

2016

Contemporary Practice of the United States Relating to International Law

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Recommended Citation

Daugirdas, Kristina. "Contemporary Practice of the United States Relating to International Law." Julian D. Mortenson, co-editor. *Am. J. Int'l L.* 110, no. 3 (2016): 554-95.

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

U.S. Supreme Court Upholds Law Facilitating Compensation for Victims of Iranian Terrorism

On April 20, 2016, the U.S. Supreme Court handed down *Bank Markazi, aka Central Bank of Iran v. Peterson*, which upheld the Iran Threat Reduction and Syria Human Rights Act of 2012. The Act “makes available for postjudgment execution” by American victims of Iran-sponsored acts of terrorism a specific group of assets held in New York on behalf of the Central Bank of Iran.¹ Emphasizing that foreign policy judgments by the political branches require “respectful review by courts,” the Court rejected Iran’s argument that the statute violated separation of powers principles.² The main practical effect of the *Bank Markazi* decision was to clear the way for certain plaintiffs to collect on existing merits judgments in their favor.³ In response, Iran filed a claim against the United States with the International Court of Justice (ICJ) under the 1955 Treaty of Amity between the two countries.⁴

The *Bank Markazi* decision results from efforts by victims of Iran-sponsored acts of terrorism, including the 1983 Beirut Marine Barracks bombing,⁵ to collect on judgments they won against Iran.⁶ The framework for their claims was established by the Foreign Sovereign Immunities Act of 1976 (FSIA). The FSIA sets a baseline rule of foreign sovereign immunity, providing that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.”⁷ The Act then carves out various exceptions to that immunity, one of which pertains to state sponsored terrorism.⁸

Congress originally enacted the terrorism exception in 1996 (and amended it in 2008) in response to various plaintiffs’ unsuccessful attempts to sue countries responsible for terrorist attacks.⁹ The relevant text lifts sovereign immunity if two conditions are satisfied. First, the plaintiff must bring a case

¹ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1316 (2016).

² *Id.* at 1317.

³ *See id.*

⁴ *See* ICJ Press Release, Iran Institutes Proceedings Against the United States with Regard to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity (June 15, 2016), at <http://www.icj-cij.org/docket/files/164/19032.pdf>.

⁵ “At approximately 6:25 a.m. Beirut time, . . . [a] truck crashed through a concertina wire barrier and a wall of sandbags, and entered the barracks. When the truck reached the center of the barracks, the bomb in the truck detonated. The resulting explosion was the largest non-nuclear explosion that had ever been detonated on the face of the Earth.” *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 56 (D.D.C. 2003) (footnote omitted). “As a result of the Marine barracks explosion, 241 servicemen were killed . . .” *Id.* at 58. “The United States has long recognized Iran’s complicity in this attack.” *Bank Markazi*, 136 S. Ct. at 1320 n.6. (citing H.R. REP. NO. 104-523, pt. 1, at 9 (1996) (“After an Administration determination of Iran’s involvement in the bombing of the Marine barracks in Beirut in October 1983, Iran was placed on the U.S. list of state sponsors of terrorism on January 19, 1984.”)).

⁶ *See Bank Markazi*, 136 S. Ct. at 1316.

⁷ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1604 (2012).

⁸ 28 U.S.C. §1605A. *See also* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 102 AJIL 350, 350 (2008).

⁹ “The bill I am introducing today will bring clarity to this law on behalf of victims of terrorism and reaffirm their right to sue and collect damages from state sponsors of terrorism. There are several reasons why the law needs to be improved. First, the courts decided in 2004 in *Cicippio-Puleo v. Islamic Republic of Iran* that, contrary to the intent of the Flatow amendment, there would be no Federal private right of action against foreign governments. The ruling stated that there could only be legal action against individual officials and employees of that government. Second, current law permits judgment holders to only seize assets over which a terrorist state has day-to-day managerial control, thereby allowing terrorist states to hide their assets from the victims who have successful judgments

in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.¹⁰

Second, the defendant state must have been officially designated a “state sponsor of terrorism”¹¹ by the Secretary of State as defined under section 1605A of the FSIA.¹² If both conditions are satisfied, the defendant state cannot raise a sovereign immunity defense to that suit.

The terrorism exception has proved controversial, both within the United States and internationally. From the outset, State and Justice Department officials advised against enacting the exception,¹³ noting that it would put the United States out of step with the practice of other states regarding sovereign immunity.¹⁴ They warned that not only could such a deviation erode the credibility of the FSIA as a whole,¹⁵ but that it could also interfere with foreign policy decisions, such as the imposition of sanctions.¹⁶ Furthermore, the State Department had advised that enactment of the exception might prompt other states to respond by enacting their own reciprocal exceptions, perhaps for “other kinds of alleged wrongdoing that could be of concern to us.”¹⁷

The ICJ has described the terrorism exception as virtually unique. In a case assessing the legality of Italy’s exception to foreign sovereign immunity for serious human rights violations, the ICJ said the American terrorism exception had “no counterpart in the legislation of other States [and] [n]one of the States which enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts

against them. Third, state sponsors of terrorism, such as Libya, which is still responsible for terrorist acts it committed in the past, have consistently abused the appeals process to delay litigation proceedings. My new legislation will address these issues and improve the ability of victims to hold state sponsors of terrorism accountable.” 153 CONG. REC. S10791-01, 10793 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg).

¹⁰ 28 U.S.C. §1605A(a)(1).

¹¹ *Id.*, §1605A(a)(2)(A)(i)(I). “[T]he term ‘state sponsor of terrorism’ means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.” *Id.*, §1605A(h)(6).

¹² Additionally, the claimant/victim must have been a national of the United States or member of the armed forces or “otherwise an employee of the Government of the United States” when the act occurred and, if the act occurred in the foreign state against which the claim is brought, the claimant must afford “the foreign state a reasonable opportunity to arbitrate the claim.” *Id.*, §1605A (a)(2)(A)(ii)-(iii).

¹³ See *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Judiciary Comm.*, 103d Cong. (1994).

¹⁴ See *id.* at 13–14 (prepared Statement of Jamison S. Borek, Deputy Legal Adviser, Department of State) (“We are not aware of any instance in which a state permits jurisdiction over such tortious conduct of a foreign state without territorial limitations.”).

¹⁵ *Id.* at 14.

¹⁶ See *id.*

¹⁷ *Id.* at 15.

alleged.”¹⁸ (One month after the ICJ decision, Canada enacted a similar exception for terrorist acts.¹⁹)

A number of plaintiffs have relied on the FSIA’s terrorism exception to secure jurisdiction against Iran and win billions of dollars in default judgments. The winning plaintiffs, however, faced a problem when it came to execution: although the terrorism exception permits personal jurisdiction over Iran, victims of terrorism often found it practically and legally challenging to identify Iranian assets that would actually be subject to collection proceedings.²⁰ As the U.S. Supreme Court explained,

Subject to stated exceptions, the FSIA shields foreign-state property from execution. When the terrorism exception was adopted, only foreign-state property located in the United States and “used for a commercial activity” was available for the satisfaction of judgments. Further limiting judgment-enforcement prospects, the FSIA shields from execution property “of a foreign central bank or monetary authority held for its own account.”²¹

In response to the difficulties that plaintiffs encountered, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA),²² which lifts FSIA immunity against attachment and execution for certain assets that have been “blocked” by the executive branch:²³

Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . the blocked assets²⁴ of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.²⁵

In 2012, President Barack Obama signed a sweeping executive order that blocked “[a]ll property and interests in property of the Government of Iran, including the Central Bank of

¹⁸ Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, para. 88 (Feb. 3).

¹⁹ State Immunity Act, R.S.C., 1985, c. S-18 Can.). Canada’s exception states, in relevant part: “A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.” *Id.* at 6.1.

²⁰ See Brief for the United States as Amicus Curiae at 2, *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016) (No. 14-770). The majority of judgments remained unpaid. *Id.* at 1320.

²¹ *Bank Markazi*, 136 S. Ct. at 1318 (citations omitted). The “commercial exception” provides that “[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution.” 28 U.S.C. §1610. As relevant here, §1611 stipulates that “[n]otwithstanding the provisions of section 1610 of this chapter, *the property of a foreign state shall be immune from attachment and from execution, if (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution.*” 28 U.S.C. § 1611(b)(1) (emphasis added).

²² *Bank Markazi*, 136 S. Ct. at 1318.

²³ See *id.*

²⁴ A number of programs including the International Emergency Economic Powers Act and Trading with the Enemy Act “authorize the President to ‘block’ particular assets in the United States.” In general, blocking programs prohibit transactions concerning property of the targeted foreign government in the absence of Executive Branch authorization. Brief for the United States as Amicus Curiae at 3, *Bank Markazi*, 136 S. Ct. 1310 (No. 14-770).

²⁵ Terrorism Risk Insurance Act, H.R. 3210, 107th Cong. §201(a) (2002) (codified at 28 U.S.C. § 1610(f)(1)(A)).

Iran, that are in the United States.”²⁶ While this order clearly triggered the TRIA exception to FSIA execution immunity for all covered assets, its applicability to some assets was nonetheless contested. In the specific cases that eventually led to the Supreme Court’s *Bank Markazi* decision, for example, successful judgment plaintiffs sought and obtained restraints on the transfer of Iranian assets held in a New York bank account pursuant to the FSIA’s terrorism judgment execution provisions.²⁷ When plaintiffs initiated an action for turnover under the TRIA,²⁸ however, Iran argued that the precise language of the TRIA’s ownership requirements had not been satisfied. In short, “Bank Markazi contended that the blocked assets were not assets ‘of’ Bank Markazi,” but instead “were ‘of’ a financial intermediary which held them in the United States on Bank Markazi’s behalf.”²⁹

Largely in response to Iran’s efforts to narrowly interpret the TRIA’s ownership language, Congress passed the Iran Threat Reduction and Syria Human Rights Act of 2012.³⁰ Section 8772 of that Act explicitly targets the specific assets at issue in the district court proceedings that gave rise to the Supreme Court’s *Bank Markazi* decision.³¹ Section 8772(a) makes available for execution “a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b) . . . in order to satisfy judgment to the extent of any compensatory damages” caused by the acts of terrorism enumerated in the FSIA’s terrorism exception.³² Section 8772(b) then defines the relevant assets as those “identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings.”³³

Before allowing execution against an asset described in section 8772(b), a court must first determine that the asset is:

- (A) held in the United States for a foreign securities intermediary doing business in the United States;
- (B) a blocked asset (whether or not subsequently unblocked) . . . ; and
- (C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran.³⁴

²⁶ Exec. Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012) (emphasis added).

²⁷ *Bank Markazi*, 136 S. Ct. at 1320 n.10.

²⁸ *See id.*

²⁹ *Bank Markazi*, 136 S. Ct. at 1318 n.3. “[T]he bond assets have been held in a New York account at Citibank directly controlled by Clearstream Banking, S.A. (Clearstream), a Luxembourg-based company that serves ‘as an intermediary between financial institutions worldwide.’ Initially, Clearstream held the assets for Bank Markazi and deposited interest earned on the bonds into Bank Markazi’s Clearstream account. At some point in 2008, Bank Markazi instructed Clearstream to position another intermediary—Banca UBAE, S.p.A., an Italian bank—between the bonds and Bank Markazi. Thereafter, Clearstream deposited interest payments in UBAE’s account, which UBAE then remitted to Bank Markazi.” *Id.* at 1321 (citations omitted).

³⁰ *See id.* at 1318.

³¹ *See Peterson*, 2013 WL 1155576, at *24.; *see also Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 188 (2d Cir. 2014) (“Although Iran argues that the TRIA ownership requirements have not been satisfied, we need not reach this issue in light of Congress’s enactment of § 8772.”).

³² 22 U.S.C. §8772(a)(1) (2012).

³³ *Id.*, §8772(b).

³⁴ *Id.*, §8772(a)(1).

The court must then determine that “Iran holds equitable title to, or the beneficial interest in, the assets” and that no other person possesses “a constitutionally protected interest in the assets” under the Fifth Amendment to the Constitution of the United States.³⁵ Only then does the court order the turnover of the assets in satisfaction of valid judgments.

In response to the renewed motions by plaintiffs in these cases relying on section 8722, the District Court made the required findings and ordered the relevant assets to be turned over to plaintiffs³⁶ on “the two independent bases of TRIA section 201(a) and 22 U.S.C. § 8772.”³⁷ It rejected Iran’s argument that that the Act violated the separation of powers doctrine because the Act “effectively dictates the outcome of this one case.”³⁸ On appeal, the Second Circuit upheld the District Court’s decision.³⁹ The Supreme Court then granted certiorari.⁴⁰

In a 6–2 decision, the Court affirmed the Second Circuit and rejected Iran’s separation of powers challenge to section 8772.⁴¹ The Court dismissed in particular Bank Markazi’s argument that section 8772 impermissibly “directed certain factfindings and specified the outcome under the amended law.”⁴² The Court noted the long-established principles that legislation may be “particularized,”⁴³ that Congress may “make valid statutes retroactively applicable to pending cases,”⁴⁴ and that Congress “may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.”⁴⁵ The Court was therefore unmoved by the fact that section 8772 deals with “a limited category of cases”⁴⁶ that are “identified by caption and docket number.”⁴⁷ In the Court’s view, the Act simply establishes “new substantive *standards*, entrusting to the District Court application of those standards to the facts (contested or uncontested) found by the court.”⁴⁸ While the Court suggested that at least one of the relevant findings might not be a foregone conclusion in this case,⁴⁹ it held that “[i]n any event, a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.”⁵⁰

³⁵ *Id.*, §8772(a)(2).

³⁶ *Bank Markazi*, 136 S. Ct. at 1320–21.

³⁷ *Peterson*, 758 F.3d at 189.

³⁸ See *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at *31 (S.D.N.Y. Mar. 13, 2013); Brief for Petitioner on Writ of Certiorari at 19, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770).

³⁹ *Peterson*, 758 F.3d at 188.

⁴⁰ *Peterson v. Islamic Republic of Iran*, 136 S. Ct. 26 (2015).

⁴¹ *Bank Markazi*, 136 S. Ct. at 1322.

⁴² *Id.* at 1325.

⁴³ *Id.* at 1327.

⁴⁴ *Id.* at 1324, (quoting RICHARD FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 323, n.29 (7th ed. 2015)).

⁴⁵ *Bank Markazi*, 136 S. Ct. at 1325.

⁴⁶ *Id.* at 1326 n.23.

⁴⁷ *Id.* at 1326.

⁴⁸ *Id.* (emphasis added).

⁴⁹ The District Court made findings related to the definitions of “beneficial interest” and “equitable title.” *Id.* at 1325 n.20. Furthermore, “§8772 required the District Court to determine whether the Bank owned the assets in question.” *Id.* In this particular case, however, Bank Markazi conceded that “Iran held the requisite ‘equitable title to, or beneficial interest in, the assets.’” *Id.* at 1321.

⁵⁰ *Id.* at 1325. This holding in particular appears to have severely limited the implications of some famous language from *United States v. Klein*, 80 U.S. 128 (1872), perhaps to the vanishing point. See *id.* at 146 (stating that Congress may not “prescribe rules of decision to the Judicial Department . . . in [pending] cases”).

These general doctrinal observations were framed without regard to the specific subject matter of section 8772. But the Supreme Court concluded by emphasizing “that §8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper.”⁵¹ By blocking or governing the availability of foreign-state assets for attachment, Congress and the president act “[i]n pursuit of foreign policy objectives.”⁵² While the precise role played in the Court’s conclusion by these foreign affairs considerations was not specified, the Court emphasized that such foreign policy measures “have never been rejected as invasions upon the Article III judicial power.”⁵³

In dissent, Justices Roberts and Sotomayor observed that “Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties’ specific legal disputes to guarantee respondents’ victory.”⁵⁴ They claimed that the Act thus worked a particular “type of unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 does precisely that, changing the law—for these proceedings alone—simply to guarantee that respondents win. The law serves no other purpose.”⁵⁵ In the dissenters’ view, the Constitution prohibits such action by the legislature.

Five days after the Supreme Court decision was issued, Iran vowed to “sue the United States at the International Court of Justice at The Hague to prevent the distribution of nearly \$2 billion in impounded assets.”⁵⁶ Iranian Foreign Minister Javad Zarif was quoted by the Iranian state news agency as saying: “We have announced since the beginning that [the] Iranian government does not recognize the U.S. extra-territorial law and considers the U.S. court ruling to blockade Iranian funds null and void and in gross violation of the international law.”⁵⁷ The same week, Iran suggested that it was considering an unspecified retaliation.⁵⁸ In a letter released by Iran’s United Nations Mission to Secretary-General Ban Ki-moon, Zarif wrote:

The principle of state immunity is one of the cornerstones of the international legal order and a rule of customary international law. . . . Its primacy has also been recognized by the community of nations, all legal systems and the International Court of Justice. . . . It is a matter of grave concern that the United States Congress, along with other branches of the U.S. Government, seem to believe that they can easily defy and breach the fundamental

⁵¹ *Bank Markazi*, 136 S. Ct. at 1328.

⁵² *Id.*

⁵³ *Id.* See also *id.* at 1322 (“Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the ‘province and duty . . . to say what the law is’ in particular cases and controversies.”) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

⁵⁴ *Bank Markazi*, 136 S. Ct. at 1330 (Roberts, J., dissenting).

⁵⁵ *Id.* at 1332.

⁵⁶ Rick Gladstone, *Iran Threatens Lawsuit in StreetHague Court Over U.S. Ruling on \$2 Billion*, N.Y. TIMES, Apr. 25, 2016, at A6.

⁵⁷ Patrick Goodenough, *Iran Threatens to Take US to Int’l Tribunal Over Supreme Court Terror Payout Ruling*, CNS NEWS (Apr. 26, 2016) at <http://cnsnews.com/news/article/patrick-goodenough/iran-threatens-take-us-intl-tribunal-over-supreme-court-terror> (alteration in original).

⁵⁸ Rick Gladstone, *Iran Hints at Retaliation Over U.S. Use of Seized Assets*, N.Y. TIMES, Apr. 28, 2016, at A3.

principle of state immunity, by unilaterally waiving the immunity of states and even Central Banks in total contravention of the international obligations of the United States and under a groundless legal doctrine that the international community does not recognize.⁵⁹

The Coordinating Bureau of the Non-Aligned Movement (CoB) also disparaged *Bank Markazi* as inconsistent with international law:⁶⁰ “The CoB objects to US defiance to international law through the unilateral waiving of the sovereign immunity of States and their institutions in total contravention of the international and treaty obligations of the United States and under a spurious legal ground that the international community does not recognize.”⁶¹

On June 14, 2016, Iran filed a claim against the United States at the ICJ.⁶² The pleadings allege “violations by the Government of the United States of America of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America,”⁶³ including by denying “fair and equitable treatment” and “freedom of access to the courts,” by “applying unreasonable or discriminatory measures,” and by taking property of Iranian nationals without “prompt payment of just compensation.”⁶⁴

In its ICJ pleadings, Iran alleges that the United States violated these obligations by undertaking a series of

legislative and executive acts that have the practical effect of subjecting the assets and interests of Iran and Iranian entities, including those of the Central Bank of Iran (also known as “Bank Markazi”), to enforcement proceedings in the United States, even where such assets or interests . . . “are held by Iran or Iranian entities . . . and benefit from immunities from enforcement proceedings as a matter of international law, and as required by the [1955] Treaty.”⁶⁵

Iran also notes that “United States courts ‘have repeatedly dismissed attempts by Bank Markazi to rely on the immunities to which such property is entitled’ and maintains that “‘the assets of Iranian financial institutions . . . have already been seized, or are in the process of being seized and transferred.’”⁶⁶ Iran also alleges violations relating to the U.S. courts’ failure to recognize

⁵⁹ Letter from Dr. Javad Zarif, Minister for Foreign Affairs of the Islamic Republic of Iran, to Ban Ki-moon, UN Secretary General (Apr. 28, 2016), *available at* <http://iran-un.org/en/2016/04/28/28-april-2016-letter-of-h-e-dr-m-javad-zarif-minister-for-foreign-affairs-of-the-islamic-republic-of-iran-addressed-to-h-e-ban-ki-moon-secretary-general-united-nations/>.

⁶⁰ See Communiqué by the Coordinating Bureau of the Non-Aligned Movement in Rejection of Unilateral Actions by the United States in Contravention of International Law, in Particular the Principle of State Immunity (May 5, 2016), *available at* <http://iran-un.org/en/2016/05/05/05-may-2016-communiqué-by-the-coordinating-bureau-of-the-non-aligned-movement-in-rejection-of-unilateral-actions-by-the-united-states-in-contravention-of-international-law-in-particular-the-principle/>.

⁶¹ *Id.*

⁶² ICJ Press Release, Iran Institutes Proceedings Against the United States with Regard to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity (June 15, 2016), *at* <http://www.icj-cij.org/docket/files/164/19032.pdf>. The treaty entered into force on June 16, 1957.

⁶³ *Id.* at 1.

⁶⁴ Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 284 UNTS 93, 110, 112, 114, 116, 118.

⁶⁵ ICJ Press Release, *supra* note 62, at 1 (alterations in original).

⁶⁶ *Id.*

the “separate juridical status (including the separate legal personality) of all Iranian companies.”⁶⁷ A State Department spokesman responded to notice of the filing by stating that “we believe that the United States has acted consistent with its obligations under international law.”⁶⁸

Russia Argues Enhanced Military Presence in Europe Violates NATO-Russia Agreement; United States Criticizes Russian Military Maneuvers over the Baltic Sea as Inconsistent with Bilateral Treaty Governing Incidents at Sea

In February 2016, the United States and NATO announced plans to expand their military presence in Europe. Russia responded by claiming that the United States and NATO had violated the NATO-Russia Founding Act (Founding Act).¹ Around the same time, the Russian air force conducted a series of maneuvers over the Baltic Sea that—in the view of the United States—were inconsistent with the Incidents at Sea Treaty (INCSEA) between the United States and Russia.² Russia defended the legality of the flights.

The Founding Act is an international instrument signed by Russia, NATO, and each individual NATO member state in 1997, at a time when NATO was considering whether to admit Poland, the Czech Republic, and Hungary into the alliance.³ While the Founding Act is styled as a political agreement,⁴ Russian President Boris Yeltsin described the act as “a firm and absolute commitment for all signatory states.”⁵ The Founding Act includes language that addresses the stationing of permanent forces in new NATO member states. According to the Agreement,

NATO reiterates that in the current and foreseeable security environment, the Alliance will carry out its collective defence and other missions by ensuring the necessary interoperability, integration, and capability for reinforcement rather than by additional permanent stationing of substantial combat forces. Accordingly, it will have to rely on adequate infrastructure commensurate with the above tasks. In this context, reinforcement may take place, when necessary, in the event of defence against a threat

⁶⁷ *Id.* at 2.

⁶⁸ Asa Fitch, *Iran Sues U.S. in International Court Over Frozen Assets*, WALL ST. J. (June 16, 2016), at <http://www.wsj.com/articles/iran-sues-u-s-in-international-court-over-frozen-assets-1466027629>.

¹ Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, N. Atl. Treaty Org.-Russ., May 27, 1997, 36 ILM 1006 [hereinafter Founding Act].

² Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, U.S.-Soviet Union, May 25, 1972, 23 UST 1168 [hereinafter INCSEA Treaty].

³ See Marian Nash (Leich), *Contemporary Practice of the United States*, 92 AJIL 494, 495–96 (1998); Michael R. Gordon, *Russia Agrees to NATO Plan Pushed by Clinton to Admit Nations From Eastern Bloc*, N.Y. TIMES, May 15, 1997, at A18; The White House Press Release, Fact Sheet, NATO Russia Founding Act (May 27, 1997), at <http://clinton6.nara.gov/1997/05/1997-05-27-fact-sheet-on-nato-russia-founding-act.html>.

⁴ See, e.g., Founding Act, *supra* note 1 (“The North Atlantic Treaty Organization and its member States, on the one hand, and the Russian Federation, on the other hand, . . . based on an enduring political commitment undertaken at the highest political level, will build together a lasting and inclusive peace in the Euro-Atlantic area on the principles of democracy and cooperative security.”) (emphasis added).

⁵ The White House Press Release, Remarks by President Clinton, French President Chirac, Russia President Yeltsin, and NATO Secretary General Solana at NATO/Russia Founding Act Signing Ceremony (May 27, 1997), at <https://clinton4.nara.gov/WH/New/Europe/19970527-814.html>; see also Gordon, *supra* note 3; Jack Mendelsohn, *The NATO Russian Founding Act*, ARMS CONTROL ASSOCIATION (May 1, 1997), at https://www.armscontrol.org/act/1997_05/jm.

of aggression and missions in support of peace consistent with the United Nations Charter and the [Organization for Security and Co-operation in Europe] governing principles, as well as for exercises consistent with the adapted [Treaty on Conventional Armed Forces in Europe],⁶ the provisions of the Vienna Document 1994⁷ and mutually agreed transparency measures. Russia will exercise similar restraint in its conventional force deployments in Europe.⁸

In February 2016, the United States announced that it would double its military presence in Eastern Europe as part of its European Reassurance Initiative.⁹ In particular, the United States would add a rotational combat brigade, which would consist of approximately 3,000 to 4,000 soldiers, and pre-position additional military equipment, such as ammunition, fuel, artillery, and combat vehicles.¹⁰ Ambassador Douglas Lute, the U.S. Permanent Representative to NATO, addressed the consistency of these plans with the Founding Act:

This of course is all in accordance with the NATO-Russia Founding Act. Some would claim otherwise, but they're frankly wrong. The NATO-Russia Founding Act allows for improvements in infrastructure such as this prepositioning that I've outlined. These are rotational troops that I've described, not permanent troops. And the majority of the prepositioning will be in Western Europe, not in the East.¹¹

Not long after the Obama administration announced these changes to the European Reassurance Initiative, NATO announced that it would also enhance its presence in Eastern and Central Europe. NATO Secretary General Jens Stoltenberg announced that "NATO Defence Ministers agreed on an enhanced forward presence in the eastern part of our Alliance" and that the additional forces would be "multinational, to make clear that an attack against one Ally is an attack against all Allies, and that the Alliance as a whole will respond."¹² Similar to the Obama administration's announcement, NATO announced that the force would be "rotational and supported by a programme of exercises; and it will be complemented by the necessary logistics and infrastructure to support pre-positioning and facilitate rapid reinforcement."¹³ NATO later announced, in June 2016, that the additional combat forces will consist

⁶ Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, S. TREATY DOC. 102-08, 30 ILM 1 (establishing limits on the conventional military equipment that the state parties to the Treaty of Washington and the Treaty of Warsaw may station in Europe).

⁷ Organization for Security and Co-operation in Europe [OSCE], *Vienna Document 1994*, OSCE DOC.FSC/2/95 (Nov. 28, 1994) (establishing security confidence building measures between the member states of the Conference on Security and Co-operation in Europe).

⁸ Founding Act, *supra* note 1.

⁹ U.S. Dep't of State Press Release, Telephonic Press Briefing on the European Reassurance Initiative, Major General David W. Alvin, Director of Strategy and Policy U.S. European Command (Feb. 29, 2016), at <http://www.state.gov/r/pa/ime/useuropeanmediahub/transcripts/2016/253810.htm> [hereinafter Major Alvin Briefing]; see also The White House Press Release, Statement by the President on the FY2017 European Reassurance Initiative Budget Request (Feb. 2, 2016), at <https://www.whitehouse.gov/the-press-office/2016/02/02/statement-president-fy2017-european-reassurance-initiative-budget> (announcing a four-fold increase in ERI funding for fiscal year 2017).

¹⁰ See Alvin Briefing, *supra* note 9.

¹¹ U.S. Dep't of State Press Release, Telephonic Press Briefing with Ambassador Douglass Lute, U.S. Permanent Representative to NATO (Feb. 9, 2016), at <http://www.state.gov/r/pa/ime/useuropeanmediahub/transcripts/2016/252314.htm>.

¹² N. Atl. Treaty Org. Press Release, NATO Boosts its Defence and Deterrence Posture (Feb. 11, 2016), at http://www.nato.int/cps/en/natohq/news_127834.htm.

¹³ *Id.*

of four multinational battalions, and they will deploy on a rotational basis to the Baltic states and Poland.¹⁴

Russia argued that NATO's plans to expand its presence in Europe were inconsistent with the Founding Act because NATO intended to station permanent troops in new member states. According to Russian Foreign Minister Sergey Lavrov,

[w]hat we see on the NATO Eastern flank is the continuous rotation of US troops and the troops of its allies, almost daily military exercises, and the construction of new military infrastructure. Taken together, these steps are inconsistent with the letter and spirit of the NATO-Russia Founding Act and alter the military and political landscape in a major way, especially in northeastern Europe, making it an area of heightened tension instead of a peaceful and stable area in the military sense, which [it] was only recently.¹⁵

Lavrov later stated that NATO "has already violated the 1997 NATO-Russia Founding Act, which stipulates clearly that there should be no permanent stationing of substantial combat forces in new NATO member states."¹⁶

NATO defended the troop buildup on several grounds. Stoltenberg acknowledged that "[t]here will be troops there all the time," but he emphasized that NATO was "not speaking about permanent based troops; . . . they will be on a rotational basis."¹⁷ He also pointed out that "[s]ubstantial combat forces' was never defined when the NATO-Russia Founding Act was agreed in 1997."¹⁸ He elaborated:

[In 1997] there were different proposals on the table. And even if you take into account the Russian proposal we are well below their definition of substantial combat forces. We speak about a battalion-size presence. And that's in no way something which can be assessed as violating the NATO-Russia Founding Act.¹⁹

Finally, Stoltenberg pointed out that Europe's security environment has "very much changed" since Russia and NATO signed the Founding Act in 1997.²⁰ Such change is significant because the Founding Act states that NATO's commitment regarding permanent troops applies "in the current and foreseeable security environment."²¹

U.S. officials had made similar arguments on previous occasions. In 2014, Obama and Estonian President Toomas Ilves pointed out the changed circumstances during a joint news conference where Ilves stated:

¹⁴ Jens Stoltenberg, Sec'y Gen., N. Atl. Treaty Org., Pre-Ministerial Press Conference (June 13, 2016), at http://www.nato.int/cps/en/natohq/opinions_132272.htm.

¹⁵ Sergey Lavrov, Foreign Minister of Russia, Address at the Fifth Moscow Conference on International Security (Apr. 27, 2016), at http://www.mid.ru/en/web/guest/foreign_policy/international_safety/disarmament/-/asset_publisher/rp0fUBmANaH/content/id/2256120.

¹⁶ Interview with Sergey Lavrov, Foreign Minister of Russia, in Moscow, Russia (Apr. 28, 2016), at [HYPERLINK http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2258885](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2258885) [hereinafter Lavrov Interview]; see also Interview with Alexander Grushko, Russian Permanent Representative to NATO (May 31, 2016), at http://www.mid.ru/en/web/guest/nota-bene/-/asset_publisher/dx7DsH1WAM6w/content/id/2297957.

¹⁷ Jens Stoltenberg, Sec'y Gen., N. Atl. Treaty Org., Press Conference with Members of the Bundespressekonferenz "The Warsaw Summit – Adapting NATO in Turbulent Times" (June 2, 2016), at http://www.nato.int/cps/en/natohq/opinions_131901.htm.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *supra* text accompanying note 8.

I suggest all those who say we can't do anything because of the NATO-Russia Founding Act read the NATO-Russia Founding Act, which says that these conditions hold—to quote—“in the current and foreseeable” future, or “the security environment of the current and foreseeable” future. That was the security environment of 1997, when Boris Yeltsin was President, and there had been no violations of either the U.N. Charter or the 1975 Helsinki Final Act, [or] the 1990 Paris Charter.

So I would argue this is an unforeseen and new security environment, and therefore one has to hold on to certain provisions. It does not mean we have to give up the whole act, but certainly when an agreement in certain parts no longer holds, well, then it's time to make a change.

I mean, the NATO-Russia Founding Act has been violated by Russia. We continue to support the vision of that document, but its substance has changed dramatically, and I am confident that all of NATO's actions are and will be conducted in accordance with its international commitments as an alliance.²²

Obama agreed that “the circumstances clearly have changed.”²³ In 2015, Secretary of Defense Ashton Carter fleshed out this perspective, stating that Russia's aggression in Ukraine had violated the Founding Act, which requires that NATO and Russia comply with the UN Charter.²⁴ Carter stated that “[s]ince Russia began its campaign against Ukraine early last year,” Russia has “violat[ed] the UN Charter, the Helsinki Accords, and the NATO-Russia Founding Act, as well as the commitment it made in Budapest [in 1994 through] the Budapest Memorandum.”²⁵

As the dispute about the U.S. and NATO plans for a troop buildup continued, Russia conducted a series of military maneuvers near U.S. military assets that the United States described as dangerous, unprofessional, and potentially in violation of international law. According to the U.S. Defense Department, on April 11, 2016, while the U.S.S. Donald Cook was conducting training exercises in the Baltic Sea, two Russian fighter jets made “numerous close-range and low altitude passes” of the ship.²⁶ One day later, a Russian helicopter and two Russian fighter jets again made repeated, low-range passes over the U.S.S. Donald Cook “in a simulated attack profile.”²⁷ On April 14, 2016, a “Russian aircraft did a barrel roll over an Air Force RC-135U reconnaissance aircraft operating in international airspace,”²⁸ and another Russian jet similarly intercepted an American reconnaissance plane on April 29, 2016.²⁹

²² Toomas Hendrik Ilves, President of Estonia, Press Conference with President Barack Obama (Sept. 3, 2014), at <https://www.whitehouse.gov/photos-and-video/video/2014/09/03/president-obama-holds-press-conference-president-ilves-estonia>.

²³ *Id.*

²⁴ Ashton Carter, U.S. Sec'y of Defense, Remarks at Atlantik Brücke: “U.S., Germany, & NATO Are Moving Forward Together” (June 22, 2015), at <http://www.defense.gov/News/Speeches/Speech-View/Article/606684> [hereinafter Secretary Carter Remarks]; Founding Act, *supra* note 1.

²⁵ Secretary Carter Remarks, *supra* note 24.

²⁶ U.S. Dep't of Defense Press Release, Navy Ship Encounters Aggressive Russian Aircraft in Baltic Sea (Apr. 13, 2016), at <http://www.defense.gov/News-Article-View/Article/720536/navy-ship-encounters-aggressive-russian-aircraft-in-baltic-sea> [hereinafter Dep't of Defense Press Release].

²⁷ *Id.*

²⁸ U.S. Dep't of Defense Press Release, NATO-Russia Council to Meet for First Time Since 2014 (Apr. 19, 2016), at <http://www.defense.gov/News-Article-View/Article/737397/nato-russia-council-to-meet-for-first-time>

The United States stated that Russia's military maneuvers were inconsistent with the bilateral INCSEA Treaty, which the United States and Russia signed at the 1972 Moscow Summit after a series of collisions between U.S. and Russian naval forces.³⁰ According to Article IV of the treaty,

Commanders of aircraft of the Parties shall use the greatest caution and prudence in approaching aircraft and ships of the other Party operating on and over the high seas, in particular, ships engaged in launching or landing aircraft, and in the interest of mutual safety shall not permit: simulated attacks by the simulated use of weapons against aircraft and ships, or performance of various aerobatics over ships, or dropping various objects near them in such a manner as to be hazardous to ships or to constitute a hazard to navigation.³¹

After describing the Russian military's close interactions with the U.S.S. Donald Cook in early April, White House Press Secretary Josh Earnest read from Article IV of the INCSEA and claimed that it was clear that "the conduct of the Russian military pilots in this particular incident is inconsistent with that agreement."³² Secretary of State John Kerry then spoke with Lavrov to register the United States' "strong objections to unsafe maneuvers executed by Russian military aircraft over the USS Donald Cook in the Baltic Sea."³³ The Pentagon similarly raised concerns that Russia's series of maneuvers were unsafe and could have led to conflict. According to a press release responding to the incidents involving the U.S.S. Donald Cook, U.S. military officials stated that "[t]hese actions have the potential to unnecessarily escalate tensions between countries, and could result in a miscalculation or accident that could cause serious injury or death."³⁴

Russia denied the U.S. accusations that its military maneuvers were unprofessional and denied that they violated Russia's international obligations. According to Russian Defense Ministry Major-General Igor Konashenkov, the Russian aircraft that approached the U.S.S. Donald Cook spotted "the ship within the visibility zone, [and] the Russian pilots turned their aircraft away from the vessel fully observing the safety measures."³⁵ The military official stated that, "all flights of aircraft of the Russian Aerospace Forces are performed strictly in accordance with the international regulations on

since-2014; Sophie Tatum & Barbara Starr, *Russia Denies Wrongdoing After Jet Barrel-rolls over U.S. Aircraft*, CNN (Apr. 17, 2016), at <http://www.cnn.com/2016/04/16/politics/russian-jet-barrel-rolled-us-aircraft/>.

²⁹ Barbara Starr, *Russians 'Barrel Roll' over Another U.S. Air Force Plane*, CNN (Apr. 29, 2016), at <http://www.cnn.com/2016/04/29/politics/russians-barrel-roll-air-force-plane/>; *US Accuses Russia over Baltic Jet Manoeuvre*, BBC (Apr. 29, 2016), at <http://www.bbc.com/news/world-us-canada-36175973>.

³⁰ Bureau of International Security and Nonproliferation, *Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas*, U.S. DEP'T OF STATE, at <http://www.state.gov/t/isn/4791.htm> (last visited July 15, 2016).

³¹ INCSEA Treaty, *supra* note 2.

³² The White House Press Release, Press Briefing by Press Sec'y Josh Earnest (Apr. 14, 2016), at <https://www.whitehouse.gov/the-press-office/2016/04/14/press-briefing-press-secretary-josh-earnest-41416>.

³³ U.S. Dep't of State Press Release, Secretary Kerry's Phone Call With Foreign Minister Lavrov (Apr. 15, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/04/255870.htm>.

³⁴ Dep't of Defense Press Release, *supra* note 6.

³⁵ *USS Donald Cook was About 70 km from Russian Navy Base When Warplanes Passed it*, TASS RUSS. NEWS AGENCY (Apr. 14, 2016), at <http://tass.ru/en/defense/869555> [hereinafter RUSS. NEWS AGENCY]; see also Lavrov Interview, *supra* note 16 ("The Russian aircraft were on a legitimate training flight in this area, which is high seas airspace. They saw a heavily armed US destroyer approaching a Russian military base and decided to take a closer look. As soon as they saw who it was, with the fly-by happening at a safe distance, they turned back and continued their flight.").

the use of airspace over neutral waters,” and he added that the U.S. naval ship and the Russian aircraft both had equal rights of navigation in international waters and airspace.³⁶

While Lavrov linked the dispute over the Russian naval maneuvers to the dispute over the Founding Act, he did not suggest that the maneuvers were formal countermeasures:

When we hear these days that Russia has been carrying out dangerous manoeuvres near NATO borders, I think that this is merely a mean-spirited attempt to turn the issue on its ears. In its expansion efforts, the North Atlantic Treaty Organisation is getting closer and closer to Russia’s borders. The Alliance has already violated the 1997 NATO-Russia Founding Act, which stipulates clearly that there should be no permanent stationing of substantial combat forces in new NATO member states. However, despite these obligations, NATO military infrastructure is inching closer and closer to Russia’s borders. But when Russia takes action to ensure its security, we are told that Russia is engaging in dangerous manoeuvres near NATO borders. In fact, NATO borders are getting closer to Russia, not the opposite. We have a saying in Russia: If you want to understand what the people surrounding you want from you, you have to start by understanding why they have surrounded you. This is what we are trying to do. The latest incident in the Baltic Sea was related to a US destroyer armed with dozens of cruise missiles navigating in just a few dozen kilometres from the Russian military base in Baltiysk, which is Russian territory.³⁷

U.S. Secretary of State Determines ISIL Is Responsible for Genocide

On March 17, 2016, U.S. Secretary of State John Kerry made a formal determination that the Islamic State of Iraq and the Levant (ISIL), also known as Daesh¹ or as the Islamic State of Iraq and Syria (ISIS), “is responsible for genocide.”² This announcement marks only the second time that the United States has attached that label to an ongoing crisis.³

The U.S. Congress had been pushing the administration to make such a determination. Last December, a provision attached to a spending bill gave Kerry ninety days to determine whether the persecution of “Christians and people of other religions in the Middle East by violent Islamic extremists . . . constitutes mass atrocities or genocide.”⁴ On March 14,

³⁶ RUSS. NEWS AGENCY, *supra* note 35.

³⁷ Lavrov Interview, *supra* note 16.

¹ Da’esh is an Arabic acronym of al-Dawla al-Islamiya fi Iraq wa ash-Sham—meaning the Islamic State of Iraq and al-Sham. When spoken in Arabic, Da’esh sounds similar to the Arabic phrase for “sowers of discord” or “one who crushes underfoot.” The term has a pejorative connotation, and several different countries have started using it instead of ISIS or ISIL in order to deny legitimacy to the terrorist organization. See generally Orlando Crowcroft, *Why ISIS Hates Being Called Daesh: What’s the Correct Name for the World’s Most Dangerous Terrorists?*, INT’L BUS. TIMES (Dec. 2, 2015), at <http://www.ibtimes.co.uk/why-isis-hate-being-called-daesh-whats-correct-name-world-s-most-dangerous-terrorists-1531506>. Kerry started using the term Daesh instead of ISIL in December, 2014. See Adam Taylor, ‘Daesh’: John Kerry Starts Calling the Islamic State a Name they Hate, WASH. POST (Dec. 5, 2014), at <https://www.washingtonpost.com/news/worldviews/wp/2014/12/05/daesh-john-kerry-starts-calling-the-islamic-state-a-name-they-hate>.

² U.S. Dep’t of State Press Release, Sec’y of State John Kerry, Remarks on Daesh and Genocide (Mar. 17, 2016), at <http://www.state.gov/secretary/remarks/2016/03/254782.htm> [hereinafter Kerry Remarks].

³ Adam Chandler, *How Meaningful is the ISIS Genocide Designation?*, THE ATLANTIC (Mar. 19, 2016), at <http://www.theatlantic.com/international/archive/2016/03/isis-genocide-designation/474414/>; see also John R. Crook, *Contemporary Practice of the United States*, 99 AJIL 266 (2005).

⁴ Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 7033 (2015).

2016—three days before the statutory deadline—the House of Representatives unanimously passed a concurrent resolution expressing the view that the “atrocities perpetrated by ISIL against Christians, Yazidis, and other religious and ethnic minorities in Iraq and Syria constitute . . . genocide.”⁵ The House exhorted all governments and international organizations to “call ISIL atrocities by their rightful names: war crimes, crimes against humanity, and genocide.”⁶

By this time, a number of other countries had already condemned ISIL for engaging in genocide. In August 2014, the Iraqi Parliament designated ISIL’s acts in “north Iraq a genocide” and called on the international community to “prosecute ISIS and to hold responsible the states and institutions that support or finance their activities.”⁷ Later that month, German Chancellor Angela Merkel also accused ISIL of genocide.⁸ In September 2015, a representative of the Prime Minister of the Kurdistan Region of Iraq stated that what “religious minorities are suffering is ‘genocide’” and called on world leaders to use the word “genocide” in their statements and speeches.⁹ The Council of Europe voted in January 2016 by a margin of 117 to 1 that ISIL was committing genocide.¹⁰ The next month, the European Parliament followed suit by voting to recognize the occurrence of genocide.¹¹

During a press briefing on March 16, 2016—the day before Kerry’s announcement—the State Department Deputy Spokesperson emphasized that the process of making a determination with respect to genocide involved “a very detailed, rigorous legal analysis.”¹²

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by the United Nations General Assembly in 1948¹³ and ratified by the United States in 1988.¹⁴ In a declassified 2004 memorandum about genocide in Darfur, the State Department expressed the view that this treaty text supplies “the internationally

⁵ H.R. Con. Res. 75, 114th Cong. (2016). The Resolution passed by a vote of 393 to 0. *Final Results for Roll Call 112*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Mar. 14, 2016), at <http://clerk.house.gov/evs/2016/roll112.xml>.

⁶ H.R. Con. Res. 75, 114th Cong. (2016).

⁷ *Iraqi Parliament Resolution Calls ISIS Acts Genocide*, ASSYRIAN INT’L NEWS AGENCY (Aug. 7, 2014), at <http://www.aina.org/news/20140807164526.htm>.

⁸ Katie Pavlich, *State Department Declares ISIS is Committing Genocide Against Christians in Iraq and Syria*, TOWNHALL (Mar. 17, 2016), at <http://townhall.com/tipsheet/katiepavlich/2016/03/17/breaking-isis-genocide-n2135279>.

⁹ Indefenseofchristians, *Bayan Sami Abdul Rahman KRG Representative to the U.S. Speaks at the 2015 IDC Convention*, YOUTUBE (Oct. 22, 2015), at <https://www.youtube.com/watch?v=aWL0f4MZXi0>.

¹⁰ Foreign Fighters in Syria and Iraq, EUR. PARL. ASS. RES. 2091 (Jan. 27, 2016), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=22482&lang=en>.

¹¹ Joint Motion for a Resolution, EUR. PARL. DOC. RC\1085712EN (Feb. 3, 2016), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bMOTION%2bP8-RC-2016-0149%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>.

¹² The White House Press Release, Press Briefing by Deputy Spokesperson Mark C. Toner (Mar. 16, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/03/254764.htm> [hereinafter Toner Press Briefing].

¹³ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention].

¹⁴ *Senate Consideration of Treaty Document 81-15 (Feb. 19, 1986)*, CONGRESS.GOV, at <https://www.congress.gov/treaty-document/81st-congress/15> (last visited July 1, 2016) (passed by a vote of 83 to 11); Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. TIMES (Nov. 4, 1988), at <http://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html>.

accepted definition” of genocide “under customary international law.”¹⁵ The 2004 memorandum also notes that the prohibition on genocide is a part of customary international law and “a preemptory norm of international law (i.e., ‘*jus cogens*’).”¹⁶

The Genocide Convention defines genocide in terms of two elements: the act and the mental state.¹⁷ Article II of the Convention lists five separate categories of actions in regard to a protected group that satisfy the act requirement:

- (a) Killing members of a protected group;
- (b) Causing serious bodily injury or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁸

A group or individual satisfies the mental state of this crime by committing a genocidal act “with the intent to destroy, in whole or in part,” a protected group, “as such.”¹⁹ The United States ratified the Genocide Convention with an understanding that “the Convention requires a specific intent to destroy a group in whole or substantial part, at least within a given country.”²⁰ In a 2007 decision, the International Court of Justice also addressed the intent requirement.²¹ The Court noted that each of the acts enumerated in Article II include mental elements; the acts must be deliberate or intentional.²² In addition, the Court said, Article II

requires the establishment of the “intent to destroy, in whole or in part, . . . [the protected] group, as such.” It is not enough to establish, for instance . . . that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; . . . It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.²³

¹⁵ Memorandum on Genocide and Darfur from William H. Taft, IV, Legal Adviser, U.S. Dep’t of State, to The Deputy Secretary (June 25, 2004), at 2, available at http://nsarchive.gwu.edu/NSAEBB/NSAEBB356/20040625_darfur.PDF [hereinafter Darfur Memorandum].

¹⁶ *Id.*

¹⁷ See Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT’L L. 399, 399 (2001).

¹⁸ Genocide Convention, *supra* note 13, Art. 2.

¹⁹ *Id.*

²⁰ Sean D. Murphy, *Department of State Legal Analysis of 1994 Genocide in Rwanda*, 96 AJIL 258, 260 (2002) (quoting a newly released 1994 State Department memorandum relating to genocide in Rwanda).

²¹ Application of the Convention on the Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 ICJ 140 (Feb. 26) [hereinafter ICJ Genocide Judgment].

²² *Id.*, para. 186 (“‘Killing’ must be intentional, as must ‘causing serious bodily or mental harm.’ Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words ‘deliberately’ and ‘intended,’ quite apart from the implications of the words ‘inflicting’ and ‘imposing’; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the [International Law Commission], are by their very nature conscious, intentional or volitional acts.”) (citation omitted).

²³ *Id.*, para. 187.

In the United States, the Secretary of State has typically made the determination that genocide has occurred or is occurring in a particular country.²⁴ (By contrast, United Kingdom Human Rights Minister Joyce Anelay declined to make a similar determination, arguing that it is for judges, and not for government officials, to declare if genocide has taken place.²⁵) An excerpt of Kerry's announcement follows:

My purpose in appearing before you today is to assert that, in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yezidis, Christians, and Shia Muslims. Daesh is genocidal by self-proclamation, by ideology, and by actions—in what it says, what it believes, and what it does. Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.

I say this even though the ongoing conflict and lack of access to key areas has made it impossible to develop a fully detailed and comprehensive picture of all that Daesh is doing and all that it has done . . . [O]ver the past months, we have conducted a review of the vast amount of information gathered by the State Department, by our intelligence community, by outside groups. And my conclusion is based on that information and on the nature of the acts reported.

We know, for example, that in August of 2014 Daesh killed hundreds of Yezidi men and older women in the town of Kocho and trapped tens of thousands of Yezidis on Mount Sinjar without allowing access to food, water, or medical care. Without our intervention, it was clear those people would have been slaughtered. Rescue efforts aided by coalition airstrikes ultimately saved many, but not before Daesh captured and enslaved thousands of Yezidi women and girls—selling them at auction, raping them at will, and destroying the communities in which they had lived for countless generations.

We know that in Mosul, Qaraqosh, and elsewhere, Daesh has executed Christians solely because of their faith; that it executed 49 Coptic and Ethiopian Christians in Libya; and that it has also forced Christian women and girls into sexual slavery.

We know that Daesh massacred hundreds of Shia Turkmen and Shabaks at Tal Afar and Mosul; besieged and starved the Turkmen town of Amerli; and kidnapped hundreds of Shia Turkmen women, raping many in front of their own families.

We know that in areas under its control, Daesh has made a systematic effort to destroy the cultural heritage of ancient communities—destroying Armenian, Syrian Orthodox, and Roman Catholic churches; blowing up monasteries and the tombs of prophets; desecrating cemeteries; and in Palmyra, even beheading the 83-year-old scholar who had spent a lifetime preserving antiquities there.

We know that Daesh's actions are animated by an extreme and intolerant ideology that castigates Yezidis as, quote, "pagans" and "devil-worshippers," and we know that Daesh has threatened Christians by saying that it will, quote, "conquer your Rome, break your crosses, and enslave your women."

²⁴ Darfur Memorandum, *supra* note 15; *see also* Crook, *supra* note 3, at 267 ("[W]e concluded, I concluded, that genocide has been committed in Darfur.") (statement of then-Secretary of State Colin Powell).

²⁵ Patrick Wintour, *Ministers Criticized for Refusing to Act on Isis Genocide Motion*, THE GUARDIAN (Apr. 21, 2016), at <http://www.theguardian.com/politics/2016/apr/21/uk-government-criticised-for-refusing-to-act-on-motion-accusing-isis-of-genocide>.

Shia Muslims, meanwhile, are referred to by Daesh as, quote, “disbelievers and apostates,” and subjected to frequent and vicious attacks. In December, a year ago, a 14-year-old boy named Usaid Barho approached the gate of a Shiite mosque in Baghdad, unzipped his jacket to show that he was wearing an explosive vest and he surrendered to the guards. He had been recruited by Daesh in Syria, and joined to serve Islam, but he was told after his recruitment that, unless he obeyed every order, Shiites would come and rape his mother. Daesh said of Shias, and I quote, “It is a duty imposed upon us to kill them, to fight them, to displace them, and to cleanse the land of their filth.”

One element of genocide is the intent to destroy an ethnic or religious group, in whole or in part. We know that Daesh has given some of its victims a choice between abandoning their faith or being killed, and that for many is a choice between one kind of death and another.

The fact is that Daesh kills Christians because they are Christians; Yezidis because they are Yezidis; Shia because they are Shia. This is the message it conveys to children under its control. Its entire worldview is based on eliminating those who do not subscribe to its perverse ideology. There is no question in my mind that if Daesh succeeded in establishing its so-called caliphate, it would seek to destroy what remains of ethnic and religious mosaic once thriving in the region.²⁶

Kerry then addressed the role of future legal proceedings against individuals:

I want to be clear. I am neither judge, nor prosecutor, nor jury with respect to the allegations of genocide, crimes against humanity, and ethnic cleansing by specific persons. Ultimately, the full facts must be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal. But the United States will strongly support efforts to collect, document, preserve, and analyze the evidence of atrocities, and we will do all we can to see that the perpetrators are held accountable.²⁷

As for the consequences of this announcement, Kerry said:

I hope that my statement today will assure the victims of Daesh’s atrocities that the United States recognizes and confirms the despicable nature of the crimes that have been committed against them.

Second, I hope it will highlight the shared interest that otherwise diverse groups have in opposing Daesh. After all, the reality of genocide underscores even more starkly the need for a comprehensive and unified approach to defeating Daesh both in its core in Syria and Iraq and more broadly in its attempt to establish external networks.²⁸

At a press conference in February, a month before the announcement, White House Press Secretary Josh Earnest explained that the Obama administration had not yet used the term “genocide” to describe Daesh’s actions because “the use of that specific term has legal ramifications.”²⁹ But during the run-up to Kerry’s announcement, the administration rejected the

²⁶ Kerry Remarks, *supra* note 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ The White House Press Release, Press Briefing by Press Secretary Josh Earnest (Feb. 4, 2016), at <https://www.whitehouse.gov/the-press-office/2016/02/04/press-briefing-press-secretary-josh-earnest-242016>.

view that the determination would trigger new international legal obligations. A State Department spokesperson said that “acknowledging that genocide or crimes against humanity have taken place in another country would not necessarily result in any particular legal obligation for the United States.”³⁰ He explained that the Genocide Convention’s obligation to prevent genocide is territorially limited:

[I]t does create obligations on states to prevent genocide within their territory and [to] punish genocide, so there is the accountability aspect of it. I think in this particular case, there may not be—or there will not be a sea change in how we’re approaching Daesh [W]e’re already very, for lack of a better word, hell-bent on destroying Daesh, removing it from its enclaves in Syria and Iraq, because we already recognize what a murderous, barbaric terrorist group . . . it already is.”³¹

The Obama administration’s view that the obligation to prevent genocide is territorially limited is consistent with the positions taken by prior administrations in the 2004 Darfur memorandum and a 1994 memorandum regarding genocide in Rwanda.³² Some commentators, however, disagree, citing the International Court of Justice (ICJ) 2007 decision interpreting the Genocide Convention.³³ In that case, the ICJ explained the obligation to prevent genocide in Article 1 of the Genocide Convention requires states to employ “all means reasonably available to them, so as to prevent genocide so far as possible.”³⁴ The Court went on to explain:

In this area the notion of “due diligence,” which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also

³⁰ Toner Press Briefing, *supra* note 12.

³¹ *Id.*; see also John Hudson, *Obama Administration Declares Islamic State Genocide Against Christians*, FOREIGN POLICY (Mar. 17, 2016), at <http://foreignpolicy.com/2016/03/17/obama-administration-declares-islamic-state-genocide-against-christians/> (“When pressed about the usefulness of the declaration, [a senior State Department official] said the U.S. believes it is important to ‘document the history of what’s happened to these innocent people,’ formally recognize their suffering, galvanize the international community to help defeat the Islamic State and contribute to the effort to document and analyze the group’s atrocities.”).

³² Darfur Memorandum, *supra* note 15, at 3 (“Based on the available facts, a determination that genocide has occurred in Darfur would have no immediate legal—as opposed to moral, political, or policy—consequences for the United States. In prior years, the Department rejected arguments by some human rights advocates . . . that would impose a legal obligation on all Contracting Parties to take particular measures to ‘prevent’ genocide in areas outside of their territory.”); Memorandum from Conrad Harper, Legal Adviser, U.S. Dep’t of State, to The Secretary (May 20, 1994), at 2, available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB53/rw052194.pdf> (“A [U.S. government] statement that acts of genocide have occurred would not have any particular legal consequences. Under the Convention, the prosecution of persons charged with genocide is the responsibility of the competent courts in the state where the acts took place or an international penal tribunal (none has yet been established); the U.S. has no criminal jurisdiction over acts of genocide occurring within Rwanda unless they are committed by U.S. citizens or they fall under another criminal provision of U.S. law (such as those relating to acts of terrorism for which there is a basis for U.S. jurisdiction).”).

³³ See, e.g., John Heieck, *Daesh and the Duty to Prevent Genocide*, OPINIO JURIS (Apr. 6, 2016), at <http://opiniojuris.org/2016/04/06/daesh-and-the-duty-to-prevent-genocidel/>.

³⁴ ICJ Genocide Judgment, *supra* note 21.

be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.³⁵

According to one commentator, whether the United States' current efforts to combat ISIL satisfy the ICJ standard is not entirely clear. A United States-led coalition has been "pounding Daesh with airstrikes since mid-2014," but "Daesh's genocidal campaign continues."³⁶ To fully satisfy the due diligence standard, this commentator argues that the United States, together with the other members of the UN Security Council, should adopt a robust resolution to address the situation.³⁷ The UN Secretary-General has likewise urged the Security Council to take further action "to end the religiously and ethnically-motivated violence sweeping the region and [to] end impunity for those committing crimes against humanity."³⁸ As of the date of publication, no such resolution has yet been adopted.

INTERNATIONAL ORGANIZATIONS

United States Blocks Reappointment of WTO Appellate Body Member

On May 12, 2016, the United States announced its decision to block the reappointment of Seung Wha Chang to a second term on the Appellate Body of the World Trade Organization (WTO).¹ This decision received widespread criticism, especially by South Korea, Chang's home state.

The seven-member Appellate Body, which generally acts by consensus, hears appeals from WTO Dispute Settlement Body decisions regarding trade conflicts between member states:²

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall

³⁵ *Id.* According to the Court, a state's obligations to act to prevent genocide "arise[s] at the moment instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed." *Id.*, para. 431.

³⁶ See generally Heieck, *supra* note 33.

³⁷ *Id.* (endorsing a resolution that would "inter alia, refer the situations in Iraq and Syria to the International Criminal Court, impose arms embargos on Daesh and related groups, and authorize the deployment of a UN peace-enforcing force to the areas in which Daesh is operating").

³⁸ UN Press Release, At Security Council, Ban Urges Action to End Violence Against Religious, Ethnic Minorities in Middle East (Mar. 27, 2015), at <http://www.un.org/apps/news/story.asp?NewsID=50439#.V5kOJEB95hA>.

¹ Statement by the U.S. at the Meeting of the WTO Dispute Settlement Body 1 (May 23, 2016) [hereinafter U.S. WTO Statement], available at https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (footnotes and citations omitted). See Manfred Elsig, Mark Pollack & Gregory Shaffer, *The U.S. is Causing Controversy in the World Trade Organization. Here's What's Happening.*, WASH. POST (June 9, 2016), at <https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/>.

² For background on the WTO dispute resolution system and the role of the Appellate Body in resolving trade disputes, including procedures for appeals, see *Understanding the WTO: Settling Disputes*, WTO, at https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited July 15, 2016). See also Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 2(4), THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 UNTS 401, 33 ILM 1226 (1994) [hereinafter Dispute Settlement Understanding]; Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.³

Appellate Body judges are appointed for an initial four-year term and can then be reappointed for maximum of one additional four-year term:⁴

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.⁵

While any member state may block this second-term appointment, reappointments are typically routine and uncontroversial.⁶ The United States' blocking of Chang's reappointment comes at a time when the WTO was already in the process of replacing another outgoing member, leaving the current complement at five instead of seven.⁷

U.S. opposition to Chang's reappointment was explained in terms of disagreement with several cases in which panels on which Chang sat allegedly overstepped the scope of the Appellate Body's authority.⁸ Deputy United States Trade Representative (and United States Ambassador to the WTO) Michael Punke and United States Trade Representative General Counsel Tim Reif issued a joint statement offering more detail:

The United States is strongly opposed to appellate body members deviating from their appropriate role by restricting the rights or expanding trade agreement obligations [of WTO members] . . . The United States will not support any individual with a record of restricting trade agreement rights or expanding trade agreement obligations.⁹

The statement continued:

The integrity of the WTO depends on the stability of a healthy, well-functioning dispute settlement system that fairly applies the international trade rules as they are in-fact

³ Dispute Settlement Understanding, *supra* note 2, Art. 17 (1).

⁴ *Id.*, Art. 17(2).

⁵ *Id.*

⁶ See Elsig, *supra* note 1.

⁷ See Arman Sarvarian & Filippo Fontanelli, *The USA and Re-Appointment at the WTO: A 'Legitimacy Crisis'?*, EJIL:TALK! (May 27, 2016), at <http://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/>.

⁸ See Elsig, *supra* note 1. The list of cases the United States Trade Representative pointed to included Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R (adopted Apr. 14, 2016); Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R (adopted Mar. 20, 2015); Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (adopted Dec. 18, 2014); and Appellate Body Report, *United States—Countervailing and Anti-dumping Measures on Certain Products from China*, WTO Doc. WT/DS449/AB/R (adopted July 7, 2014). The cases are not all disputes to which the United States was a party, and the U.S. Trade Representative claims that unfavorable outcomes to the United States are not the motivating factor behind opposing Chang. See Sarvarian, *supra* note 7.

⁹ Sarvarian & Fontanelli, *supra* note 7.

written—and that does not attempt to rewrite the rules or write new rules that are inconsistent with the trade obligations that were carefully negotiated by the United States and other WTO members.¹⁰

The United States Trade Representative provided several specific examples of conduct on the part of the WTO Appellate Body the United States found objectionable:

First, in the recent DS453 appellate report in the financial services dispute between Panama and Argentina, more than two-thirds of the Appellate Body's analysis—46 pages—is in the nature of *obiter dicta*. The Appellate Body reversed the panel's findings on likeness and said that this reversal rendered moot all the panel's findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving the dispute—they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis is comprised simply of advisory opinions on legal issues.

The Appellate Body is not an academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it is not the role of panels or the Appellate Body to “make law” outside of the context of resolving a dispute—in effect, to use an appeal as an occasion to write a treatise on a WTO agreement. But that is what the report did in this appeal.

Second, in DS430, a dispute in which the United States was the complaining party and prevailed, we noted that the appellate report engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal, and even expressed “concerns” in that discussion on findings of the panel that were not raised by either party in the appeal. Furthermore, during the hearing, the Appellate Body devoted considerable time to an issue that the parties and the third parties agreed had not been raised on appeal, involving an item that was not on the record, that had not been raised by either party in its arguments, and had not been examined by the panel and was not the subject of any panel findings. The questioning was of such concern that the United States felt compelled to devote its entire closing statement to urging the Appellate Body not to opine on that non-appealed issue.

It is not the role of the Appellate Body to engage in abstract discussions or to divert an appeal away from the issues before it in order to employ resources on matters that are not presented in, and will not help resolve, a dispute.

A third example occurred in DS437. The United States explained its concerns that the Appellate Body report suggests a view of dispute settlement that departs markedly from that set out in the DSU and reflected in numerous prior reports.

There, the Appellate Body report rejected a party's appeal, but then went on to reverse the Panel report and to find a breach on the basis of an argument and approach entirely of the Appellate Body's creation. This approach suggests that panels and the Appellate Body are to conduct independent investigations and apply new legal standards, regardless of what

¹⁰ Victoria Guida, *WTO Appellate Body Soon to Have Another Vacancy*, POLITICO MORNING TRADE (May 12, 2016), at <http://www.politico.com/tipsheets/morning-trade/2016/05/tpp-death-watch-wto-appellate-body-soon-to-have-another-vacancy-kerlikowske-time-for-cbp-to-get-tough-214258>.

either party actually argues to the panel or Appellate Body. But that is not right. Under the DSU, panels and the Appellate Body are to consider the evidence and arguments put forward by the parties to make an objective assessment of the matter before it.¹¹

The United States has blocked reappointments on at least two previous occasions. In 2011, the United States blocked the reappointment of Jennifer Hillman, an American, to a second term, indicating dissatisfaction with her performance.¹² The United States also blocked the initial appointment of James Gathii, a law professor at Loyola University in Chicago who was nominated by Kenya, in 2014.¹³ Other member states initially resisted the United States, causing the appointment process to deadlock; ultimately Kenya withdrew Gathii's candidacy.¹⁴ In contrast to the domestic judicial confirmation process in the United States, appointments to the WTO's Appellate Body tend to be fairly apolitical.¹⁵ Some commentators view the U.S. opposition to Chang's reappointment as a serious escalation in the politicization of Appellate Body judicial appointments, since it is the first time the United States has blocked reappointment of a non-American judge.¹⁶

The United States' decision to block Chang's reappointment provoked significant controversy among WTO member states.¹⁷ South Korea rebuked the United States in particularly strong terms:

This opposition is, to put it bluntly, an attempt to use reappointment as a tool to rein in Appellate Body members for decisions they may make on the bench Its message is loud and clear: "If AB members make decisions that do not conform to U.S. perspectives, they are not going to be reappointed."¹⁸

South Korea declared that that it will oppose all other reappointments as a result of the United States' actions.¹⁹ At a May 23 meeting of WTO member states, additional concerns about the

¹¹ U.S. WTO Statement, *supra* note 1 (citations omitted).

¹² See Gary Clyde Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PETERSON INST. FOR INT'L ECONOMICS (June 13, 2011), at <https://piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system>. For a discussion of how the blocking of Hillman's reappointment might be related to the "zoning" controversy, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 71 (2016).

¹³ See Elsig, *supra* note 1. See also Gregory Schaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237, 271 (2016). For details on Gathii's initial nomination, see *Gathii Nominated for WTO Job*, DAILY NATION (June 16, 2013), at <http://www.nation.co.ke/News/Gathii-nominated-to-WTO-Appellate-Body/-/1056/1883786/-/10kv1kwz/-/index.html>.

¹⁴ See Howse, *supra* note 12, at 72.

¹⁵ See *id.*

¹⁶ See *id.*; see also Manfred Elsig & Mark Pollack, Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body, Paper Prepared for Presentation at the 4th Annual Conference on the Political Economy of International Organizations 58 (Jan. 27–29, 2011), available at http://wp.peio.me/wp-content/uploads/2014/04/Conf4_Elsig-Pollack-24.01.2011.pdf (discussing the perception of the United States as affecting the outcomes of cases through judicial selection as early as 2007 with Jennifer Hillman).

¹⁷ For particular criticisms from member states, see WTO Press Release, Members Debate Appointment/Reappointment of Appellate Body Members (May 23, 2016), at https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm [hereinafter WTO Debate] (public summary of meeting minutes). For comments made by trade envoys criticizing the United States, see D. Ravi Kanth, *US Body Blow to DSU, Creating Systemic Crisis*, THIRD WORLD NETWORK (May 17, 2016), at <http://www.twn.my/title2/wto.info/2016/ti160514.htm>.

¹⁸ Alex Lawson, *WTO Members Clash over Appellate Body Reappointment*, LAW360 (May 23, 2016), at <http://www.law360.com/articles/799169/wto-members-clash-over-appellate-body-reappointment>.

¹⁹ See Sarvarian & Fontanelli, *supra* note 7.

United States' decision were expressed by Brazil, China, the European Union, and India, among others. Criticism focused especially on fears that the conflict might compromise the integrity and impartiality of the Appellate Body, including by putting pressure on judges to rule in particular ways by implicit threat of nonreappointment.²⁰ The European Union labeled the move by the United States "unprecedented" and called it "a very serious threat to the independence and impartiality of current and future appellate body members."²¹

At a June 22, 2016, meeting of the WTO, South Korea issued a formal joint statement with fifteen other member states criticizing U.S. actions in blocking Chang:

[W]e are deeply worried that the reasons provided by a Member for disagreeing with the reappointment are undercutting a basic premise that the rules-based WTO system is built upon: the Members' trust. . . . [We have] grave concerns that linking reappointment of an AB Member with rulings in specific cases is tantamount to interfering with the Appellate Body's deliberations and thus risks undermining its impartiality and independence. . . . Moreover, singling out one AB Member for criticisms directed at the Appellate Body reports is unjustifiable; the reports are those of the "Appellate Body" and not of an individual AB Member. . . . We agree that such actions risk creating a dangerous precedent and should not be repeated. . . . We look forward to working with all Members to find a constructive path that addresses the systemic concerns raised by Members, bearing in mind the critical role that dispute settlement plays in safeguarding the multilateral trading system.²²

South Korea then issued its own separate response, detailing its disagreements with the U.S. legal objections to each of the cases it cited in its May 23, 2016, statement. South Korea's statement concluded: "This approach is not only unbecoming of a leader of the multilateral trading system; it is also destabilising."²³

Six sitting Appellate Body judges also criticized U.S. actions in a letter to the Chair of the WTO's Dispute Settlement Body, objecting in particular to the singling out of Chang for nonreappointment. The six judges insisted that the Body's rulings should be attributed to the body as a whole:

With regard to accuracy, no case is the result of a decision by one Appellate Body Member, nor should interpretations or outcomes be attributed to a single Member. . . . Appeals are heard and decided by three Members who are chosen randomly to constitute the Division for each case. . . . During a Division's consideration of a case, there is always a formal, intensive exchange of views, in person in Geneva, between the three Division Members and the Appellate Body Members who are not on the Division Our reports are reports of the Appellate Body.²⁴

²⁰ See WTO Debate, *supra* note 17.

²¹ Elsig, *supra* note 1. See also Shawn Donnan, *US Accused of Undermining WTO*, FINANCIAL TIMES (May 30, 2016), at <https://next.ft.com/content/1b89a3b4-261d-11e6-8ba3-cdd781d02d89>.

²² Kanaga Raja, *WTO Members Scold an Isolated US Over AB Veto*, THIRD WORLD NETWORK (June 24, 2016), at <http://www.twn.my/title2/wto.info/2016/ti160621.htm> [hereinafter WTO AB Veto]. See also WTO Press Release, Compliance Panels Established in Disputes over Broiler Products, Tuna (June 22, 2016), at https://www.wto.org/english/news_e/news16_e/dsb_22jun16_e.htm.

²³ WTO AB Veto, *supra* note 23.

²⁴ D. Ravi Kanth, *AB Members Challenge US Over Reappointment of Seung Wha Chang*, THIRD WORLD NETWORK (May 20, 2016), at <http://www.twn.my/title2/wto.info/2016/ti160516.htm>.

Shortly thereafter, all thirteen living emeritus members of the Appellate Body, including Americans, signed onto another letter to the Chair of the Dispute Settlement Board letter objecting to the treatment of Chang:

[W]e think it urgent nonetheless to voice our consensus that this political decision by the Members of the WTO must never be made in such a way that could threaten to politicize WTO dispute settlement and imperil the impartial independence of every Member of the Appellate Body that is required by the WTO Rules of Conduct. The continued impartial independence of the WTO Appellate Body is essential to upholding the rule of law in international trade; moreover, we see it as a prerequisite to providing security and predictability for the rule-based multilateral trading system for the benefit of all of the Members of the WTO.

A decision on the reappointment of a Member of the Appellate Body should not be made on the basis of the decisions in which that Member has participated as a part of the divisions in particular appeals, lest the impartiality, the independence, and the integrity of that one Member, and, by implication, of the entire Appellate Body, be called into question. Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference, lest the Appellate Body become a creature of political favor, and be reduced to a mere political instrument. Rather, as provided in Article 17.3 of the WTO Dispute Settlement Understanding, the standard for both appointment and reappointment should be whether the person in question is “of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.”²⁵

The United States has called these letters “unfortunate,”²⁶ suggesting that they represent another example of the kind of inappropriate judicial conduct that underlies its original objections to Chang. Responding to the criticism that it was unfairly singling out Chang, the United States also argued that Chang’s individual views were made clear by questions he asked on the record during hearings, not necessarily by the Body’s rulings and opinions alone.²⁷ The United States responded further in a statement to the WTO Dispute Settlement Body:

We have also heard an argument that it is inaccurate to hold an individual Appellate Body Member accountable for the reports that he signs because others have also signed the same report. The suggestion appears to be that because *more than one* person expresses the same views, *none* of the members should be held responsible for endorsing those views. This is not how the system works and does a disservice to each Appellate Body Member who has worked hard to be sure that a report accurately reflects their views. In fact, in a number of instances an Appellate Body member has provided separate, individual views in a report.²⁸

Given the current appointment structure, the two vacancies in the current WTO Appellate Body may remain unfilled for some time. Various proposals have been floated to curtail the increasing politicization of Appellate Body appointments more generally. One option would be an “authoritative interpretation” by the WTO that reappointments are automatic in the

²⁵ Letter from former Appellate Body Members to the Chair of the WTO Dispute Settlement Board (May 31, 2015), available at <http://worldtradelaw.typepad.com/files/abletter.pdf>.

²⁶ WTO Debate, *supra* note 17.

²⁷ *See id.*

²⁸ U.S. WTO Statement, *supra* note 1.

absence of agreed-upon charges such as grave misconduct or illness.²⁹ Another approach would move to single, longer appointment term, so as to avoid member states blocking the reappointment of judges with whose decisions or comments during the decision-making process they find objectionable.³⁰ Alternatively, an electoral system could be adopted for the Appellate Body, allowing member states to nominate individuals and then to vote on nominees' appointments (or Appellate Body members' reappointments).³¹ A ban on judges sitting on cases involving their home countries, as found in other international courts, could also be incorporated.³² For now, at least two vacancies will remain on the Appellate Body until the Chang dispute is resolved.

USE OF FORCE AND ARMS CONTROL

U.S. Department of Defense Releases Report of Investigation Finding That October 2015 Air Strike on Doctors Without Borders Hospital in Kunduz, Afghanistan, Was Not a War Crime

On October 3, 2015, U.S. forces in Kunduz, Afghanistan attacked a trauma center operated by Doctors Without Borders, also known as Médecins Sans Frontières (MSF).¹ MSF explained:

[The organization] had been working in Kunduz since August 2011 when the Kunduz Trauma Centre (KTC) was opened. The KTC is the only facility of its kind in north-eastern Afghanistan. The Trauma Centre provided high-quality, free surgical care to victims of general trauma like traffic accidents, as well as those presenting with conflict-related injuries such as from bomb blasts or gunshots. The hospital had 92 beds, which increased exceptionally to 140 beds at the end of September 2015 to cope with the unprecedented number of admissions. The KTC was equipped with an emergency department, three operating theatres and an intensive care unit, as well as X-ray, a pharmacy, physiotherapy and laboratory facilities.²

The air strike killed at least thirty people, of whom at least thirteen were civilians, and injured many more. Following the strike, Army General John Campbell, then the commander of U.S. forces in Afghanistan, ordered an investigation to determine the cause of the incident and whether the use of force complied with the law of armed conflict and the applicable rules of engagement.³ On April 29, 2016, the U.S. Central Command released a declassified version of the resulting report which concluded that—while U.S. forces were unaware that

²⁹ D. Ravi Kanth, *US "Undercutting" Members' "Trust" in WTO by AB Veto*, THIRD WORLD NETWORK (June 23, 2016), at <http://www.twn.my/title2/wto.info/2016/ti160617.htm>.

³⁰ WTO Debate, *supra* note 18. The United States currently opposes the single-term system, for the same reason it objects to *de facto* reappointment: disallowing member states to voice negative feedback in the form of blocking reappointments does not allow for the removal of judges who are not performing their jobs properly. Sarvarian & Fontanelli, *supra* note 7.

³¹ Sarvarian & Fontanelli, *supra* note 7.

³² *Id.*

¹ See U.S. CENT. COMMAND, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015; INVESTIGATION AND FOLLOW-ON ACTIONS 1 (Apr. 29, 2016) [hereinafter SUMMARY MEMORANDUM].

² MEDECINS SANS FRONTIERES, INITIAL MSF INTERNAL REVIEW: ATTACK ON KUNDUZ TRAUMA CENTRE, AFGHANISTAN 2 (Nov. 5, 2015) [hereinafter MSF INTERNAL REVIEW].

³ See U.S. FORCES-AFGHANISTAN, INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MÉDECINS SANS FRONTIÈRES / DOCTORS WITHOUT BORDERS TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015 017-21 (Apr. 28, 2016) [hereinafter INVESTIGATION REPORT].

they were striking a medical facility—the attack had violated both the applicable rules of engagement and the international laws of armed conflict.⁴ The report did not conclude, however, that the attack constituted a war crime, and none of the individuals involved have been referred for prosecution.

To complete the report, Campbell appointed a lead investigator and two deputy investigators from outside Afghanistan⁵ because “[it] was important that the officers investigating the incident had the requisite seniority and independence to conduct a thorough and unbiased inquiry.”⁶ The investigation team also included “over a dozen subject matter experts from several specialty fields.”⁷ Over the course of the investigation, the team

visited the MSF Trauma Center site and several other locations in the city of Kunduz. The team interviewed more than 65 witnesses including personnel at the Trauma Center, members of U.S. and Afghan ground forces, members of the aircrew, and representatives at every echelon of command in Afghanistan. The team had full access to classified information.⁸

Campbell approved the report of the investigation on November 21.⁹ He provided an overview of the report’s conclusions on November 25,¹⁰ after which the report was reviewed and redacted to avoid disclosing classified information.¹¹

The declassified report was released several months later, on April 29, 2016. This report detailed the sequence of events culminating in the October 3 strike. Taliban and associated insurgents had taken control of key locations in Kunduz on September 28, surprising U.S. and Afghan forces with the speed and scope of their attack. In response, U.S. and Afghan forces shifted their plans and resources to retake the city.¹²

The events that led to the air strike on the MSF trauma center began with an emergency call for air support to special forces on the ground.¹³ Because of that call, the AC-130 aircraft that later hit the MSF trauma center launched sixty-nine minutes before its originally scheduled

⁴ U.S. Cent. Command Press Release, U.S. Central Command Releases U.S. Forces-Afghanistan Investigation into Airstrike on Doctors Without Borders Trauma Center in Kunduz, Afghanistan (Apr. 29, 2016), at <http://www.centcom.mil/news/press-release/april-29-centcom-releases-kunduz-investigation>.

⁵ SUMMARY MEMORANDUM, *supra* note 1, at 1. The lead investigating officer was Army Major General William Hickman, and the deputies were Air Force Brigadier General Robert Armfield and Army Brigadier General Sean Jenkins. *Id.*

⁶ U.S. Dep’t of Defense Press Release, Department of Defense Press Briefing by General Campbell via Teleconference from Afghanistan (Nov. 25, 2016), at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/631359/department-of-defense-press-briefing-by-general-campbell-via-teleconference-fro> [hereinafter Campbell Briefing].

⁷ SUMMARY MEMORANDUM, *supra* note 1, at 1.

⁸ *Id.*

⁹ See INVESTIGATION REPORT, *supra* note 3, at 002.

¹⁰ See Campbell Briefing, *supra* note 6.

¹¹ See U.S. Dep’t of Defense Press Release, Department of Defense Press Briefing by Army General Joseph Votel, Commander, U.S. Central Command (Apr. 29, 2016), at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/746686/department-of-defense-press-briefing-by-army-general-joseph-votel-commander-us> [hereinafter Votel Briefing].

¹² See INVESTIGATION REPORT, *supra* note 3, at 043–050, paras. 20–47; Campbell Briefing, *supra* note 6.

¹³ See Campbell Briefing, *supra* note 6 (describing the early launch as a response to a “troops-in contact situation” (TIC)). Emergency calls result in immediate air support from available aircraft. See *id.*; see also Noah Schactman, *The Phrase That’s Screwing Up the Afghan War*, WIRED (Dec. 9, 2009), at <https://www.wired.com/2009/12/the-phrase-thats-screwing-up-the-afghan-air-war/> (describing general purpose and execution of the TIC call).

takeoff. According to the declassified report, this early launch had some important consequences. Specifically,

[t]he aircrew did not receive any printed current operational graphics showing the planned operating area and specifically did not have any charts that showed no[-]strike targets or the location of the MSF Trauma Center. Additionally, none of the . . . products, or information loaded into the AC-130 guidance systems contained [no-strike list] data for the Kunduz area.¹⁴

As it turned out, the AC-130 was not needed to respond to the situation that triggered the emergency call, and the AC-130 was diverted to provide close air support to the U.S. commander in Kunduz.¹⁵

Although a U.S. officer e-mailed updated mission products to the AC-130 after it launched, including information that identified the location of the MSF center, a mechanical failure prevented the AC-130 from sending or receiving e-mail.¹⁶ As a result, the aircrew did not have the MSF coordinates even though they had previously been added to the Department of Defense's no-strike list and disseminated to various levels of the U.S. chain of command.¹⁷

The strike on the MSF trauma center followed communications between the ground force commander, Army Major Michael Hutchinson,¹⁸ the leader of the U.S. special operation team in Kunduz; the joint terminal attack controller (JTAC), a subordinate team member located in the same compound as Hutchinson; and the aircrew of the AC-130. Around the time of the AC-130's launch, Hutchinson received the coordinates for the actual target, the Afghan National Directorate of Security (NDS) headquarters,¹⁹ which was under Taliban control.²⁰ Shortly thereafter, Hutchinson provided these coordinates to the aircrew.²¹ Before this transmission occurred, the AC-130 "was fired on by a surface-to-air missile, and subsequently moved several miles away from the city center," where it then received the coordinates.²² This maneuver, however, "degraded [the AC-130's] ability to locate ground targets."²³

When the AC-130 finally arrived at the place identified by the coordinates, its sensor observed a location in an open field.²⁴ The aircrew then requested a detailed description of the

¹⁴ INVESTIGATION REPORT, *supra* note 3, at 052, para 48 (footnote omitted).

¹⁵ Campbell Briefing, *supra* note 6.

¹⁶ INVESTIGATION REPORT, *supra* note 3, at 052, para. 49.

¹⁷ *See id.* at 044–45, paras. 27–29; *id.* at 078–79, para. 108(a)(1)–(4); *see also* MSF INTERNAL REVIEW, *supra* note 2 ("Due to the increased intensity of fighting in Kunduz, MSF reaffirmed the well-known location of the [trauma center] by once again emailing its GPS coordinates to US Department of Defense, Afghan Ministry of Interior and Defense and US army in Kabul . . . Confirmation of receipt was received from both US Department of Defense and US army representatives, both of whom assured [MSF] that the coordinates had been passed on to the appropriate parties.")

¹⁸ Hutchinson's name was redacted in the report but identified in a subsequent media report. *See* Matthieu Aikins, *Doctors with Enemies: Did Afghan Forces Target the M.S.F. Hospital?*, N.Y. TIMES MAG. (May 17, 2016), at <http://www.nytimes.com/2016/05/22/magazine/doctors-with-enemies-did-afghan-forces-target-the-msf-hospital.html>.

¹⁹ *See* INVESTIGATION REPORT, *supra* note 3, at 053, para. 51.

²⁰ *See id.* at 044, para. 26.

²¹ *See id.* at 054, para. 53.

²² Votel Briefing, *supra* note 11; *see also* INVESTIGATION REPORT, *supra* note 3, at 053, para. 52.

²³ SUMMARY MEMORANDUM, *supra* note 1, at 2.

²⁴ INVESTIGATION REPORT, *supra* note 3, at 054, para. 55.

target.²⁵ Through an interpreter, Afghan forces gave Hutchinson an updated description of the target as having “an outer perimeter wall, with multiple buildings inside of it” and “an arch-shaped gate” on the compound’s north side.²⁶ Relying solely on this description, the aircrew incorrectly determined that the MSF hospital, rather than the NDS facility, was the target.²⁷

The aircrew then observed the MSF hospital for several minutes to assess the activity there. They relayed their observations to Hutchinson, who concluded—based solely on their description—that “the compound was under Taliban control and that the nine personnel observed were hostile.”²⁸ He could not see the NDS facility from his location.²⁹ The AC-130’s line-of-sight equipment—which normally transmits secure video footage from the aircraft to the JTAC³⁰—“was inoperable due to a critical shortage of batteries,”³¹ leaving both Hutchinson and the JTAC without the same view as the aircrew. Following this exchange, the JTAC told the aircrew that Hutchinson wanted the mission to “lighten the load for [the Afghan ground forces’] infil[tration],” and stated further that the AC-130 would be “softening the target for partner forces.”³² Uncertain about what precisely this language meant, the aircrew decided that Hutchinson’s intent was essentially for the AC-130 to “find bad things and . . . shoot them.”³³

Soon after, Hutchinson perceived a hostile act against Afghan ground forces based on the “sound of automatic gunfire coming from the east-west road near the NDS facility.”³⁴ Unaware that the AC-130 was targeting the MSF hospital instead of the NDS facility, Hutchinson decided to authorize a strike.³⁵ Contrary to his belief, Afghan ground forces were then located nine kilometers from the NDS facility and were not being attacked.³⁶ While the MSF hospital was treating wounded Taliban members, the report determined that “[n]o individuals [there] were committing hostile acts or demonstrating hostile intent,” and the center “was not the target of the . . . mission.”³⁷ This latter finding contradicted a statement made in the immediate aftermath of the attack by the governor of Kunduz, Hamdullah Danish, that

²⁵ See *id.* at 057, paras. 59, 61.

²⁶ See *id.* at 056–58, paras. 58, 61–62. One media story observed that this description does not resemble the NDS facility’s distinctive layout, and suggested that Afghan forces might have intentionally misled Hutchinson in order to target the MSF center because of its relationship with and treatment of Taliban members. See Aikins, *supra* note 18. The Department of Defense report, however, did not reach this conclusion or even suggest it as a possibility.

²⁷ See *id.* at 057–58, para. 62.

²⁸ *Id.* at 056, para. 57.

²⁹ See *id.* at 054, para 54 & n.105.

³⁰ See Thomas Gibbons-Neff & Dan Lamothe, *Pentagon: 2015 Strike on Doctors Without Borders Hospital in Afghanistan Was Not a War Crime*, WASH. POST (Apr. 29, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/04/29/pentagon-2015-strike-on-doctors-without-borders-hospital-in-afghanistan-was-not-a-war-crime/>.

³¹ See INVESTIGATION REPORT, *supra* note 3, at 054, para. 54.

³² *Id.* at 059, paras. 65–66.

³³ *Id.* at 059–61, paras. 65–70.

³⁴ *Id.* at 061–62, para. 74.

³⁵ *Id.* at 061–62, paras. 74, 76. His intent, as relayed by the JTAC, was to “destroy targets of all opportunity”—that is, both the physical compound and the people inside it. *Id.* at 063, para. 77.

³⁶ *Id.* at 062, para. 76.

³⁷ *Id.* at 095–96, para. 115(a)(2), (4); see also Votel Briefing, *supra* note 11 (“Our forces did not receive fire from the trauma center during the incident, nor did the investigation find that insurgents were using it as a base for operations.”).

“[t]he hospital campus was 100 percent used by the Taliban” to plot and carry out attacks in the city.³⁸

The AC-130 aircrew began the strike at 2:08 AM.³⁹ At 2:19 AM, a U.S. officer received a call from an MSF representative indicating that the MSF hospital was being hit by an air strike.⁴⁰ A U.S. battle captain then called the aircrew and asked if the strike was affecting “a major compound south of their engagement area,” and the crew replied no—believing that they were striking the NDS facility.⁴¹ Then the officer who had initially spoken with the MSF representative called the MSF representative again to confirm the grid location of the MSF hospital.⁴² After determining that the AC-130 was striking the MSF hospital, the officer informed Hutchinson shortly after 2:33 AM, prompting him to radio the crew to cease fire.⁴³

The report found that the strike ended at 2:37 AM, after the AC-130 had fired its last round.⁴⁴ According to reports published by MSF and the United Nations Assistance Mission in Afghanistan, however, the strike ended later. The MSF review indicated that the strike “stopped between approximately 3am and 3[:.]13am.”⁴⁵ Similarly, the UN report highlighted the MSF’s findings that “the airstrike continued for 30 minutes after MSF first informed United States and NATO officials that the hospital was under aerial attack.”⁴⁶ The U.S. report did not address the discrepancy between its conclusions and those of MSF.

The U.S. Central Command’s report stated that “there were at least 30 fatalities (13 MSF employees, 10 patients, and 7 others yet to be identified) and approximately 37 wounded.”⁴⁷ That number appears to be based on MSF’s own estimate following the attack.⁴⁸

³⁸ Tim Craig & Craig Whitlock, *Afghan Response to Hospital Bombing Is Muted, Even Sympathetic*, WASH. POST (Oct. 4, 2015), at https://www.washingtonpost.com/world/afghan-official-hospital-in-airstrike-was-a-taliban-base/2015/10/04/8638af58-6a47-11e5-bdb6-6861f4521205_story.html. The Afghan Ministry of Defense similarly claimed that terrorists had entered the MSF center and used “the buildings and people inside as a shield.” Lynne O’Donnell, *Doctors Without Borders: 19 Dead in Clinic Airstrike*, AP: THE BIG STORY (Oct. 3, 2015), at <http://bigstory.ap.org/article/069682e9bee94ce4a48e347ac4dc3ec0/doctors-without-borders-afghan-clinic-bombed-3-staff-dead>. The president of MSF International, Dr. Joanne Liu, denied these claims. See Joanne Liu, *MSF Denounces Blatant Breach of International Humanitarian Law*, MEDECINS SANS FRONTIERES/DOCTORS WITHOUT BORDERS (Oct. 6, 2015), at <http://www.doctorswithoutborders.org/article/msf-denounces-blatant-breach-international-humanitarian-law>.

³⁹ INVESTIGATION REPORT, *supra* note 3, at 066, para. 83.

⁴⁰ *Id.* at 067, para. 84.

⁴¹ *Id.* at 067–68, para. 84.

⁴² *Id.* at 068, para. 86.

⁴³ *Id.* at 068, paras. 86–87.

⁴⁴ *Id.* at 068, paras. 85.

⁴⁵ MSF INTERNAL REVIEW, *supra* note 2, at 12. MSF has requested that the United States explain these contrasting timelines. *Kunduz: Some of MSF’s Questions in Response to the U.S. Military Investigation into Their Attack on the Hospital*, MEDICINS SANS FRONTIERES (Apr. 29, 2016), at <http://www.msf.org/en/article/kunduz-some-mfs%E2%80%99s-questions-response-us-military-investigation-their-attack-hospital>.

⁴⁶ Rep. of the UN Assistance Mission in Afg., Afghanistan: Human Rights and Protections of Civilians in Armed Conflict: Special Report on Kunduz Province 8 (Dec. 2015), available at https://unama.unmissions.org/sites/default/files/special_report_on_kunduz_province_12_december_2015.pdf [hereinafter UNAMA Report].

⁴⁷ INVESTIGATION REPORT, *supra* note 3, at 070, para. 94.

⁴⁸ See MSF INTERNAL REVIEW, *supra* note 2, at 12; SUMMARY MEMORANDUM, *supra* note 1, at 3 (indicating that the U.S. military did not independently verify MSF’s fatality report); see also RICHARD C. KIM & MOHAMMAD KABIR, EXECUTIVE SUMMARY: COMBINED CIVILIAN CASUALTY (CIVCAS) ASSESSMENT OF AN AIR-STRIKE ON A MEDICAL FACILITY IN KUNDUZ CITY ON 03 OCTOBER 2015, para. 3(a) (Nov. 2015), available at https://www.shape.nato.int/resources/3/images/2015/saceur/exec_sum.pdf (providing similar casualty figure from NATO civilian casualty team investigation).

Having discussed the basic facts of the incident, the report went on to make specific evaluative findings as requested by General Campbell. It began by stating the obvious: that the AC-130 had “misidentified the intended objective . . . and mistakenly engaged the MSF Trauma Center and personnel at the facility.”⁴⁹ While the report emphasized that “US personnel directly involved in the strike did not *know* the building was a hospital,”⁵⁰ it found serious fault with various members of the U.S. team.⁵¹

As an initial matter, the misidentification was the result of Hutchinson’s and the AC-130 commander’s “fail[ure] to maintain situational awareness of their operating area,” as well as the aircrew’s failure “to attain the critical [no-strike list] information” before and after the AC-130’s launch.⁵² According to the report, having experienced an equipment failure, the aircrew should have contacted the operations center to obtain the critical no-strike list.⁵³ Hutchinson compounded these initial errors when he “authorized an engagement of a compound in direct violation of . . . Tactical Guidance and [rules of engagement],” in particular by relying on others’ reports without following up to confirm their accuracy.⁵⁴

The report also concluded that Hutchinson had “willfully violated the [rules of engagement] and tactical guidance by improperly authorizing offensive operations.”⁵⁵ Hutchinson had operational authority to “employ fires in self-defense” against hostile acts.⁵⁶ But, according to the report, he “could not have reasonably believed that a hostile act warranting engagement . . . existed.”⁵⁷ Hutchinson and the aircrew “never positively identified a hostile act originating from the MSF Trauma Center, nor did [they] positively identify a hostile act being committed against [U.S. or Afghan forces], and no consideration was given for the potential for civilians in the compound.”⁵⁸

The report then went on to conclude that “[Hutchinson] and [the] aircrew failed to comply with the [law of armed conflict].”⁵⁹ According to the report, Hutchinson’s and the aircrew’s actions were inconsistent with the principles of distinction, proportionality, and precautions in attack. First, “[Hutchinson] and the Aircraft Commander failed to make a proper determination that the [MSF hospital] was a lawful military objective.”⁶⁰ Accordingly, the center “should have been presumed to be a civilian compound.”⁶¹ Second, “any engagement of a target that is not a lawful military objective is facially disproportional. The MSF Trauma Center

⁴⁹ INVESTIGATION REPORT, *supra* note 3, at 074, para. 106(a).

⁵⁰ *Id.* (emphasis added). Although the bulk of the report’s findings focused on the actions of U.S. personnel leading up to the strike, the report also concluded that “[w]hen select commands were notified that the Trauma Center was being engaged . . ., on-shift leaders took insufficient steps that could have minimally mitigated damage to personnel [there].” *Id.* at 078, para. 108(a).

⁵¹ *See, e.g., id.* at 074, para. 106(a)(2).

⁵² *Id.* at 081, para. 109(a), (a)(2).

⁵³ *Id.* at 081, para. 109(a)(2).

⁵⁴ *Id.* at 082–83, para. 110(a).

⁵⁵ *See id.* at 086, para. 112(a)(1).

⁵⁶ *Id.*

⁵⁷ *See id.* at 086, para. 112(a)(1)(a).

⁵⁸ *See id.* at 089, para. 112(a)(2)(a)(ii).

⁵⁹ *Id.* at 093, para. 114(a).

⁶⁰ *Id.* at 095, para. 114(g)(5). *See also* Peter Margulies, *Centcom Report on the Kunduz Hospital Attack: Accounting for a Tragedy of Errors*, LAWFARE (May 2, 2016), at <https://www.lawfareblog.com/centcom-report-kunduz-hospital-attack-accounting-tragedy-errors>.

⁶¹ INVESTIGATION REPORT, *supra* note 3, at 091, para. 113(g)(2).

was not a lawful military objective. At the point of engagement, any use of force against it was disproportional,” particularly because “[t]here were no legitimate circumstances requiring the crew members to make decisions to engage without clarifying or requesting more information.”⁶² Third, “[t]he aircrew failed to take feasible precautions to reduce the risk of harm to individuals they could not positively identify as combatants.”⁶³

The report itself did not address whether Hutchinson’s or the aircrew’s actions constituted a war crime.⁶⁴ Nonetheless, following the public release of the report, Army General Joseph Votel elaborated:

The investigation concluded that certain personnel failed to comply with the rules of engagement in the law of armed conflict. However, the investigation did not conclude that these failures amounted to a war crime.

The label [“war crimes” is] typically reserved for intentional acts—intentional targeting of civilians or intentionally targeting protected objects or locations.⁶⁵

Accordingly, the sixteen U.S. service members punished for their role in the strike were not referred for prosecution. Instead, they were subject to “appropriate administrative or disciplinary action . . . includ[ing] suspension and removal from command, letters of reprimand, formal counseling, . . . extensive retraining . . . , and boards to evaluate the flight certification of three aircrew members.”⁶⁶

Votel’s focus on intentional acts tracks the definition of a war crime under the Rome Statute of the International Criminal Court (ICC). Relevant acts defined as war crimes under the Rome Statute include “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”; “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians. . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”; and “[i]ntentionally directing attacks against . . . hospitals and places where the sick and wounded are collected, provided they are not military objectives.”⁶⁷ Criminal liability attaches “only if the material elements [of the crime] are committed with intent and knowledge.”⁶⁸ “[A] person has intent where: (a) [i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”⁶⁹ Some scholars have pointed out that the Rome Statute’s high standard does not necessarily reflect customary

⁶² *Id.* at 091, para. 113(g)(1), (3).

⁶³ *Id.* at 093, para. 113(g)(4)(f).

⁶⁴ *See id.* at 073–96, paras. 106–116 (detailing findings of investigation).

⁶⁵ Votel Briefing, *supra* note 11; *see also* SUMMARY MEMORANDUM, *supra* note 1, at 2 (using identical language to define war crime and reiterating report’s finding that “none of the personnel knew that they were striking a medical facility”). Votel repeated later in the same press conference that “an unintentional action takes it out of the realm of actually being a deliberate war crime against persons or protected locations.” Votel Briefing, *supra* note 11.

⁶⁶ SUMMARY MEMORANDUM, *supra* note 1, at 4.

⁶⁷ Rome Statute of the International Criminal Court Art. 8(2)(b)(i), (iv), (ix), July 17, 1998, 2187 UNTS 90, 37 ILM 1002 [hereinafter Rome Statute]. The UNAMA report reflects a similarly high standard. *See* UNAMA REPORT, *supra* note 46, at 12 (“Should an attack against a hospital be found to have been *deliberate*, it may amount to a war crime.” (emphasis added)).

⁶⁸ Rome Statute, *supra* note 67, Art. 30(1).

⁶⁹ *Id.* Art. 30(2).

international law,⁷⁰ which may interpret “intentional” to also include a lower “recklessness” standard.⁷¹

The ICC itself may weigh in on the question because it has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan after May 1, 2003.⁷² In a November 2015 report, the ICC’s Office of the Prosecutor acknowledged the ongoing NATO and U.S. investigations, and stated that “[a]lleged crimes committed in Kunduz during the September-October 2015 events will be further examined by the Office.”⁷³ As of the date of publication, the ICC has not taken further action following the public release of the U.S. report.

MSF and Human Rights Watch both questioned the U.S. report’s conclusion that no war crime had occurred.⁷⁴ Following the public release of the report, the president of MSF Belgium, Meinie Nicolai, stated:

The threshold that must be crossed for this deadly incident to amount to a grave breach of international humanitarian law is not whether it was intentional or not. . . . [A]rmed groups cannot escape their responsibilities on the battlefield simply by ruling out the intent to attack a protected structure such as a hospital.⁷⁵

Likewise, the Asia Policy Director of Human Rights Watch, John Sifton, asserted that “[w]ar crimes can . . . be committed through reckless behavior,” and identified a previous instance in which the U.S. Army had court-martialed an officer for homicide because of reckless conduct.⁷⁶ In light of their concerns, both MSF and Human Rights Watch have called for independent investigations into the incident.⁷⁷

U.S. officials have expressed sympathy for the victims in the wake of the report. When the report’s findings were first announced in November 2015, General Campbell offered his “sincere condolences to the victims of this . . . tragic, but avoidable accident.”⁷⁸ In addition, on March 22, 2016, the new commander of U.S. and NATO forces in Afghanistan, General John W. Nicholson, Jr., met in Kunduz with local officials and victims of the strike. He stated:

I wanted to come to Kunduz personally and stand before the families and the people of Kunduz to deeply apologize for the events which destroyed the hospital and caused the

⁷⁰ The Rome Statute itself states that “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” *Id.* Art. 10.

⁷¹ See, e.g., Adil Ahmad Haque, *What the Kunduz Report Gets Right (and Wrong)*, JUST SECURITY (May 10, 2016), at <https://www.justsecurity.org/30986/kunduz-report-and-wrong/>; Alex Whiting, *Recklessness, War Crimes, and the Kunduz Hospital Bombing*, JUST SECURITY (May 2, 2016), at <https://www.justsecurity.org/30871/recklessness-war-crimes-kunduz-hospital-bombing/>.

⁷² OFFICE OF THE PROSECUTOR, INT’L CRIMINAL CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015) 26, para. 112 (Nov. 12, 2015).

⁷³ *Id.* at 28, para. 120.

⁷⁴ See Liu, *supra* note 38; John Sifton, *Pentagon Hospital Attack Report Falls Short*, HUMAN RIGHTS WATCH (May 4, 2016), at <https://www.hrw.org/news/2016/05/04/pentagon-hospital-attack-report-falls-short>.

⁷⁵ *Initial Reaction from MSF to Public Release of US Military Investigative Report on the Attack on MSF Trauma Hospital in Kunduz, Afghanistan*, MÉDECINS SANS FRONTIÈRES (Apr. 29, 2016), at <http://www.doctorswithoutborders.org/article/initial-reaction-msf-public-release-us-military-investigative-report-attack-msf-trauma> [hereinafter *Initial Reaction from MSF*].

⁷⁶ Sifton, *supra* note 74.

⁷⁷ See *Initial Reaction from MSF*, *supra* note 75; Sifton, *supra* note 74.

⁷⁸ Campbell Briefing, *supra* note 6.

deaths of staff, patients and family members . . . I grieve with you for your loss and suffering, and humbly and respectfully ask for your forgiveness.⁷⁹

Finally, Votel announced on April 29 that

U.S. Forces-Afghanistan leaders have . . . provided condolence payments to more than 170 individuals and families affected by this tragedy. These modest payments are not designed to compensate the victims or place a value on their lives, but are a gesture of sympathy.

And the Department of Defense has approved \$5.7 million in funds to construct a comparable structure in Kunduz that is suitable for use as a medical facility.⁸⁰

United States Expands Air Strikes Against al-Shabaab; State Department Legal Adviser Discusses Legal Justification for Counterterrorism Operations Abroad

On March 5, 2016, the U.S. military launched an air strike in Somalia that reportedly killed more than 150 militants who were training with al-Shabaab, a terrorist group affiliated with Al Qaeda.¹ Days later, the Pentagon reported another U.S.-supported attack against a militant base that left nineteen al-Shabaab fighters dead.² Carried out by both manned and unmanned aircraft,³ the first attack targeted a training facility called Raso Camp—approximately 120 miles north of Mogadishu⁴—during a graduation ceremony for a large group of fighters who were expected to depart in the near future.⁵ It was the deadliest attack against al-Shabaab in more than a decade.⁶ The second attack was reportedly carried out with American attack helicopters and U.S. military personnel serving “in an advisory role” to Somali forces.⁷

While the Pentagon has characterized these attacks as similar to previous operations,⁸ news outlets have described them as a marked escalation and “a sharp tactical shift for U.S. military

⁷⁹ Mujib Mashal & Najim Rahim, *U.S. Commander in Afghanistan Apologizes for Bombing of Hospital*, N.Y. TIMES, Mar. 22, 2016, at A10.

⁸⁰ Votel Briefing, *supra* note 11.

¹ U.S. Dep’t of Defense Press Release, Statement from Pentagon Press Secretary Peter Cook on Airstrike in Somalia (Mar. 7, 2016), at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/687305/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia> [hereinafter DOD Raso Statement]; Thomas Gibbons-Neff, *U.S. Airstrike Kills More Than 150 at Somalia Terrorist Camp, Military Says*, WASH. POST (Mar. 7, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/03/07/u-s-drone-strike-kills-more-than-150-in-somalia/>.

² Mohammed Ibrahim, *Somalia Raid Aided by U.S. Kills Fighters From Shabab*, N.Y. TIMES, Mar. 9, 2016, at A4.

³ DOD Raso Statement, *supra* note 1.

⁴ Gibbons-Neff, *supra* note 1.

⁵ Pentagon officials declined to disclose how they knew the targeted fighters were “training for a large-scale attack” against U.S. and AMISOM forces. It has been reported that the military was acting on intelligence gathered from local sources and American spy planes. Helene Cooper, *U.S. Strikes in Somalia Kill 150 Shabab Fighters*, N.Y. TIMES, Mar. 7, 2016, at A1.

⁶ *Id.*; see also Gibbons-Neff, *supra* note 1.

⁷ Ibrahim, *supra* note 2. A Pentagon spokesman would not disclose whether the Americans remained on the helicopters during the entire operation, but he said the Americans did not “go all the way to the objective” and that the mission was a “Somali operation.” *Id.*

⁸ See Question to the Pentagon from Charlie Savage (Mar. 8, 2016), Answer from Lt. Col. Joe Sowers (Mar. 10, 2016) (2016), available at <https://assets.documentcloud.org/documents/2757459/Shabab-DOD-Statement.pdf> [hereinafter DOD Question-Answer] (referencing Letter to Congressional Leaders on the Global Deployment of United States Combat-Equipped Armed Forces, 2015 DAILY COMP. PRES. DOC. 883 (Dec. 11, 2015)) (“The

operations in Somalia.”⁹ According to the Pentagon, U.S. intelligence monitored the training camp in Raso for several weeks and concluded that the graduating fighters “posed an imminent threat to U.S. and African Union Mission in Somalia (AMISOM) forces in Somalia.”¹⁰ Therefore, the United States carried out the attack “in self-defense and in defense of our [AMISOM] partners,” a justification similar to the announced basis for a series of U.S. strikes in 2015.¹¹ The White House press secretary described the attack as a “good example” of how the U.S. military can work in partnership with local ground forces and said that “[t]he removal of those terrorist fighters degrades al-Shabaab’s ability to meet the group’s objectives in Somalia, including recruiting new members, establishing bases, and planning attacks on U.S. and AMISOM forces.”¹²

Commentators have characterized the recent large-scale attacks against al-Shabaab as a sharp divergence from previous American strikes against terrorist groups abroad.¹³ News sources reported that the United States launched only about a dozen recorded air strikes in Somalia since 2003 prior to the attacks in March 2016.¹⁴ They also reported anonymous statements by American officials describing a relaxation of the rules for approving targeted strikes in Somalia due to concerns about a resurgent al-Shabaab.¹⁵ Moreover, unlike prior air strikes against al-Shabaab, which generally targeted individuals who were specifically known to be part of both al-Shabaab and Al Qaeda,¹⁶ the recent attacks were aimed at significantly larger numbers of rank-and-file al-Shabaab foot soldiers with no reported connection to Al Qaeda. This apparent shift in U.S. practice raises a number of questions about the domestic and international legal basis for the U.S. expanded air strikes against al-Shabaab and similar terrorist groups.

As a matter of U.S. law, the Pentagon asserted that the Raso attack was carried out under the 2001 Authorization to Use Military Force (AUMF),¹⁷ which authorizes the president to

President has similarly reported that U.S. forces took a series of strikes to support U.S. and AMISOM forces in Somalia in June, July, and November 2015.”).

⁹ E.g., Sudarsan Raghavan & Craig Whitlock, *Despite U.S. Airstrikes, a Somali Militia Is Rising Again*, WASH. POST (Mar. 8, 2016), at https://www.washingtonpost.com/world/africa/despite-us-airstrikes-a-somali-militia-is-rising-again/2016/03/08/2fddeeb8-e537-11e5-a9ce-681055c7a05f_story.html.

¹⁰ DOD Question-Answer, *supra* note 8; see also Raghavan & Whitlock, *supra* note 9 (quoting Army Gen. David M. Rodriguez, head of U.S. military’s Africa Command) (“The camps [like Raso] are transitory” and pose a concern “because the last three times they did something similar to this, they had an ability to conduct a devastating attack on the [African Union] forces.”).

¹¹ DOD Raso Statement, *supra* note 1.

¹² The White House Press Release, Press Briefing by Press Secretary Josh Earnest (Mar. 7, 2016), at <https://www.whitehouse.gov/the-press-office/2016/03/07/press-briefing-press-secretary-josh-earnest-372016> [hereinafter Earnest Statement].

¹³ See *supra*, note 9.

¹⁴ Raghavan & Whitlock, *supra* note 9.

¹⁵ Ibrahim, *supra* note 2.

¹⁶ See Robert Chesney, *What Is the Domestic Law Basis for U.S. Airstrikes Supporting AMISOM in Somalia?*, LAWFARE (July 31, 2015), at <https://www.lawfareblog.com/what-domestic-law-basis-us-airstrikes-supporting-amisom-somalia>; Ashley Deeks, *Defending Broadened U.S. Strikes Against al-Shabaab?*, LAWFARE (July 29, 2015), at <https://www.lawfareblog.com/defending-broadened-us-strikes-against-al-shabaab>; see also Letter to Congressional Leaders on the Global Deployment of United States Combat-Equipped Armed Forces, 2015 DAILY COMP. PRES. DOC. 428 (June 11, 2015) (emphasis added) (describing the purpose of U.S. attacks in Somalia as “to counter the terrorist threat posed by al-Qa’ida and associated elements of al-Shabaab” and identifying the victims of counterterrorism strikes as “al-Shabaab operatives who are part of al-Qa’ida”); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 199 (2015) (explaining that targets of U.S. strikes in Syria were tied to Al Qaeda).

¹⁷ DOD Question-Answer, *supra* note 8.

use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11, 2001] terrorist attacks, or harbored such organizations or persons.”¹⁸ Throughout the Bush and Obama administrations, the executive branch has interpreted the AUMF to apply to “al Qaeda, the Taliban, and associated forces.”¹⁹ The AUMF authorization does not provide a clear basis for the strikes against al-Shabaab because neither Congress nor the president has ever publicly identified al-Shabaab as an “associated force” under the statute.²⁰ Instead, the administration has generally limited the use of force against al-Shabaab to the targeting of specific named individuals who are known to be *personally* “associated” with Al Qaeda (sometimes referred to as “dual-hatted” fighters).²¹

While the recent strike against low-level fighters at Raso Camp seems by all accounts to be quite expansive compared to earlier uses of force against al-Shabaab, the Pentagon asserted that the attack was “authorized by the 2001 AUMF.”²² When questioned by reporters about this apparent gap between the AUMF’s text and the operation carried out under its mandate, a Department of Defense spokesman said that while “[s]uch strikes in the tactical defense of U.S. and partner nation ground force units are not subject to the deliberate analysis [of targeting only individuals who are deemed to be part of al-Qaeda, they] are considered to be ‘necessary and appropriate force’ authorized by the 2001 AUMF.”²³ He added that “[t]he fact that an al-Qa’ida-affiliated group has not been identified as an ‘associated force’ for purposes of the AUMF does not mean that the United States has made a final determination that the group is not an ‘associated force.’”²⁴

Commentators have suggested various legal theories that might justify the expanded attacks on al-Shabaab. One suggested that the administration appeared to view the attack as a justified response to a “continuing and imminent threat” to U.S. military advisers,²⁵ approximately fifty of whom have been deployed in Somalia since 2013.²⁶ According to this reporter, the U.S. advisers were dispatched for two reasons: “[T]o help stabilize Somalia against the Shabab as a whole, and to help counter those elements within the Shabab who have Qaeda links. The second motive means that the [AUMF] covers the entire mission.”²⁷ In other words, because the U.S. advisers were dispatched at least in part to thwart members of al-Shabaab who are “associated” with Al Qaeda for purposes of the AUMF, they constituted authorized forces who had the right to protect themselves from “continuing and imminent” threats. Though not plainly

¹⁸ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

¹⁹ Daugirdas & Mortenson, *supra* note 16, at 210.

²⁰ Slightly confusing the matter, the U.S. government describes al-Shabaab as “affiliated with” or as “an affiliate of” Al Qaeda. See DOD Raso Statement, *supra* note 1. Furthermore, there are reports of the administration internally debating the status of al-Shabaab due in part to the varying ambitions of its membership: while the group shares common ideologies with Al Qaeda, many of its members are solely focused on controlling Somalia and so do not qualify as “associated forces.” See Charlie Savage, *At White House, Weighing Limits of Terror Fight*, N.Y. Times, Sept. 15, 2011, at A1.

²¹ Chesney & Deeks, *supra* note 16.

²² DOD Question-Answer, *supra* note 8.

²³ *Id.*

²⁴ *Id.*

²⁵ Charlie Savage, *Is the U.S. Now at War with the Shabab? Not Exactly*, N.Y. TIMES, Mar. 14, 2016, at A11.

²⁶ Gibbons-Neff, *supra* note 1.

²⁷ Savage, *supra* note 25.

stated by the administration, this theory assumes that lawfully deployed U.S. forces have the inherent right to repel “continuing and imminent” threats and that such threats include harms that the government thinks will materialize in the future and that cannot be stopped without a preemptive strike.²⁸

When questioned as to whether this theory allows U.S. forces to target *all* al-Shabaab fighters—since every member of the group arguably poses a “continuing” threat to U.S. advisers in Somalia—the Pentagon’s general counsel stated that the “limiting principle” of its position was the “specificity of the intelligence” indicating the likely departure and attack planned by the targeted fighters.²⁹ He said, “[t]his is not a totally expansive theory that ‘Al Shabab folks are dangerous and they pose a risk whenever and wherever they are’—that would be an unlimited principle.”³⁰ Rather, “there was a determination from the commander that this was the last, best opportunity to stop what was believed to be a very serious attack that there were no adequate defenses for.”³¹

A different reading of the Pentagon’s statements casts them as an evolving application of the inherent right to self-defense under domestic constitutional and perhaps statutory law.³² According to the U.S. standing rules of engagement, “[u]nit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.”³³ Furthermore, this inherent right can extend to other affiliated forces (such as AMISOM) as designated in the mission rules of engagement.³⁴ Scholars have debated the source of this inherent right to unit self-defense, but the U.S. government has routinely grounded it in the president’s Article II authority as Commander-in-Chief.³⁵ The government has also justified limited military operations abroad based on the president’s constitutional authority to conduct U.S. foreign relations.³⁶

²⁸ At least one scholar has noted the seemingly paradoxical meaning of a threat that is both “continuing” and “imminent.” Robert Chesney, *Airstrikes Outside Areas of Active Hostilities: Attacks in Somalia and Questions About the Current Shape of the Policy*, LAWFARE (Mar. 7, 2016), at <https://www.lawfareblog.com/airstrikes-outside-are-as-active-hostilities-attacks-somalia-and-questions-about-current-shape-policy>. Nevertheless, the U.S. government has understood “imminence” broadly such that “[t]he requirement that a targeted person pose an imminent threat ‘does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.’” John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 462, 466 (2013).

²⁹ Savage, *supra* note 25 (quoting Robert S. Taylor, acting Pentagon general counsel).

³⁰ *Id.*

³¹ *Id.*

³² See Erica Gaston, *Do the Strikes on al Shabaab Stretch the AUMF or The Unit Self-defense Doctrine?*, LAWFARE (Mar. 18, 2016), at <https://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine>.

³³ *Id.* (quoting CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005)).

³⁴ *Id.*

³⁵ See, e.g., Crook, *supra* note 28, at 464 (quoting a 2013 Department of Justice White Paper) (“Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense.”); John R. Crook, *Contemporary Practice of the United States*, 106 AJIL 670, 671 (2012) (“[A]s a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack.”) (quoting John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Wilson Center: The Ethics and Efficacy of the President’s Counterterrorism Strategy (April 30, 2012), at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy#>).

³⁶ See, e.g., Authority to Use Military Force in Libya, 35 Op. Att’y Gen. 1 (Apr. 1, 2011) (“[W]e believe that . . . the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign

However unclear the administration's theory about the legal basis for its expanded strikes against al-Shabaab, U.S. Press Secretary Josh Earnest stated unequivocally that the strike at Raso Camp followed "exactly the kind of counterterrorism strategy that the President has laid out."³⁷

As a matter of international law, the administration's justification for the Raso Camp strikes appears grounded in the Pentagon's claim that the attack was carried out "in self-defense and in defense of [its AMISOM] partners."³⁸ This reference to self-defense evokes Article 51 of the UN Charter, which recognizes the "inherent right of individual or collective self-defence" as an exception to the Article 2(4) principle that all UN members refrain from the "threat or use of force against the territorial integrity" of any state.³⁹ Beyond that observation, the Pentagon's statement did not make specific reference to Article 51 or otherwise offer a detailed explanation of the why the al-Shabaab strikes comport with international law.

The administration's views on the use of force more generally, however, were recently elucidated in a speech delivered by Brian Egan, the recently confirmed State Department Legal Adviser, to the American Society of International Law.⁴⁰ While Egan's speech focused on the use of force against the Islamic State, or ISIL, much of his message was germane to the U.S. justifications for force against other non-state actors, including al-Shabaab. Egan emphasized that U.S. military actions "comply with the law of armed conflict" in regard to both the "international law justification for resorting to the use of force, or the *jus ad bellum*" and "the *jus in bello*—the legal rules we follow in carrying out" the use of force.⁴¹ He then went on to elaborate the current U.S. view on both questions.

In his discussion of *jus ad bellum*, Egan clarified the administration's view that "the inherent right of individual and collective self-defense recognized in the U.N. Charter is not restricted to threats posed by States."⁴² He also elucidated the administration's understanding of imminence in the context of self-defense, which relates to the Pentagon's claim that the targeted al-Shabaab fighters "posed an imminent threat to U.S. and [AMISOM] forces."⁴³ According to Egan, "a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have occurred, but also in response to *imminent* ones before they occur."⁴⁴ In explaining the origin of this imminence standard, he observed that "for at least the past two hundred years, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors."⁴⁵ Egan then laid out the following factors analyzed by the United States when considering whether an armed attack is "imminent":

affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.").

³⁷ Earnest Statement, *supra* note 12.

³⁸ DOD Raso Statement, *supra* note 1.

³⁹ UN Charter, Arts. 2(4), 51.

⁴⁰ See Brian Egan, State Dept. Legal Adviser, Keynote Address at the American Society of International Law Annual Meeting: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016) [hereinafter Egan Speech], available at <http://www.state.gov/s/l/releases/remarks/255493.htm>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ DOD Raso Statement, *supra* note 1.

⁴⁴ Egan Speech, *supra* note 40.

⁴⁵ *Id.* (referencing the *Caroline* incident). At least one scholar has argued that imminence is best understood as an application of the necessity requirement (discussed *infra*) rather than as a distinct requirement for the use of force in self-defense. Marty Lederman, *ASIL Speech by State Legal Adviser Egan on International Law and the Use of Force*

[T]he nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.⁴⁶

The Raso Camp strikes appear to have been guided by factors like those described by Egan. A Pentagon spokesman reportedly stated that “[w]e do believe there was a direct threat [and] that this strike has been successful in reducing that threat.”⁴⁷ The head of the U.S. military’s Africa Command told the Senate Armed Services Committee that “the last three times [al-Shabaab] did something similar to this [graduation ceremony at Raso Camp], they had an ability to conduct a devastating attack on the [AMISOM] forces.”⁴⁸ And the acting Pentagon general counsel reportedly said that “there was a determination . . . that this was the last, best opportunity to stop what was believed to be a very serious attack that there were no adequate defenses for.”⁴⁹ In this light, consider Egan’s comments about the specificity of intelligence needed to identify an imminent threat:

The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.⁵⁰

While the Pentagon described the al-Shabaab fighters as posing an “imminent threat,” it is unclear whether the United States relied exclusively on Egan’s account of imminence to justify its recent strikes in Somalia. As of the date of this publication, it is not clear whether the United States has submitted an Article 51 letter to the United Nations, as required by member states that rely on self-defense to justify offensive action in another sovereign’s territory.⁵¹ In this light, it is worth noting that Egan’s comments leave space for the possibility that the United States might be relying on a claim of continuing self-defense against al-Shabaab:

In the view of the United States, once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended.⁵²

Because the Raso Camp strike took place in Somalia, the *ad bellum* analysis does not end with justification vis-à-vis al-Shabaab. As Egan explained in his ASIL speech, “international

Against ISIL, JUST SECURITY (Apr. 4, 2016), at <https://www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/>.

⁴⁶ *Id.* (citing, among other things, factors first proposed by Sir Daniel Bethlehem in his article, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 770, 775 (2012)).

⁴⁷ Raghavan & Whitlock, *supra* note 9.

⁴⁸ *Id.*

⁴⁹ Savage, *supra* note 25.

⁵⁰ Egan Speech, *supra* note 40.

⁵¹ UN Charter, Art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.”).

⁵² Egan Speech, *supra* note 40.

law not only requires a State to analyze whether it has a legal basis for the use of force against a particular non-State actor—which I’ll call the ‘against whom’ question—but also requires a State to analyze whether it has a legal basis to use force against that non-State actor in a particular location—which I’ll call the ‘where’ question.”⁵³ Here too, Egan’s speech offers the most extensive recent explanation of this administration’s understanding of consent and self-defense in relation to state sovereignty when the United States exercises force in another state’s territory:

Indeed, under the *jus ad bellum*, the international legal basis for the resort to force in self-defense on another State’s territory takes into account State sovereignty. The international law of self-defense requires that such uses of force be necessary to address the threat giving rise to the right to use force in the first place. States therefore must consider whether unilateral actions in self-defense that would impinge on a territorial State’s sovereignty are necessary or whether it might be possible to secure the territorial State’s consent before using force on its territory against a non-State actor. . . .

It is with respect to this “where” question that international law requires that States must either determine that they have the relevant government’s consent or, if they must rely on self-defense to use force against a non-State actor on another State’s territory, determine that the territorial State is “unable or unwilling” to address the threat posed by the non-State actor on its territory. . . . This “unable or unwilling” standard is, in our view, an important application of the requirement that a State, when relying on self-defense for its use of force in another State’s territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.⁵⁴

While “the United States has relied on both consent and self-defense in its use of force against ISIL,”⁵⁵ it is not clear that it would need to resort to a claim that Somalia is “unable or unwilling” to strike al-Shabaab. The federal government of Somalia has been cooperating with AMISOM, a U.S. partner⁵⁶ and regional peacekeeping mission that is operated by the African Union with the approval of the United Nations.⁵⁷ As part of its mandate to help stabilize the country,⁵⁸ AMISOM has conducted joint operations with Somali forces in both offensive and

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (noting that the UN Charter “does not prohibit an otherwise lawful use of force when undertaken with the consent of the State upon whose territory the force is to be used”). *See also id.* (“In Iraq, U.S. operations against ISIL are conducted with Iraqi consent and in furtherance of Iraq’s own armed conflict against the group. And in Syria, U.S. operations against ISIL are conducted in individual self-defense and the collective self-defense of Iraq and other States.”).

⁵⁶ *See* Leslie Keopka, U.S., *AMISOM Hone Operational Military Decision Making Processes*, U.S. AFRICA COMMAND (June 26, 2014), at <http://www.africom.mil/NewsByCategory/article/23262/u-s-amisom-hone-operation-al-military-decision-making-processes>; The White House Press Release, Fact Sheet: U.S. Support for Peacekeeping in Africa (Aug. 6, 2014), at <https://www.whitehouse.gov/the-press-office/2014/08/06/fact-sheet-us-support-peacekeeping-africa>.

⁵⁷ AMISOM Background, AMISOM: AFRICAN UNION MISSION IN SOMALIA, at <http://amisom-au.org/amisom-background/> (last visited July 13, 2016); Frequently Asked Questions, AMISOM: AFRICAN UNION MISSION IN SOMALIA, at <http://amisom-au.org/frequently-asked-questions> (last visited July 12, 2016) (stating that the principal aim of AMISOM is “to provide support for the Federal Government of Somalia in its efforts to stabilize the country and foster political dialogue and reconciliation”).

⁵⁸ AMISOM Mandate, AMISOM: AFRICAN UNION MISSION IN SOMALIA, at <http://amisom-au.org/amisom-mandate/> (last visited July 13, 2016).

defensive missions against al-Shabaab.⁵⁹ Furthermore, in public statements about the recent strikes in Somalia, the Pentagon has made multiple references to its partnership with African Union forces. A spokesperson described the Raso Camp attack as “in the tactical defense of U.S. and partner nation ground force units,”⁶⁰ and asserted that “[t]he removal of these fighters degrades al-Shabaab’s ability to meet the group’s objectives in Somalia, including recruiting new members, establishing bases, and planning attacks on U.S. and AMISOM forces.”⁶¹

Egan’s observations on *jus in bello*, or the legal rules that govern the carrying out of offensive action, are also relevant to the U.S. strike on Raso Camp. Since al-Shabaab is a nonstate actor, Egan’s observations about ISIL would apply here in full: “[T]he applicable international legal regime governing [these] military operations is the law of armed conflict covering NIACs [non-international armed conflicts], most importantly, Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in [NIACs].”⁶²

In his speech, Egan highlighted a few specific targeting rules that the administration regards as applicable to all parties in a NIAC. First, he said that “parties must distinguish between military objectives, including combatants, on the one hand, and civilians and civilian objects on the other. Only military objectives, including combatants, may be made the object of attack.” He defined “military objectives” as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Egan also elaborated on some possible misunderstandings about how the United States determines whether specific individuals may be lawful objects of attack:

In many cases we are dealing with an enemy who does not wear uniforms or otherwise seek to distinguish itself from the civilian population. In these circumstances, we look to all available real-time and historical information to determine whether a potential target would be a lawful object of attack. To emphasize a point that we have made previously, it is not the case that all adult males in the vicinity of a target are deemed combatants. Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member of an organized armed group with which we are engaged in an armed conflict. For example, with respect to membership in an organized armed group, we may examine the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of State militaries that are liable to

⁵⁹ See, e.g., AMISOM Press Release, AU Chairperson Condemns Attempted Attack Against AMISOM in Somalia (June 9, 2016), at <http://amisom-au.org/2016/06/au-chairperson-condemns-attempted-attack-against-amisom-in-somalia/> (describing defensive operations carried out jointly by AMISOM and the Somali National Army); AMISOM Press Release, Remarks by Ambassador Francisco Caetano Jose Madeira, African Union Special Representative for Somalia and Head of AMISOM at the Security Council Briefing on Somalia (Jan. 28, 2016), at <http://amisom-au.org/wp-content/uploads/2016/01/REMARKS-BY-AMBASSADOR-FRANCISCO-CAETANO-JOSE%CC%81-MADEIRA.pdf> (describing “joint operations” between the Somali National Army and AMISOM troops, which “facilitate continued offensive operations”).

⁶⁰ DOD Question-Answer, *supra* note 8.

⁶¹ DOD Raso Statement, *supra* note 1.

⁶² Egan Speech, *supra* note 40.

attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.

Egan also noted that in addition to these targeting rules, the United States adheres to “the fundamental law of armed conflict principles of distinction, proportionality, necessity, and humanity.”⁶³ Finally, Egan emphasized that “[i]n many cases, the United States imposes standards on its direct action operations that go beyond the requirements of the law of armed conflict.” For example, he said that although the United States is not party to the 1977 Additional Protocol to the 1949 Geneva Conventions and thus not bound to comply with it under treaty law, U.S. practice is “already consistent with the Protocol’s provisions.” He also discussed the Presidential Policy Guidance, or PPG, a set of policy standards that guide the United States’ use of lethal force against terrorist targets outside areas of active hostilities.⁶⁴ Consistent with prior statements by the Obama administration, Egan said that these standards “exceed what the law of armed conflict requires.”⁶⁵

In closing his speech, Egan explained the importance of U.S. compliance with international law in all armed conflicts:

We comply with the law of armed conflict because it is the international legal obligation of the United States; because we have a proud history of standing for the rule of law; because it is essential to building and maintaining our international coalition; because it enhances rather than compromises our military effectiveness; and because it is the right thing to do.⁶⁶

⁶³ *Id.* The Obama administration has previously discussed these *jus in bello* principles with respect to targeted strikes. See John R. Crook, *Contemporary Practice of the United States*, 106 *AJIL* 670, 671 (2012) (quoting a speech by John O. Brennan, then Assistant to the President for Homeland Security and Counterterrorism, who defines the principles of necessity, distinction, proportionality and humanity, and asserts that U.S. targeted strikes conform to all of them).

⁶⁴ *Id.*; see also John R. Crook, *Contemporary Practice of the United States*, 107 *AJIL* 674 (2013) (announcing the codification of the PPG as “a framework that governs [U.S.] use of force against terrorists—insisting upon clear guidelines, oversight and accountability”). Scholars have debated whether Somalia qualifies as an “area of active hostilities.” See, e.g., Robert Chesney, *supra* note 28 (observing that it is unclear whether Somalia is an area of active hostilities and questioning whether the Raso Camp strikes were consistent with the PPG). Although Egan did not discuss Somalia specifically, he said that “[f]or the purposes of the PPG, the determination that a region is an ‘area of active hostilities’ takes into account, among other things, the scope and intensity of the fighting.” Egan Speech, *supra* note 40.

⁶⁵ Egan Speech, *supra* note 40. Egan focused on one of the PPG standards—namely, the “threshold of ‘near certainty’ that non-combatants will not be injured or killed.” He described this standard as “higher than that imposed by the law of armed conflict, which contemplates that civilians will inevitably and tragically be killed in armed conflict.” *Id.*

⁶⁶ *Id.*