralization of authority and establishing an inclusive nationwide dialogue and measures for improving the humanitarian and economic situation in Donbas. But the Ukrainian authorities are doing none of those things.

. . . .

Turning now to the humanitarian aspects of the agreements, we find that instead of taking measures to rebuild Donbas, the Ukrainian Government has established a new order for financing its budgetary institutions and meeting social and pension payments—they have simply been cancelled. How can there be any talk of trust from ordinary people’s point of view when their homes being bombed and they themselves lack the wherewithal to live? In that regard, we reject any accusations directed at Russia’s efforts to send humanitarian convoys carrying food, medicines and building materials to Donetsk and Luhansk. In the worsening circumstances, such accusations are simply amoral. And we have had enough of the fabrications and distortions on this subject. Kyiv is informed about every humanitarian convoy fully and in good time, but getting its cooperation is problematic. We get the feeling that it is not very concern[ed] about the fate of its own people in those regions.³⁶

Ukrainian Ambassador Yuriy Sergeyev rejoined:

Ukraine remains devoted to the settlement of the conflict through diplomatic means. The [Trilateral Contact Group] held several meetings, including those in Minsk, on 5 and 19 September. The agreements reached at those meetings—a protocol and a memorandum dated 5 and 19 September, respectively—were supposed to become an important step towards . . . a secure Russian/Ukrainian border and the return of peace and stability to eastern Ukraine

³⁵ 7311th Meeting of the Security Council, UN Doc. S/PV.7311, at 6–8 (Nov. 12, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7311 [hereinafter Nov. 12 Security Council Debate].

³⁶ *Id.* at 18–19.

The commitment to the implementation of the agreements was confirmed during the high-level meeting held in Milan on 17 October, in which the President of the Russian Federation participated.³⁷ Despite their claims, the separatists and the Russian Federation, as their sponsor, continue to commit gross violations of the Minsk agreements

I agree with what my Russian colleague said earlier, that in Russian the word “truth” has no plural form but that the word “lie” does. In that regard, I wish to draw the Council’s attention to a few major points concerning violations of the Minsk agreements.

. . . .

The illegal movement of cargo from the territory of the Russian Federation through the State border, which the Russian delegation today characterized as humanitarian aid, to the civilians of the Donetsk and Luhansk regions, is . . . a matter of deep concern to Ukraine. It was organized without seeking the official consent of the Ukrainian side, without completing the necessary border and customs procedures by the relevant Ukrainian authorities, and without coordinating with the International Committee of the Red Cross for its representatives to accompany the cargo, in breach of the national legislation of Ukraine and the agreements reached earlier. The latest so-called humanitarian convoys crossed the State border of Ukraine on 31 October and 2 and 4 November. We demand that the Russian Federation stop using the issue of humanitarian aid as a cover for delivering illegal supplies of troops, mercenaries and weapons to eastern Ukraine.

. . . .

We agreed in Minsk that the OSCE . . . would ensure the ongoing monitoring and verification of the Ukrainian-Russian border, and envisaged the creation of security zones in the border regions of Ukraine and the Russian Federation. Where are we with that? Ukraine has rendered all necessary assistance to the OSCE Special Monitoring Mission in Ukraine [to] effectively implement its mandate.

Russian-supported militants have not extended security guarantees to OSCE personnel in all areas that they control, and obstruct the Mission’s monitoring activities. Moreover, in order to hide its violations, the Russian military uses cutting-edge electronic technology to jam OSCE drones, thereby disturbing monitoring efforts in the region in spite of the Minsk agreements. The Russian side has also refused to join the consensus on the proposed expansion of the mandate of the existing OSCE observation mission at two Russian border checkpoints to all Russian checkpoints along the 400-kilometre section of the border in the Donetsk and Luhansk regions.

With the Mission’s mandate set to expire on 23 November, we urge the Russian side to demonstrate a clear commitment to the peaceful resolution of the crisis in the eastern Ukraine by agreeing to allow OSCE observers to conduct their monitoring activities at all border crossings with Ukraine and along the entire length of the border in the area. That would contribute to establishing effective border verification by the OSCE, as foreseen in

³⁷ The October 17 Milan talks focused on Ukraine’s gas supply from Russia. Press Release, Meeting of the Leaders of Russia, Ukraine, Germany, and France (Oct. 17, 2014), at <http://eng.kremlin.ru/news/23113>. Those discussions continued with “EC-brokered talks” on October 21 in Berlin and culminated on October 30 with a binding agreement in Brussels. Marie Harf, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (Oct. 21, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/10/233205.htm>; Pasquale De Micco, *Briefing: The Russian-Ukrainian Gas Deal: Taking the Bite Out of Winter?*, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR EXTERNAL POLICIES, POLICY DEP’T, at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536415/EXPO_BRI\(2014\)536415_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536415/EXPO_BRI(2014)536415_EN.pdf) 5. (“[T]he final agreement brokered by the Commission is not entirely transparent: while the binding protocol is public, the annex is secret.”).

the Minsk agreements. Why is there such a stark difference in the approaches adopted by Ukraine and Russia to the role that the OSCE monitors can play in the current situation? Ukraine is open to transparent monitoring and control. Russia and its puppets are not.³⁸

Sergeyev later added: “I would just remind our Russian colleague, citing one of the most famous Russian writers, Turgenev: ‘There is one truth for everyone. Everyone has their own truth, but there is only one real truth.’”³⁹

United States and Afghanistan Sign Bilateral Security Agreement

On September 30, 2014, the United States and Afghanistan signed a bilateral security agreement¹ authorizing the continued presence of U.S. troops in Afghanistan beyond the formal conclusion of the international combat mission on December 28, 2014.² The signing came nearly a year after U.S. Secretary of State John Kerry had said the United States and Afghanistan had finalized the language of the agreement³ and nearly two years after negotiations over the agreement had begun.⁴ The agreement provides that U.S. troops will remain in Afghanistan to train and advise Afghan forces, while also conducting limited counterterrorism operations against Al Qaeda.⁵

Throughout the negotiations in 2013, the United States maintained that failure to reach an agreement by the end of that year would risk the termination of the United States’ presence in Afghanistan entirely—the “zero option.”¹¹ Despite pressure from U.S. and some Afghan

³⁸ Nov. 12 Security Council Debate, *supra* note 35, at 21–22.

³⁹ *Id.* at 24.

¹ Security and Defense Cooperation Agreement, U.S.-Afg., Sept. 30, 2014, at <http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf>. For a brief background of the political context of the agreement, see Declan Walsh & Azam Ahmed, *Mending Alliance, U.S. and Afghanistan Sign Long-Term Security Agreement*, N.Y. TIMES, Sept. 30, 2014, at A6.

² The international combat mission, comprised of NATO and U.S. troops, operated in Afghanistan pursuant to UN Security Council Resolution 1386 and related agreements with Afghanistan. *See* S.C. Res. 1386, UN Doc. S/RES/1386 (Dec. 20, 2001) (establishing the International Security Assistance Force (ISAF), which NATO led); Military Technical Agreement Between the International Security Assistance Force and the Interim Administration of Afghanistan, Jan. 4, 2002, at <http://webarchive.nationalarchives.gov.uk/+http://www.operations.mod.uk/isafmta.pdf> (outlining the responsibilities of the ISAF and the interim administration in providing security, law, and order); Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian, and Civic Assistance, Military and Training Exercises, and Other Activities, U.S.-Afg., May 28, 2003, T.I.A.S. (formalizing the presence of U.S. troops in Afghanistan); Enduring Strategic Partnership Agreement, U.S.-Afg., May 2, 2012, at <http://www.whitehouse.gov/sites/default/files/2012.06.01.u.s.-afghanistanspassignedtext.pdf> (outlining a general framework for continued relations in the decade following the scheduled withdrawal of troops in 2014, including through negotiations for a new Bilateral Security Agreement). *See also* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 101, 101–05 (2014) (describing the negotiations and the political impasse before the signing of the security agreement); John Crook, *Contemporary Practice of the United States*, 106 AJIL 649, 649–50 (2012) (explaining the conditions under which the Enduring Strategic Partnership of 2012 was signed).

³ Karen DeYoung & Tim Craig, *U.S., Afghanistan Agree on Language of Security Accord, says Kerry*, WASH. POST, Nov. 20, 2013, available at http://www.washingtonpost.com/world/national-security/us-afghanistan-agree-on-language-of-security-accord-kerry-says/2013/11/20/85136c40-521a-11e3-a7f0-b790929232e1_story.html.

⁴ *Id.*

⁵ Security and Defense Cooperation Agreement, *supra* note 1.

¹¹ Rod Norland & Alissa J. Rubin, *Karzai’s Bet: U.S. Bluffing in Warning on Security Pact*, N.Y. TIMES, Nov. 27, 2013, at A8; *see also* Daugirdas & Mortenson, *supra* note 2.

officials,¹² then-President Hamid Karzai repeatedly indicated his reluctance to conclude the agreement.¹³ This reluctance was related, in part, to his demand that U.S. troops not enter the homes of Afghan civilians during future counterterrorism operations.¹⁴ The delay also jeopardized any agreement authorizing the continued presence of NATO forces, which was expected to be substantially similar to the U.S. forces agreement.¹⁵

Following the failure to reach an agreement by the end of 2013, U.S. and NATO officials reiterated that continued delay would result in the withdrawal of their troops. In February 2014, Anders Fogh Rasmussen, then-secretary general of NATO, stated that “[o]ur preferred option is to stay,” but “if we don’t have the legal framework in place, we will have to withdraw everything.”¹⁶ U.S. officials warned that such a departure would leave Afghanistan vulnerable to the reemergence of a prominent Al Qaeda presence. General Joseph Dunford, then U.S. and NATO commander in Afghanistan, asserted that “[a] withdrawal, in my mind, means abandoning the people of Afghanistan . . . and then providing Al Qaeda the space within which to begin again to plan and conduct operations against the West.”¹⁷

At that time, senior U.S. officials signaled their willingness to wait until the completion of Afghan presidential elections, to be held on April 5, 2014, to finalize the agreement¹⁸—all ten candidates had expressed their willingness to sign the security pact.¹⁹ By contrast, Karzai, in his final address to Afghanistan’s parliament in March, declared that U.S. troops could leave by the end of the year because the Afghan military already protected 93 percent of the country and was capable of taking over entirely.²⁰ Karzai is quoted as saying, “I want to say to all those foreign countries who maybe out of habit or because they want to interfere, that they should not interfere.”²¹ The election resulted in a runoff, scheduled for June 14, between Ashraf Ghani, a former finance minister, and Abdullah Abdullah, a former foreign minister.²²

¹² Tim Craig & Karen DeYoung, *Karzai Tells Susan Rice of More Demands for Accord Extending U.S. Troop Presence*, WASH. POST, Nov. 25, 2013, available at http://www.washingtonpost.com/world/national-security-adviser-susan-rice-visits-afghanistan-amid-tension-over-troop-accord/2013/11/25/fd0f8460-55dd-11e3-835d-e7173847c7cc_story.html; see also Rod Norland, *Elders Back Security Pact That Karzai Won’t Sign*, N.Y. TIMES, Nov. 25, 2013, at A4.

¹³ Nathan Hodge, Dion Nissenbaum & Yaroslav Trofimov, *Afghan Leader Jeopardizes Security Pact*, WALL ST. J., Nov. 21, 2013, available at <http://online.wsj.com/articles/SB10001424052702304791704579211271054226730>.

¹⁴ *Id.*; see also Norland, *supra* note 12.

¹⁵ Press Release, John Kerry, Sec’y of State, U.S. Dep’t of State, Solo Press Availability at NATO (Dec. 3, 2013), at <http://www.state.gov/secretary/remarks/2013/12/218268.htm>.

¹⁶ Anders Fogh Rasmussen, Sec’y Gen., N. Atl. Treaty Org., Doorstep Statement by the NATO Secretary General at the Start of the NATO Defence Ministers Meeting (Feb. 26, 2014), at http://www.nato.int/cps/en/natolive/opinions_107404.htm.

¹⁷ General Joseph F. Dunford, Hearing to Receive Testimony on the Situation in Afghanistan, Senate Committee on Armed Services (Mar. 12, 2014), at <http://www.armed-services.senate.gov/imo/media/doc/14-19%20-%203-12-14.pdf>.

¹⁸ Adam Entous & Julian E. Barnes, *Frustrated by Karzai, U.S. Shifts Afghanistan Exit Plans*, WALL ST. J., Feb. 10, 2014, available at <http://online.wsj.com/articles/SB10001424052702303874504579375211469366596>.

¹⁹ Kathy Gannon & Rahim Faiez, *Karzai Says Afghanistan Doesn’t Need U.S. Troops to Stay Past End of Year*, WASH. POST, Mar. 15, 2014, available at http://www.washingtonpost.com/world/asia_pacific/karzai-says-afghanistan-doesnt-need-us-troops-to-stay-past-end-of-year/2014/03/15/72e9017a-ac73-11e3-a06a-e3230a43d6cb_story.html.

²⁰ *Id.*

²¹ *Id.*

²² See Tim Craig & Sharif Hassan, *Afghanistan’s Karzai Calls for Candidates Abdullah, Ghani to Put Aside Differences*, WASH. POST, Sept. 9, 2014, available at <http://www.washingtonpost.com/world/war-zones/afghanistans->

Between the first and second rounds of the election, Obama outlined a plan for the continued presence of U.S. troops. A residual force of 9,800 U.S. troops would remain for one year following the end of the international combat mission;²³ that force would be cut in half by the end of 2015, and eventually reduced to a small military presence of several hundred at the U.S. Embassy in Kabul by the end of 2016.²⁴ During this period, the troops would concentrate on training Afghan security forces and pursuing any remaining Al Qaeda presence.²⁵

By August, disputes over alleged fraud in the second round of voting²⁶ resulted in fears that a group of Afghan ministers linked to security forces “would seize power and install an interim government.”²⁷ The Obama administration made multiple efforts to address the situation: Kerry traveled to Kabul twice to try to broker a resolution²⁸ while Obama telephoned each candidate several times.²⁹ Obama publicly commented that lack of a political consensus in Afghanistan would limit the United States’ ability to maintain a military presence.³⁰ Despite such warnings, Obama’s advisers acknowledged the president would not pursue the “zero option” and would work with NATO allies to train and equip Afghan forces to the extent possible even without a new security agreement,³¹ albeit under the less strategically effective conditions of the 2012 Enduring Strategic Partnership Agreement between Afghanistan and the United States.³²

After contentious negotiations between Ghani and Abdullah, the two agreed to a power-sharing deal in which Ghani would be president and Abdullah would assume the newly created position of chief executive.³³ In his inaugural speech on September 29, Ghani expressed plans for a broad reform agenda, demarcating a departure from his predecessor’s leadership style and

karzai-calls-for-candidates-abdullah-ghani-to-put-aside-differences/2014/09/09/d5be042e-381b-11e4-9c9f-ebb47272e40e_story.html (describing concerns about potential violence before the runoff).

²³ Karen DeYoung, *Obama to Leave 9,800 Troops in Afghanistan*, WASH. POST, May 27, 2014, available at http://www.washingtonpost.com/world/national-security/obama-to-leave-9800-us-troops-in-afghanistan-senior-official-says/2014/05/27/57f37e72-e5b2-11e3-a86b-362fd5443d19_story.html.

²⁴ *Id.*

²⁵ Mazzetti & Schmitt, *supra* note 8.

²⁶ Kevin Sieff, *Afghans Protest Alleged Election Fraud*, WASH. POST, June 21, 2014, available at http://www.washingtonpost.com/world/afghans-protest-alleged-election-fraud/2014/06/21/86348a91-57cf-4428-88db-2dbc609b6d2a_story.html.

²⁷ Mark Landler, *Obama Holds to Afghanistan Withdrawal Deadline*, N.Y. TIMES, Aug. 19, 2014, at A3.

²⁸ *Id.*

²⁹ Rod Norland, *Afghan Presidential Rivals Finally Agree on Power-Sharing Deal*, N.Y. TIMES, Sept. 20, 2014, at A13 (noting that “in addition to Mr. Kerry’s interventions, Obama called each of the candidates three times since the runoff, and the American ambassador, James B. Cunningham, and other American diplomats met with Mr. Ghani 39 times, Mr. Abdullah 42 times and Mr. Karzai 15 times in an effort to broker the settlement”).

³⁰ Landler, *supra* note 27.

³¹ *Id.*

³² Enduring Strategic Partnership Agreement, *supra* note 2. Although this agreement provided a framework for the continued presence of some U.S. troops, the lack of a bilateral security agreement presented significant practical obstacles. Among other issues, the Enduring Strategic Partnership Agreement offered uncertain legal protections for U.S. troops and included a cut-off point—the end of 2014—beyond which U.S. troops would not be permitted to access Afghan facilities. *Id.* at III(2)b-c; VIII(1)

³³ Tim Craig, *Ghani Named Winner of Afghan Election, Will Share Power with Rival in New Government*, WASH. POST, Sept. 21, 2014, available at http://www.washingtonpost.com/world/ghani-abdullah-agree-to-share-power-in-afghanistan-as-election-stalemate-ends/2014/09/21/df58749a-416e-11e4-9a15-137aa0153527_story.html.

policies, including in relation to cooperation with U.S. and NATO troops.³⁴ The day following the inauguration, Afghanistan and the United States and Afghanistan, as well as Afghanistan and NATO, signed security agreements.³⁵

As announced in May, the agreement permits 9,800 U.S. troops, stationed at nine separate bases around the country, to remain in Afghanistan³⁶ to train Afghan security forces; the troops include special operations forces who will undertake counterterrorism missions.³⁷ A U.S. base in the eastern Afghan city of Jalalabad may also remain a launching point for armed drone missions into Pakistan.³⁸ The number of troops would be halved by 2016, with U.S. forces remaining only in Kabul and at Bagram air base.³⁹ By the end of 2017, U.S. forces would be reduced to “a military advisory component at the U.S. Embassy in Kabul,” numbering around several hundred.⁴⁰ The agreement would remain in force “until the end of 2024 and beyond” unless terminated by either side with two years’ notice.⁴¹ The United States also remains committed to funding military training activities and civilian aid.⁴²

The agreement is largely identical to the draft that was agreed upon in November 2013,⁴³ and contains a number of provisions outlining the scope of the United States’ authority over its own personnel. Article 13 retains the United States’ “exclusive right to exercise jurisdiction” over U.S. troops “in respect of any criminal or civil offenses committed in the territory of Afghanistan,” but stipulates that Afghan and U.S. personnel will cooperate to investigate and resolve legal disputes involving U.S. troops.⁴⁴ In addition, “Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees.”⁴⁵ Article 22 provides for the waiver of any and all claims between the parties for damages to property or the death of either U.S. or Afghan troops, as well as their “respective civilian components,” that may arise out of the performance of official duties in Afghanistan.⁴⁶

The agreement also imposes new limits on the ability of U.S. troops to enter Afghan homes during counterterrorism and military operations.⁴⁷ Article 2(4) provides that “the Parties

³⁴ Rod Norland & Declan Walsh, *President Ashraf Ghani of Afghanistan Is Sworn In, Even as He Shares the Stage*, N.Y. TIMES, Sept. 29, 2014, at A6.

³⁵ Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Concerning Mutually Agreed NATO-Led Activities in Afghanistan (Sept. 30, 2014), at http://www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en; Security and Defense Cooperation Agreement, *supra* note 1.

³⁶ Walsh & Ahmed, *supra* note 1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sudarsan Raghavan & Karen DeYoung, *U.S. and Afghanistan Sign Vital, Long-Delayed Security Pact*, WASH. POST, Sept. 30, 2014, available at http://www.washingtonpost.com/world/us-afghanistan-sign-security-pact-to-allow-american-forces-to-remain-in-country/2014/09/30/48f555ce-4879-11e4-a046-120a8a855cca_story.html.

⁴⁰ *Id.*

⁴¹ Security and Defense Cooperation Agreement, *supra* note 1, art. 26(1).

⁴² See U.S. Dep’t of State, Background Briefing Call on the U.S.-Afghanistan Security and Defense Cooperation Agreement (Sept. 30, 2014), at <http://www.state.gov/r/pa/prs/ps/2014/09/232345.htm> [hereinafter Background Briefing Call] (indicating that although civilian assistance would shrink as the troops are drawn down, the United States still has “a long-term commitment to Afghanistan’s economic sustainability”).

⁴³ *Id.*

⁴⁴ Security and Defense Cooperation Agreement, *supra* note 1.

⁴⁵ *Id.* at art. 13(6).

⁴⁶ *Id.* at art. 22(1).

⁴⁷ Daugirdas & Mortenson, *supra* note 2, at 102.

acknowledge that U.S. military operations to defeat Al Qaeda and its affiliates may be appropriate in the common fight against terrorism,” and they will pursue those ends “with the intention of protecting U.S. and Afghan national interests without unilateral U.S. military counterterrorism operations.”⁴⁸ Instead, U.S. counterterrorism operations “are intended to complement and support” those of the Afghan National Defense and Security Forces, “with full respect for Afghan sovereignty and full regard for the safety and security of the Afghan people, including in their homes.”⁴⁹ Article 3 notes that “United States forces shall not enter Afghan homes for the purpose of military operations and searches except under extraordinary circumstances involving urgent risk to life and limb of U.S. nationals”⁵⁰ and they “shall not arrest or imprison Afghan nationals, nor maintain or operate detention facilities in Afghanistan.”⁵¹ (On December 11, 2014, the United States announced it had closed its last detention facility in Afghanistan.⁵²)

In contrast, the NATO status of forces agreement allows around 4,000 NATO troops to remain in Afghanistan in a noncombat role after 2014.⁵³ The troops will largely focus on assisting the United States in training Afghan security forces.⁵⁴

U.S. officials heralded the security agreement.⁵⁵ Noting the winding path of its negotiation, senior U.S. Department of State officials suggested that the finalization of the agreement had perhaps not been as uncertain as was portrayed publicly:

I would say the acrimony was often overstated, because while President Karzai made statements that are well known, at the same time the great majority of Afghan Government officials were supportive of signing the [bilateral security agreement] and of the relationship with the United States, the great majority of the Afghan public was supportive of signing the agreement and of the relationship with the United States So . . . while some of his sentiments were not unique to him, I think there’s a breadth and depth of commitment to the relationship with the United States in Afghanistan that is sometimes overlooked.⁵⁶

Ghani likewise commended the finalization of the agreement. “We have signed an agreement for the good of our people,” he said at the signing ceremony.⁵⁷ However, he stressed the monetary and procedural commitments accompanying the continued presence of international forces: the United States and NATO pledged \$16 billion in economic aid to Afghanistan; U.S.

⁴⁸ Security and Defense Cooperation Agreement, *supra* note 1.

⁴⁹ *Id.* at art. 2(4).

⁵⁰ *Id.* at art. 3(3).

⁵¹ *Id.*

⁵² Frank Jack Daniel, *U.S. Closes Bagram Prison, Says No More Detainees Held in Afghanistan*, REUTERS, Dec. 11, 2014, available at http://www.reuters.com/article/2014/12/11/us-usa-cia-torture-bagram-idUSKBN0JO2B720141211?utm_source=Sailthru&utm_medium=email&utm_term=%2AAAPak%20Daily%20Brief&utm_campaign=2014_The%20South%20Asia%20Daily%2012-11.

⁵³ Walsh & Ahmed, *supra* note 1.

⁵⁴ *Id.*

⁵⁵ John Kerry, Sec’y of State, U.S. Dep’t of State, Press Statement: Signing of Bilateral Security Agreement and NATO Status of Forces Agreement (Sept. 30, 2014), at <http://www.state.gov/secretary/remarks/2014/09/232329.htm>; Barack Obama, Statement by the President on the Signing of the Bilateral Security Agreement and NATO Status of Forces Agreement in Afghanistan (Sept. 30, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/30/statement-president-signing-bilateral-security-agreement-and-nato-status>.

⁵⁶ Background Briefing Call, *supra* note 42.

⁵⁷ Walsh & Ahmed, *supra* note 1.

forces are limited in their ability to raid Afghan homes; foreign contractors are subject to Afghan jurisdiction and regulation; and both countries have the right to withdraw from the pact in two years.⁵⁸

A number of questions remained at the time of the signing. Over the summer, a multifront Taliban offensive called into question the ability of Afghan security forces, even with additional training, to keep the Taliban in check.⁵⁹ The use of U.S. airstrikes was also undecided. Karzai had virtually banned such attacks, but Ghani had signaled a willingness to reconsider the policy.⁶⁰

Some of these issues appear to have been addressed in late October⁶¹ when Obama reportedly approved—pursuant to the 2001 Authorization for the Use of Military Force⁶²—a broader role for U.S. troops than had been previously announced.⁶³ Obama authorized U.S. military leaders in Afghanistan to undertake combat operations—with the use of ground forces, manned aircrafts, and drones—in three circumstances: “against Al Qaeda and other ‘transnational’ terrorist groups, [for the] protection of U.S. forces engaged in training or other activities, and [in] assistance to Afghan forces.”⁶⁴ According to reports, U.S. military officials encouraged the decision, fearing total⁶⁵ collapse of Afghan forces in the face of the increasingly aggressive Taliban presence in some provinces.⁶⁶ In turn, Ghani and his national security adviser reportedly agreed to the expanded role because of similar concerns over the rising number of casualties resulting from the expanded Taliban presence.⁶⁷ Following the decision, the Ghani administration reportedly reauthorized nighttime raids.⁶⁸

U.S. and Afghan officials emphasized that the authorization would not drastically alter the course set out in the bilateral security agreement. White House officials noted that “the United States’ combat mission in Afghanistan will be over by the end of this year” but “the United States may provide combat enabler support to the [Afghan National Security and Defense Forces] in limited circumstances to prevent detrimental strategic effects to these Afghan security forces.”⁶⁹ A senior military official similarly cabined the authorization, noting it was “not a license for offensive combat operations against the Taliban just because we still have U.S. capabilities in the country.”⁷⁰ An Afghan presidential spokesperson expressed guarded support for the expanded combat role of U.S. troops, commenting that although “in the fight against

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Karen DeYoung & Missy Ryan, *Afghan Mission for U.S. to Continue under New Authorities*, WASH. POST, Nov. 22, 2014, available at http://www.washingtonpost.com/world/national-security/white-house-gives-commanders-broader-authority-to-support-afghan-troops/2014/11/22/8741f2fc-724e-11e4-ad12-3734c461eab6_story.html.

⁶² *Id.*

⁶³ Mazzetti & Schmitt, *supra* note 8.

⁶⁴ DeYoung & Ryan, *supra* note 61.

⁶⁵ Mazzetti & Schmitt, *supra* note 8.

⁶⁶ See, e.g., Azam Ahmed, *Hour's Drive Outside Kabul, Taliban Reign*, N.Y. TIMES, Nov. 23, 2014, at A1 (describing violence in the Tagab district of Kapisa Province).

⁶⁷ Raghavan, *supra* note 6.

⁶⁸ Rod Norland & Taimoor Shah, *Afghanistan Quietly Lifts Ban on Nighttime Raids*, N.Y. TIMES, Nov. 24, 2014, at A9.

⁶⁹ Norland & Shah, *supra* note 68.

⁷⁰ DeYoung & Ryan, *supra* note 65.

international terrorism and training of our national security forces, we count on the support and assistance of our international partners,” Afghan troops would be “responsible for the security and defense of the Afghan people.”⁷¹

United States Announces “Changes and Confirmations” in Its Interpretation of the UN Convention Against Torture

On November 12, 2014, in a presentation before the UN Committee Against Torture, the United States described several “changes and confirmations” in its interpretation of the United States’ obligations under the UN Convention Against Torture (CAT).¹ The presentation was made pursuant to Article 19 of the CAT, which requires that parties submit “reports on the measures they have taken to give effect to their undertakings under th[e] Convention.”² Reports must be submitted one year after the treaty enters into force and subsequently every four years.³

The United States had previously declined to address the geographic scope of its international obligations under the CAT.⁴ A 2013 report to the Committee Against Torture, for example, had described the scope of the prohibition under domestic law as follows:

Under U.S. law, officials of all government agencies are prohibited from engaging in torture, at all times, and in all places, not only in territory under U.S. jurisdiction. Under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-163, 42 U.S.C. 2000dd (“No individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment”), every U.S. official, wherever he or she may be, is also prohibited from engaging in acts that constitute cruel, inhuman or degrading treatment or punishment. This prohibition is enforced at all levels of U.S. government.⁵

The 2013 report specified, however, that it “does not address the geographic scope of the Convention as a legal matter, although it does respond to related questions from the Committee in factual terms.”⁶

⁷¹ Raghavan, *supra* note 6.

¹ Bernadette Meehan, Spokeswoman, U.S. Nat’l Sec. Council, Statement on the U.S. Presentation to the Committee Against Torture (Nov. 12, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a>. See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 17–18, *opened for signature* Dec. 10, 1984, 1465 UNTS 85 [hereinafter Convention Against Torture]. The United States has been a party to the Convention Against Torture since November 20, 1994. The Committee Against Torture is a body of ten independent experts that monitors implementation of the Convention Against Torture. *Committee Against Torture*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, at <http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx>.

² See Convention Against Torture, art. 19; G.A. Res. 39/46, art. 19, UN Doc. A/RES/39/46 (Dec. 10, 1984).

³ *Id.*

⁴ Periodic Report of the United States of America to the United Nations Committee Against Torture, Aug. 12, 2013, at <http://www.state.gov/j/drl/rls/213055.htm>.

⁵ *Id.* para. 13.

⁶ *Id.* para. 5. According to news reports, Harold Koh, then-legal adviser of the U.S. Department of State, wrote a lengthy memo in January 2013, concluding that the position that the CAT has no application abroad is “not legally available to policymakers.” Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES, Mar. 6, 2014, at <http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html>; see also Harold Hongju Koh, *Memo to the President: Say Yes to the Torture Ban*, POLITICO, Nov. 5, 2014, at <http://www.politico.com/magazine/story/2014/11/memo-to-the-president-say-yes-to-the-comprehensive-torture-ban-112598.html>.

At the November 2014 presentation, by contrast, Mary McLeod, acting legal adviser of the U.S. Department of State, indicated that “[t]here should be no doubt, the United States affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times and in all places, and we remain resolute in our adherence to these positions.”⁷

Addressing the requirement that each state party *prevent* “in any territory under its jurisdiction” acts of torture and acts of cruel, inhuman or degrading treatment or punishment,⁸ McLeod explained the geographical scope of the United States’ obligations as follows:

[W]e understand that where the text of the Convention provides that obligations apply to a State Party in “any territory under its jurisdiction,” such obligations, including the obligations in Articles 2 and 16 to prevent torture and cruel, inhuman or degrading treatment or punishment, extend to certain areas beyond the sovereign territory of the State Party, and more specifically to “all places that the State Party controls as a governmental authority.” We have determined that the United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and with respect to U.S. registered ships and aircraft.⁹

In her statement, McLeod used language similar to that used by the Reagan administration to describe the United States’ obligations under the CAT when it submitted the treaty to the Senate for its consent.¹⁰

There is some disagreement about the extent to which the position announced in 2014 diverges from positions taken by the Bush administration. In 2006, the United States had explicitly rejected the view that the obligation in Article 16 applied to territories outside of the United States but within its *de facto* control. At that time, the United States had claimed:

By its terms, Article 16 of the CAT obliges States Parties “to prevent *in any territory under its jurisdiction* other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of “territory under [the] jurisdiction” of the United States. The United States does not accept the concept that “de facto control” equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention that indicates that the two are equivalent.¹²

The United States had also appeared to reject the view that Article 16 of the CAT applied to U.S. registered ships and aircraft. Its written comments to the Committee Against Torture included the following interpretive point:

⁷ Mary E. McLeod, Acting Legal Adviser, U.S. Dep’t of State, Opening Statement at the U.S. Periodic Review Before the UN Committee Against Torture (November 12, 2014), at <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places>; see also Tom Malinowski, Opening Statement at the U.S. Periodic Review Before the UN Committee Against Torture (November 12, 2014), at <https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions> (“We believe that torture, and cruel, inhuman and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions.”).

⁸ G.A. Res. 39/46, art. 12, 16, UN Doc. A/RES/39/46 (Dec. 10, 1984).

⁹ McLeod, *supra* note 7.

¹⁰ See S. TREATY DOC. NO. 100–20, at 13 (1984) (“The term ‘territory under its jurisdiction’ refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State.”); see also Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014), at <http://justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality>.

¹² U.S. Dep’t of State, United States Written Response to Questions Asked by the Committee Against Torture para. 44 (Apr. 28, 2006), at <http://www.state.gov/j/drl/rls/68554.htm>.

Article 16 is limited, by its own terms, to “territory under [the State Party’s] jurisdiction.” Article 5 of the CAT expressly distinguishes between “territory under [a State Party’s] jurisdiction” and “on board a ship or aircraft of that State.” See Article 5(a) (requiring a State Party to “establish its jurisdiction” over offenses that constitute torture “[w]hen the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State”).¹³

These comments apparently reflected a compromise reached among different agencies within the U.S. government.¹⁴ In 2005, Stephen Bradbury, the principal deputy assistant attorney general, wrote a memo for the Central Intelligence Agency (CIA) concluding that the CIA’s interrogation program, which was implemented, among other places, at Guantanamo Bay, could not violate Article 16 of the CAT because “the interrogations conducted by the CIA do not take place in any ‘territory under [United States] jurisdiction’ within the meaning of Article 16.”¹⁵ The memo identified the United States’ reservation to Article 16, which interprets the Article as prohibiting only conduct which would violate the Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution, as placing a territorial limit on its application because “[t]hese Amendments have been construed by the courts not to extend protections to aliens outside the United States.”¹⁶

In 2009, the Obama administration withdrew this and three other memos regarding the CIA’s interrogations, indicating that they “no longer represent the views of the Office of Legal Counsel.”¹⁷ The most recent announcement serves to expressly confirm the implications of the withdrawal: the Obama administration understands jurisdiction under U.S. control to include Guantanamo Bay.¹⁸

The Obama administration also clarified its view of the relationship between the CAT and the law of armed conflict. National Security Council Spokeswoman Bernadette Meehan stated:

[A] time of war does not suspend the operation of the Convention, which continues to apply even when a State is engaged in armed conflict. Although the more specialized laws of war—which contain parallel categorical bans on torture and other inhumane treatment

¹³ *Id.*

¹⁴ See John B. Bellinger, III, *The Convention Against Torture: Extraterritorial Application and Application to Military Operations*, LAWFARE (Oct. 26, 2014), at <http://www.lawfareblog.com/2014/10/the-convention-against-torture-extraterritorial-application-and-application-to-military-operations> (“This [2006] statement left open the possibility that the U.S. does accept that Article 16 applies outside the U.S. in some cases. This was a compromise statement agreed among various agencies, in light of the view of the Justice Department that Article 16 did not apply outside the territory of the United States in any circumstances, and the position of the Department of State that Article 16 applied to territory outside the United States in certain circumstances.”).

¹⁵ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice to John A. Rizzo, Sen. Dep’y Gen. Counsel, Central Intelligence Agency, at 16 (May 30, 2005), at <http://fas.org/irp/agency/doj/olc/article16.pdf>.

¹⁶ *Id.* The reservation reads in full: “That the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” 136 Cong. Rec. 36198 (1990) [hereinafter U.S. Reservation].

¹⁷ Memorandum from David J. Barron, Acting Assistant Att’y Gen., to the Att’y Gen. (Apr. 15, 2009), at <http://fas.org/irp/agency/doj/olc/withdraw-0409.pdf>.

¹⁸ See Cleveland, *supra* note 10.

in situations of armed conflict—take precedence over the Convention where the two conflict, the laws of war do not generally displace the Convention’s application.¹⁹

McLeod reiterated:

Although the law of armed conflict is the controlling body of law with respect to the conduct of hostilities and the protection of war victims, a time of war does not suspend operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed conflict. The obligations to prevent torture and cruel, inhuman, and degrading treatment and punishment in the Convention remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict.²⁰

McLeod’s statement addressed concerns that arose after the United States submitted its second periodic report to the Committee Against Torture in 2006. At the review, former U.S. Department of State Legal Adviser John B. Bellinger, III, stated in his opening remarks that “[i]t is the view of the United States that these detention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations.”²¹ Based on this remark, some suggested the United States did not consider the CAT to apply at all during times of armed conflict.²² Bellinger has argued, however, that the United States has always considered the CAT to apply at all times and suggested McLeod’s statements serve as an affirmation of the Bush administration’s position.²³ The United States’ position under the Bush administration was that the specialized laws of war, as opposed to the CAT, apply to military operations and conduct, but in no way displace or suspend operation of the Treaty in general.²⁴ Others argue that the announcement signals an important shift that brings the United States’ view “much closer to the Committee’s position” that the CAT applies “at all times, whether in peace, war or armed conflict.”²⁵

¹⁹ Meehan, *supra* note 1.

²⁰ McLeod, *supra* note 7.

²¹ John B. Bellinger, III, Legal Adviser, U.S. Dep’t of State, Opening Remarks at the U.S. Periodic Review Before the UN Committee Against Torture (May 5, 2006), at <http://www.state.gov/j/drl/rls/68557.htm>.

²² Sarah Cleveland, *The United States and the Torture Convention, Part II: Armed Conflict*, JUST SECURITY (Nov. 19, 2014), at <http://justsecurity.org/17581/united-states-torture-convention-armed-conflict> (arguing that the announcement signals an important shift that brings the U.S. “much closer to the Committee’s position” that the Convention applies “at all times, whether in peace, war or armed conflict”).

²³ See John B. Bellinger, III, *U.S. Delegation Asserts Article 16 of Convention Against Torture Applies Outside U.S. Territory in Certain Circumstances, but Law of Armed Conflict “Takes Precedence” in Situations of Armed Conflict*, LAWFARE (Nov. 12, 2014), at <http://www.lawfareblog.com/2014/11/u-s-delegation-asserts-article-16-of-convention-against-torture-applies-outside-u-s-territory-in-certain-circumstances-but-law-of-armed-conflict-takes-precedence-in-situations-of-armed-conflict/> (“[T]he U.S. Government has reaffirmed that the law of armed conflict, or international humanitarian law, is the *lex specialis* applicable to U.S. military operations. Although the U.S. was criticized . . . for stating this same position in 2006, this was a longstanding U.S. view.”).

²⁴ See Bellinger, *supra* note 13 (noting that with regard to torture and CIDT, “the substantive standards are the same under international law” for both the laws of war and international human rights law).

²⁵ Cleveland, *supra* note 21. In two memoranda, later withdrawn by the Obama Administration, Steven G. Bradbury argued that while CIA interrogation methods comply with U.S. domestic law, “[n]othing in this memorandum . . . should be read to suggest that the use of these techniques would conform to . . . United States obligations under the Geneva Conventions in circumstances where those Conventions apply. We do not address the application of article 16 of the United Nations Convention Against Torture.” Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, Memorandum for John A. Rizzo, Sen. Dep’y Gen. Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*, at 1 (May 10, 2005). The note may suggest an understanding that the choice of

Finally, Meehan explained that the “U.S. delegation will affirm the United States’ obligation to abide by the exclusionary rule set forth in Article 15 of the Convention in the Periodic Review Board process for law of war detainees at Guantanamo, as well as in military commissions.”²⁶ Because Article 15 has no complementary provision in the Geneva Conventions or the two additional protocols,²⁷ it was previously unclear whether the United States considered Article 15 as applying to Guantanamo Bay proceedings. Meehan’s statement expressly affirms that the United States considers Article 15 to apply to military proceedings, and it provides an example of how the Obama administration interprets the CAT as informing and complementing existing international humanitarian law.

The UN Committee Against Torture released its report on the United States’ compliance with the CAT on November 28, 2014.²⁸ In it, the Committee “welcome[d] the State party’s unequivocal commitment to abide by the universal prohibition of torture and ill-treatment everywhere.”²⁹ The Committee also noted that it “value[d] the statement made by the State party’s delegation that . . . the obligations in article 16 [of the CAT] apply beyond the sovereign territory of the United States to any territory under its jurisdiction.”³⁰ However, the Committee reiterated its view that the United States should withdraw its reservation to Article 16 of the CAT. The reservation states that the prohibitions against cruel, inhuman or degrading treatment in the Treaty are understood as “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”³¹ The Committee expressed its concern that as long as the reservation remains in place, the prohibitions under Article 16 may be subject to limiting interpretations, such as those in the memoranda circulated under the Bush administration.³²

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States and China Make Joint Announcement to Reduce Greenhouse Gas Emissions, Bolstering Multilateral Climate Change Negotiations

The United States and China are among the world’s largest emitters of greenhouse gases; as the White House acknowledges, together they “account for over one third of global greenhouse

legal regimes requires a binary choice between the laws of war and the CAT—meaning, that one must apply to the exclusion of the other—apply, as opposed to the newly iterated understanding that the two apply concurrently and complement and inform each other.

²⁶ Meehan, *supra* note 1.

²⁷ Cleveland, *supra* note 21.

²⁸ UN Committee Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of United States of America, CAT/C/USA/CO/3-5 (Nov. 28, 2014), at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=5 [hereinafter Concluding Observations].

²⁹ *Id.* para. 10.

³⁰ *Id.*

³¹ U.S. Reservation, *supra* note 15.

³² The Committee cites the discussion of the Article 16 reservation in the declassified “Torture Memos” as evidence that impermissible legal interpretations are possible as long as the reservation persists: “While noting that these memoranda were revoked by Presidential Executive Order 13491 to the extent of their inconsistency with that order, the Committee remains concerned that the State party has not withdrawn yet its reservation to article which could permit interpretations incompatible with the absolute prohibition of torture and ill treatment.” Concluding Observations, *supra* note 27, para. 10

gas emissions.”¹ After many months of bilateral talks, on November 11, 2014, the two countries made a joint announcement articulating targets for reducing emissions on greenhouse gases.² The announcement states, in part:

1. The United States of America and the People’s Republic of China have a critical role to play in combating global climate change, one of the greatest threats facing humanity. The seriousness of the challenge calls upon the two sides to work constructively together for the common good.
2. To this end, President Barack Obama and President Xi Jinping reaffirmed the importance of strengthening bilateral cooperation on climate change and will work together, and with other countries, to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at the United Nations Climate Conference in Paris in 2015. They are committed to reaching an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.
3. Today, the Presidents of the United States and China announced their respective post-2020 actions on climate change, recognizing that these actions are part of the longer range effort to transition to low-carbon economies, mindful of the global temperature goal of 2°C. The United States intends to achieve an economy-wide target of reducing its emissions by 26%–28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%. China intends to achieve the peaking of CO₂ emissions around 2030 and to make best efforts to peak early and intends to increase the share of non-fossil fuels in primary energy consumption to around 20% by 2030. Both sides intend to continue to work to increase ambition over time.³

As explained in more detail below, neither the United States nor China currently has an international obligation to achieve a specific level of reduction of greenhouse gas emissions. Both states have previously made nonbinding commitments to achieve certain reductions, however—and their newly announced commitments go beyond those earlier commitments.

In addition, the United States and China are participating in multilateral negotiations regarding climate change. In their joint announcement, they expressed their hope that their new commitments would help those negotiations reach a successful conclusion:

The United States and China hope that by announcing these targets now, they can inject momentum into the global climate negotiations and inspire other countries to join in coming forward with ambitious actions as soon as possible, preferably by the first quarter of

¹ Office of the Press Sec’y, The White House, Fact Sheet: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation (Nov. 11, 2014), at <https://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c> [hereinafter Nov. 11 White House Press Release]; Robert Stowe, *The U.S.-China Deal on Climate Change: Minilateralism at Work*, ENERGY COLLECTIVE (Nov. 17, 2014), at <http://theenergycollective.com/robertstowe/2156196/us-china-deal-climate-change-minilateralism-work>.

² Press Release, Office of the Press Sec’y, The White House, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change> [hereinafter U.S.-China Joint Announcement]; Matt Hoyer & Holly Yan, *U.S. and China Reach Historic Climate Change Deal, Vow to Cut Emissions*, CNN (Nov. 12, 2014), at <http://www.cnn.com/2014/11/12/world/us-china-climate-change-agreement>; Mark Landler, *U.S. and China Reach Climate Accord After Months of Talks*, N.Y. TIMES, Nov. 11, 2014, available at <http://www.nytimes.com/2014/11/12/world/asia/china-us-xi-obama-apec.html>.

³ U.S.-China Joint Announcement, *supra* note 2.

2015. The two Presidents resolved to work closely together over the next year to address major impediments to reaching a successful global climate agreement in Paris.⁴

Ongoing multilateral negotiations are scheduled to culminate in Paris in December 2015.⁵

The first multilateral agreement regarding climate change—the United Nations Framework Convention on Climate Change (UNFCCC)⁶—to which both the United States and China are party, was adopted in 1992. The UNFCCC identifies its ultimate objective as achieving “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁷ The UNFCCC does not translate this objective into numerical terms, nor does it impose legally binding quantitative limits on parties’ emissions of greenhouse gases. The periodic meetings of the Conference of the Parties to the UNFCCC have, however, been the key venue for negotiating the Kyoto Protocol to the UNFCCC (Kyoto Protocol⁸) and a series of additional and more specific commitments.⁹

The Kyoto Protocol, adopted in 1997, imposes legally binding quantitative limits on the emissions of greenhouse gases through 2020—but only for industrialized states.¹⁰ These limits do not bind the United States because it declined to become a party to the Kyoto Protocol.¹¹ China acceded to the Protocol in 2002;¹² like other developing countries, it was not obliged to reduce its greenhouse gas emissions by a specific amount. The United States has repeatedly objected to the dichotomy between developing and developed states and specifically cited China’s lack of binding commitments to justify its refusal to participate in the Kyoto Protocol.¹³

In 2008, for the first time since the United States renounced the Kyoto Protocol, the parties to the UNFCCC agreed “to launch a comprehensive process to enable the full, effective and sustained implementation of the [UNFCCC].”¹⁴ On December 18, 2009, delegations to the fifteenth Conference of the Parties—including the United States—agreed to the Copenhagen Accord.¹⁵ The Accord, for the first time, translated the UNFCCC’s goal into a numerical

⁴ *Id.*

⁵ Conference of the Parties, Rep. on its 19th Sess., Nov. 28–Dec. 11, 2011, Decision 1/CP.17 UN Doc. FCCC/CP/2011/9/Add.1 para. 4 (Mar. 15, 2012). Dec. 11, 2011); see also U.S.-China Joint Announcement, *supra* note 2.

⁶ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107 [hereinafter Convention on Climate Change].

⁷ *Id.* at art. 2.

⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc. FCCC/CP/1997/7/Add.1 (Dec. 11, 1997) [hereinafter Kyoto Protocol].

⁹ See Convention on Climate Change, *supra* note 6, art. 7.

¹⁰ Kyoto Protocol, *supra* note 8, art. 3; Berlin Mandate, Decision 1/CP.1, UN Doc. FCCC/CP/1995/7/Add.1, art. 2(a), (b) (June 6, 1995); Doha Amendment to the Kyoto Protocol (2012), at http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php; see also Mary J. Bortscheller, *Equitable But Ineffective: How The Principle Of Common But Differentiated Responsibilities Hobbles The Global Fight Against Climate Change*, SUSTAINABLE DEV. L. & POL’Y 49, 49 (2010).

¹¹ Sean D. Murphy, *Contemporary Practice of the United States*, 95 AJIL 647 (2001).

¹² UNFCCC, Status of Ratification of the Kyoto Protocol, *available at* http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

¹³ See, e.g., Bortscheller, *supra* note 10, at 49.

¹⁴ Conference of the Parties, Rep. on its 13th Sess., Dec. 3–15, 2007, Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1 para. 1 (Mar. 14, 2008) (deciding “to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012”).

¹⁵ Copenhagen Accord, UN Doc. FCCC/CP/2009/11/L.7 (Dec. 18, 2009); see also Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post Mortem*, 104 AJIL 230 (2010) (analyzing the content and background of the Accord).

objective: “reduc[ing] global emissions [of greenhouse gases] so as to hold the increase in global temperature below 2 degrees Celsius.”¹⁶ While it set a precise numerical target, the Accord did not impose new legally binding obligations or specify how much individual parties would contribute to meeting this target. Instead, industrialized states “commit[ted] to implement individually or jointly the quantified economy-wide emissions targets for 2020,” while other states were to identify and communicate the “[n]ationally appropriate mitigation actions” they intended to take.¹⁷

Pursuant to the Copenhagen Accord, the United States announced emissions targets for 2020 “[i]n the range of 17% [from a 2005 baseline], in conformity with anticipated U.S. energy and climate legislation.”¹⁸ China indicated that it would

endeavor to lower its carbon dioxide emissions per unit of GDP by 40–45% by 2020 compared to the 2005 level, increase the share of non-fossil fuels in primary energy consumption to around 15% by 2020 and increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from the 2005 levels.¹⁹

The United States’ newly announced commitment to reduce annual greenhouse gas emissions by 26–28 percent below its 2005 level by 2025 is significantly more ambitious than the target it announced pursuant to the Copenhagen Accord.²⁰ According to the White House,

[t]he new U.S. goal will double the pace of carbon pollution reduction from 1.2 percent per year on average during the 2005–2020 period to 2.3–2.8 percent per year on average between 2020 and 2025. This ambitious target is grounded in intensive analysis of cost-effective carbon pollution reductions achievable under existing law and will keep the United States on the right trajectory to achieve deep economy-wide reductions on the order of 80 percent by 2050.²¹

China’s announcement is noteworthy in part because of its identification of a peak year. Greenhouse gas emissions from China—and other developing countries—have been growing quickly, and China had never previously identified a year in which they would peak before beginning to decline.²² Highlighting the significance of another aspect of China’s newly announced plan, the White House explained that in order to meet its goal of increasing the share of energy consumption from non-fossil fuels, China must deploy “an additional 800–1,000 gigawatts of nuclear, wind, solar and other zero emission generation capacity by 2030—more than all the coal-fired power plants that exist in China today and close to total current electricity generation capacity in the United States.”²³ The White

¹⁶ See Copenhagen Accord, *supra* note 15, para. 2.

¹⁷ *Id.* paras. 4–5.

¹⁸ Letter from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Executive Secretary, UNFCCC Secretariat (Jan. 28, 2010), *available at* http://unfccc.int/meetings/copenhagen_dec_2009/items/5264.php.

¹⁹ Letter from SU Wei, Director General, Department of Climate Change, National Development and Reform Commission of China, to Yvo de Boer, Executive Secretary, UNFCCC Secretariat (Jan. 28, 2010), *available at* http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5265.php.

²⁰ Nov. 11 White House Press Release, *supra* note 1.

²¹ *Id.*

²² See, e.g., Stowe, *supra* note 1.

²³ Nov. 11 White House Press Release, *supra* note 1.

House expressed its confidence that China would meet this target “based on its broad economic reform program, plans to address air pollution, and implementation of President Xi’s call for an energy revolution.”²⁴

As negotiations have continued for a new multilateral agreement to govern greenhouse gas emissions after 2020, the contours of a possible agreement have emerged. It appears that individual states will determine how much they will contribute to the UNFCCC’s ultimate goal.²⁵ At the nineteenth Conference of the Parties in Warsaw in 2013, states decided to

invite all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties towards achieving the objective of the Convention . . . and to communicate them well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions.²⁶

In conjunction with the U.S.-China Joint Announcement, the United States specified that it “will submit its 2025 target to the Framework Convention on Climate Change as an ‘Intended Nationally Determined Contribution’ no later than the first quarter of 2015.”²⁷ The Joint Announcement indicated that the commitments it contained constituted “part of the longer range effort to transition to low-carbon economies, mindful of the global temperature goal of 2° C”—as set out in the Copenhagen Accord.²⁸ The joint announcement also affirmed the commitments of Obama and Xi to “reach[] an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances.”²⁹

USE OF FORCE AND ARMS CONTROL

United States Deepens Its Engagement with ISIL Conflict

The rise of the Islamic State of Iraq and the Levant (ISIL) has led to renewed U.S. military action in the Middle East. ISIL is the latest incarnation of an armed group, first known as Tawhid and Jihad and then later as Al Qaeda in Iraq, that rose to prominence in Iraq after the

²⁴ *Id.*

²⁵ See Daniel Bodansky, *A Big Deal on Climate?*, OPINIO JURIS (Nov. 16, 2014), at <http://opiniojuris.org/2014/11/16/guest-post-big-deal-climate/> (“The negotiations already seemed on track to produce a new agreement, reflecting a bottom-up architecture, consisting of national pledges (like those announced in Beijing) and international review.”).

²⁶ Conference of the Parties, Rep. on its 19th Sess., Nov. 11–23, 2013, Decision 1/CP.19 UN Doc. FCCC/CP/2013/10/Add.1 para. 2(b) (Jan. 31, 2014); see also Lima Call for Action, Decision-/CP.20 paras. 9–14, 16, available at http://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf.

²⁷ Nov. 11 White House Press Release, *supra* note 1.

²⁸ U.S.-China Joint Announcement, *supra* note 2; see also Copenhagen Accord, *supra* note 15, para. 2.

²⁹ *Id.*; see also Lima Call for Action, *supra* note 26, pmb. para. 3 (indicating the Conference of the Parties “[u]nderscores its commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances”).

fall of Saddam Hussein in 2003.¹ The group successfully pursued attacks on U.S. forces at the time, but its violent tactics alienated many Iraqis.² In 2006, after the death of its leader, Abu Musab al-Zarqawi, the group rebranded itself as the Islamic State in Iraq, or ISI, in an attempt to garner more influence inside the country.³ In 2012, however, the group's new leader, Abu Bakr al-Baghdadi, turned his attention to Syria where, aided by the country's spreading civil war, the group re-emerged.⁴

ISIL's mission since its formation has been to establish a Sunni caliphate across much of the Middle East.⁵ Although the United States and other countries have labeled the group a "terrorist organization," ISIL has also attempted to provide policing, religious education, and welfare programs in some of the areas it has occupied, suggesting that it aims to establish a permanent government.⁶

The Syrian civil war has facilitated the recent dramatic expansion of ISIL's influence and control.⁷ In late 2013, as that conflict increased instability in the area, al-Baghdadi announced that the group was expanding its mission into Syria.⁸ Taking advantage of the chaotic situation on the ground, ISIL was able to recruit tens of thousands of fighters and establish what it called a "state" over large swaths of territory.⁹ As ISIL amassed increasing power in Syria, its relationship with Al Qaeda grew acrimonious, despite the two groups' many years of close ties.¹⁰ By February 2014, Al Qaeda had officially severed its ties to ISIL.¹¹ Once ISIL established its foothold in Syria, it began to expand into Iraq. ISIL gained control of Fallujah in western Iraq in January 2014.¹² By June, the group had conquered Mosul, Iraq's second largest city and a critical transportation hub.¹³ ISIL also took Tikrit, an important city in central Iraq only fifty miles from Baghdad, although the Iraqi army reclaimed the city shortly thereafter.¹⁴

¹ Graeme Baker, *ISIL: Rising Power in Iraq and Syria*, AL JAZEERA, June 11, 2014, at <http://www.aljazeera.com/news/middleeast/2014/06/isil-eminant-threat-iraq-syria-20146101543970327.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Kaveh Waddell, *ISIS Is More Than Just a "Terrorist Organization,"* NATIONAL JOURNAL, June 17, 2014, at <http://www.nationaljournal.com/defense/isis-is-more-than-just-a-terrorist-organization-20140617>.

⁶ *Id.*

⁷ Liz Sly, *ISIS: The al-Qaeda-Linked Islamists Powerful Enough to Capture a Key Iraqi City*, WASH. POST, June 10, 2014, at <http://www.washingtonpost.com/blogs/worldviews/wp/2014/06/10/isis-the-al-qaeda-linked-islamists-powerful-enough-to-capture-a-key-iraqi-city>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Ben Hubbard, *Al Qaeda Breaks with Jihadist Group in Syria Involved in Rebel Infighting*, N.Y. TIMES, Feb. 4, 2014, at A9.

¹¹ *Id.*

¹² Tim Arango, Kareem Fahim & Ben Hubbard, *Rebels' Fast Strike in Iraq Was Years in the Making*, N.Y. TIMES, June 15, 2014, at A1.

¹³ *Id.*

¹⁴ Rod Nordland & Suadad Al-Salhy, *Iraqi Army, in New Show of Force, Drives Back Insurgents in Major City*, N.Y. TIMES, June 29, 2014, at A10.

In response to ISIL's advances, the United States initially accelerated its delivery of weapons to the Iraqi government. Iraq's Prime Minister Nouri al-Maliki apparently first requested additional weapons in January 2014 during a call with U.S. Vice President Joe Biden.¹⁵ The requested weapons were delivered shortly thereafter.¹⁶ In March 2014, the U.S. embassy in Baghdad explained that it had delivered the weapons "in response to specific Iraqi requests and pursuant to a holistic counter-terrorism policy that incorporates political, economic, and security measures," with a particular focus on ISIL.¹⁷ The embassy noted that the United States was "determined to help the [Iraqi Security forces] respond to this threat," by providing missiles, rifles, and ammunition.¹⁸

As ISIL gained more territory inside Iraq, the Iraqi government explicitly requested direct U.S. air support.¹⁹ Iraq first asked for such help in May, but the United States chose not to act at that time.²⁰ Iraq reiterated its request for military assistance in a June 25, 2014, letter from Ibrahim al-Ushayqir, the minister for foreign affairs, to Ban ki-Moon, the secretary-general of the United Nations and the president of the Security Council.²¹ Around this time, President Barack Obama announced that he would send 300 U.S. military advisors to Iraq. He indicated that the forces were sent "to increase our support to Iraqi security forces" and noted a plan to "work with Congress to provide additional equipment."²² The president emphasized that "American forces will not be returning to combat in Iraq" and would only serve in a supporting role.²³

On September 2, 2014, Obama authorized an additional 350 military personnel to go to Iraq to protect diplomatic facilities and personnel.²⁴ Although Obama noted that the United States remained committed to "support[ing] the Government of Iraq in its fight against the Islamic State of Iraq and the Levant (ISIL)," he also indicated that the forces would not "serve in a combat role."²⁵ In November, in order to boost the Iraqis fighting ISIL, the United States sent 1,500 additional troops to Iraq to help train and advise the Iraqi and Kurdish forces.²⁶

¹⁵ Loveday Morris & Ernesto Londoño, *Iraq's Maliki Says He Has Asked for New Arms from U.S., Will Also Seek Training for Troops*, N.Y. TIMES, Jan. 16, 2014, at http://www.washingtonpost.com/world/middle_east/iraqs-maliki-says-he-has-asked-for-weapons-from-us-will-also-seek-training-for-troops/2014/01/16/0f369ed6-7ea0-11e3-9556-4a4bf7bcbd84_story.html.

¹⁶ Press Release, U.S. Mission to Iraq, U.S. Delivers Critical Arms to Iraq (Mar. 16, 2014), at <http://iraq.usembassy.gov/pr-03162014.html>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Terrorist March in Iraq: The U.S. Response: Hearing Before the H. Comm. on Foreign Affairs*, 113th Cong. 32–33 (2014) (statement by Brett McGurk, Deputy Assistant Sec'y for Iraq and Iran, U.S. Dep't of State), available at <http://docs.house.gov/meetings/FA/FA00/20140723/102485/HHRG-113-FA00-Transcript-20140723.pdf>.

²⁰ *Id.*

²¹ Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691 (Sept. 22, 2014), at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/697.

²² Barack Obama, Remarks by the President on the Situation in Iraq (June 19, 2014), at <http://www.whitehouse.gov/the-press-office/2014/06/19/remarks-president-situation-iraq>.

²³ *Id.*

²⁴ Office of the Press Sec'y, The White House, Statement by the Press Secretary on Iraq (Sept. 2, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/02/statement-press-secretary-iraq>.

²⁵ *Id.*

²⁶ Helene Cooper & Michael D. Shear, *Obama to Send 1,500 More Troops to Assist Iraq*, N.Y. TIMES, Nov. 8, 2014, at A1.

Via diplomatic note, Iraq “committed itself to providing protections for [U.S. advisory] personnel equivalent to those provided to personnel who were in the country before the crisis.”²⁷ The Obama administration had considered similar assurances insufficient in 2011, when the Iraqi parliament’s failure to extend legal immunity to U.S. armed forces played an important role in the withdrawal of all U.S. forces from Iraq.²⁸ In 2014, however, the Obama administration deemed these assurances “adequate” for the purpose of engaging ISIL, given the “short-term assessment and advisory mission” of the personnel in question.²⁹

The United States continued to play a supporting role through the end of the summer as ISIL gained increasingly large amounts of territory inside Iraq.³⁰ By early August, ISIL had seized the strategically located Mosul Dam,³¹ and the United States abruptly shifted its strategy. In a televised address on August 7, Obama announced that he had authorized airstrikes in Iraq.³² The initial airstrike campaign was limited to targeting ISIL convoys moving to take the city of Erbil and helping the Iraqi army rescue Yezidi civilians trapped on Mount Sinjar.³³ The airstrikes later expanded to other targets in Iraq, with the United States conducting over 150 strikes.³⁴

These airstrikes came at the direct behest of the Iraqi government.³⁵ Repeating his call for assistance in a September 20, 2014 letter to the United Nations, al-Ushayqir noted that Iraq “welcome[d] the commitment that was made by 26 States to provide the new Iraqi Government with all necessary support in its war against ISIL, including appropriate military assistance through the provision of air cover in coordination with the Iraqi armed forces and in accordance with international law.”³⁶

²⁷ Marie Harf, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (June 23, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/06/228334.htm>.

²⁸ Peter Baker, *Diplomatic Note Promises Immunity From Iraqi Law for U.S. Advisory Troops*, N.Y. TIMES, June 24, 2014, at A10. See also U.S. Dep’t of State Press Release, *Iraq: Status of Immunity for Department of State Contractor Personnel in Iraq* (Oct. 18, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/10/175680.htm>.

²⁹ Baker, *supra* note 28, at A10 (quoting Rear Adm. John F. Kirby, the Pentagon spokesman).

³⁰ See, e.g., Marie Harf, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (July 21, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/07/229550.htm> (stating that the United States would “help the Iraqi Government in its fight against ISIL writ large”); Jen Psaki, Spokesperson, U.S. Department of State, Daily Press Briefing (July 29, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/07/229907.htm> (stating that the United States had “increased and expanded . . . the kind of assistance and the scope of assistance we’re providing”).

³¹ Tim Arango, *Jihadists Rout Kurds in North and Seize Strategic Iraqi Dam*, N.Y. TIMES, Aug. 8, 2014, at A1. See also Jen Psaki, Spokesperson, U.S. Department of State, Daily Press Briefing (Aug. 4, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/08/230196.htm> (“We know that . . . the Mosul Dam has been in the sights of ISIL since its offensive began in June . . . [O]ur understanding is that [Kurdish] forces remain in control of the dam. Certainly, we would be concerned if that changed.”).

³² Barack Obama, Statement by the President (Aug. 7, 2014), at <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president> [hereinafter Aug. 7 Statement by the President].

³³ *Id.*; see also Marie Harf, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (Aug. 8, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/08/230407.htm>.

³⁴ Office of the Press Sec’y, The White House, Fact Sheet: Strategy to Counter the Islamic State of Iraq and the Levant (ISIL) (Sept. 10, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/10/fact-sheet-strategy-counter-islamic-state-iraq-and-levant-isil> [hereinafter Sept. 10 Fact Sheet].

³⁵ Letter dated Sept. 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691 (Sept. 22, 2014).

³⁶ *Id.*

As the ISIL presence grew across the border in Syria, the United States organized a coalition to expand the airstrike campaign,³⁷ both to support Iraq and other regional partners and to combat ISIL's long-term presence in the war-torn country.³⁸ The Obama administration announced the expansion of the United States' involvement to Syria in early September, and the first airstrikes on Syrian targets began later that month.³⁹ Bahrain, Jordan, Saudi Arabia, and the United Arab Emirates all joined the United States in conducting the Syrian portion of the airstrike campaign.⁴⁰ By late December, the coalition military forces had collectively conducted more than 500 airstrikes inside Syria, resulting in the death of at least "1,000 ISIL fighters."⁴¹ Regular airstrikes continued into January 2015,⁴² by which time Stuart Jones, the U.S. ambassador to Iraq, estimated that 6,000 ISIL fighters had been killed.⁴³

U.S. airstrikes inside Syria were also aimed at the Khorasan Group, a group of individuals who have been connected with Al Qaeda at various times in recent years, and whose members came to Syria from Pakistan and Afghanistan beginning in 2012. The Khorasan Group was largely unknown until Obama mentioned it in his September 23 statement marking the beginning of airstrikes inside Syria.⁴⁴ Some administration officials suggested airstrikes against the group were needed to thwart an "imminent" attack, while others suggested the group's plotting was merely "aspirational."⁴⁵ U.S. officials believe the group's leader, Mushin al-Fadhi, responsible for the group's formation in Syria, was killed in coalition airstrikes in September.⁴⁶

Although the United States' justification under international law for coalition airstrikes inside Iraq is relatively uncomplicated, its justification of military strikes in Syria is more involved. In her September 23, 2014 letter to the secretary-general of the United Nations, U.S. Ambassador to the United Nations Samantha Power argued that the United States had authority under international law to conduct airstrikes against ISIL in Syria both in self-defense and in order to help Iraq defend itself.⁴⁷ Invoking Article 51 of the UN Charter, Power wrote:

³⁷ Transcript of Background Conference Call on the President's Address to the Nation (Sept. 10, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> [hereinafter Sept. 10 Conference Call].

³⁸ Sept. 10 Fact Sheet, *supra* note 34.

³⁹ Transcript of Background Conference Call on Airstrikes in Syria (Sept. 23, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/23/background-conference-call-airstrikes-syria> [hereinafter Sept. 23 Conference Call].

⁴⁰ U.S. Dep't of Defense, *Coalition Airstrikes Continue Against ISIL in Iraq, Syria*, DOD NEWS (Jan. 20, 2014), at <http://www.defense.gov/news/newsarticle.aspx?id=123997>.

⁴¹ Luis Martinez, *U.S. Airstrikes in Iraq and Syria Have Cost \$1 Billion*, ABC NEWS (Dec. 19, 2014), at <http://abcnews.go.com/Politics/us-airstrikes-iraq-syria-cost-billion/story?id=27728260> (quoting Brett McGurk's remarks before a congressional panel the preceding week).

⁴² U.S. Dep't of Defense, *Airstrikes Continue Against ISIL Targets in Syria, Iraq*, DOD NEWS (Jan. 22, 2015), at <http://www.defense.gov/news/newsarticle.aspx?id=128010>.

⁴³ Barbara Starr, *U.S. Officials Say 6,000 ISIS Fighters Killed in Battles*, CNN (Jan. 22, 2015), at <http://edition.cnn.com/2015/01/22/politics/us-officials-say-6000-isis-fighters-killed-in-battles>.

⁴⁴ Mark Mazzetti, *A Terror Cell That Avoided the Spotlight*, N.Y. TIMES, Sept. 24, 2014, at <http://www.nytimes.com/2014/09/25/world/middleeast/khorasan-a-terror-cell-that-avoided-the-spotlight.html>. See also Barack Obama, Statement by the President on Airstrikes in Syria (Sept. 23, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria> [hereinafter Sept. 23 Statement by the President].

⁴⁵ Mazzetti, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ Letter from Samantha Power, U.S. Ambassador to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations, UN Doc. S/2014/695 (Sept. 23, 2014).

Iraq has made clear it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq's people. For these reasons, the Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm forces to perform their task of regaining control of the Iraqi borders.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown it cannot and will not confront these safe-havens effectively itself.⁴⁸

Power's reference to Syria being "unwilling or unable" to act against ISIL invokes relatively controversial legal reasoning that the United States has previously advanced to explain its strikes—sometimes without the consent of the local state, as happened against suspected terrorists in Somalia and Pakistan.⁴⁹

The United States justified its strikes against the Khorasan Group in Syria under a different rationale. In her letter, Power addressed the Khorasan Group in a single sentence: "In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies."⁵⁰ That same day, the U.S. Department of Defense claimed that the Khorasan Group "was nearing the execution phase of an attack either in Europe or the homeland," suggesting that the "partners and allies" Power described were not in the Middle Eastern theater.⁵¹ Some observers inferred that the United States was relying on a theory of anticipatory self-defense as the international legal basis for the Khorasan Group strikes.⁵² As an alternative justification, the United States might have relied on the claimed right to individual self-defense against Al Qaeda, because other elements of Al Qaeda have already conducted a series of armed attacks against the United States—a rationale complicated by the fact

⁴⁸ *Id.*

⁴⁹ Sources conflict on whether the United States received permission from the Yemeni government for all of its strikes against alleged terrorists in that country. See, e.g., Colum Lynch, *Obama Hints at Legal Rationale for Airstrikes in Syria*, FOREIGN POLICY, Aug. 28, 2014, at <http://foreignpolicy.com/2014/08/28/obama-hints-at-legal-rationale-for-airstrikes-in-syria> (noting that the United States "struck alleged terrorist targets in Somalia, Pakistan, and Yemen, sometimes without the local government's consent"); Shuaib Almosawa & Rod Nordland, *Drone Strike in Yemen Said to Kill Senior Qaeda Figure*, N.Y. TIMES, Feb. 6, 2015, at A6.

⁵⁰ Letter from Samantha Power, *supra* note 47.

⁵¹ Lieutenant General William Mayville & Press Sec'y Rear Admiral John Kirby, Department of Defense Press Briefing on Operations in Syria by Lt. Gen. Mayville in the Pentagon Briefing Room (Sept. 23, 2014), at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505> [hereinafter Sept. 23 Dep't of Defense Press Briefing].

⁵² See, e.g., Jennifer Daskal, Ashley Deeks & Ryan Goodman, *Strikes in Syria: The International Law Framework*, LAWFARE (Sept. 24, 2014), at <http://www.lawfareblog.com/2014/09/strikes-in-syria-the-international-law-framework>.

that the Khorasan Group as such has never attacked the United States, and it is unclear what level of control Al Qaeda has over the group.⁵³

Before the United States launched its first airstrikes in Syria on September 22, 2014, it informed the Syrian government of the pending action, although a Department of Defense spokesperson made clear that the United States does “not coordinate with the Assad regime” and no “military-to-military communication” had occurred.⁵⁴ Moreover, Army Lt. Gen. William C. Mayville Jr., the Pentagon’s director for operations described Syrian military radar as “passive” during the United States’ first round of air strikes.⁵⁵ Although U.S. officials went to great lengths to downplay the interaction between U.S. and Syrian officials, the limited interaction is significant in light of the United States’ continuing aid to rebels in Syria seeking to overthrow President Bashar al-Assad.⁵⁶

The Syrian government itself has given mixed signals in recent months as to whether it consents to U.S. airstrikes on its territory. On September 29, 2014 Walid Al-Moualem, the foreign minister of Syria, told the UN General Assembly that ISIS was “unleashed like a monster against Syria, Iraq, and Lebanon. Let us together stop this ideology and its exporters.”⁵⁷ In a later interview, Al-Moualem suggested that the United States’ campaign should be expanded to target other militant groups active inside Syria, noting that Syria and the United States were on the same side in the fight.⁵⁸ More recently, however, in responding to the potential entrance of coalition ground forces into Syria to fight ISIL, Assad remarked that “[a]ny troops that don’t work in cooperation with the Syrian army are illegal and should be fought,” even if the troops and the Syrian government share a common enemy.⁵⁹

In a statement the morning after the United States’ first strikes in Syria, Ban said:

The parties involved in this campaign must abide by international humanitarian law and take all necessary precautions to avoid and minimize civilian casualties [T]oday’s strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government. I think it is undeniable—and

⁵³ Louise Arimatsu & Michael N. Schmitt, *Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUM. J. TRANSNAT’L L. BULLETIN 1, 14–15 (2014).

⁵⁴ Sept. 23 Dep’t of Defense Press Briefing, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ Rebecca Collard & Brian Murphy, *Syria Informed in Advance of U.S.-led Airstrikes Against Islamic State*, WASH. POST, Sept. 23, 2014, at http://www.washingtonpost.com/world/syria-informed-in-advance-of-us-led-airstrikes-against-islamic-state/2014/09/23/848d79ae-4315-11e4-b437-1a7368204804_story.html. For more background on the United States’ role in the Syrian conflict, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 97 (2014), 108 AJIL 340 (2014); John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 899 (2013).

⁵⁷ H. E. Walid Al-Moualem, Deputy Prime Minister of the Syrian Arab Republic, Statement at the General Debate of the 69th Sess. of the UN General Assembly (Sept. 29, 2014), at http://www.un.org/en/ga/69/meetings/gadebate/pdf/SY_en.pdf.

⁵⁸ Zeina Karam, *Syrian Foreign Minister: The U.S. Said “We Are Not After the Syrian Army” Before Airstrikes*, ASSOCIATED PRESS, Sept. 30, 2014 at <http://www.businessinsider.com/syrian-foreign-minister-the-us-said-we-are-not-after-the-syrian-army-before-airstrikes-2014-9#ixzz3MjKw64bF>; see also Ryan Goodman, *Taking the Weight off of International Law: Has Syria Consented to U.S. Airstrikes?*, JUST SECURITY (Dec. 23, 2014), at <http://justsecurity.org/18665/weight-international-law-syria-consented-airstrikes>.

⁵⁹ Ryan Goodman, *Assad: Willing to Risk Direct Confrontation with U.S. over Moderate Rebels—and Stronger Opposition to U.S. Airstrikes*, JUST SECURITY (Jan. 27, 2015), at <http://justsecurity.org/19419/syria-assad-risk-direct-confrontation-moderate-rebels-opposition-airstrikes>.

the subject of broad international consensus—that these extremist groups pose an immediate threat to international peace and security.⁶⁰

Russia, however, immediately denounced the U.S.'s airstrikes as contrary to international law.⁶¹ A statement from the Russian Ministry of Foreign Affairs specified that the airstrikes “can be carried out only within the framework of international law,” which required “explicit consent of the Syrian government or a relevant decision by the Security Council.”⁶² Russia emphasized that it has “[r]epeatedly warned that those who initiate the unilateral use of force bear full international and legal responsibility for its consequences.”⁶³

The United States' allies, in justifying coalition strikes, appear to have focused their rationale on action against ISIL within Iraq. The United Kingdom noted that “[i]t is clear in this case that Iraq has consented to the use of military force to defend itself against ISIL in Iraq.”⁶⁴ French and Canadian officials offered similar legal reasoning for their participation in airstrikes, with the Canadian foreign minister stating that the “democratically elected Government of Iraq has invited and asked for this support and assistance.”⁶⁵

As for the domestic legal authority for U.S. airstrikes in Iraq and Syria, the U.S. legal position continues to evolve. The initial airstrikes on targets in Iraq during August were narrow in scope—the first order was limited to “tak[ing] targeted strikes against ISIL terrorist convoys” and “help[ing] save Iraqi civilians” from the Yazidi minority, who were stranded on Mount Sinjar.⁶⁶ Obama explained the legal authority for these strikes in letters sent to the U.S. Congress in accordance with the requirements of the War Powers Resolution.⁶⁷ In these letters, Obama informed congressional leaders that he had taken military actions “in the national security and foreign policy interests of the United States.”⁶⁸ In the first letter, in which he reported

⁶⁰ See Press Release, Sec'y General, Climate Change Summit Not about Talk, but Action, Secretary-General Says at Press Conference, Stressing “All of Us Can Make a Difference” (Sept. 23, 2014), at <http://www.un.org/press/en/2014/sghsm16186.doc.htm>.

⁶¹ Karoun Demirjian, *Russia Condemns U.S. Airstrikes Against Islamic State in Syria*, WASH. POST, Sept. 23, 2014, at http://www.washingtonpost.com/world/russia-condemns-us-airstrikes-against-islamic-state-in-syria/2014/09/23/de639dc6-42f4-11e4-b437-1a7368204804_story.html.

⁶² The Ministry of Foreign Affairs of the Russian Fed'n, Statement Regarding the Strikes on the Syrian Territory (Sept. 23, 2014), at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b4325699005bcb3/2dc5b556c23ac4f044257d5c005ce420!OpenDocument.

⁶³ *Id.*

⁶⁴ Dapo Akande & Zachary Vermeer, *The Airstrikes Against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, EJIL:TALK! (Feb. 2, 2015), at <http://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars>.

⁶⁵ *Id.*

⁶⁶ Aug. 7 Statement by the President, *supra* note 32.

⁶⁷ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

⁶⁸ See, e.g., Letter from the President to the Speaker of the House of Representatives (Aug. 17, 2014), at <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq>; Letter from the President to the Speaker of the House of Representatives (Aug. 8, 2014), at <http://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq> [hereinafter Aug. 8 Letter from the President].

airstrikes on ISIL, Obama cited as authority his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”⁶⁹ The White House appeared to rely on force-protection and humanitarian justifications for each strike.⁷⁰

On September 10, 2014, Obama held a major televised news conference to announce the expansion of U.S. airstrikes to ISIL positions in Syria. Addressing the nation, the president said that the United States would lead a coalition of nations to “degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy.”⁷¹ By that point, the United States had already conducted over a hundred airstrikes across Iraq.⁷² Obama promised to expand the United States’ commitment to Syria, stating specifically that he “[would] not hesitate to take action against ISIL in Syria, as well as Iraq.”⁷³ The president disclaimed any need for additional congressional authorization, stating that he “[had] the authority to address the threat from ISIL.”⁷⁴ He also expressed his belief that the United States is “strongest as a nation when the President and Congress work together” and noted that he would “welcome congressional support for [the] effort.”⁷⁵

After the speech, the White House clarified its position: the president had authority to order airstrikes against ISIL under the joint congressional resolution passed the week after the September 11, 2001 terrorist attacks.⁷⁶ The resolution, known as the 2001 Authorization for Use of Military Force (2001 AUMF), gave statutory authorization for military engagement, providing:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷⁷

⁶⁹ Aug. 8 Letter from the President, *supra* note 68; *see also* Office of the Press Sec’y, The White House, Press Gaggle by Press Secretary Josh Earnest en route Charlotte, NC, 8/26/2014 (Aug. 26, 2014), *at* <http://www.whitehouse.gov/the-press-office/2014/08/26/press-gaggle-press-secretary-josh-earnest-en-route-charlotte-nc-8262014> (citing the president’s “powers as the Commander-in-Chief”).

⁷⁰ *See, e.g.*, Robert Chesney, *Article II and Iraq: Justifications for the Mosul Dam Operation in the WPR Notification*, LAWFARE (Aug. 17, 2014), *at* <http://www.lawfareblog.com/2014/08/article-ii-and-iraq-justifications-for-the-mosul-dam-operation-in-the-wpr-notification>.

⁷¹ Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), *at* <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> [hereinafter Sept. 10 Statement by the President].

⁷² U.S. Dep’t of Defense, *U.S. Military Conducts Airstrikes in Support of Dam Operations*, DOD NEWS (Sept. 7, 2014), *at* <http://www.defense.gov/news/newsarticle.aspx?id=123103>.

⁷³ Sept. 10 Statement by the President, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Office of the Press Sec’y, The White House, Press Briefing by Press Secretary Josh Earnest, 9/11/2014 (Sept. 11, 2014), *at* <http://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014> [hereinafter Sept. 11 Press Briefing].

⁷⁷ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. §1541 (2012)); *see also* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973). For additional background on the 2001 AUMF, *see* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 550 (2014); John R. Crook, Contemporary Practice of the United States, 107 AJIL 462 (2013); John R. Crook, Contemporary Practice of the United States, 104 AJIL 656 (2010); 103 AJIL 758 (2009); 103 AJIL 351 (2009); 100 AJIL 918 (2006); 100 AJIL 214 (2006); 99 AJIL 895 (2005); Sean D. Murphy, Contemporary Practice of the United States, 98 AJIL 186 (2004); 97 AJIL 196 (2003); 96 AJIL 981 (2002); 96 AJIL 475 (2002); 96 AJIL 237 (2002).

The White House stated that the president “can rely on the 2001 AUMF as statutory authority for the military airstrike operations he is directing against ISIL . . . [and] he has the authority to continue these operations beyond 60 days, consistent with the War Powers Resolution, because the operations are authorized by a statute.”⁷⁸ The president subsequently notified the Congress of military actions in Syria in accordance with the War Powers Resolution, citing both constitutional and statutory authority.⁷⁹

A few days after Obama’s speech, the White House claimed that a second statute could also serve as legal authority for airstrikes, although only those in Iraq. According to an administration official, the 2002 Authorization for the Use of Military Force in Iraq (2002 AUMF) “would serve as an alternative statutory authority basis on which the President may rely” for the administration’s campaign of airstrikes.⁸⁰ The 2002 AUMF provides:

The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.⁸¹

By relying on statutory authorization, the administration sought to avoid the problem of limitations on military action enacted by Congress in the War Powers Resolution. Specifically, the White House claimed that explicit congressional authorization mooted the War Powers Resolution’s sixty-day limitation on operations, which removed what would otherwise have been an October 7 statutory deadline for the termination of operations.⁸²

Obama had previously expressed interest in the repeal of both AUMFs. In a high-profile May 2013 speech at the National Defense University, the president had noted that the 2001 AUMF was “nearly twelve years old . . . [and t]he Afghan War [was] coming to an end.”⁸³ As a result, he “look[ed] forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate,” and “[would] not sign laws designed to expand this mandate any further.”⁸⁴ Although the president stated that the “systematic effort to dismantle terrorist organizations must continue,” he was emphatic that “this war, like all

⁷⁸ Sept. 10 Conference Call, *supra* note 37.

⁷⁹ See, e.g., Letter from President Obama to the Speaker of the House of Representatives (Sept. 23, 2014), at <http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

⁸⁰ Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES, Sept. 13, 2014, at A8.

⁸¹ Pub. L. No. 107-243, §3(a), 116 Stat. 1498 (2002) (codified at 50 U.S. §1541 note (2012)). For additional background on the 2002 AUMF, see Sean D. Murphy, *Contemporary Practice of the United States*, 97 AJIL 419 (2003); 96 AJIL 956 (2002).

⁸² Spencer Ackerman, *White House Says Expired War Powers Timetable Irrelevant to ISIS Campaign*, GUARDIAN (Oct. 16, 2014), at <http://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq> (quoting National Security Council Spokeswoman Bernadette Meehan).

⁸³ John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 674, 677 (2013); see also Remarks of President Barack Obama (May 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama> [hereinafter May 23 Remarks of President Obama].

⁸⁴ May 23 Remarks of President Obama, *supra* note 83.

wars, must end.”⁸⁵ As ISIL gained strength in the summer of 2014, the national security advisor, Susan M. Rice, sent a letter to John A. Boehner, the Speaker of the House of Representatives, urging the House of Representatives to “repeal” the “outdated” 2001 AUMF.⁸⁶

After the ISIL strikes began, the White House stated that the 2001 AUMF “continues to apply to this terrorist organization that is operating in Iraq and Syria.”⁸⁷ The White House suggested that the Congress could provide “a new limited authorization for the use of military force that would specifically address the threat posed by ISIL.”⁸⁸ A new AUMF would supply an “expression of support from Congress” enabling the administration to “send a more united message overseas” and “formulate and implement our counter-ISIL strategy more broadly.”⁸⁹ At the same time, Obama did not back off his earlier assertions that that he did “not . . . need[] that new authorization in order to take sustained action” because the president “[had] the authority that is necessary to carry this out.”⁹⁰ When Secretary of State John Kerry was challenged about the administration’s legal authority during congressional hearings, he stated that “good lawyers within the White House, within the State Department who have examined this extremely closely have come to the conclusion across the board” that the 2001 AUMF applied to ISIL.⁹¹

On the administration’s legal theory, the 2001 AUMF provided a legal basis for strikes in Syria because the targets of the strikes were tied to groups—namely, Al Qaeda and the Taliban—that are unequivocally within the ambit of 2001 AUMF.⁹² When the strikes began on September 23, the United States thus targeted not only ISIL, but also the Khorasan Group, which the administration described as “seasoned al Qaeda operatives in Syria”⁹³ who were “associated with al Nusra Front in Syria.”⁹⁴ The White House explained that the Khorasan Group was “very clearly within the ambit of the AUMF,” which, under longstanding executive

⁸⁵ *Id.* See also Press Release, The White House, Remarks As Prepared for Delivery By Assistant to the President for Homeland Security and Counterterrorism Lisa Monaco (Nov. 19, 2013), at <http://www.whitehouse.gov/the-press-office/2013/11/19/remarks-prepared-delivery-assistant-president-homeland-security-and-coun> (reiterating that “the President is committed to working with Congress to refine, and ultimately repeal the mandate of the AUMF.”); White House Press Release, Background Conference Call on the President’s Commencement Address at West Point (May 28, 2014), at <http://www.whitehouse.gov/the-press-office/2014/05/28/background-conference-call-presidents-commencement-address-west-point> (suggesting that “[the United States] shouldn’t just have open-ended authorities for the use of military force that continue indefinitely; . . . the AUMF in 2001 was written for a specific purpose and time”).

⁸⁶ Letter from Susan M. Rice, National Security Advisor, to John A. Boehner, Speaker of the House (July 25, 2014), at http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3.

⁸⁷ Sept. 11 Press Briefing, *supra* note 76.

⁸⁸ Sept. 10 Conference Call, *supra* note 37.

⁸⁹ Transcript of Background Conference Call on the Administration’s Request for Overseas Contingency Operations (Nov. 7, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/07/background-conference-call-administrations-request-overseas-contingency->

⁹⁰ Sept. 10 Conference Call, *supra* note 37.

⁹¹ U.S. Senate Committee on Foreign Relations, Hearing on United States Strategy to Defeat the Islamic State in Iraq and the Levant (Sept. 17, 2014), at <http://www.foreign.senate.gov/hearings/united-states-strategy-to-defeat-the-islamic-state-in-iraq-and-the-levant>; see also *Transcript: John Kerry Testifies on War Against ISIS*, CNN (Sept. 17, 2014), at <http://transcripts.cnn.com/TRANSCRIPTS/140917/cnr.07.html>.

⁹² Sept. 23 Conference Call, *supra* note 39.

⁹³ Sept. 23 Statement by the President, *supra* note 44.

⁹⁴ Sept. 23 Conference Call, *supra* note 39.

branch interpretation, “applies to al Qaeda, the Taliban, and associated forces.”⁹⁵ Similarly, ISIL was “known as al Qaeda in Iraq for a number of years” and “at war with the U.S.”⁹⁶ It was “only recently that they split with al Qaeda,” and the administration “[didn’t] believe that Congress would have intended to remove the President’s authority to use force against this group simply because the group had a disagreement with al Qaeda leadership.”⁹⁷ Some commentators expressed skepticism about these arguments, and instead counseled in favor of enacting a new AUMF⁹⁸

In early November 2014, after the midterm elections, Obama said that he would “begin engaging Congress over a new Authorization to Use Military Force against ISIL.”⁹⁹ Citing the specific conditions that motivated the 2001 and 2002 AUMFs, the president said that “it makes sense for us to make sure that the authorization from Congress reflects what we perceive to be not just our strategy over the next two or three months, but our strategy going forward.”¹⁰⁰ Despite this movement toward a new AUMF, the White House maintained its position that the president remained fully authorized to continue operations under the 2001 AUMF, according to “a wide variety of administration lawyers.”¹⁰¹

Congressional reactions to the administration’s legal claims varied. From the beginning of the United States’ conflict with ISIL, some legislators pushed for a new AUMF,¹⁰² but with an upcoming election, congressional leaders faced unknown electoral repercussions for authorization and avoided holding a vote.¹⁰³ Congress was reportedly more open to considering a new AUMF after the election.¹⁰⁴ The Senate Committee on Foreign Relations held a hearing on the subject in December, where Kerry asserted that a new AUMF “should give the President the clear mandate and flexibility he needs,” but it “should also be limited and specific to the threat posed [by ISIL].”¹⁰⁵ He expressed openness to a three-year limitation suggested by Sen.

⁹⁵ *Id.*; see also Robert Chesney, *The 2001 AUMF: From Associated Forces to (Disassociated) Successor Forces*, LAWFARE (Sept. 10, 2014), at <http://www.lawfareblog.com/2014/09/the-2001-aumf-from-associated-forces-to-disassociated-successor-forces> (describing the associated forces theory).

⁹⁶ Sept. 23 Conference Call, *supra* note 39.

⁹⁷ *Id.*

⁹⁸ See, e.g., Harold Hongju Koh, *Obama’s ISIL Legal Rollout: Bungled, Clearly. But Illegal? Really?*, JUST SECURITY (Sept. 29, 2014), at <http://justsecurity.org/15692/obamas-isil-legal-rollout-bungled-clearly-illegal-really>.

⁹⁹ Office of the Press Sec’y, The White House, Remarks by the President in a Press Conference (Nov. 5, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference>.

¹⁰⁰ *Id.*

¹⁰¹ Office of the Press Sec’y, The White House, Briefing by Press Secretary Josh Earnest (Nov. 6, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/06/press-briefing-press-secretary-josh-earnest-1162014>.

¹⁰² See, e.g., Press Release, Senator Tim Kaine, On Senate Floor, Kaine Calls for Congressional Authorization of U.S. Military Action in Iraq & New AUMF (June 25, 2014), at <http://www.kaine.senate.gov/press-releases/on-senate-floor-kaine-calls-for-congressional-authorization-of-us-military-action-in-iraq-and-new-aumf> (“[T]he current crisis in Iraq . . . is not the kind of conflict where the President can or should act unilaterally. . . . [T]he President must seek Congressional authorization.”); Press Release, Senator John McCain, *McCain & Graham in the New York Times: “Stop Dithering, Confront ISIS”* (Aug. 29, 2014), at <http://www.mccain.senate.gov/public/index.cfm/2014/8/mccain-graham-in-the-new-york-times-stop-dithering-confront-isis> (“We have consistently advocated revising the [2001 AUMF] that has provided congressional backing for counterterrorism operations Now could be the right time to update this authorization in light of evolving terrorist threats like ISIS.”).

¹⁰³ Jonathan Weisman, Mark Landler & Jeremy W. Peters, *As Obama Makes Case, Congress Is Divided on Campaign Against Militants*, N.Y. TIMES, Sept. 9, 2014, at A16.

¹⁰⁴ Mark Landler & David E. Sanger, *Obama to Seek Congressional Backing for Military Campaign Against ISIS*, N.Y. TIMES, Nov. 6, 2014, at A12.

¹⁰⁵ John Kerry, Sec’y of State, Testimony Before the Senate Foreign Relations Committee (Dec. 9, 2014), at <http://www.state.gov/secretary/remarks/2014/12/234876.htm>.

Robert Menendez, the chairman of the committee.¹⁰⁶ After the new Congress took office in 2015, the Republican leadership asked the president to provide language for a new resolution.¹⁰⁷ The White House continued to express support for a new AUMF, without conceding its necessity.¹⁰⁸ And despite Kerry's earlier openness to limitations, the chairman of the Joint Chiefs of Staff, General Martin E. Dempsey, stated in January that any new AUMF "shouldn't constrain activities geographically" and he did not think "constraints on time, or a 'sunset clause'" were necessary.¹⁰⁹

NATO Affirms that Cyber Attacks May Trigger Collective Defense Obligations

At the September 2014 Wales Summit, the North Atlantic Treaty Organization (NATO) adopted an Enhanced Cyber Defence Policy that formally affirmed cyber defense as part of member states' collective defense obligations.¹ The new policy recognizes that a cyber attack can, in some cases, trigger the obligation under Article 5 of the NATO Charter to take action—potentially including the use of armed force—to assist another party that faces an armed attack.²

A joint Wales Summit Declaration explained the reasoning behind the new policy as follows:

As the Alliance looks to the future, cyber threats and attacks will continue to become more common, sophisticated, and potentially damaging. To face this evolving challenge, we have endorsed an Enhanced Cyber Defence Policy, contributing to the fulfillment of the

¹⁰⁶ *Id.* ("I note that Chairman Menendez has suggested that a three-year limitation should be put into an AUMF. We support that proposal, but we support it subject to a provision that we should work through together that provides for extension in the event that circumstances require it.")

¹⁰⁷ See Jennifer Bendery, *ISIS War Authorization Language Could Come in "a Few Weeks," Says Bob Corker*, HUFFINGTON POST (Jan. 13, 2015), at http://www.huffingtonpost.com/2015/01/13/war-authorization-obama_n_6465120.html; Burgess Everett, *Hill Leaders More Hopeful on War Authorization After W. H. Meeting*, POLITICO (Jan. 13, 2015), at <http://www.politico.com/story/2015/01/hill-leaders-war-authorization-white-house-114226.html>.

¹⁰⁸ In his 2015 State of the Union address, Obama "call[ed] on this Congress to show the world that we are united in this mission by passing a resolution to authorize the use of force against ISIL." Office of the Press Sec'y, The White House, Remarks by the President in State of the Union Address (Jan. 20, 2015), at <http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>.

¹⁰⁹ Lisa Ferdinando, *Dempsey: Keep All Options on Table for Use of Force Against ISIL*, DOD NEWS (Jan. 23, 2015), at <http://www.defense.gov/news/newsarticle.aspx?id=128023>.

¹ Wales Summit Declaration paras. 74–75, Sept. 5, 2014, available at http://www.nato.int/cps/en/natohq/official_texts_112964.htm.

² Wales Summit Declaration, *supra* note 1, para. 72 (affirming that "cyber defence is part of NATO's core task of collective defence"). See North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 UNTS 243 ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."). See also NATO, *Collective Defence: Invocation of Article 5* (Nov. 11, 2014), at http://www.nato.int/cps/en/natohq/topics_110496.htm (noting that Article 5 was invoked "for the first time in NATO's history," in response to the September 11 terrorist attacks on the United States); Sean D. Murphy, *Terrorist Attacks on World Trade Center and Pentagon*, 96 AJIL 237, 244 (2002) (discussing legal implications of September 11 attacks and the U.S. response).

Alliance's core tasks. The policy reaffirms the principles of the indivisibility of Allied security and of prevention, detection, resilience, recovery, and defence. It recalls that the fundamental cyber defence responsibility of NATO is to defend its own networks, and that assistance to Allies should be addressed in accordance with the spirit of solidarity, emphasizing the responsibility of Allies to develop the relevant capabilities for the protection of national networks. Our policy also recognises that international law, including international humanitarian law and the UN Charter, applies in cyberspace. Cyber attacks can reach a threshold that threatens national and Euro-Atlantic prosperity, security, and stability. Their impact could be as harmful to modern societies as a conventional attack. We affirm therefore that cyber defence is part of NATO's core task of collective defence. A decision as to when a cyber attack would lead to the invocation of Article 5 would be taken by the North Atlantic Council on a case-by-case basis.

We are committed to developing further our national cyber defence capabilities, and we will enhance the cyber security of national networks upon which NATO depends for its core tasks, in order to help make the Alliance resilient and fully protected. Close bilateral and multinational cooperation plays a key role in enhancing the cyber defence capabilities of the Alliance. We will continue to integrate cyber defence into NATO operations and operational and contingency planning, and enhance information sharing and situational awareness among Allies. Strong partnerships play a key role in addressing cyber threats and risks. We will therefore continue to engage actively on cyber issues with relevant partner nations on a case-by-case basis and with other international organisations, including the EU, as agreed, and will intensify our cooperation with industry through a NATO Industry Cyber Partnership. Technological innovations and expertise from the private sector are crucial to enable NATO and Allies to achieve the Enhanced Cyber Defence Policy's objectives. We will improve the level of NATO's cyber defence education, training, and exercise activities. We will develop the NATO cyber range capability, building, as a first step, on the Estonian cyber range capability, while taking into consideration the capabilities and requirements of the NATO CIS School and other NATO training and education bodies.³

As the above statement indicates, this was not NATO's first engagement with the problem of cyber warfare. NATO first adopted a package of policies aimed at cyber defense in 2008, in response to a digital attack on Estonia's infrastructure in 2007,⁴ and defense ministers from NATO member states held a minister-level meeting dedicated to cyber security in June 2013.⁵ The most significant new legal element of the 2014 Wales Summit policy was its express assertion that cyber attacks can trigger NATO member states' collective defense obligations under Article 5 of the Washington Treaty.⁶

As NATO's Deputy Assistant Secretary General for Emerging Security Challenges explained:

[F]or the first time we state explicitly [in the 2014 Wales Summit policy] that the cyber realm is covered by Article 5 of the Washington Treaty, the collective defence clause. We don't say in exactly which circumstances or what the threshold of the attack has to be to

³ Wales Summit Declaration, *supra* note 1, paras. 72–73.

⁴ See NATO, *Cyber Defence* (Sept. 30, 2014), at http://www.nato.int/cps/en/natohq/topics_78170.htm.

⁵ At this meeting, NATO's secretary general is quoted as saying, “[c]yber attacks do not stop at national borders. Our defences should not, either.” NATO, *Defence Ministers Make Progress on Cyber Protection* (June 4, 2013), at http://www.nato.int/cps/en/natolive/news_101143.htm. See also *Cyberspace Security*, NATO Multimedia Library, at <http://www.natolibguides.info/cybersecurity> (visited Nov. 23, 2014).

⁶ Wales Summit Declaration, *supra* note 1.

trigger a collective NATO response and we don't say what that collective NATO response should be. This will be decided by allies on a case-by-case basis, but we established a principle that at a certain level of intensity of damage, malicious intention, a cyber attack could be treated as the equivalent of an armed attack.⁷

A State Department spokesperson explained the United States' endorsement of the Wales Summit Declaration:

The greatest responsibility of the alliance is to protect and defend our territories and our populations against attack, as set out in Article 5. We are committed to further strengthening the transatlantic bond and to providing the resources, capabilities, and political will required to ensure the alliance remains ready to meet any challenge. Today we reaffirm our strong commitment to collective defense and to ensuring security and assurance for all allies.⁸

⁷ Steve Ranger, *NATO Updates Cyber Defence Policy as Digital Attacks Become a Standard Part of Conflict*, ZDNET (June 30, 2014), at <http://www.zdnet.com/nato-updates-cyber-defence-policy-as-digital-attacks-become-a-standard-part-of-conflict-7000031064>.

⁸ Marie Harf, Deputy Spokesperson, U.S. Dep't of State, Daily Press Briefing (Sept. 5, 2014), at <http://www.state.gov/r/pa/prs/dpb/2014/09/231306.htm>.