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# Contemporary Practice of the United States Relating to International Law


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## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTINA DAUGIRDAS AND JULIAN DAVIS MORTENSON

### ***In this section:***

- Iran and United States Continue to Implement Nuclear Deal, Although Disputes Persist
- United States Continues to Challenge Chinese Claims in South China Sea; Law of the Sea Tribunal Issues Award Against China in *Philippines-China* Arbitration
- U.S. Navy Report Concludes That Iran's 2015 Capture of U.S. Sailors Violated International Law
- United States Justifies Its Use of Force in Libya Under International and National Law
- U.S. Drone Strike Kills Taliban Leader in Pakistan
- U.S. Government Releases Casualty Report, Executive Order, and Presidential Policy Guidance Related to Its Counterterrorism Strike Practices
- The Department of Defense Clarifies Legal Protections for Journalists in Updated Law of War Manual
- Federal Court of Claims Finds That Settlement Without Compensation of Foreign Nationals' Claims Against Libya Does Not Violate Fifth Amendment

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

*Iran and United States Continue to Implement Nuclear Deal, Although Disputes Persist*

A little over one year ago, Iran, the five permanent members of the UN Security Council, Germany, and the European Union agreed on the Joint Comprehensive Plan of Action (JCPOA), which was designed to limit the scope and content of Iran's nuclear program in exchange for sanctions relief.<sup>1</sup>

The United States maintains that Iran is complying with the terms of the JCPOA. In a statement to the press, White House Press Secretary Josh Earnest stated that "[r]ight now, as we speak, Iran is in compliance with the agreement. . . . That is a fact that is verified by independent, international experts who, because of the agreement, no[w] have the kind of access that's required to verify it."<sup>2</sup> Most prominently, the United States has lauded Iran for dismantling two-thirds of its centrifuges, disabling the core of the plutonium reactor at the Arak facility, removing 98 percent of its stockpile of enriched uranium, and permitting access to International Atomic Energy Agency (IAEA) inspection officials.<sup>3</sup> In one instance the United States and the IAEA did raise concerns that Iran had exceeded a 130 metric ton heavy water stockpile limit by 0.9 tons.<sup>4</sup> Iran quickly corrected the mistake to the United States' satisfaction.<sup>5</sup> Because of the limits that the JCPOA has imposed, the United States asserts that the agreement has extended Iran's breakout time from two to three months to at least one year.<sup>6</sup>

Iranian officials, by contrast, have complained that the United States is not fulfilling its commitments under the JCPOA. In an August 2016 speech to supporters, Ayatollah Ali Khamenei complained about the United States' conduct: "Today, even the diplomatic officials and those who were present in the [JCPOA] negotiations reiterate the fact that the US is breaching its promises, and while speaking softly and sweetly [to Iran], is busy obstructing and damaging Iran's economic relations with other countries."<sup>7</sup> Khamenei further stated that "[t]he JCPOA, as an experience, once again proved the futility of negotiations with Americans, their lack of commitment to their promises and the necessity of distrust of US pledges."<sup>8</sup>

Iran's complaints relate mainly to its view that the United States is not fully implementing the sanctions relief promised in the JCPOA. The United States, in the main, has responded that

<sup>1</sup> Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 80 (2016) [hereinafter JCPOA]. Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 649 (2015); 110 AJIL 347 (2016) [hereinafter Daugirdas & Mortenson, 110 AJIL].

<sup>2</sup> White House Press Release, Press Gaggle by Press Secretary Josh Earnest and Senior Advisor Brian Deese en route to Midway Atoll (Sep. 1, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/01/press-gaggle-press-secretary-josh-earnest-and-senior-advisor-brian-deese>.

<sup>3</sup> Ambassador Samantha Power, U.S. Mission to the UN, Remarks at the UN Security Council Briefing on Iran Nonproliferation and the Implementation of Resolution 2231 (July 16, 2016), at <http://usun.state.gov/remarks/7374> [hereinafter Ambassador Power's Remarks to UNSC].

<sup>4</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Feb. 26, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/02/253722.htm>.

<sup>5</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Sept. 1, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/09/261531.htm>.

<sup>6</sup> Ambassador Power's Remarks to UNSC, *supra* note 3.

<sup>7</sup> JCPOA *Proved Necessity of Distrust in US Promises: Leader*, PRESS TV (Aug. 1, 2016), at <http://www.presstv.com/Detail/2016/08/01/477946/Iran-US-Leader-Khamenei-JCPOA>.

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

the JCPOA relates only to sanctions that focus on Iran's nuclear activity, and that it does not touch on sanctions imposed for other reasons, such as human rights or terrorism.

More specifically, Iran has raised concerns that it is unable to access its central bank's assets held abroad, in part because of U.S. limits that make it difficult to convert those assets to non-U.S. currencies.<sup>9</sup> In order to gain access to funds contained abroad, Iran would like to conduct a financial maneuver called a "U-turn"—that is, briefly clearing funds through a U.S. financial institution in order to price the conversion of the funds into euros or other currencies.<sup>10</sup> In an interview with the website *Al-Monitor*, the governor of the Central Bank of Iran, Valiollah Seif, stated that it was Iran's "expectation" that the U-turn provision was a nuclear-related sanction that would be waived by the United States as part of implementing the JCPOA.<sup>11</sup>

The United States has denied that the JCPOA requires it to permit Iran to engage in U-turn transactions. Treasury Secretary Jack Lew explained:

You know, we have been very clear that the nuclear sanctions on Iran that limited access to Iran's reserves and to financial institutions were lifted when Iran complied with its nuclear-related obligations under the Joint Comprehensive Plan of Action. We have been clear in going around the world making that point, both government-to-government and to financial institutions.

Iran has many challenges in doing business. Some of them have to do with Iran's own business practices. Some of them have to do with Iran's other activities outside of the nuclear arena, where they continue to engage in supporting terrorism, regional destabilization, missile testing that is violating norms, and human rights problems that they have in their own country. So there are still sanctions on Iran in those areas while the nuclear sanctions have been lifted.

I think that we have to be clear. Iran, complied with the nuclear agreement. Therefore, the nuclear sanctions are lifted. I think that that is a process that is becoming more and more clear. And we'll keep our part of the bargain there. But the U.S. financial system is not open to Iran and that is not something that is going to change. So the challenge is going to be how to work through an international financial system that is complicated, where there . . . is a lot of attention paid to what U.S. law requires. And I think our obligation is to be clear, which I've tried very hard to do and our team has tried very hard to do.

You know, if you look at what makes a sanctions regime work, a sanctions regime works if in order to get relief from the sanctions a government changes its policy. So the government of Iran changed its policy, that's why we lifted the sanctions that were nuclear sanctions. The government of Iran has not changed its behavior in all of those other areas. And

<sup>9</sup> UN Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)*, Annex I.B, para. 5, UN Doc. S/2016/589 (Aug. 2, 2016) [hereinafter *Secretary-General's Report*]. See generally 31 C.F.R. 560.516 (2015) (detailing the rules for U.S. depository institutions regarding transfers to and from Iran); Iranian Transaction Regulations, 73 Fed. Reg. 66,541 (Nov. 10, 2008) (laying out amendments made to the Iranian Transaction Regulations).

<sup>10</sup> Barbara Slavin, *Central Bank Governor: Iran Expects Access to US Financial System*, AL-MONITOR (Apr. 15, 2015), at <http://www.al-monitor.com/pulse/originals/2016/04/iran-expects-limited-access-us-financial-system.html>.

<sup>11</sup> *Id.* Moreover, in a submission to the United Nations, Iran claimed that the Iranian Central Bank did not "have free access to its assets held abroad due to the US lack of cooperation in converting those assets into non-US currencies as well as for their transfer, despite the U.S. commitments in this regard under paragraph 21 (iv) and paragraphs and 7.2 of Annex IV of JCPOA." *UN Secretary-General's Report*, *supra* note 9, Annex I.B, para. 5.

there still are other sanctions in place. And navigating through that is going to be a challenge, but it's one where I think clarity will help. We're not proposing that the U-turn be changed.<sup>12</sup>

A separate impediment inhibiting Iran's access to its central bank funds is the U.S. Supreme Court's recent decision in *Bank Markazi v. Peterson*.<sup>13</sup> In *Bank Markazi*, the Court upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 that made "available for postjudgment execution a set of assets held at a New York bank for Bank Markazi, the Central Bank of Iran."<sup>14</sup> Congress eliminated execution immunity for these assets in order to enable certain plaintiffs to satisfy existing judgments awarded against Iran under the Foreign Sovereign Immunities Act, which permits actions against foreign governments for certain terrorism related activities.<sup>15</sup> In upholding the statute and allowing the plaintiffs' cases to proceed, the Court held that "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts."<sup>16</sup>

After the Court issued its decision in *Bank Markazi*, Iran claimed that the decision was inconsistent with the JCPOA. According to Iran, "[l]ess than 4 months after the JCPOA's Implementation Day, around US\$ 1.8 billion of Iran Central Bank's assets were seized following a U.S. court order. . . . This unlawful and illegitimate act is inconsistent with the spirit of the JCPOA."<sup>17</sup> Despite Iran's objections, President Barack Obama's administration supported the Court's decision. According to State Department Spokesperson John Kirby, the Court's decision was "consistent with the position that we took when the legislation calling for this compensation was actually signed into law by the President back in 2012, and we have supported consistently compensation for the families in this case."<sup>18</sup> Moreover, a State Department official has affirmed: "We believe the court decision is consistent with U.S. international obligations. This case has been the subject of robust U.S. judicial proceedings, including by our highest court."<sup>19</sup>

Separately, Iran has complained about the United States' implementation of its commitment to revoke Executive Order 13645, which imposed various sanctions on Iran.<sup>20</sup> The United States claims to have implemented this commitment on January 16, 2016, with

<sup>12</sup> *Why U.S. Economic Leadership Matters: The Case for U.S. Economic Leadership: A Conversation with Jacob J. Lew*, COUNCIL ON FOREIGN RELATIONS (Apr. 11, 2016), at <http://www.cfr.org/united-states/why-us-economic-leadership-matters/p37731>; see also U.S. Dep't of State Press Release, Background Briefing on the JCPOA Implementation (Sep. 17, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/09/247017.htm>; U.S. Dep't of State Press Release, Daily Press Briefing (Apr. 15, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/04/255860.htm>.

<sup>13</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); see also Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 555 (2016).

<sup>14</sup> *Bank Markazi*, 136 S. Ct. at 1316.

<sup>15</sup> 28 U.S.C. §1605A (2012).

<sup>16</sup> *Bank Markazi*, 136 S. Ct. at 1325.

<sup>17</sup> *Secretary-General's Report*, *supra* note 9, Annex I.B, para. 2.

<sup>18</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Apr. 20, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/04/256417.htm>.

<sup>19</sup> Cristian Farias, *Iran Decries Supreme Court Ruling Favor of Terror Victims as "Theft,"* HUFFINGTON POST (Apr. 22, 2016), at [http://www.huffingtonpost.com/entry/iran-supreme-court-terror-ruling\\_us\\_571a66f5e4b0d912d5fe8054](http://www.huffingtonpost.com/entry/iran-supreme-court-terror-ruling_us_571a66f5e4b0d912d5fe8054); see also White House Press Release, Press Briefing by Press Secretary Josh Earnest and Ben Rhodes (Apr. 21, 2016), at <https://www.whitehouse.gov/the-press-office/2016/04/21/press-briefing-press-secretary-josh-earnest-and-ben-rhodes-4212016>.

<sup>20</sup> Exec. Order No. 13,645, 3 C.F.R. §298 (2014).

Obama's promulgation of Executive Order 13716.<sup>21</sup> While the later order does indeed rescind Executive Order 13645 as such, it then goes on to reproduce and adopt portions of that earlier Order—verbatim.<sup>22</sup> Iran has objected, arguing that this reimposition of sanctions “is not consistent with United States commitment for termination of the Executive Order as well as paragraph 26 of the JCPOA regarding refraining from re-introduction or re-imposition of lifted sanctions.”<sup>23</sup> According to the United States, the carryover sections in Executive Order 13716 contain sanctions provisions that are unrelated to Iran's nuclear program, such that they fall outside the JCPOA.<sup>24</sup>

In addition to its objections about the scope of sanctions relief at the federal level, Iran claims that the United States is not doing enough to discourage individual U.S. states from continuing to enforce sanctions or divestment regimes against Iran. The JCPOA provides:

If a law at the state or local level in the United States is preventing the implementation of the sanctions lifting as specified in this JCPOA, the United States will take appropriate steps, taking into account all available authorities, with a view to achieving such implementation. The United States will actively encourage officials at the state or local level to take into account the changes in the U.S. policy reflected in the lifting of sanctions under this JCPOA and to refrain from actions inconsistent with this change in policy.<sup>25</sup>

To implement this commitment, the State Department sent letters to the governor of every U.S. state and the leaders of certain localities. These letters encouraged their recipients to consider the JCPOA as they implement their sanctions regimes. According to Kirby, the letters “encourage state and local officials to take into account the [changes] to our sanctions that resulted from the JCPOA, and to examine whether those changes affect the implementation of their state and local laws.”<sup>26</sup> However, Kirby noted that the letters do not “require action” by the recipients of the letters.<sup>27</sup> Iran has objected that the United States is not fulfilling its commitment in the JCPOA, taking the position that “[f]ormalistic writing of letters cannot be considered active encouragement.”<sup>28</sup>

<sup>21</sup> Exec. Order No. 13,716, 81 Fed. Reg. 3693 (2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Secretary-General's Report*, *supra* note 9, Annex I.B, para. 4.

<sup>24</sup> See Remarks on Iran, 2015 DAILY COMP. PRES. DOC. 22 (Jan. 17, 2016).

<sup>25</sup> JCPOA, *supra* note 1, para. 25.

<sup>26</sup> U.S. Dep't of State Press Release, Daily Press Briefing (Apr. 18, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/04/255946.htm>.

<sup>27</sup> *Id.* Kerry emphasized this point in response to a question at a congressional hearing:

Mr. DESANTIS. . . . Secretary Kerry, just real quickly, because this is not going to be ratified as a treaty, there are a lot of States, and Florida particularly, where State legislatures have enacted sanctions against Iran in various capacities. Do you acknowledge that this deal will not affect states' ability to do it since it is not going to be approved as a treaty, it is not going to be considered the supreme law of the land, it will be more of an Executive-to-an-Executive agreement?

Secretary KERRY. That is accurate, but we would urge those States, if Iran is fully complying with this agreement, we will take steps to urge them not to interfere with that.

*Iran Nuclear Agreement: The Administration's Case: Hearing Before the Comm. on Foreign Affairs, 114th Cong.* 81 (2015). See also Jack Goldsmith & Amira Mikhail, *Does the Iran Deal Require USG to Seek Preemption of (Some) State Sanctions?*, LAWFARE (Apr. 27, 2016), at <https://www.lawfareblog.com/does-iran-deal-require-usg-seek-preemption-some-state-sanctions> (discussing whether the JCPOA preempts state sanctions against Iran).

<sup>28</sup> *Secretary-General's Report*, *supra* note 9, Annex I.B, para. 3.

In addition to complaints regarding the scope of sanctions relief, Iran claims that recently enacted changes to the U.S. visa waiver program are inconsistent with the JCPOA. On December 18, 2015, the United States passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 (Visa Waiver Program).<sup>29</sup> The Visa Waiver Program requires individuals who have recently traveled to Iran to obtain a visa before entering the United States, even if they are citizens of a country that participates in the visa-free travel program.<sup>30</sup> After Iran complained about the new law, U.S. Secretary of State John Kerry stated in a letter to Iranian Minister of Foreign Affairs Mohammad Javad Zarif that the administration would comply with the JCPOA by using a provision in the Visa Waiver Program that allows for presidential waiver and by issuing exceptions for business travel.<sup>31</sup> In Iran's view, Kerry's response was insufficient. First, Iran criticized his proposal because "[t]here are no waivers for tourist trips to Iran."<sup>32</sup> Second, Iran claimed that the U.S. policy would violate several provisions of the JCPOA:

The new Act was adopted against several provisions of the JCPOA, including paragraphs 26, 28 and 29.<sup>33</sup> In accordance with paragraph 26 of the JCPOA, the United States is committed to prevent interference with the realization of the full benefit by Iran of the sanctions lifting specified in Annex II. Under Paragraph 28 of the JCPOA, the US is committed to refrain from any action that would undermine its successful implementation. . . . Also, paragraph 29 of the JCPOA has committed the United States to refrain from any policy specifically intended to directly and adversely affect the normalization of trade and economic relations with Iran.<sup>34</sup>

The United States and members of the European Union have responded to Iran's concerns mainly by emphasizing that the JCPOA does not cover obligations relating to sanctions that are unrelated to Iran's nuclear development program. In a joint statement by France, Germany, the United Kingdom, the United States, and the High Representative of the European Union for Foreign Affairs and Security Policy, the parties stated:

We will not stand in the way of permitted business activity with Iran, and we will not stand in the way of international firms or financial institutions' engaging with Iran, as long as they follow all applicable laws. In the JCPOA, all parties pledged to take steps to ensure Iran's access in areas of trade, technology, finance and energy. . . . Our governments have

<sup>29</sup> White House Press Release, Statement by the Press Secretary on H.R. 2029 (Dec. 18, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/18/statement-press-secretary-hr-2029>; H.R. Res. 2029, Div. O, Title II, 114th Cong. (2015) (enacted); Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 356.

<sup>30</sup> See H.R. Res. 2029, Div. O §203.

<sup>31</sup> Letter from John Kerry, Sec'y of State, to Mohammad Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran (Dec. 19, 2015), at <http://www.niacouncil.org/text-sec-kerry-letter-to-zarif-regarding-visa-waiver-reform/>.

<sup>32</sup> *Secretary-General's Report*, *supra* note 9, Annex I.B, para. 1.

<sup>33</sup> [Editors' note: Paragraph 26 provides: "The United States will make best efforts in good faith to sustain this JCPOA and to prevent interference with the realisation of the full benefit by Iran of the sanctions lifting specified in Annex II." Paragraph 28 provides: "The E3/EU + 3 and Iran commit to implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation." Paragraph 29 provides: "The EU and its Member States and the United States, consistent with their respective laws, will refrain from any policy specifically intended to directly and adversely affect the normalisation of trade and economic relations with Iran inconsistent with their commitments not to undermine the successful implementation of this JCPOA." JCPOA, *supra* note 1.]

<sup>34</sup> *Secretary-General's Report*, *supra* note 9, Annex I.B, para. 1



provided extensive guidance on the scope of sanctions lifted and those that remain in place and will continue to do so including through additional guidance.<sup>35</sup>

Kerry similarly emphasized the U.S. commitment to implementing the JCPOA at a press conference with Sharif last April. At the press conference, Kerry stated, “We have no objection and we do not stand in the way of foreign banks engaging with Iranian banks and companies, obviously as long as those banks and companies are not on our sanctions list for non-nuclear reasons.”<sup>36</sup> In response to Kerry’s statement, Sharif stated that Iran “hope[s] that with this statement by Secretary Kerry and other steps that were taken by the United State[s], now we will see serious implementation of all JCPOA benefits that Iran should derive from this agreement.”<sup>37</sup>

Even though the United States has praised Iran’s implementation of the JCPOA, it has sharply criticized Iran’s implementation of UN Security Council Resolution 2231—a separate instrument designed to support and implement the JCPOA.<sup>38</sup> First, the United States maintains that new ballistic missile tests conducted by Iran in March 2016 were inconsistent with UNSC Resolution 2231.<sup>39</sup> Resolution 2231 states that

Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion,<sup>40</sup> whichever is earlier.<sup>41</sup>

In a report on the implementation of the Resolution, UN Secretary-General Ban Ki-moon stated:

I am concerned by the ballistic missile launches conducted by the Islamic Republic of Iran in March 2016. I call upon the Islamic Republic of Iran to refrain from conducting such launches, given that they have the potential to increase tensions in the region. Whereas it is for the Security Council to interpret its own resolutions, I am concerned that those launches are not consistent with the constructive spirit demonstrated by the signing of the Joint Comprehensive Plan of Action.<sup>42</sup>

In a Security Council meeting discussing the Secretary-General’s report, U.S. Ambassador Samantha Power echoed the report’s conclusion, saying that “Iran and other Member States have at times taken actions that, while not violations of the JCPOA, are inconsistent with Resolution 2231. . . . These include Iran’s repeated ballistic missile launches, which this Council called upon Iran not to undertake.”<sup>43</sup>

<sup>35</sup> U.S. Dep’t of State Press Release, Statement by France, Germany, United Kingdom, United States, and the High Representative of the European Union for Foreign Affairs and Security on Post-JCPOA Business With Iran (May 19, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/05/257455.htm>.

<sup>36</sup> U.S. Dep’t of State Press Release, Remarks Before Meeting with Iranian Foreign Minister Javad Sharif (April 22, 2016), at <http://www.state.gov/secretary/remarks/2016/04/256536.htm>.

<sup>37</sup> *Id.*

<sup>38</sup> Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 352–56.

<sup>39</sup> Ambassador Power’s Remarks to UNSC, *supra* note 3.

<sup>40</sup> [Editors’ note: The “Broader Conclusion” is a determination that may be reached by the IAEA “that all nuclear material in Iran remains in peaceful activities.” JCPOA, *supra* note 1, Annex V, para. 19.]

<sup>41</sup> S.C. Res 2231, Annex B, para. 3 (July 20, 2015).

<sup>42</sup> *Secretary-General’s Report*, *supra* note 9, para. 8.

<sup>43</sup> Ambassador Power’s Remarks to UNSC, *supra* note 3.



Second, the United States claims that Iran violated Resolution 2231 by conducting unauthorized weapons transfers. Resolution 2231 states that

[a]ll states are to . . . [t]ake the necessary measures to prevent, except as decided otherwise by the UN Security Council in advance on a case-by-case basis, the supply, sale, or transfer of arms or related materiel from Iran by their nationals or using their flag vessels or aircraft, and whether or not originating in the territory of Iran, until the date five years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.<sup>44</sup>

U.S. concern about Iran's compliance with this provision emerged in March 2016, after the U.S. Navy and other forces intercepted a "shipment of weapons hidden aboard a small, stateless dhow. The illicit cargo included 1,500 AK-47s, 200 RPG launchers and 21 .50 caliber machine guns."<sup>45</sup> The Navy concluded that the "seizure [was] the latest in a string of illicit weapons shipments assessed by the U.S. to have originated in Iran that were seized in the region by naval forces," including additional seizures by France and Australia.<sup>46</sup> Secretary-General Ban Ki-moon expressed concern about the allegations of Iranian weapons transfers, but noted that Iran denied that it had ever engaged in such an activity.<sup>47</sup>

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

##### *United States Continues to Challenge Chinese Claims in South China Sea; Law of the Sea Tribunal Issues Award Against China in Philippines-China Arbitration*

Between May and June 2016, the United States conducted several naval exercises in the South China Sea that prompted negative reactions from China. Like other recent U.S. operations, these exercises reflected the United States' continuing objection to China's territorial and maritime claims in the South China Sea.<sup>1</sup> Since at least the 1950s, China has asserted claims to certain islands and waters in the area; the United States has rejected those claims as inconsistent with the international law of the sea.<sup>2</sup> In November 2013, China began a series of significant land reclamation projects in the Spratly Islands<sup>3</sup> that the United States has also opposed due to concerns about regional destabilization and potential militarization of the artificial features.<sup>4</sup> China, in turn, has blamed the United States for escalating the situation by conducting military exercises in the region.<sup>5</sup>

<sup>44</sup> S.C. Res 2231, *supra* note 43, Annex B, para. 6(b).

<sup>45</sup> Dep't of the Navy, Press Release, Third Illicit Arms Shipment in Recent Weeks Seized in Arabian Sea (Apr. 4, 2016), at [http://www.navy.mil/submit/display.asp?story\\_id=93990](http://www.navy.mil/submit/display.asp?story_id=93990).

<sup>46</sup> *Id.*

<sup>47</sup> *Secretary-General's Report*, *supra* note 9, para. 9.

<sup>1</sup> See Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 120 (2016) [hereinafter Daugirdas & Mortenson, 110 AJIL]; 109 AJIL 667 (2015) [hereinafter Daugirdas & Mortenson, 109 AJIL]; 108 AJIL 331 (2014) [hereinafter Daugirdas & Mortenson, 108 AJIL].

<sup>2</sup> See OFFICE OF OCEAN & POLAR AFFAIRS, U.S. DEP'T OF STATE, LIMITS IN THE SEAS: NO. 143, CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (2014) [hereinafter LIMITS IN THE SEAS]; Daugirdas & Mortenson, 108 AJIL, *supra* note 1, at 332–33.

<sup>3</sup> Daugirdas & Mortenson, 109 AJIL, *supra* note 1, at 667–68.

<sup>4</sup> *Id.* at 668.

<sup>5</sup> Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 121.

The first of the recent U.S. naval operations occurred on May 10, 2016, when the guided-missile destroyer USS *William P. Lawrence* conducted a “freedom of navigation” operation within twelve nautical miles of Fiery Cross Reef.<sup>6</sup> The operation was the second such U.S. operation in the region this year, following the missile destroyer USS *Curtis Wilbur*’s passage within twelve nautical miles of Triton Island on January 29.<sup>7</sup> This increased activity implements a commitment U.S. officials made last fall to undertake more frequent freedom of navigation operations in the region.<sup>8</sup>

In response to the passage of the *William P. Lawrence*, three Chinese fighter jets and three ships monitored the vessel until it left the area.<sup>9</sup> Chinese Foreign Ministry Spokesperson Lu Kang characterized the operation as “illegal[],” claiming that it “threatened China’s sovereignty and security interests, endangered safety of personnel and facilities on the reef, and jeopardized regional peace and stability.”<sup>10</sup> White House Press Secretary Josh Earnest, by contrast, asserted that the operation

[wa]s relatively routine. . . . And it [wa]s not intended to be a provocative act. It merely [wa]s a demonstration of a principle that the President has laid out on a number of occasions, which is that the United States will fly, operate and sail anywhere that international law allows.<sup>11</sup>

Two subsequent encounters between U.S. and Chinese aircraft raised regional temperatures even further. On May 17, two Chinese tactical fighters intercepted a U.S. Navy reconnaissance plane that was conducting what the White House described as a “routine. . . . patrol” above the South China Sea.<sup>12</sup> The Chinese aircraft came within fifty feet of the U.S. plane, forcing the U.S. aircraft to descend to avoid collision.<sup>13</sup> Pentagon Press Secretary Peter Cook said that the U.S. “air crew felt that the approach was not conducted in . . . a safe and professional manner.”<sup>14</sup> Indeed,

<sup>6</sup> Simon Denyer & Thomas Gibbons-Neff, *China Scrambles Fighter Jets as U.S. Destroyer Steams Past Disputed Island*, WASH. POST (May 10, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/05/10/china-scrambles-fighters-jets-as-u-s-destroyer-steams-past-disputed-island>. According to a Pentagon spokesperson, the vessel exercised its “right of innocent passage.” *Id.*

<sup>7</sup> See Missy Ryan, *U.S. Missile Destroyer Sailed Close to Island Claimed by China*, WASH. POST (Jan. 30, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/01/30/u-s-missile-destroyer-sailed-close-to-island-claimed-by-china>.

<sup>8</sup> See Daugirdas & Mortenson, 110 AJIL, *supra* note 1, at 124.

<sup>9</sup> Denyer & Gibbons-Neff, *supra* note 6.

<sup>10</sup> Ministry of Foreign Aff. of China Press Release, Foreign Ministry Spokesperson Lu Kang’s Regular Press Conference (May 10, 2016), at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1362106.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1362106.shtml). The Chinese Ministry of Defense spokesperson, Senior Col. Yang Yujun, made a similar statement about the *Curtis Wilbur*’s January 29 operation, saying that it “severely violated the law” and harmed “regional peace and stability.” *China Drives Off US Destroyer Intruding into Xisha Islands Waters*, MINISTRY OF NAT’L DEFENSE OF CHINA (Jan. 31, 2016), at [http://eng.mod.gov.cn/DefenseNews/2016-01/31/content\\_4638409.htm](http://eng.mod.gov.cn/DefenseNews/2016-01/31/content_4638409.htm).

<sup>11</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (May 12, 2016), at <https://www.whitehouse.gov/the-press-office/2016/05/12/press-briefing-press-secretary-josh-earnest-5122016>.

<sup>12</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (May 19, 2016), at <https://www.whitehouse.gov/the-press-office/2016/05/19/press-briefing-press-secretary-josh-earnest-5192016> [hereinafter May 19 Press Briefing]; see also Thomas Gibbons-Neff, *Chinese Jets Intercept U.S. Recon Plane, Almost Colliding over South China Sea*, WASH. POST (May 18, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/05/18/chinese-jets-intercept-u-s-recon-plane-almost-colliding-over-south-china-sea/>.

<sup>13</sup> Gibbons-Neff, *supra* note 12.

<sup>14</sup> U.S. Dep’t of Defense Press Release, Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room (May 19, 2016), at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/777180/departement-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in>.

on May 26, the Pentagon announced that its “review of the [May 17] intercept . . . ha[d] assessed the intercept to have been unsafe based upon the Memorandum of Understanding with China and International Civil Aviation Organization (ICAO) standards.”<sup>15</sup> A senior Chinese military officer dismissed this concern, stating that “the Rules of Behavior for Safety of Air and Maritime Encounters signed between China and the US only provide[] technical regulations.”<sup>16</sup> He asserted instead that the Chinese aircraft “ha[d] taken necessary and professional countermeasures” to the U.S. plane’s “close-in reconnaissance. . . . If the problem is to be solved once and for all, the United States must stop its close-in reconnaissance against China.”<sup>17</sup>

A similar interaction occurred less than a month later, when two Chinese fighter jets intercepted a U.S. Air Force reconnaissance aircraft engaged in a patrol over the East China Sea.<sup>18</sup> U.S. Pacific Command stated that “[o]ne of the intercepting Chinese jets had an unsafe excessive rate of closure on the [U.S.] aircraft,” but indicated that “this seem[ed] to be a case of improper airmanship, as no other provocative or unsafe maneuvers occurred.”<sup>19</sup> However, the Department of Defense was “addressing the issue with China in appropriate diplomatic and military channels.”<sup>20</sup> Echoing China’s response to the earlier incident, Chinese Foreign Ministry Spokesperson Hong Lei said that the United States was “playing up” the issue:

Everything starts with the US military aircraft’s frequent reconnaissance against China’s coastal areas which severely threatens China’s safety at sea and in the air. China has the right to take defensive moves in response. We urge the US to stop such kind of reconnaissance activities and prevent similar incident[s] from happening again.<sup>21</sup>

<sup>15</sup> Idrees Ali, *Pentagon Says China Aircraft Intercept Violated 2015 Agreement*, REUTERS (May 26, 2016), at <http://www.reuters.com/article/us-usa-china-southchinasea-idUSKCN0YH2NZ>; see also SUPPLEMENT TO THE MEMORANDUM OF UNDERSTANDING ON THE RULES OF BEHAVIOR FOR SAFETY OF AIR AND MARITIME ENCOUNTERS BETWEEN THE DEPARTMENT OF DEFENSE OF THE UNITED STATES OF AMERICA AND THE MINISTRY OF NATIONAL DEFENSE OF THE PEOPLE’S REPUBLIC OF CHINA Annex III (Sept. 10, 2015), available at [http://www.defense.gov/Portals/1/Documents/pubs/US-CHINA\\_AIR\\_ENCOUNTERS\\_ANNEX\\_SEP\\_2015.pdf](http://www.defense.gov/Portals/1/Documents/pubs/US-CHINA_AIR_ENCOUNTERS_ANNEX_SEP_2015.pdf) [hereinafter SUPPLEMENT]. The parties’ supplement to the Memorandum states that “[m]ilitary aircraft that encounter each other in flight should operate consistent with the Convention on International Civil Aviation and its Annexes and guidance to the extent practicable.” *Id.*, §I. To this end, aircraft “should ensure safe separation to avoid creating a safety hazard. To determine safe separation, military aircraft should comprehensively consider their own national rules, relevant international guidance, and factors including the mission, meteorological considerations, and flight situation.” *Id.*, §IV(i) (footnote omitted).

<sup>16</sup> Ministry of Nat’l Defense of China Press Release, Defense Ministry’s Regular Press Conference (May 26, 2016), at [http://eng.mod.gov.cn/Press/2016-05/26/content\\_4665371.htm](http://eng.mod.gov.cn/Press/2016-05/26/content_4665371.htm).

<sup>17</sup> *Id.*

<sup>18</sup> U.S. Pac. Command, FACEBOOK (June 8, 2016), at <https://www.facebook.com/pacific.command/posts/10155279313912588>. China announced an air defense identification zone over the East China Sea in November 2013, but the United States and other countries have continued military patrols there. See generally Kristina Daugardis & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AJIL 106 (2014).

<sup>19</sup> U.S. Pac. Command, *supra* note 18.

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

<sup>21</sup> Ministry of Foreign Aff. of China Press Release, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference (June 8, 2016), at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1370729.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1370729.shtml) [hereinafter Hong Press Conference].

Statements by U.S. and Chinese officials following these events reflected continued tension about China's activities. Addressing a report that China might announce an air defense identification zone in the South China Sea,<sup>22</sup> U.S. Secretary of State John Kerry said that would be "a provocative and destabilizing act, which would automatically raise tensions."<sup>23</sup> He reiterated this position following the U.S.-China Strategic and Economic Dialogue, noting the United States' "concern about any unilateral steps by any party . . . to alter the status quo" in the region.<sup>24</sup> Chinese State Councilor Yang Jiechi, on the other hand, asserted that "China has every right to uphold its territorial sovereignty and lawful and legitimate maritime entitlements," since "the South China Sea islands have been Chinese territory since ancient times."<sup>25</sup>

Shortly thereafter, tensions in the region were heightened still further when an arbitral tribunal established pursuant to the UN Convention on the Law of the Sea (UNCLOS)<sup>26</sup> issued an award rejecting a number of China's maritime claims in the South China Sea.<sup>27</sup> The Philippines had initiated the arbitration in January 2013, seeking decisions regarding: (1) whether China's historical claims in the South China Sea were consistent with UNCLOS; (2) whether certain features claimed by both China and the Philippines were capable of generating entitlements to maritime zones greater than twelve nautical miles; and (3) whether the Philippines could exercise its rights within and beyond its exclusive economic zone (EEZ) and continental shelf.<sup>28</sup> Although it is a party to UNCLOS, China has "consistently rejected" the arbitration and has "adhered to a position of non-acceptance and non-participation in the proceedings,"<sup>29</sup> claiming that the Philippines had agreed to resolve maritime disputes in the South China Sea solely through bilateral negotiation.<sup>30</sup>

Despite China's objections, the Tribunal found jurisdiction over the dispute and ruled in the Philippines' favor on the merits. The Tribunal explained that, because dispute solely concerned the interpretation and application of UNCLOS, it did not implicate either country's claims to sovereignty over islands in the South China Sea and therefore the Philippines was not

<sup>22</sup> See Minnie Chan, *Beijing Ready to Impose Air Defence Identification Zone in South China Sea Pending US Moves*, SOUTH CHINA MORNING POST (June 1, 2016), at <http://www.scmp.com/news/china/article/1960954/beijing-ready-impose-air-defence-identification-zone-south-china-sea>; see also Daugirdas & Mortenson, *supra* note 18, at 106 (describing China's imposition of air defense identification zone over East China Sea in November 2013).

<sup>23</sup> U.S. Dep't of State Press Release, Joint Press Availability with Mongolian Foreign Minister Lundeg (June 5, 2016), at <http://www.state.gov/secretary/remarks/2016/06/258078.htm>.

<sup>24</sup> U.S. Dep't of State Press Release, U.S.-China Press Statements (June 7, 2016), at <http://www.state.gov/secretary/remarks/2016/06/258163.htm>.

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

<sup>26</sup> The Tribunal was appointed pursuant to Annex VII of the UNCLOS. The Permanent Court of Arbitration is providing administrative services as Registrar in the proceeding. See *In re Arbitration Between the Republic of the Philippines and the People's Republic of China*, PCA Case No. 2013-19, Award, paras. 30–31 (July 12, 2016) [hereinafter *In re South China Sea*]; see also *Case Administration*, PERM. CT. ARB. (2016), at <https://pca-cpa.org/en/services/arbitration-services/case-administration/> (detailing nature of services provided).

<sup>27</sup> See Perm. Ct. Arb. Press Release, *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* (July 12, 2016), at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>. For a more detailed discussion of the decision, see Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AJIL 746–60 (2016).

<sup>28</sup> See *In re South China Sea*, *supra* note 26, para. 28.

<sup>29</sup> *Id.*, paras. 4, 11, 116.

<sup>30</sup> See, e.g., Hong Press Conference, *supra* note 21.

obliged to engage in further bilateral negotiations with China before initiating this proceeding.<sup>31</sup> Furthermore, UNCLOS permits proceedings to continue in a party's absence, and the Tribunal took steps to ensure procedural fairness to both parties and to understand China's position on the relevant issues despite its absence from the proceedings.<sup>32</sup> Accordingly, the Tribunal held that its award was binding on China.<sup>33</sup>

The United States issued a statement emphasizing four aspects of the Tribunal's decision.<sup>34</sup> First, the U.S. noted the Tribunal's determination that China's claims to maritime areas in the South China Sea based on historic rights are "incompatible with [UNCLOS] to the extent that [they] exceed[] the limits of China's maritime zones as provided for by [UNCLOS]."<sup>35</sup> Accordingly, the Tribunal found that there was "no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line'"<sup>36</sup>—a conclusion long advocated by the United States.<sup>37</sup> The second holding emphasized by the United States was that none of the features claimed by China in the South China Sea—regardless of whether they are taken individually or collectively—can generate a maritime zone beyond twelve nautical miles.<sup>38</sup> Third, the U.S. statement flagged the tribunal's conclusion that China had violated the Philippines' sovereign rights in its EEZ, both by interfering with Philippine fishing and by building artificial islands there.<sup>39</sup> Fourth, the U.S. noted the tribunal's conclusion that China's land reclamation and construction of artificial features had severely harmed the coral reef environment in the Spratly Islands and violated China's obligations under UNCLOS to protect fragile ecosystems and to prevent harm to endangered species.<sup>40</sup>

Chinese officials immediately denounced the award. The Ministry of Foreign Affairs released a statement declaring "that the award is null and void and has no binding force. China neither accepts nor recognizes it."<sup>41</sup> The statement claimed that the Philippines initiated the arbitration in "bad faith," seeking only "to deny China's territorial sovereignty and maritime

<sup>31</sup> See *In re South China Sea*, *supra* note 26, paras. 149, 153–56, 158–60.

<sup>32</sup> See *id.*, paras. 117, 144.

<sup>33</sup> *Id.*, para. 143.

<sup>34</sup> A senior State Department official highlighted these four parts of the award as the "key elements from [the United States'] point of view." U.S. Dep't of State Press Release, Background Briefing on South China Sea Arbitration (July 12, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/07/259976.htm> [hereinafter Background Briefing].

<sup>35</sup> *In re South China Sea*, *supra* note 26, para. 261.

<sup>36</sup> Press Release, *supra* note 27, at 2; see also *In re South China Sea*, *supra* note 26, paras. 263–70; Background Briefing, *supra* note 34 (noting "the invalidation of the nine-dash line claim").

<sup>37</sup> See LIMITS IN THE SEAS, *supra* note 2 and accompanying text.

<sup>38</sup> See *In re South China Sea*, *supra* note 26, paras. 643–46; Background Briefing, *supra* note 34 (highlighting "the determination that the features in the Spratly Islands and the Scarborough Reef are entitled to no more than [twelve] nautical miles by way of maritime space").

<sup>39</sup> See *In re South China Sea*, *supra* note 26, paras. 757, 1043; Background Briefing, *supra* note 34 (pointing out tribunal's conclusion "that the construction of artificial islands by China and the conduct of Chinese fishing fleets violated the rights of the Philippines").

<sup>40</sup> See *id.*, paras. 992–93; Background Briefing, *supra* note 34 (noting the award's finding "that the large-scale reclamation and constructing these military outposts in the Spratlys damage the environment").

<sup>41</sup> Full Text of Statement of China's Foreign Ministry on Award of South China Sea Arbitration Initiated by Philippines, XINHUA NEWS (July 12, 2016), at [http://news.xinhuanet.com/english/2016-07/12/c\\_135507744.htm](http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm) [hereinafter *Statement on Award*]. Taiwan and several other countries expressed support for this position. See *ROC Position on the South China Sea Arbitration*, MINISTRY OF FOREIGN AFF. OF CHINA (TAIWAN) (July 12, 2016), at [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=0E7B91A8FBEC4A94&csms=220E98D761D34A9A&cs=5B5A9134709EB875](http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&csms=220E98D761D34A9A&cs=5B5A9134709EB875).



rights and interests in the South China Sea.”<sup>42</sup> Chinese Foreign Minister Wang Yi criticized the arbitration as “a political farce staged under legal pretext.”<sup>43</sup> Likewise, Vice Foreign Minister Liu Zhenmin identified several factors purportedly showing that the Tribunal was “seriously flawed” and biased.<sup>44</sup> Finally, Vice Foreign Minister Zhang Yesui insisted that China “will not accept any proposition and action based on the award and will never negotiate with any other country over the South China Sea based on the illegal award. No one, no country and no organization should expect to use the award to put pressure on China.”<sup>45</sup>

State Department Spokesperson John Kirby said that “the Tribunal’s decision is final and legally binding on both China and the Philippines. The United States expresses its hope and expectation that both parties will comply with their obligations.”<sup>46</sup> He asserted separately that China would be in breach of international law “[i]f [it] fail[ed] to abide by the ruling.”<sup>47</sup> That said, Kerry also noted that “the United States . . . does not take a position on the side of one claimant or another claimant. We don’t get involved in the substance of somebody’s claims.”<sup>48</sup> Instead, Earnest said, the United States’ “interest lies in a desire for a peaceful resolution to disputes and competing claims in [the South China Sea],” since it “wants to preserve the freedom of navigation and free flow of commerce in that region.”<sup>49</sup> Accordingly, a senior State Department official explained that the award’s greatest significance to the United States was its creation of

an important diplomatic opportunity. . . . [O]nce the dust settles and the rhetoric subsides, this decision opens the door to some very practical and potentially productive discussions among the various claimants in the South China Sea, in part because the ruling significantly narrows the geographic scope of the areas in question.

<sup>42</sup> *Statement on Award*, *supra* note 42.

<sup>43</sup> Ministry of Foreign Aff. of China Press Release, Remarks by Chinese Foreign Minister Wang Yi on the Award of the So-called Arbitral Tribunal in the South China Sea Arbitration (July 12, 2016), *at* [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1380003.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1380003.shtml).

<sup>44</sup> *See* Ministry of Foreign Aff. of China Press Release, Vice Foreign Minister Liu Zhenmin at the Press Conference on the White Paper Titled China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 13, 2016), *at* [http://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1381980.shtml](http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381980.shtml) [hereinafter Liu Press Conference]. Specifically, Liu asserted that: (1) the Tribunal “is not an international court,” as it is not a part of the International Court of Justice, International Tribunal for the Law of the Sea, or Permanent Court of Arbitration; (2) the composition of the Tribunal was “the result of political manipulation”; (3) the Tribunal was unable to properly understand the issues because it did not contain any members from Asia; (4) the award contained conclusions that were inconsistent with some of the Tribunal members’ previous statements; and (5) the Tribunal may have been paid by a country with interests adverse to China’s, such as the Philippines. *Id.*

<sup>45</sup> Ministry of Foreign Aff. of China Press Release, China’s Sovereignty and Maritime Rights and Interests in the South China Sea Shall Not Be Affected by Arbitration Award (July 16, 2016), *at* [http://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1382766.shtml](http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1382766.shtml).

<sup>46</sup> U.S. Dep’t of State Press Release, Decision in the Philippines-China Arbitration (July 12, 2016), *at* <http://www.state.gov/r/pa/prs/ps/2016/07/259587.htm>; *see also* White House Press Release, Press Gaggle by Press Secretary Josh Earnest en Route Dallas, TX (July 12, 2016), *at* <https://www.whitehouse.gov/the-press-office/2016/07/12/press-gaggle-press-secretary-josh-earnest-en-route-dallas-tx-7122016> [hereinafter Press Gaggle] (“[B]ased on the well-established process that’s codified in [UNCLOS], this tribunal ruling is final and binding on both parties.”).

<sup>47</sup> U.S. Dep’t of State Press Release, Daily Press Briefing (July 12, 2016), *at* <http://www.state.gov/r/pa/prs/dpb/2016/07/259605.htm>.

<sup>48</sup> U.S. Dep’t of State Press Release, Press Availability in Vientiane, Laos (July 26, 2016), *at* <http://www.state.gov/secretary/remarks/2016/07/260475.htm>.

<sup>49</sup> Press Gaggle, *supra* note 46.

So we are working diplomatically with each of the parties to try to encourage them to use this decision as the basis for discussions and potentially the basis for agreement on what constitutes acceptable behavior in the disputed areas and to explore the potential down the road for things like joint development.<sup>50</sup>

China's conduct after the award suggested that such progress may be unlikely. A Philippine media report indicated that, days after the award, Chinese vessels were still preventing fishing by Filipino fishermen near Scarborough Reef, even though the Tribunal found that such action violated the Philippines' rights.<sup>51</sup> Furthermore, the commander of the People's Liberation Army Navy, Wu Shengli, stated that China "will never stop [its] construction on the Nansha Islands<sup>52</sup> halfway . . . the Nansha Islands are China's inherent territory, and our necessary construction on the islands is reasonable, justified and lawful."<sup>53</sup>

China has also shown no signs of ceasing its military activities in the region. On July 18, a spokesperson for the People's Liberation Army Air Force said that China had recently conducted a combat air patrol over the South China Sea, including Scarborough Reef, and that such patrols would be a "regular" practice in the future.<sup>54</sup> Liu also reiterated China's position that it has the right to impose an air defense identification zone in the South China Sea "[i]f [its] security is threatened, . . . depend[ing] on [its] comprehensive judgment."<sup>55</sup> Finally, Senior Col. Yang Yujun announced on July 28 that the Chinese and Russian navies would hold a joint drill in the South China Sea in September, in part to "enhance the capabilities of the two navies to jointly deal with maritime security threats."<sup>56</sup> However, Earnest did not express concern about this announcement: "I don't know what exercises they are planning, but in the same way that the United States and China have a military-to-military relationship, I'm not surprised to hear that Russia and China are seeking to build on their military-to-military relationship, as well."<sup>57</sup>

Obama addressed the arbitral decision in an interview on September 4, 2016, shortly before arriving in China for a meeting of the G-20. In response to a question about the conversations he anticipated having with Chinese leaders, Obama said:

[W]hat we have said to the Chinese . . . is you have to recognize that with increasing power comes increasing responsibilities. . . .

When it comes to issues related to security, if you sign a treaty that calls for international arbitration around maritime issues the fact that you're bigger than the Philippines or Vietnam or other countries, in and of itself, is not a reason for you to go around and flex your muscles. You've got to abide by international law.

<sup>50</sup> Background Briefing, *supra* note 34.

<sup>51</sup> See Floyd Whaley, *After the Philippines Celebrates South China Sea Ruling, Reality Sets In*, N.Y. TIMES, July 14, 2016, at A3.

<sup>52</sup> [Editors' Note: The United States refers to these Islands as the Spratly Islands.]

<sup>53</sup> *PLA Navy Chief Urges China-U.S. Cooperation in Handling South China Sea*, XINHUA NEWS (July 18, 2016), at [http://news.xinhuanet.com/english/2016-07/18/c\\_135522556.htm](http://news.xinhuanet.com/english/2016-07/18/c_135522556.htm).

<sup>54</sup> *China's Air Force Conducts Combat Air Patrol in South China Sea*, XINHUA NEWS (July 18, 2016), at [http://news.xinhuanet.com/english/2016-07/18/c\\_135522387.htm](http://news.xinhuanet.com/english/2016-07/18/c_135522387.htm).

<sup>55</sup> Liu Press Conference, *supra* note 44.

<sup>56</sup> *China, Russia Navies to Hold Drill in South China Sea*, XINHUA NEWS (July 28, 2016), at [http://news.xinhuanet.com/english/2016-07/28/c\\_135547357.htm](http://news.xinhuanet.com/english/2016-07/28/c_135547357.htm).

<sup>57</sup> White House Press Release, Press Briefing by the Press Secretary Josh Earnest (July 28, 2016), at <https://www.whitehouse.gov/the-press-office/2016/07/28/press-briefing-press-secretary-josh-earnest-72816>.



And part of what I've talked to communicate to President Xi is that the United States arrives at its power, in part, by restraining itself. You know, when we bind ourselves to a bunch of international norms and rules, it's not because we have to, it's because we recognize that, over the long-term, building a strong international order is in our interests. And I think over the long-term, it will be in China's interests, as well.

So where we see them violating international rules and norms, as we have seen in some cases in the South China Sea or in some of their behavior when it comes to economic policy, we've been very firm. And we've indicated to them that there will be consequences.

But what we've tried to emphasize to them is, if you are working within international rules and international norms, then we should be partners. There's no reason that we cannot be friendly competitors on the commercial side and important partners when it comes to dealing with the many international problems that threaten both of us.<sup>58</sup>

A summary of Obama's meeting with President Xi Jinping issued by the White House confirmed that the two leaders had a "candid exchange" about the tribunal decision and that Obama emphasized the importance of China's adherence to UNCLOS, but did not provide further details of their conversation.<sup>59</sup>

#### *U.S. Navy Report Concludes That Iran's 2015 Capture of U.S. Sailors Violated International Law*

In June 2016, the U.S. Navy released a report summarizing its investigation of Iran's capture and detention of ten U.S. sailors the preceding year.<sup>1</sup>

The report began with several factual findings. According to the report, on January 12, 2015, two U.S. Navy riverine command boats (RCBs) left Bahrain for Kuwait several hours later than planned.<sup>2</sup> To make up for the delay, the boats deviated from their planned route.<sup>3</sup> That deviation "caused them to transit unknowingly through Saudi Arabian territorial seas and then through Iranian territorial seas off the coast of Farsi Island," where one of the two boats experienced an engine problem.<sup>4</sup> While in Iranian waters, both boats stopped to undertake repairs.<sup>5</sup> While those repairs were being completed, "two Iranian Revolutionary Guard Corps [IRGC] . . . patrol craft approached at high speed with weapons uncovered."<sup>6</sup> The Iranian boats blocked the RCBs from leaving Iranian waters even though the boats communicated

<sup>58</sup> Interview with U.S. President Barack Obama with Fareed Zakaria, Public Square, CNN, (Sept. 16, 2016), at <http://transcripts.cnn.com/TRANSCRIPTS/1609/04/fzgps.01.html>.

<sup>59</sup> White House Press Release, Readout of the President's Meeting with President Xi Jinping of China (Sept. 3, 2016), at <https://www.whitehouse.gov/the-press-office/2016/09/03/readout-presidents-meeting-president-xi-jin-ping-china>.

<sup>1</sup> DEP'T OF THE NAVY, IRANIAN CAPTURE OF RIVERINE COMMAND BOATS (RCB) / NAVY SAILORS, EXECUTIVE SUMMARY 3–4 (June 29, 2016) [hereinafter NAVY REPORT].

<sup>2</sup> *Id.* at 1; *see also* U.S. Dep't of Defense Press Release, Department of Defense Press Briefing by Adm. Richardson on the Results of the Investigation into the Seizure of Two Riverine Boats and the Detention of 10 U.S. Navy Personnel by Iranian Forces in the Pentagon Briefing Room (June 30, 2016), at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/822039/departments-of-defense-press-briefing-by-adm-richardson-on-the-results-of-the-in>.

<sup>3</sup> NAVY REPORT, *supra* note 1, at 1.

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

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

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

their mechanical failures.<sup>7</sup> The Iranians then “boarded, searched, and seized the RCBs,” replaced the U.S. flag with an IRGC flag, and “searched, blindfolded and bound the crew.”<sup>8</sup> After the Iranians forced two sailors by gunpoint to drive the RCBs to Farsi Island, Iran detained and interrogated the crewmembers.<sup>9</sup> On the morning of January 13, 2016, the Iranians forced a sailor to read an apology on camera, and then it released the soldiers.<sup>10</sup>

In addition to making factual findings, the report integrated a formal legal opinion by the judge advocate general that analyzed whether the United States and Iran complied with international law during the incident.<sup>11</sup> The report concluded that the RCBs were in Iranian waters legally and that Iran violated international law by obstructing the RCBs’ right to innocent passage. According to the report,

the RCBs were entitled to transit through territorial seas continuously and expeditiously as an exercise of the right of innocent passage. Vessels in innocent passage may stop if necessary due to *force majeure* or distress; the RCBs did not violate international law by stopping to assess and repair an engine casualty. The IRGCN vessels obstructed innocent passage by maneuvering in front of one of the RCBs with weapons trained on the crew, forcing it to stop.<sup>12</sup>

The report did find that “[i]t was reasonable for Iran to investigate the unusual appearance of armed U.S. Naval vessels within territorial waters so close to its shores.”<sup>13</sup> But the report also concluded that a “coastal state’s remedy when transit is non-innocent is to request compliance with international law, and failing that, require the offending vessel to depart the territorial sea.”<sup>14</sup>

Second, the report concluded that Iran violated the United States’ sovereign immunity. According to the judge advocate general, “[s]overeign immunity protects the RCBs and any material or personnel onboard from seizure or search, as well as protecting the identity of any crew or cargo, whether in national or international waters.”<sup>15</sup> Applying these principles of sovereign immunity to Iran’s conduct, the report found that the “[t]he actions of the [IRGC] . . . personnel in forcibly detaining RCB 802 and RCB 805 and taking their crews into custody during the incident were inconsistent with customary international law.”<sup>16</sup> Specifically, the report concluded that Iran violated sovereign immunity by “by taking down the American flag and replacing it with an Iranian flag, ransacking the vessels, damaging equipment, searching the vessels and crew members, and interrogating the crew members . . . [and] by revealing the identities of the crew.”<sup>17</sup>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 17.

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

<sup>10</sup> *Id.* at 80.

<sup>11</sup> *Id.* at 18.

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

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 20.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Third, the report found that Iran violated maritime custom in failing to assist the RCBs. Although the report conceded that “Iran was not obliged under international law to offer assistance to the RCBs,” it found that it is “the custom among mariners from time immemorial” to offer assistance to another “vessel dead in the water and indicating mechanical problems.”<sup>18</sup>

At the time of the incident, Iran acknowledged that the United States had accidentally entered its territorial waters, but it nonetheless called the U.S. actions illegal. According to a statement by the IRGC, Iran decided to release the sailors

[f]ollowing technical and operational investigations and in interaction with relevant political and national security bodies of the country and after it became clear that the US combat vessels’ illegal entry into the Islamic Republic of Iran’s waters was the result of an unintentional action and a mistake and after they extended an apology.<sup>19</sup>

At the time of the incident, the U.S. State Department Spokesperson Mark Toner stated, “[W]e’ve seen no indications thus far that they were mistreated during their period of detention. In fact, it was our understanding that they were given blankets, a place to sleep, as well as fed.”<sup>20</sup> Nonetheless, Toner stated that the United States would conduct a “follow-up assessment,” and may “modify [its] assessment” based on debriefing the sailors involved.<sup>21</sup>

#### USE OF FORCE AND ARMS CONTROL

##### *United States Justifies Its Use of Force in Libya Under International and National Law*

In August 2016, the United States conducted air strikes in Libya targeting forces of the Islamic State of Iraq and the Levant (ISIL). As a matter of domestic law, the administration of President Barack Obama views the air strikes as authorized by the 2001 Authorization of Military Force (AUMF).<sup>1</sup> Under international law, the Obama administration has justified the strikes as responding to the explicit invitation of Libya’s UN-recognized “unity” government.

The roots of the latest strikes—and some of the legal questions they have raised—lie in the 2011 North Atlantic Treaty Organization (NATO) military intervention in Libya, which resulted in the fall of the ruling Libyan government.<sup>2</sup> As a matter of international law, the NATO intervention relied on UN Security Council Resolution 1973, which authorized “all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”<sup>3</sup> As a matter of domestic authority, Obama asserted the constitutional right to “direct[] these actions, which are in the national security and

<sup>18</sup> *Id.* at 19–20.

<sup>19</sup> *Iran Frees Captured US Marines*, FARS NEWS AGENCY (Jan. 13, 2016), at <http://en.farsnews.com/newstext.aspx?nn=13941023000875>.

<sup>20</sup> U.S. Dep’t of State Press Release, Daily Press Briefing (Jan. 13, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/01/251198.htm>.

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

<sup>1</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001) (reprinted at 50 U.S.C. §1541 note).

<sup>2</sup> John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 776, 776 (2011); 105 AJIL 569, 573 (2011).

<sup>3</sup> S.C. Res. 1973 (Mar. 17, 2011). The resolution passed through the Security Council unopposed, although Brazil, China, Germany, India, and Russia abstained. See UN Security Council Press Release, Security Council

foreign policy interests of the United States, pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”<sup>4</sup>

In June 2011, House Majority Leader John Boehner wrote a letter to Obama stating: “[I]t would appear that in five days, the Administration will be in violation of the War Powers Resolution [of 1973] unless it asks for and receives authorization from Congress or withdraws all U.S. troops and resources from the mission.”<sup>5</sup> The Obama administration responded the following day by asserting that—while “the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization”<sup>6</sup>—it was prepared to view a bipartisan resolution authorizing the continuing use of force as politically appropriate.<sup>7</sup> The United States House of Representatives debated, but never passed, a resolution continuing the President’s authority to intervene militarily in Libya. Congress did not, however, vote to strip the operation of its funding.<sup>8</sup>

Approves “No-Fly Zone” over Libya, Authorizing “All Necessary Measures” to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions (Mar. 17, 2011), at <http://www.un.org/press/en/2011/sc10200.doc.htm>.

<sup>4</sup> Letter from Barack Obama, President of the U.S., to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, War Powers Resolution Regarding Iraq (Aug. 8, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>. See also Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to Eric Holder, Attorney General, Authority to Use Military Force in Libya 7 (Apr. 1, 2011), available at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

<sup>5</sup> Letter from John Boehner, Speaker of the U.S. House of Representatives, to Barack Obama, President of the U.S. (June 14, 2011), available at [http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/Letter\\_to\\_POTUS\\_Libya\\_061411.PDF](http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/Letter_to_POTUS_Libya_061411.PDF). The War Powers Resolution of 1973 states, in relevant part:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

50 U.S.C. §1544(b).

<sup>6</sup> THE WHITE HOUSE, REPORT TO THE UNITED STATES HOUSE OF REPRESENTATIVES ON UNITED STATES ACTIVITIES IN LIBYA (June 15, 2011), available at <https://assets.documentcloud.org/documents/204680/united-states-activities-in-libya-6-15-11.pdf> (“U.S. military operations are distinct from the kind of ‘hostilities’ contemplated by the Resolution’s 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.”).

<sup>7</sup> *Id.* (“The Administration has repeatedly indicated its strong support for the bipartisan resolution drafted by Senators McCain, Kerry, Lieberman, Levin, Feinstein, Graham, and Chambliss that would confirm that both branches are united in their commitment to supporting the aspirations of the Libyan people for political reform and self-government.”).

<sup>8</sup> H.R. 2278, 112th Cong. (2011–2012). See also Jonathan Allen & Seung Min Kim, *Libya Votes Show House Divided*, POLITICO (June 24, 2011), at <http://www.politico.com/story/2011/06/libya-votes-show-house-divided-057711?o=0>; Josh Rogin, *Despite Vote, Majority of Congressmen Want to End the Libya War*, FOREIGN POLICY (June 24, 2011), at <http://foreignpolicy.com/2011/06/24/despite-vote-majority-of-congressmen-want-to-defund-the-libya-war>.

That background set the stage for the most recent use of force, which emerged when the elected Libyan government came into conflict with a rival Islamist government.<sup>9</sup> In December 2015, the two governments reached an agreement to function together as the Government of National Accord (GNA),<sup>10</sup> an entity formed by the signing of the Libyan Political Agreement on December 17, 2015, and recognized by the United Nations as the “sole legitimate government of Libya.”<sup>11</sup> Not long thereafter, however, ISIL sent about 300 experienced fighters to Libya from Syria and carved out control over a swath of territory spreading west from the city of Derna close to the Egyptian border.<sup>12</sup>

In response to a request for assistance against ISIL by the governing GNA coalition, the United States has provided various forms of military assistance, first by leading the move to exempt arming the GNA from the UN arms embargo, then by deploying U.S. special forces to work with Libyan government forces, and finally by conducting air strikes in support of the Libyan government.

In May 2016, the United States—leading a coalition of all five permanent members of the UN Security Council and a dozen other countries—issued a communiqué indicating its willingness to arm the GNA:

The Government of National Accord has voiced its intention to submit appropriate arms embargo exemption requests to the UN Libya Sanctions Committee to procure necessary lethal arms and materiel to counter UN-designated terrorist groups and to combat Da’esh throughout the country. We will fully support these efforts while continuing to reinforce the UN arms embargo.<sup>13</sup>

The arms embargo remains in place and no exemption for the GNA has yet been officially granted;<sup>14</sup> in fact, the Security Council passed a resolution on June 14, 2016, providing for additional naval enforcement of the embargo amid fears that weapons smuggled into the country will end up in the hands of ISIL.<sup>15</sup>

<sup>9</sup> Ishaan Tharoor & Adam Taylor, *Here are the Key Players Fighting the War for Libya, All Over Again*, WASH. POST (Aug. 27, 2014), at <https://www.washingtonpost.com/news/worldviews/wp/2014/08/27/here-are-the-key-players-fighting-the-war-for-libya-all-over-again>.

<sup>10</sup> Declan Walsh, *Libya’s Unity Government Defies Air Blockade to Reach Tripoli*, N.Y. TIMES, Mar. 30, 2016, at A8.

<sup>11</sup> UN Security Council Press Release, *Unanimously Adopting Resolution 2259 (2015)*, Security Council Welcomes Signing of Libyan Political Agreement on New Government for Strife-Torn Country (Dec. 23, 2015), at <https://web.archive.org/web/20160130034711/http://www.un.org/press/en/2015/sc12185.doc.htm>.

<sup>12</sup> Paul Cruickshank, Nic Robertson, Tim Lister & Jomana Karadsheh, *ISIS comes to Libya*, CNN (Nov. 18, 2014), at <http://www.cnn.com/2014/11/18/world/isis-libya>.

<sup>13</sup> U.S. Dep’t of State Press Release, *Ministerial Meeting for Libya Joint Communique* (May 16, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/05/257236.htm>. See also Paul D. Shinkman, *U.S., Other U.N. Powers Back Arms Imports for Libya*, U.S. NEWS (May 16, 2016), at <http://www.usnews.com/news/articles/2016-05-16/us-other-un-powers-back-arms-imports-for-libya-despite-security-concerns>.

<sup>14</sup> *Security Council Committee Established Pursuant to Resolution 1970 (2011) Concerning Libya*, UNITED NATIONS SECURITY COUNCIL SUBSIDIARY ORGANS, <https://www.un.org/sc/suborg/en/sanctions/1970> (last visited Oct. 3, 2016).

<sup>15</sup> United Nations Security Council Press Release, *Security Council Authorizes Inspection of Suspected Embargo-Breaking Vessels off Libya’s Coast, Unanimously Adopting Resolution 2292 (2016)* (June 14, 2016), at <http://www.un.org/press/en/2016/sc12401.doc.htm>.

In an attempt to assist the GNA, the United States had begun placing special forces in Libya as early as 2015 to build alliances with local militias against ISIL.<sup>16</sup> In January 2016, a Pentagon spokesperson emphasized that the special forces are being used for the purpose of intelligence and force coordination:

Q: Can you— can you rule out U.S. boots on the ground going to Libya? Is that (inaudible) discussion?

MR. COOK: You—you know the situation right now. We've had—acknowledged that there have been some U.S. forces in Libya trying to establish contact with forces on the ground so that we get a clear picture of what's happening there.

But beyond that, it's—again, we're going to consider all of our options going forward. Right now, that's not something that's—that's under consideration.<sup>17</sup>

In August 2016, following the latest round of air strikes, a Pentagon spokesperson offered further observations on the role being played by U.S. special forces on the ground:

As with any military operation supporting another force, coordination and synchronization of effort is essential. To that end, a small number of U.S. forces have gone in and out of Libya to exchange information with these local forces in established joint operations centers, and they will continue to do so as we strengthen the fight against [ISIL] and other terrorist organizations. . . . They are not on the front lines, nor are they on the ground in Sirte. [They are providing] unique capabilities. . . [n]otably intelligence, surveillance, and reconnaissance (ISR) and precision strikes—that will help enable GNA-aligned forces to make a decisive, strategic advance.<sup>18</sup>

In November 2015, the United States began conducting air strikes in Libya. The first such strike resulted in the death of ISIL's leader in Libya, himself a longtime Al Qaeda operative:

On November 13, the U.S. military conducted an airstrike in Libya against Abu Nabil, aka Wissam Najm Abd Zayd al Zubaydi, an Iraqi national who was a longtime al Qaeda operative and the senior ISIL leader in Libya.

Reporting suggests he may also have been the spokesman in the February 2015 Coptic Christian execution video. Nabil's death will degrade ISIL's ability to meet the group's objectives in Libya, including recruiting new ISIL members, establishing bases in Libya, and planning external attacks on the United States.

While not the first U.S. strike against terrorists in Libya, this is the first U.S. strike against an ISIL leader in Libya and it demonstrates we will go after ISIL leaders wherever they operate.<sup>19</sup>

<sup>16</sup> Paul D. Shinkman, *U.S. Commandos Expand Anti-ISIS War into Libya*, U.S. NEWS (Jan. 29, 2016), at <http://www.usnews.com/news/articles/2016-01-29/us-commandos-expand-anti-isis-war-into-libya>.

<sup>17</sup> U.S. Dep't of Defense Press Release, Press Briefing by Press Secretary Peter Cook in the Pentagon Briefing Room (Jan. 27, 2016), at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/645195/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in>.

<sup>18</sup> Kristina Wong, *Pentagon Acknowledges US Ground Forces Supporting ISIS Fight in Libya*, THE HILL (Aug. 10 2016), at <http://thehill.com/policy/291008-pentagon-acknowledges-us-ground-forces-supporting-isis-fight-in-libya>.

<sup>19</sup> U.S. Dep't of Defense Press Release, Statement from Pentagon Press Secretary Peter Cook on U.S. strike in Libya (Nov. 14, 2015), at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/628954/statement-from-pentagon-press-secretary-peter-cook-on-us-strike-in-libya>.



Air strikes have continued intermittently since November. One assault in February 2015 killed at least forty-nine people at a terrorist training camp.<sup>20</sup> Another in August 2016 targeted ISIL forces in and around the coastal town of Sirte,<sup>21</sup> which had been under ISIL control until the strikes and had particular strategic value as an access point to the Libyan oil fields.<sup>22</sup> In its announcement of the August 2016 strikes, the United States noted that air strikes in support of the GNA could be expected to continue indefinitely:

Today, at the request of the Libyan Government of National Accord (GNA), the United States military conducted precision air strikes against ISIL targets in Sirte, Libya, to support GNA-affiliated forces seeking to defeat ISIL in its primary stronghold in Libya. These strikes were authorized by the president following a recommendation from Secretary Carter and Chairman Dunford. They are consistent with our approach to combating ISIL by working with capable and motivated local forces. GNA-aligned forces have had success in recapturing territory from ISIL thus far around Sirte, and additional U.S. strikes will continue to target ISIL in Sirte in order to enable the GNA to make a decisive, strategic advance. The U.S. stands with the international community in supporting the GNA as it strives to restore stability and security to Libya. These actions and those we have taken previously will help deny ISIL a safe haven in Libya from which it could attack the United States and our allies.<sup>23</sup>

The *jus ad bellum* justification for the United States' renewed interventions in 2015 and 2016 appears to be the explicit invitation of the Libyan GNA government.<sup>24</sup> Libyan Prime Minister Fayez Seraj announced on state TV that he was "request[ing] the United States to carry out targeted air strikes on Daesh" and that "these operations are limited to a specific timetable and do not exceed [Sirte] and its suburbs."<sup>25</sup> In response to questioning on this point, a Pentagon spokesperson had the following exchange:

Q: And who in Libya authorized the strike?

MR. COOK: Again, specifically here, we believe that this was carried out under international law, and also specifically, that this operation was consistent with domestic and international law, and that this operation was conducted with the knowledge of Libya authorities.<sup>26</sup>

<sup>20</sup> Greg Botelho & Barbara Starr, *49 Killed in U.S. Airstrike Targeting Terrorists in Libya*, CNN (Feb. 20, 2016), at <http://www.cnn.com/2016/02/20/africa/libya-us-airstrike-isis>.

<sup>21</sup> Helene Cooper, *U.S. Conducts Airstrikes Against ISIS in Libya*, N.Y. TIMES, Aug. 1, 2016, at A4. See also Missy Ryan & Sudarsan Raghavan, *U.S. Strikes Islamic State Stronghold in Libya, Expanding Campaign Against Militant Group*, WASH. POST (Aug. 1, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/08/01/unity-states-strikes-islamic-state-stronghold-in-libya-expands-campaign-against-militant-group>.

<sup>22</sup> Goran Tomasevic & Yeganeh Torbati, *U.S. Warplanes Launch Bombing Campaign on Islamic State in Libya*, REUTERS (Aug. 1, 2016), at <http://www.reuters.com/article/us-libya-security-idUSKCN10C2NF>.

<sup>23</sup> U.S. Dep't of Defense Press Release, Statement by Pentagon Press Secretary Peter Cook on U.S. Air Strike in Libya (Aug. 1, 2016), at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/881794/statement-by-pentagon-press-secretary-peter-cook-on-us-air-strike-in-libya>.

<sup>24</sup> Tomasevic & Torbati, *supra* note 22.

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

<sup>26</sup> U.S. Dep't of Defense Press Release, Press Briefing by Press Secretary Peter Cook in the Pentagon Briefing Room (Feb. 19, 2016), at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/659088/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in> [hereinafter Press Briefing by Cook].



The significance of the GNA's invitation to the United States is emphasized by the contrasting experience of France, which recently sent troops into Libya without GNA sanction.<sup>27</sup> When these troops were killed in a helicopter crash, the GNA accused France of violating "Libyan soil" by sending troops without consultation.<sup>28</sup> U.S. reliance on the GNA's invitation is not without complications. The GNA has struggled to exert power outside of Tripoli, and the Libyan Parliament recently returned a vote of no-confidence in the GNA government.<sup>29</sup>

The question of domestic authorization for the Libya strikes is less straightforward. Obama's efforts to enact an ISIL-specific force authorization have so far been unavailing.<sup>30</sup> The administration has therefore argued that the Libya strikes are a form of "necessary and appropriate force" under the 2001 AUMF, which provides

[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>31</sup>

A Pentagon spokesperson advanced this theory of legal authorization during a press conference concerning the February 2016 air strikes:

Q: But Peter, under what authority was this strike carried out? There is no AUMF for ISIS in Libya, no Americans were killed in the two attacks in Tunisia.

Under what authority?

MR. COOK: Well, again, we've struck in Libya previously, under the existing use of force, the authorization for the use of military force.

Q: In 2001, against Al Qaida?

MR. COOK: Yes, specifically. And this—in our targeting of Chouchane in this instance. And we believe that this was based on—was legal under international law.

Q: But you're saying that you're using the 2001 AUMF against Al Qaida to go after ISIS in Libya?

MR. COOK: Specifically, again, as a—the use of military force against ISIL is authorized by the 2001 authorization for the use of military force, specifically. Just as it was—as we used it in our previous strike in Libya. . . .

Q: Thank you. Since yesterday or this morning's strike was conducted under the 2001 authorization, does the Pentagon even need a new AUMF anymore? Is there any point to

<sup>27</sup> Sudarsan Raghavan & James McAuley, *Libya's U.N.-Backed Government Decries French Troop Presence in Rival Zone*, WASH. POST (Jul. 21, 2016), at [https://www.washingtonpost.com/world/libyas-un-backed-government-decries-french-troop-presence-with-rival/2016/07/21/71168ede-4f33-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/world/libyas-un-backed-government-decries-french-troop-presence-with-rival/2016/07/21/71168ede-4f33-11e6-aa14-e0c1087f7583_story.html).

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

<sup>29</sup> Sudarsan Raghavan, *Libya's Parliament Rejects U.N.-Backed Unity Government*, WASH. POST (Aug. 22, 2016), at [https://www.washingtonpost.com/world/middle\\_east/libyas-parliament-rejects-un-backed-unity-government/2016/08/22/a86c08de-6886-11e6-91cb-ecb5418830e9\\_story.html](https://www.washingtonpost.com/world/middle_east/libyas-parliament-rejects-un-backed-unity-government/2016/08/22/a86c08de-6886-11e6-91cb-ecb5418830e9_story.html).

<sup>30</sup> For discussion of Obama's unsuccessful push for an ISIL-specific force authorization, see Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 429 (2015); 109 AJIL 199 (2015).

<sup>31</sup> Authorization for Use of Military Force §1.

Congress negotiating a new AUMF if all of these expanded strikes can be covered under the 2001 vote?

MR. COOK: I think the secretary has made this point previously that, obviously, we feel like we have the legal authorities to carry these out, but another Authorization for the Use of Military Force along the lines of what the president proposed sometime back he thinks would be constructive, would be helpful and if nothing else, would be an indication of support from the Congress on behalf of the American people for our troops who are carrying out this very important mission.

Q: But beyond the—the symbolic show of support, is there any legal authority that you currently lack that you would need from Congress right now in order to carry out this expanded war against the Islamic State?

MR. COOK: We feel we have the existing legal authorities we need, but again, if Congress were to move forward with an Authorization for the Use of Military Force along the lines that the secretary and the president have mentioned previously, they—the secretary believes that would be a positive step.<sup>32</sup>

These claims are consistent with the Obama administration's now established view that the 2001 AUMF covers ISIL because of its origins in the group known as Al Qaeda in Iraq.<sup>33</sup> As then-general counsel to the CIA Stephen Preston stated in April 2015:

In 2003, a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before 9/11—conducted a series of sensational terrorist attacks in Iraq. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, often referred to as al-Qa'ida in Iraq, or AQI for short, conducted numerous deadly terrorist attacks against U.S. and coalition forces, as well as Iraqi civilians, using suicide bombers, car bombs and executions. In response to these attacks, U.S. forces engaged in combat—at times, near daily combat—with the group from 2004 until U.S. and coalition forces left Iraq in 2011. Even since the departure of U.S. forces from Iraq, the group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel in Iraq.

The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. The recent split between ISIL and current al-Qa'ida leadership does not remove ISIL from coverage under the 2001 AUMF, because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined bin Laden's al-Qa'ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it, not al-Qa'ida's current leadership, is the true executor of bin Laden's legacy. There

<sup>32</sup> See Press Briefing by Cook, *supra* note 26.

<sup>33</sup> In May of 2016, Army Captain Nathan Michael Smith filed a lawsuit challenging Obama's authority to use the 2001 AUMF as a basis for conducting armed hostilities on ISIL. Complaint for Declaratory Relief, Smith v. Obama, Case 1:16-cv-00843 (D.D.C. 2016) (The 2001 AUMF “does not authorize the war against ISIS. It authorized the President to wage war against those responsible for the attacks of September 11, 2001—meaning al Qaeda—and the governments which harbored it—meaning the Taliban. ISIS is in no way responsible for the September 11 attacks.”). The government has filed a motion to dismiss. Defendant's Motion to Dismiss, Smith v. Obama, Case 1:16-cv-00843-CKK (D.D.C. 2016).

are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa'ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests.

In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue protecting the country from ISIL—a group that has been subject to that AUMF for close to a decade—simply because of disagreements between the group and al-Qa'ida's current leadership. A contrary interpretation of the statute would allow the enemy—rather than the President and Congress—to control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.

Some initially greeted with skepticism the President's reliance on the 2001 AUMF for authority to renew military operations against ISIL last year. To be sure, we would be having a different conversation if ISIL had emerged out of nowhere a year ago, having no history with bin Laden and no more connection to current al-Qa'ida leadership than it has today, or if the group once known as AQI had, for example, renounced terrorist violence against the United States at some point along the way. But ISIL did not spring fully formed from the head of Zeus a year ago, and the group certainly has never laid down its arms in its conflict against the United States.

The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden's jihadist movement, but this same enemy of the United States continues to plot and carry out violent attacks against us to this day. Viewed in this light, reliance on the AUMF for counter-ISIL operations is hardly an expansion of authority. After all, how many new terrorist groups have, by virtue of this reading of the statute, been determined to be among the groups against which military force may be used? The answer is zero.<sup>34</sup>

### *U.S. Drone Strike Kills Taliban Leader in Pakistan*

The U.S. government recently announced that a drone strike had killed the leader of the Taliban near the Afghanistan-Pakistan border. Official statements about the strike have further elaborated the legal structure that governs the United States' evolving counterterrorism conflict with various non-state actors.

On May 23, 2016, the White House confirmed that Taliban leader Akhtar Mohammad Mansur was killed in a U.S.-operated drone strike.<sup>1</sup> President Barack Obama described Mansur as “an individual who, as head of the Taliban, was specifically targeting U.S. personnel and troops inside of Afghanistan.”<sup>2</sup> By killing Mansur, Obama said, “we have removed the leader of an organization that has continued to plot against and unleash attacks on American and

<sup>34</sup> Stephen Preston, *Policy Address: “Legal Framework for the U.S. Use of Military Force Since 9/11,”* in PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 337 (2015).

<sup>1</sup> White House Press Release, Statement by the President on the Death of Taliban Leader Mansur (May 23, 2016), at <https://www.whitehouse.gov/the-press-office/2016/05/23/statement-president-death-taliban-leader-mansur> [hereinafter Death of Taliban Leader].

<sup>2</sup> White House Press Release, Remarks by President Obama and President Quang of Vietnam in Joint Press Conference (May 23, 2016), at <https://www.whitehouse.gov/the-press-office/2016/05/23/remarks-president-obama-and-president-quang-vietnam-joint-press> [hereinafter Joint Press Conference].

Coalition forces, to wage war against the Afghan people, and align itself with extremist groups like al Qaeda.”<sup>3</sup> U.S. State Department officials described the attack as having taken place “in the Afghan-Pakistan border region.”<sup>4</sup> The Pakistan Ministry of Foreign Affairs specified that it had occurred “on Pakistani territory,”<sup>5</sup> and news reports place the strike more specifically in Baluchistan—a southwestern province of Pakistan far from the essentially ungoverned northwestern tribal belt where Pakistan has sanctioned U.S. drone strikes in the past.<sup>6</sup>

As a matter of domestic authorization, the strike was justified under the 2001 Authorization for the Use of Military Force (AUMF), which authorizes the president to use “necessary and appropriate force” against certain terrorist organizations.<sup>7</sup> The government has long interpreted the AUMF to include the Taliban.<sup>8</sup> While discussing the Mansur strike at a press conference, Obama also referenced his constitutional authority: “[I]t is my responsibility as Commander-in-Chief not to stand by, but to make sure that we send a clear signal to the Taliban and others that we’re going to protect our people.”<sup>9</sup>

The international law justification for the Mansur operation is somewhat less clear. Pakistan’s official response appeared to rule out the possibility of consent.<sup>10</sup> Following news of the attack, the Pakistan Foreign Ministry called in the U.S. ambassador to express concern that the drone strike was a “violation of Pakistan’s sovereignty and a breach of the United Nations Charter that guarantees the inviolability of the territorial integrity of its member states.”<sup>11</sup> In

<sup>3</sup> Death of Taliban Leader, *supra* note 1.

<sup>4</sup> U.S. Dep’t of State, Daily Press Briefings (May 23, 2016), at <http://www.state.gov/r/pa/prs/dpb/2016/05/257633.htm> [hereinafter May 23 Press Briefing]. See also U.S. Dep’t of State Press Release, Joint Press Availability with Burmese Foreign Minister Daw Aung San Suu Kyi (May 22, 2016), at <http://www.state.gov/secretary/remarks/2016/05/257583.htm> [hereinafter Joint Press Availability].

<sup>5</sup> Ministry of Foreign Affairs, Government of Pakistan Press Release, Pakistan Expressed Concern over Drone Strike (May 23, 2016), at <http://www.mofa.gov.pk/pr-details.php?mm=Mzc0OA> [hereinafter Pakistan Concern over Drone Strike].

<sup>6</sup> Tim Craig & Greg Miller, *U.S. Airstrike Against Taliban Leader Crossed a Pakistani “Red Line,”* WASH. POST (May 23, 2016), at [https://www.washingtonpost.com/world/asia\\_pacific/Pakistan-expresses-concern-over-us-airstrike-against-taliban-leader/2016/05/23/14eff94a-20e6-11e6-b944-52f7b1793dae\\_story.html](https://www.washingtonpost.com/world/asia_pacific/Pakistan-expresses-concern-over-us-airstrike-against-taliban-leader/2016/05/23/14eff94a-20e6-11e6-b944-52f7b1793dae_story.html). See also Dep’t of State, Daily Press Briefing (Feb. 2, 2011), at <http://www.state.gov/r/pa/prs/dpb/2010/02/136397.htm> (stating that “[t]he U.S. has a close collaboration with Pakistan on our struggle in combating extremism that exists in the tribal areas and through other parts of Pakistan”). For more on the role of Pakistani consent to at least certain aspects of the drone program, see John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 364, 364 (2009) (“Press reporting suggests that, while the government of Pakistan publicly criticizes the attacks, it has privately sanctioned them and allowed U.S. drones to operate from bases in Pakistan.”).

<sup>7</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 (2006)).

<sup>8</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 587, 589 (2016); 109 AJIL 199, 210 (2015); 104 AJIL 276, 276 (2010).

<sup>9</sup> See Joint Press Conference, *supra* note 2.

<sup>10</sup> Marty Lederman, *Moves Toward Greater Transparency on the Use of Lethal Force*, JUST SECURITY (May 24, 2016), at <https://www.justsecurity.org/31218/moves-greater-transparency-lethal-force> (citing an anonymous senior American official). Secretary of State John Kerry confirmed that the leaders of Pakistan were notified of the strike but did not discuss the timing of the notifications. See Lesley Wroughton & Robert Birsel, *Kerry Says Taliban Leader Mansour Posed a “Continuing Imminent Threat,”* REUTERS (May 23, 2016), at <http://in.reuters.com/article/usa-afghanistan-taliban-kerry-idINKCN0YD07D>.

<sup>11</sup> Pakistan Concern over Drone Strike, *supra* note 5. A senator and vice president of the Pakistan People’s Party described the strike as “illegal and expansionary in its geographical theater of targeted operation,” and a parliamentary representative from Baluchistan said: “[N]o doubt it was the crossing of the red line by the United States. . . . It’s a clear message that the U.S. can do such strikes wherever they feel is required.” See Craig & Miller, *supra* note 6.

response, a State Department spokesperson noted only that “[w]e certainly do respect Pakistan’s territorial integrity, but . . . we will carry out strikes to remove terrorists who are actively pursuing and planning and directing attacks against U.S. forces.”<sup>12</sup> For his part, U.S. Secretary of State John Kerry asserted that Pakistan was notified “of the airstrike,” but his statement was ambiguous about the timing of that notification.<sup>13</sup> And Obama insisted that the strike “does not represent a shift in our approach,”<sup>14</sup> noting that “[w]e will continue taking action against extremist networks that target the United States.”<sup>15</sup>

Some evidence suggests that the United States may have relied on self-defense under the exception for “individual or collective self-defence” in Article 51 of the UN Charter.<sup>16</sup> In particular, Obama noted that Mansur had “specifically target[ed] U.S. personnel and troops,”<sup>17</sup> and a State Department spokesperson described Mansur as “someone who was actively pursuing, planning, carrying out attacks against U.S. and Afghan forces in the region.”<sup>18</sup> It does not appear that the United States submitted an Article 51 notification to the UN Security Council regarding this particular strike. The United States did, however, submit an Article 51 notification of the use of force against the Taliban in Afghanistan in October 2001.<sup>19</sup> The United States has viewed that conflict as continuing even after the substantial reduction of U.S. forces in that country.<sup>20</sup>

The administration’s description of the facts underlying the strike do appear to align with the general U.S. understanding of *jus ad bellum* as outlined recently by Brian Egan, the State Department Legal Adviser.<sup>21</sup> In an April 2016 speech, Egan emphasized the U.S. view that: (1) a state may lawfully invoke self-defense in response to “imminent” attacks before they occur; (2) a state may rely on continuing self-defense once it has lawfully resorted to force in self-defense so long as hostilities have not ended; and (3) a state must determine that a non-consenting state is “unable or unwilling” to address the relevant threat before invoking self-defense to use force in the territory of the non-consenting state.<sup>22</sup> U.S. statements about the strike also resonate with the Presidential Policy Guidance (PPG), a set of guidelines adopted

<sup>12</sup> May 23 Press Briefing, *supra* note 4.

<sup>13</sup> *Id.* (“We have had longstanding conversations with Pakistan and Afghanistan about this objective with respect to Mullah Mansour, and both countries’ leaders were notified of the airstrike. . . . And this is a decision that was . . . done appropriately and in conversation with both parties.”).

<sup>14</sup> Joint Press Conference, *supra* note 2.

<sup>15</sup> Death of Taliban Leader, *supra* note 1.

<sup>16</sup> UN Charter Art. 51. *See also* UN Charter Art. 2(4) (requiring all members to refrain, as a baseline rule, from the “threat or use of force against the territorial integrity” of any state).

<sup>17</sup> Joint Press Conference, *supra* note 2.

<sup>18</sup> May 23 Press Briefing, *supra* note 4.

<sup>19</sup> Letter dated October 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (Oct. 7, 2001).

<sup>20</sup> Stephen Preston, *Policy Address: “Legal Framework for the U.S. Use of Military Force Since 9/11,”* in PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 337 (2015) (“As a matter of international law, the United States remains in a state of armed conflict against the Taliban, al-Qa’ida and associated forces.”).

<sup>21</sup> Brian Egan, State Dept. Legal Advisor, Keynote Address at the American Society of International Law Annual Meeting: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), *available at* <http://www.state.gov/s/l/releases/remarks/255493.htm>.

<sup>22</sup> *Id.* Egan explained that the asserted “unable or unwilling” standard is an application of the requirement under international law that states resort to force in self-defense only if it is “necessary.”



by the administration in 2013—and recently declassified<sup>23</sup>—to guide the United States’ use of force “outside areas of active hostilities.”<sup>24</sup> The PPG confirms the administration’s policy that an individual may only be targeted for lethal action if “the individual’s activities pose a continuing, imminent threat to U.S. persons.”<sup>25</sup> (The PPG does not note or explore the relevance of the “U.S. persons” limitation.)

*U.S. Government Releases Casualty Report, Executive Order, and Presidential Policy Guidance Related to Its Counterterrorism Strike Practices*

In July 2016, the Director of National Intelligence (DNI) released data on the number of counterterrorism strikes by President Barack Obama’s administration outside “areas of active hostilities,” along with estimates of the resulting combatant and non-combatant casualties.<sup>1</sup> This was the first official release of aggregate death toll assessments resulting from the U.S. counterterrorism program in these areas.<sup>2</sup> On the same day, the administration promulgated an executive order that establishes a forward-looking framework for mitigating civilian deaths during U.S. operations involving the use of force.<sup>3</sup> The information from those two sources was further supplemented in August when, in response to ongoing litigation, the government declassified a redacted version of the Presidential Policy Guidance (PPG) on action taken against terrorist targets outside “areas of active hostilities.”<sup>4</sup> Together, these materials shed new light on the government’s current policies and practices regarding the use of force, especially involving drones and targets outside conventional war zones.

On July 1, 2016, the DNI released a report on the use of force under the Obama administration’s counterterrorism program. As explained in an accompanying fact sheet, the casualty report represents one piece of the administration’s effort to “institutionalize and enhance best practices regarding U.S. counterterrorism operations and other U.S. operations involving the use of force, as well as to provide greater transparency and accountability regarding these operations.”<sup>5</sup> The report provides aggregate data on counterterrorism casualties, as well as a summary of the government’s procedures for gathering death toll statistics.<sup>6</sup>

<sup>23</sup> See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 814 (2016).

<sup>24</sup> PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013).

<sup>25</sup> *Id.* at 11.

<sup>1</sup> See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (2016) [hereinafter DNI REPORT].

<sup>2</sup> The Obama administration has previously acknowledged the existence of U.S. drone strikes outside conventional war zones, as well as the fact that U.S. strikes have caused civilian casualties. See, e.g., John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 679, 679 (2013) (discussing a letter from U.S. Attorney General Eric Holder to the chairman of the Senate Judiciary Committee disclosing the deaths of four U.S. citizens as a result of counterterrorism activities outside zones of active hostilities during the Obama administration); John R. Crook, *Contemporary Practice of the United States*, 107 AJIL 674, 676 (2013) (quoting acknowledgement by Obama that “it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war”).

<sup>3</sup> See Exec. Order No. 13,732, 81 Fed. Reg. 44,485 (July 7, 2016) [hereinafter Exec. Order No. 13,732].

<sup>4</sup> See PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (2013), available at [https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download) [hereinafter PPG].

<sup>5</sup> White House Press Release, Fact Sheet: Executive Order on the US Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the US Operations Involving the Use of Force & the DNI Release of Aggregate Data

According to the report, the United States undertook 473 strikes against terrorist targets outside “areas of active hostilities” between January 20, 2009, and December 31, 2015.<sup>7</sup> The report asserts that these strikes resulted in the deaths of somewhere between 2,372 and 2,581 combatants and between 64 and 116 non-combatants.<sup>8</sup>

As a geographical matter, the report defines “areas of active hostilities”—i.e., areas that are *excluded* from the report—to “currently include Afghanistan, Iraq, and Syria.”<sup>9</sup> The White House explained the exclusion of casualties in those countries by noting that the Department of Defense already has a mechanism in place for releasing the results of strikes there;<sup>10</sup> the DNI report, by contrast, provides information about counterterrorism operations that are not carried out by the Department of Defense.<sup>11</sup> The DNI report does not specify the locations or dates of individual strikes, nor does it disaggregate the number of casualties per strike or the status of the deceased (as combatants or non-combatants and—if applicable—their membership in a particular armed group).

The report defines non-combatants as “individuals who may not be made the object of attack under applicable international law.”<sup>12</sup> That definition excludes individuals who are “part of a belligerent party to an armed conflict, . . . [who are] taking a direct part in hostilities, or [who are] targetable in the exercise of U.S. national self-defense.”<sup>13</sup> All cases of doubt are resolved in favor of noncombatant status; i.e., any deceased person who cannot be identified as a combatant is counted as a noncombatant.<sup>14</sup> The DNI emphasized in particular that “it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants,” and noted that “[m]ales of military age may be non-combatants.”<sup>15</sup>

on Strike Outside Area of Active Hostilities (July 1, 2016), at <https://www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address> [hereinafter DNI Fact Sheet].

<sup>6</sup> DNI REPORT, *supra* note 1.

<sup>7</sup> *Id.* at 1.

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

<sup>9</sup> *Id.* Per the most current reporting, it appears that most of the strikes disclosed in the report occurred in Libya, Somalia, Yemen, and tribal Pakistan. See, e.g., Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES, July 1, 2016, at A1; Scott Shane, *Drone Strike Statistics Answer Few Questions, and Raise Many*, N.Y. TIMES, July 1, 2016, at A1 (reporting confirmation from an anonymous senior administration official that tribal Pakistan is not an “area of active hostilities” for the purpose of the DNI report).

<sup>10</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest (July 1, 2016), at <https://www.whitehouse.gov/the-press-office/2016/07/01/press-briefing-press-secretary-josh-earnest-712016> [hereinafter Press Briefing].

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

<sup>12</sup> DNI REPORT, *supra* note 1, at 1.

<sup>13</sup> *Id.* at 1 n.a. The administration used the same definition of “non-combatant” as the fact sheet released by the White House in 2013 outlining key elements of the PPG. See White House Press Release, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [hereinafter PPG Fact Sheet].

<sup>14</sup> DNI REPORT, *supra* note 1. Assuming this means that people of uncertain combatant versus noncombatant status are counted as noncombatants, one scholar has pointed out that this part of the DNI’s methodology comports with the international law presumption of civilian status. See Sarah Knuckey, *The Good and Bad in the US Government’s Civilian Casualties Announcement*, JUST SECURITY (July 2, 2016), at <https://www.justsecurity.org/31785/good-bad-governments-civilian-casualties-announcement>.

<sup>15</sup> DNI REPORT, *supra* note 1, at 1 n.a. Senior administration officials reportedly explained that “[a]n individual may be lawfully targeted if they are formally or functionally a member of an armed group with which we are engaged in an armed conflict.” Karen DeYoung & Greg Miller, *White House Releases Its Count of Civilian Deaths in Counterterrorism Operations Under Obama*, WASH. POST (July 1, 2016), at <https://www.washingtonpost.com/world/>



The report also outlines the DNI's procedures for reviewing casualty information. That information is based on "credible reports . . . drawn from all-source information, including reports from the media and non-governmental organizations."<sup>16</sup> The government's post-strike review processes are then described as follows:

[The procedures] have evolved over time to ensure that they incorporate the best available all-source intelligence, media reporting, and other information and may result in reassessments of strikes if new information becomes available that alters the original judgment. The large volume of pre- and post-strike data available to the U.S. Government can enable analysts to distinguish combatants from non-combatants, conduct detailed battle damage assessments, and separate reliable reporting from terrorist propaganda or from media reports that may be based on inaccurate information.<sup>17</sup>

The report devotes a substantial amount of space to acknowledging and explaining discrepancies between the government's statistics and those that have been calculated by nongovernmental organizations (NGOs).<sup>18</sup> As the report notes, casualty assessments by NGOs have reflected significantly higher numbers of noncombatant deaths, "rang[ing] from more than 200 to slightly more than 900 possible non-combatant deaths."<sup>19</sup> The DNI report offers a number of possible reasons for these differences:

[T]he U.S. Government uses post-strike methodologies that have been refined and honed over the years and that use information that is generally unavailable to non-governmental organizations. The U.S. Government draws on all available information (including sensitive intelligence) to determine whether an individual is part of a belligerent party fighting against the United States in an armed conflict; taking a direct part in hostilities against the United States; or otherwise targetable in the exercise of national self-defense. Thus, the

national-security/white-house-releases-its-count-of-civilian-deaths-in-counterterrorism-operations-under-obama/2016/07/01/3196aa1e-3fa2-11e6-80bc-d06711fd2125\_story.html. And functional membership includes the degree to which "the individual performs functions to the benefit of a particular terrorist group that are analogous to those traditionally performed" by members of a military, though there is "no hard and fast rule that anyone killed in a particular strike within X many feet of a known combatant is therefore a combatant." *Id.*

<sup>16</sup> DNI REPORT, *supra* note 1, at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 1–3.

<sup>19</sup> *Id.* at 2. The lowest reported noncombatant-casualty estimates, provided by the *Long War Journal*, still count more than 200 civilian deaths in Pakistan and Yemen under the current administration. *See* Bill Roggio, *Pakistan Strikes: Charting the Data for US Airstrikes in Pakistan, 2004–2016*, LONG WAR J., [www.longwarjournal.org/pakistan-strikes](http://www.longwarjournal.org/pakistan-strikes) (last visited Sept. 21, 2016); Bill Roggio & Bob Barry, *Yemen Strikes: Charting the Data for US Airstrikes in Yemen, 2002–2016*, LONG WAR J., [www.longwarjournal.org/yemen-strikes](http://www.longwarjournal.org/yemen-strikes) (last visited Sept. 21, 2016). The New America Foundation, a security policy group, estimates slightly more civilian deaths in those same two countries. *See Drone Wars Pakistan: Analysis*, NEW AMERICA, [securitydata.newamerica.net/drones/pakistan-analysis.html](http://securitydata.newamerica.net/drones/pakistan-analysis.html) (last visited Sept. 21, 2016); *Drone Wars Yemen: Analysis*, NEW AMERICA, [securitydata.newamerica.net/drones/yemen-analysis.html](http://securitydata.newamerica.net/drones/yemen-analysis.html) (last visited Sept. 21, 2016). And the Bureau of Investigative Journalism reports upwards of 801 civilian deaths during Obama's presidency—almost seven times the government's maximum estimate. *See* Jack Serle, *Obama Drone Casualty Numbers a Fraction of Those Recorded by the Bureau*, BUREAU OF INVESTIGATIVE JOURNALISM (July 1, 2016), at <https://www.thebureauinvestigates.com/2016/07/01/obama-drone-casualty-numbers-fraction-recorded-bureau>; *Get the Data: Drone Wars*, BUREAU OF INVESTIGATIVE JOURNALISM, <https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs> (last visited Sept. 21, 2016).

U.S. Government may have reliable information that certain individuals are combatants, but are being counted as non-combatants by non-governmental organizations.<sup>20</sup>

The report also notes that the government's "unique" combination of sources—including "video observations, human sources and assets, signals intelligence, geospatial intelligence, accounts from local officials on the ground, and open source reporting"—may enhance its intelligence "before, during, and after a strike" compared to NGOs' sources.<sup>21</sup> Finally, the report suggests that nongovernmental assessments may be "complicated by the deliberate spread of misinformation by some actors, including terrorist organizations."<sup>22</sup>

While defending the accuracy of its numbers relative to others, the administration acknowledges "inherent limitations on the ability to determine the precise number of combatant and non-combatant deaths given the non-permissive environments in which these strikes often occur,"<sup>23</sup> and expresses a commitment to revise its assessments "as appropriate" based on credible new information.<sup>24</sup>

In a fact sheet released alongside the DNI report (DNI Fact Sheet), the White House explained its motivation for making the casualty statistics public:

Demonstrating the legitimacy of our counterterrorism efforts requires not only complying with the law of armed conflict and setting policy standards that offer protection that exceeds the law's requirements, but also providing information to the American people about our counterterrorism efforts. As President Obama has said, when we cannot explain our efforts clearly and publicly, we face terrorist propaganda and international suspicion, we erode the legitimacy of our actions in the eyes of our partners and our people, and we undermine accountability in our own government. That is why the President believes it is important to provide the public with as much information as possible regarding the basis for and results of U.S. counterterrorism operations.<sup>25</sup>

A number of NGOs and other commentators criticized the report for being ambiguous, inaccurate, and insufficiently specific. Some suggested that, because of the lack of details about individual strike locations, dates, and corresponding casualties, it is difficult to compare the summary with independent outside evaluations.<sup>26</sup> For example, Human Rights Watch noted

<sup>20</sup> DNI REPORT, *supra* note 1, at 2. The report provides the following examples of additional intelligence that the U.S. government might obtain related to a person's combatant status: "[T]he extent to which an individual performs functions for the benefit of [an organized armed] group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; or whether that person has undertaken certain acts that reliably connote meaningful integration into the group." *Id.*

<sup>21</sup> *Id.* at 2–3.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* While the report does not itself define "non-permissive environments," the Department of Defense Dictionary of Military and Associated Terms defines "permissive environment" as an "[o]perational environment in which host country military and law enforcement agencies have control as well as the intent and capability to assist operations that a unit intends to conduct." DEP'T OF DEFENSE, JOINT PUBLICATION 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010 as amended through 2016).

<sup>24</sup> DNI REPORT, *supra* note 1, at 3.

<sup>25</sup> See DNI Fact Sheet, *supra* note 5.

<sup>26</sup> DeYoung & Miller, *supra* note 15; Savage & Shane, *supra* note 10 (quoting Jameel Jaffer, Deputy Legal Director of the ACLU); Rita Siemion, *The Upcoming Release of Obama's Targeted Killing Policy and Casualty Numbers*, JUST SECURITY (June 24, 2016), at <https://www.justsecurity.org/31654/upcoming-release-obamas-targeted-kill-ing-policy-casualty-numbers>. See also Knuckey, *supra* note 14 (criticizing the report's lack of information about injuries, individual victims, and specific causes of death); Marty Lederman, *The Government's Treatment of Civilian*

that a single 2009 strike in Yemen killed at least forty-one civilians plus four more who died in the aftermath.<sup>27</sup> If those forty-one victims are accounted for in the total figure from the DNI report, that would mean—it was noted with some skepticism—that only twenty-three civilians have been killed in all other strikes since 2009.<sup>28</sup>

While the administration expected “negative press coverage in the short term,” it insisted that “over the long term, [this and similar disclosures] will build the kind of credibility that is critical to the ongoing success of [counterterrorism] efforts.”<sup>29</sup> Accordingly, the White House emphasized “the remarkable progress that has been made over even just the last couple of years, where we have gone from refusing to even confirm that these kinds of operations are taking place to now disclosing proactively not just the fact that they have taken place but to chronicle some of the outcomes, including those that are negative.”<sup>30</sup>

On the same day as the release of the DNI casualty report, Obama promulgated a separate executive order requiring the annual release of similar data on an ongoing basis.<sup>31</sup> In addition to the new reporting requirements, his order—titled “United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force”—sets out a number of important policies and practices regarding the use of force.<sup>32</sup> Absent revocation or amendment by a future president, the order will continue to apply to all “U.S. operations involving the use of force in armed conflict or in the exercise of the Nation’s inherent right of self-defense,” regardless of location.<sup>33</sup>

Section 1 of the order notes the strategic importance of “[m]inimizing civilian casualties,” which “can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to our national security.”<sup>34</sup> This section of the order also emphasizes the United States’ “steadfast[] commit[ment] to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity,

*Casualties in Counterterrorism Operations*, JUST SECURITY (July 1, 2016), at <https://www.justsecurity.org/31764/governments-treatment-civilian-casualties-counterterrorism-operations> (criticizing the lack of distinction between strikes that preceded the issuance of the PPG and those that followed it, making it difficult to evaluate the efficacy of the PPG).

<sup>27</sup> See HUMAN RIGHTS WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN (2013), available at <https://www.hrw.org/report/2013/10/22/between-drone-and-al-qaeda/civilian-cost-us-targeted-killings-yemen> (citing a 2010 investigative report by the Yemeni parliament).

<sup>28</sup> See, e.g., Shane, *supra* note 9.

<sup>29</sup> See Press Briefing, *supra* note 10.

<sup>30</sup> *Id.* Cf. John R. Crook, Contemporary Practice of the United States, 106 AJIL 670 (2012) (discussing the first public confirmation from the U.S. government of its use of drones in counterterrorism actions).

<sup>31</sup> See Exec. Order No. 13,732, *supra* note 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Robert Chesney has noted that the disjunctive application of the order to “operations involving the use of force in armed conflict *or* in the exercise of the Nation’s inherent right of self-defense,” *id.* (emphasis added), and has suggested that the government may consider national self-defense a legal ground for the use of force that is separate from the recognition of an armed conflict under international law. See Robert Chesney, *President Obama’s Executive Order on Pre/Post Airstrike Policies and Practices*, LAWFARE (July 1, 2016), at <https://lawfareblog.com/president-obamas-executive-order-prepost-airstrike-policies-and-practices>.

<sup>34</sup> See Exec. Order No. 13,732, *supra* note 3.

humanity, distinction, and proportionality.”<sup>35</sup> And it suggests that the order creates a framework that is “more protective than the requirements of the law of armed conflict that relate to the protection of civilians.”<sup>36</sup>

In Section 2, the order details a series of specific practices that “relevant agencies” are required to take, as “consistent with mission objectives and applicable law, including the law of armed conflict,” before authorizing any strike:<sup>37</sup>

- (i) train personnel . . . on compliance with legal obligations and policy guidance that address the protection of civilians and on implementation of best practices that reduce the likelihood of civilian casualties, including through exercises, pre-deployment training, and simulations of complex operational environments that include civilians;
- (ii) develop, acquire, and field intelligence, surveillance, and reconnaissance systems that, by enabling more accurate battlespace awareness, contribute to the protection of civilians;
- (iii) develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force in different operational contexts;
- (iv) take feasible precautions in conducting attacks to reduce the likelihood of civilian casualties, such as providing warnings to the civilian population . . . , adjusting the timing of attacks, taking steps to ensure military objectives and civilians are clearly distinguished . . . ; and
- (v) conduct assessments that assist in the reduction of civilian casualties by identifying risks to civilians and evaluating efforts to reduce risks to civilians.<sup>38</sup>

After a strike takes place, the order requires “relevant agencies” to do the following, again “as appropriate and consistent with mission objectives and applicable law, including the law of armed conflict”:<sup>39</sup>

- (i) review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources . . . and take measures to mitigate the likelihood of future incidents of civilian casualties;
- (ii) acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including ex gratia payments, to civilians who are injured or to the families of civilians who are killed;
- (iii) engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties . . . ; and
- (iv) maintain channels for engagement with the International Committee of the Red Cross and other [NGOs] that operate in conflict zones and encourage such organizations to assist in efforts to distinguish between military objectives and civilians.<sup>40</sup>

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

The order does not explain the criteria for determining when the above requirements would be deemed “appropriate” and “consistent with mission objectives and applicable law,” nor does it provide examples of inappropriate or inconsistent circumstances. Some scholars have suggested that these qualifications might function as carve-outs to conceal certain strikes from the public.<sup>41</sup>

Section 3 requires the DNI to collect and review the requisite information to release an annual report substantially similar to the report released concurrently with the executive order.<sup>42</sup> In addition to aggregate strike and casualty assessments, the report must include the “general sources of information and methodology used to conduct these assessments” and must “address the general reasons for discrepancies” between the government and nongovernmental calculations for non-combatant deaths.<sup>43</sup>

As noted in the DNI Fact Sheet, the executive order aims to underscore that the administration’s “legal and policy commitments regarding the protection of civilians are fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of our Nation’s interests.”<sup>44</sup> Senior administration officials reportedly described the order as “a very deliberate attempt to ensure that the architecture . . . is durable, sustainable and lasting well beyond the next seven months or so,” in part so as to “set a positive example” for other countries using drone technology.<sup>45</sup> The “policies set forth in [the] order . . . are not,” however, “intended to create new international legal obligations [for the United States].”<sup>46</sup>

One month later, public information about the framework publicized in the DNI report and July 1 executive order was substantially supplemented by the government’s release of a redacted version of the PPG,<sup>47</sup> an eighteen-page document known by some as the “playbook” for the Obama administration’s drone program.<sup>48</sup> Obama signed the PPG in May 2013 and announced its existence during a speech at the National Defense University.<sup>49</sup> Prior to its release in August of this year, public review of the PPG had been limited to a two-and-a-half-page fact sheet issued by the White House (PPG Fact Sheet).<sup>50</sup>

With minor redactions, the full document was released by the administration after a federal judge questioned the government’s reliance on the “presidential communications” privilege to deny record requests filed by the American Civil Liberties Union (ACLU) under the Freedom of Information Act.<sup>51</sup> In addition to the PPG, four other Defense Department documents were

<sup>41</sup> See, e.g., Chesney, *supra* note 33 (suggesting that strikes conducted by the CIA as covert action might not implicate requirements that are conditioned on compliance with “applicable law”); Knuckey, *supra* note 14.

<sup>42</sup> See Exec. Order No. 13,732, *supra* note 3.

<sup>43</sup> *Id.*

<sup>44</sup> DNI Fact Sheet, *supra* note 5.

<sup>45</sup> DeYoung & Miller, *supra* note 15.

<sup>46</sup> Exec. Order No. 13,732, *supra* note 3, at 5.

<sup>47</sup> See PPG, *supra* note 4.

<sup>48</sup> See, e.g., Benjamin Wittes, *Presidential Accountability for Capture and Kill Operations Under the PPG*, LAWFARE (Aug. 8, 2016), at <https://www.lawfareblog.com/presidential-accountability-capture-and-kill-operations-under-ppg>.

<sup>49</sup> See White House Press Release, Remarks by the President at the National Defense University (May 23, 2013), at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter NDU Speech].

<sup>50</sup> See PPG Fact Sheet, *supra* note 13.

<sup>51</sup> See *American Civil Liberties Union v. Dep’t of Justice*, No. 15 Civ. 1954, slip op. at 5 (S.D.N.Y. Mar. 4, 2016).

also released, including a 2014 “Report on Associated Forces” and a 2013 memorandum about “Department of Defense Implementation of the [PPG].”<sup>52</sup>

The PPG “establishes the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets outside the United States and areas of active hostilities.”<sup>53</sup> It includes previously unreleased details about the interagency procedures established for approving lethal and nonlethal uses of force, including procedures for approving capture operations, nominating potential targets, and providing after-action reports.<sup>54</sup>

The PPG is divided into seven substantive sections, which set forth the following: (1) procedures for planning various kinds of direct action against terrorist targets; (2) approval processes for captures and long-term dispositions of suspected terrorists; (3) policies and procedures for identifying and approving individual “high-value” terrorists (HVTs) for lethal action; (4) policies and procedures for approving lethal action against targets other than HVTs; (5) procedures for approving proposals that deviate from the standards otherwise established in the PPG; (6) procedures for after-action reports; and (7) circumstances requiring congressional notification.<sup>55</sup> Throughout its discussion of these topics, the PPG places heavy emphasis on interagency collaboration:

As reflected in the procedures contained in this PPG, whenever possible and appropriate, decisions regarding direct action will be informed by departments and agencies with relevant expertise, knowledge, and equities [redacted text], as well as by coordinated interagency intelligence analysis. Such interagency coordination and consultation will ensure that decisions on operational matters of such importance are well-informed and will facilitate de-confliction among departments and agencies addressing overlapping threat streams.<sup>56</sup>

The first set of PPG procedures govern the general “operational plans” proposed by operating agencies—presumably including at least the Defense Department and CIA—for any “direct action operations” outside “areas of active hostilities.”<sup>57</sup> These direct actions include detention of suspected terrorists, lethal action against identified high-value terrorists, and action against targets other than high-value terrorists.<sup>58</sup> Substantively, such operational plans must set forth, among other things, the relevant counterterrorism objectives, the duration of

<sup>52</sup> See U.S. Releases Drone Strike “Playbook” in Response to ACLU Lawsuit, ACLU (Aug. 6, 2016), at <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit> (linking to the Defense Department documents).

<sup>53</sup> PPG, *supra* note 4, at 1.

<sup>54</sup> See *id.*

<sup>55</sup> *Id.* There is an eighth section with “general provisions.” *Id.* Since the White House publicly acknowledged its use of drones in lethal, targeted strikes against terrorist suspects (see Press Briefing, *supra* note 10), Congress has called for greater access to and oversight of covert counterterrorism operations. See, e.g., *Nomination of John O. Brennan To Be Director of the Central Intelligence Agency, Hearing Before S. Select Comm. on Intelligence*, 113th Cong. (2013) (questioning from senators on the Select Committee on Intelligence of John O. Brennan, then nominee to be director of the CIA, about the executive department’s alleged failure to provide documentation to the Committee regarding its legal analysis of specific targeted killings).

<sup>56</sup> PPG, *supra* note 4, at 2.

<sup>57</sup> *Id.* at 1–2.

<sup>58</sup> *Id.*



operational authorization requested, the international legal basis for taking the proposed action, and the requisite strike and surveillance equipment for the operation.<sup>59</sup>

Procedurally, the plans are subject to a multilayered, interagency review process. First, they undergo legal review by the general counsel of the agency executing the plan.<sup>60</sup> Next, they are submitted to the legal adviser of the National Security Staff (NSS), who—along with the general counsel of the proposing agency—consults with other department and agency counsels as deemed “necessary and appropriate.”<sup>61</sup> (The PPG does not specify who determines when consultation is in fact necessary and appropriate.) Then they are reviewed by the Deputies and Principals Committees of the National Security Council.<sup>62</sup> Finally, they are presented to the president for a final decision.<sup>63</sup>

The PPG also establishes criteria to guide the high-level review of operational plans, including consideration of “[t]he implications for the broader regional and international political interests of the United States” and “why authorizing direct action . . . is necessary to achieve U.S. policy objectives.”<sup>64</sup> All operational plans must in addition satisfy the following conditions:

[N]ear certainty that an identified HVT or other lawful terrorist target . . . is present; (b) near certainty that non-combatants will not be injured or killed; (c) [redacted text] and (d) if lethal force is being employed: (i) an assessment that capture is not feasible at the time of the operation; (ii) an assessment that the relevant governmental authorities in the country where the action is contemplated cannot or will not effectively address the threat to U.S. persons; and (iii) an assessment that no other reasonable alternatives to lethal action exist to effectively address the threat to U.S. persons.<sup>65</sup>

The second section of the PPG governs the nomination, screening, and approval processes for captures and long-term detentions of suspected terrorists.<sup>66</sup> The PPG Fact Sheet briefly announced the United States’ preference for capturing suspects rather than using lethal force;<sup>67</sup> the full document devotes approximately six pages to the corresponding standards and procedures, including detailed steps for screening suspects prior to or, if necessary, after capture operations.<sup>68</sup> The guidance also specifies that “[w]henever possible, third-country custody options that are consistent with U.S. national security should be explored” and that “[i]n no event will additional detainees be brought to the detention facilities at the Guantanamo Bay Naval Base.”<sup>69</sup>

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.* at 2–3.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 3. Except for the redacted text, all of these conditions were set forth in the 2013 PPG Fact Sheet issued by the White House. See PPG Fact Sheet, *supra* note 13. A footnote corresponding to the redacted text suggests that it may relate to “[o]perational disagreements,” which are adjudicated by the president if they arise among principals. PPG, *supra* note 4, at 3 n.2.

<sup>66</sup> PPG, *supra* note 4, at 5–11.

<sup>67</sup> See PPG Fact Sheet, *supra* note 13.

<sup>68</sup> PPG, *supra* note 4, at 5–11.

<sup>69</sup> *Id.* at 10.



The evaluation of capture and long-term detention nominations is subject to interagency review beyond the aforementioned processes that apply to all operational plans for direct action. For instance, capture nominations must be assessed by the National Counterterrorism Center (NCTC) and reviewed by a “Restricted Counterterrorism Security Group,” which is convened by the NSS and comprised of members of the CIA, NCTC, Joint Chiefs of Staff, the Departments of State, Treasury, Defense, Justice, and Homeland Security, and two redacted entities.<sup>70</sup> Review of such nominations is based on suspect profiles—the standard content of which is redacted—and is guided by PPG criteria—including, among other things, consideration of “[w]hether the proposed action would interfere with any intelligence collection,” “the feasibility of capture and the risk to U.S. personnel,” and “[t]he long-term disposition options for the individual.”<sup>71</sup>

The third set of PPG procedures relates to identifying and approving high-value terrorists for lethal action. The substantive standard for these operations was previously announced in the PPG Fact Sheet: in order to be targeted with lethal force, such individuals must pose “a continuing, imminent threat to U.S. persons.”<sup>72</sup> The conditions for lethal targeting of high-value terrorists mirror the conditions listed in the first section of the PPG with respect to all operational plans governing direct action.<sup>73</sup> And the review process is guided by evaluation criteria, suspect profiles (the standard content of which is, again, redacted), and additional interagency evaluations, which generally track those for capture and detention operations.<sup>74</sup>

After the interagency review process, lethal action approvals are then communicated to the president, who must give final authorization personally, unless there is consensus among the relevant agency heads and the target is not a U.S. citizen.<sup>75</sup> The PPG also mandates an annual review of “individuals authorized for possible lethal action to evaluate whether the intelligence continues to support a determination that the individuals [redacted text] qualify for lethal action under the standard set forth in [the PPG].”<sup>76</sup> Any new information is subject to an iterative review process similar to that of the original nomination.<sup>77</sup>

The fourth set of PPG procedures governs approvals of lethal operations against terrorist targets other than high-value terrorists.<sup>78</sup> While some commentators have assumed that this section refers primarily to so-called “signature strikes”<sup>79</sup>—strikes against groups of individuals who are not personally identifiable at the moment of the strike, but whose visible activities in

<sup>70</sup> *Id.* at 8 n.6.

<sup>71</sup> *Id.* at 10.

<sup>72</sup> PPG Fact Sheet, *supra* note 13; PPG, *supra* note 4, at 11.

<sup>73</sup> *See* note 65 and accompanying text.

<sup>74</sup> PPG, *supra* note 4, at 11–15. There are minor differences. For example, the criteria for lethal action includes consideration of “[w]hether the threat posed by the individual . . . can be minimized through a response short of lethal action” and “[w]hether the individual, if captured, would likely result in the collection of valuable intelligence.” *Id.* at 14. And the high-level review process for lethal action includes the Department of National Intelligence rather than the Department of the Treasury. *Id.* at 13.

<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Id.* at 14.

<sup>77</sup> *See id.* at 15.

<sup>78</sup> *See id.* at 15–16.

<sup>79</sup> *See, e.g.,* Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), at [https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856\\_story.html](https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html).

context suffice, in the view of the United States, to render them eligible targets for lethal force—the PPG describes relevant targets as including “manned or unmanned Vehicle Borne Improvised Explosive Devices or infrastructure, including explosives storage facilities.”<sup>80</sup> The substantive criteria and nomination and review procedures for such actions are not spelled out as granularly as in the preceding sections of the PPG. Instead, they are largely left to the operating agencies, which are instructed to “establish harmonized policies and procedures” for assessing targets other than high-value terrorists.<sup>81</sup>

The fifth section of the PPG lays out circumstances in which variations from the foregoing guidelines may be authorized.<sup>82</sup> Deviations may be allowed when direct action has already been authorized against a target, but “unforeseen circumstances” or “a fleeting opportunity” unexpectedly arises.<sup>83</sup> An alteration to an approved plan still must undergo review, must be “in full compliance with applicable law,” and must be presented to the president.<sup>84</sup> However, “extraordinary circumstances” may relax the requirements of such altered plans.<sup>85</sup>

The PPG also provides that:

Nothing in this PPG shall be construed to prevent the President from exercising his constitutional authority as Commander in Chief and Chief Executive, as well as his statutory authority, to consider a lawful proposal from operating agencies that he authorize direct action that would fall outside of the policy guidance contained herein, including a proposal that he authorize lethal force against an individual who poses a continuing, imminent threat to another country’s persons.<sup>86</sup>

The sixth section of the PPG requires that operating agencies provide information to the NSS within forty-eight hours of taking direct action against any authorized target.<sup>87</sup> These after-action reports must include, among other things, a description of the operation, an assessment of whether it achieved its objective, an assessment of combatants killed or wounded, and a description of collateral damage.<sup>88</sup>

Finally, the PPG’s seventh section mandates congressional notification for the approval, expansion, or execution of operational plans for taking direct action.<sup>89</sup> It also requires updates at least every three months regarding high-value terrorists who have recently been approved for lethal action.<sup>90</sup>

The collaborative, interagency review procedures have elicited both positive and negative reactions. One scholar surmised that “there [has] never been anything, in any nation, quite like the interagency and interbranch review reflected” in the PPG.<sup>91</sup> The Deputy Legal Director

<sup>80</sup> PPG, *supra* note 4, at 15; *see also* Lederman, *supra* note 26. The precise application of this section of the PPG is slightly difficult to discern given the remaining redactions. PPG, *supra* note 4, at 15.

<sup>81</sup> PPG, *supra* note 4, at 4.

<sup>82</sup> *See id.* at 16–17.

<sup>83</sup> *Id.* at 16.

<sup>84</sup> *Id.* at 17.

<sup>85</sup> *See id.*

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

<sup>87</sup> *Id.* at 17–18.

<sup>88</sup> *Id.* at 17.

<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.*

<sup>91</sup> Lederman, *supra* note 26.

of the ACLU noted two competing perspectives: “From one perspective [the review procedures] might be seen as reassuring, because it makes clear that these decisions are considered by many different senior people. On the other hand, the document drives home how bureaucratized, and therefore normalized, this practice of killing people away from conventional battlefields has become.”<sup>92</sup>

The PPG has also been criticized for entrenching the administration’s view that these guidelines reflect policy, rather than law, and for failing to elucidate how these general standards are carried out in practice.<sup>93</sup> For example, it remains unclear precisely what conduct the government considers to raise a “continuing, imminent threat,” what indicia would indicate that another country “cannot or will not effectively address a threat,” or how areas are categorized as “outside of active hostilities.”<sup>94</sup>

Notably, the PPG does not explain whether the administration classifies “areas of active hostilities” based on criteria that correspond to those for recognizing “armed conflicts” under international law.<sup>95</sup> Given this ambiguity, it remains unclear whether the PPG applies in situations governed by international humanitarian law (i.e., the law of armed conflict or the law of war), international human rights law, or both.<sup>96</sup> While the administration asserts that its “policy standards offer protections for civilians that exceed the requirements of the law of armed conflict,”<sup>97</sup> some commentators have argued that the PPG “takes lawfulness almost for granted,” sidestepping the larger question of which international law regimes apply.<sup>98</sup>

<sup>92</sup> Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. TIMES, Aug. 6, 2016, at A10 (quoting Jameel Jaffer, Deputy Legal Director of the ACLU); see also Charles Kels, *Defining Legal/Policy Deviancy Down? An Alternative View of the PPG*, LAWFARE (Aug. 23, 2016), at <https://www.lawfareblog.com/defining-legal-policy-deviancy-down-alternative-view-ppg> (arguing that one consequence of the PPG is “to normalize the abnormal” and describing the document as “so clinical and antiseptic” that it “masquerade[s] novel theories as matters of routine interagency review”).

<sup>93</sup> See, e.g., Jonathon Horowitz & John Reed, *The PPG Visualized, What the US Kill and Capture Bureaucracy Looks Like*, JUST SECURITY (Aug. 15, 2016), at <https://www.justsecurity.org/32391/ppg-visualized-kill-capture-bureaucracy/>; Brett Max Kaufman, *Details Abound in Drone “Playbook”—Except for the Ones That Really Matter Most*, ACLU (Aug. 8, 2016), at <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>.

<sup>94</sup> See, e.g., Horowitz & Reed, *supra* note 93; Kaufman, *supra* note 93 (claiming that “for all the PPG’s . . . invocations of legal and policy standards, those invocations come completely divorced from any substantive discussion about what the government’s chosen . . . standards actually mean and how they are applied in practice” but also recognizing that “perhaps [that information is provided] behind black boxes,” or redactions).

<sup>95</sup> Cf. Heather Brandon, *Will Obama’s Targeted Killing Policy Say What “Areas of Active Hostilities” Means?*, LAWFARE (May 5, 2016), at <https://lawfareblog.com/will-obamas-targeted-killing-policy-say-what-areas-active-hostilities-means>. Although not specified in the PPG, an article by the *Intercept* quotes an anonymous senior administration official as stating that the government’s designation of geographic zones as “areas of active hostilities” is “not the same as a determination that an armed conflict is taking place in the country at issue.” Ryan Devereaux, *Drone Casualty Report Promised As U.S. Airstrike Kills 150 Al-Shabaab Suspects*, INTERCEPT (Mar. 7, 2016), at <https://theintercept.com/2016/03/07/drone-casualty-report-promised-as-u-s-airstrike-kills-150-al-shabaab-members>.

<sup>96</sup> See Brandon, *supra* note 95.

<sup>97</sup> DNI Fact Sheet, *supra* note 5. The DNI Fact Sheet addresses some *jus in bello* principles more specifically. For example, it states that “in dealing with enemy forces that do not wear uniforms or carry their arms openly, the United States goes to great lengths to apply the fundamental law of armed conflict principle of distinction, which, among other things, requires that attacks be directed only against military objectives and not against civilians and civilian objects. The United States considers all available information about a potential target’s current and historical activities to inform an assessment of whether the individual is a lawful target.” *Id.*

<sup>98</sup> See, e.g., Kels, *supra* note 92. Kels also notes, with some skepticism, “the PPG’s notion that ‘national self-defense’ is a separate legal paradigm for the conduct of military operations, vice the initial resort to armed force.” *Id.* This observation is likely based on the administration’s statement that “even when the United States is not operating

Despite criticism of its recent disclosures—including the DNI casualty report, the executive order, and the PPG—the Obama administration maintains that “[c]ollectively, these measures demonstrate the professionalism and high standards employed by U.S. Government personnel who help keep Americans safe from terrorist threats overseas, while also underscoring our commitment to constantly refine and strengthen our counterterrorism framework and enhance accountability for our actions.”<sup>99</sup>

*The Department of Defense Clarifies Legal Protections for Journalists in Updated Law of War Manual*

On July 22, 2016, the U.S. Department of Defense published an updated version of its Law of War Manual.<sup>1</sup> The manual provides guidance to Department personnel who are responsible for implementing the law of war and executing military operations.<sup>2</sup> The revisions were focused primarily on clarifying the Manual’s provisions regarding legal protections for journalists.

The first version of the Law of War Manual was published one year ago, in 2015.<sup>3</sup> Although the U.S. Armed Forces have promulgated various documents providing legal guidance on warfare for more than a century,<sup>4</sup> it was “a long-standing goal of DoD lawyers” to “[p]romulgat[e] a DoD-wide manual on the law of war.”<sup>5</sup> As early as the 1970s, leading U.S. military officials hoped to develop a “new all-Services law of war manual . . . to reflect the views of all DoD components.”<sup>6</sup> In June 2015, that vision became a reality when the publication of the first version created the first comprehensive manual governing all branches of the military.<sup>7</sup>

International legal protections for journalists are grounded in Article 79 of Additional Protocol I to the Geneva Conventions, which declares that journalists are entitled to all rights and protections granted to civilians in times of international armed conflicts.<sup>8</sup> Even though the United States is not party to the Additional Protocol, “it supports and respects this important principle.”<sup>9</sup> Expanding on this point, the Security Council in its Resolution 2222 has

under the PPG—for example, when [it] is taking action in ‘areas of active hostilities’ . . . or when [it] is acting quickly to defend U.S. or partner forces from attack—the United States goes to extraordinary lengths to minimize the risk of civilian casualties.” DNI Fact Sheet, *supra* note 5.

<sup>99</sup> DNI Fact Sheet, *supra* note 5.

<sup>1</sup> U.S. Dep’t of Defense Press Release, DoD Announces Update to DoD Law of War Manual (July 22, 2016), at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/852738/dod-announces-update-to-the-dod-law-of-war-manual> [hereinafter DoD Manual Update].

<sup>2</sup> U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL, para. 1.1.1 (2016), available at [http://www.defense.gov/Portals/1/Documents/DoD\\_Law\\_of\\_War\\_Manual-June\\_2015\\_Updated\\_May\\_2016.pdf](http://www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf) [hereinafter REVISED MANUAL].

<sup>3</sup> U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL, preface (2015), available at [http://www.defense.gov/Portals/1/Documents/law\\_war\\_manual15.pdf](http://www.defense.gov/Portals/1/Documents/law_war_manual15.pdf) [hereinafter ORIGINAL MANUAL].

<sup>4</sup> REVISED MANUAL, *supra* note 2, preface.

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

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

<sup>7</sup> *Id.*

<sup>8</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) Art. 79(1), June 8, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I].

<sup>9</sup> See Reply Brief for Defendant-Appellant at 11, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (No. 12-3644) (“As an initial matter, it is an established law of war norm, which is reflected in Article 79 of Additional Protocol

3. *Recall[ed]* . . . that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in article 4.A.4 of the Third Geneva Convention; [and]

7. *Recall[ed] its demand* that all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel.<sup>10</sup>

It is the position of the International Committee of the Red Cross that the protections outlined in these sources have become a part of customary international law.<sup>11</sup>

The first edition of the Manual thus started from the baseline principle that “journalists are civilians”<sup>12</sup> and that “journalism does not constitute taking a direct part in hostilities such that a person would be deprived of protection from being made the object of attack.”<sup>13</sup> After establishing this baseline proposition, however, the first edition continued:

Reporting on military operations can be very similar to collecting intelligence or even spying. A journalist who acts as a spy may be subject to security measures and punished if captured. To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies.<sup>14</sup>

The first edition then discussed safeguards in international law for distinguishing between actual journalists and undercover combatants.<sup>15</sup> It also emphasized that press censorship was a legitimate wartime measure: “States may need to censor journalists’ work or take other security measures so that journalists do not reveal sensitive information to the enemy.”<sup>16</sup>

Journalists sharply criticized the first edition’s treatment of these questions. An August 2015 *New York Times* editorial provided representative commentary: “Allowing this document to stand as guidance . . . would do severe damage to press freedoms. Authoritarian leaders around the world could point to it to show that their despotic treatment of journalists . . . is broadly in line with the standards set by the United States government.”<sup>17</sup> The Committee to Protect Journalists warned that the Manual’s language “risked more journalist imprisonments by

I to the Geneva Conventions, that ‘journalists’ are generally to be protected as ‘civilians.’ Although the United States is not a party to Additional Protocol I, it supports and respects this important principle.”)

<sup>10</sup> S.C. Res. 2222, paras. 3, 7 (May 27, 2015).

<sup>11</sup> See *Journalists*, INT’L COMM. OF THE RED CROSS, at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule34](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule34) (last visited Aug. 21, 2016).

<sup>12</sup> ORIGINAL MANUAL, *supra* note 3, para. 4.24.

<sup>13</sup> *Id.*, para. 4.24.2.

<sup>14</sup> *Id.*, para. 4.24.4.

<sup>15</sup> *Id.*; see, e.g., Additional Protocol I, *supra* note 8, Art. 79(3) (explaining that journalists “may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist”).

<sup>16</sup> ORIGINAL MANUAL, *supra* note 3, at 4.24.5.

<sup>17</sup> Editorial Board, *The Pentagon’s Dangerous Views on the Wartime Press*, N.Y. TIMES (Aug. 10, 2015), at A18.

putting most of the burden on the journalist to avoid behavior that could be construed as a hostile act.”<sup>18</sup>

The Department of Defense responded, in the first instance, by reaffirming the importance of journalism. In a letter written to the nonprofit group Reporters Without Borders, the Department of Defense’s Acting General Counsel emphasized that “[t]he Department of Defense supports and respects the vital work that journalists perform. Their work in gathering and reporting the news is essential to a free society and the rule of law.”<sup>19</sup> An official source also noted that “[o]pen and independent reporting shall be the principal means of coverage of US military operations,”<sup>20</sup> and that “the Department strongly supports press freedoms and the vital work that journalists perform.”<sup>21</sup>

In response to the claim that the Manual’s language blurred the lines between journalists and spies, the Department pointed to the Manual’s embrace of the proposition that—while journalists might “*abandon* their civilian role to become spies or unprivileged belligerents”<sup>22</sup>—it is nonetheless the starting point that “journalists are civilians.”<sup>23</sup> Furthermore, the Manual itself “does not have any legal effect on journalists, and does not affect [Department of Defense] policies and procedures for engaging with the press.”<sup>24</sup> Rather, the Manual is simply “an *informational* publication on the law of war” designed to help “legal advisers providing advice on the law of war to commanders during military operations.”<sup>25</sup> The Manual also takes care to emphasize that, while it reflects the Department of Defense’s understanding of the relevant international legal protections for purpose of military activity supervised by the Department itself, the Manual “does not necessarily reflect the views of any other department or agency of the U.S. Government.”<sup>26</sup>

The revisions to the Manual respond to some of the criticisms of the first edition’s discussion of the press. The Department noted that the updates contain “substantial revision to the section on journalists as well as minor updates to other sections,” and that “[t]he journalism changes reflect input provided by the news media” after the publication of the first edition.<sup>27</sup> Department of Defense General Counsel Jennifer O’Connor said that “[a]fter the manual’s release [in 2015], [Department] lawyers heard concerns brought forward by media organizations . . . that helped us improve the manual and communicate more clearly the department’s support for the protection of journalists under the law of war.”<sup>28</sup>

<sup>18</sup> *Pentagon’s Revised Law of War Manual Recognizes Role of Independent Journalists*, COMM. TO PROTECT JOURNALISTS (July 22, 2016), at <https://cpj.org/2016/07/pentagons-revised-law-of-war-manual-recognizes-rol.php> [hereinafter *CPJ Statement*].

<sup>19</sup> Letter from Robert S. Taylor, Acting General Counsel, Department of Defense, to Christophe Deloire, Secretary-General, Reporters Without Borders (Sept. 15, 2015).

<sup>20</sup> DoD Directive 5122.05, Assistant Secretary of Defense for Public Affairs (ASD(OA)), 9 (Sept. 5, 2008).

<sup>21</sup> *The Law of War Manual: The Pentagon Responds*, AL JAZEERA (Aug. 29, 2015), at <http://www.aljazeera.com/programmes/listeningpost/2015/08/law-war-manual-pentagon-responds-150829095950357.html> [hereinafter *The Pentagon Responds*].

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> ORIGINAL MANUAL, *supra* note 3, para. 4.24.

<sup>24</sup> *The Pentagon Responds*, *supra* note 21.

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

<sup>26</sup> REVISED MANUAL, *supra* note 2, para. 1.1.1.

<sup>27</sup> DoD Manual Update, *supra* note 1.

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



The revised Manual retains the baseline proposition that “journalists are civilians and are protected as such under the law of war,”<sup>29</sup> as well as the principle that “engaging in journalism does not constitute taking a part in direct hostilities such that a person would be deprived of protection from being made the object of attack.”<sup>30</sup> The revised text places more emphasis, however, on the state’s obligation to distinguish “between the activities of journalists and the activities of enemy forces, so that journalists’ activities . . . do not result in a mistaken conclusion that a journalist is part of enemy forces.”<sup>31</sup> The Committee to Protect Journalists’ security advisor agreed: “The revised language seems to put more of the burden on military commanders to distinguish between the journalistic and enemy activities.”<sup>32</sup> And the new edition omits the first edition’s observation that “reporting on military operations can be very similar to collecting intelligence or even spying,” as well as its advice that “[t]o avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities” and be ready to “[p]resent[] identification documents, such as the identification card issued to authorized war correspondents.”<sup>33</sup>

The revised Manual did note that “combatants performing journalistic work” do not receive the same level of protection as journalists:<sup>34</sup>

Although generally journalists are civilians, journalists are not precluded from being considered combatants, whether privileged or unprivileged, if they otherwise acquire such status. For example, members of the armed forces sometimes serve as journalists or in some other public affairs capacity, and these persons have the same status as other privileged combatants. Non-State armed groups sometimes use their members for propaganda or other media activities, and such personnel are not precluded from being considered unprivileged belligerents. . . . [In addition,] an unprivileged belligerent would not be precluded from being considered as such because he or she works as a journalist.<sup>35</sup>

Reporters Without Borders welcomed the “revisions to the Law of War Manual and [thanked] the DOD for addressing [its] concerns.”<sup>36</sup> A spokesperson for the Committee to Protect Journalists called the Manual’s new language a “seismic shift” for the U.S. military, and noted that “this affirmation of journalists’ right to report armed conflicts freely and from all sides is especially welcome at a time when governments, militias, and insurgent forces around the world are routinely flouting the laws of war.”<sup>37</sup>

<sup>29</sup> REVISED MANUAL, *supra* note 2, para. 4.24.

<sup>30</sup> *Id.* para. 4.24.1.

<sup>31</sup> *Id.* para. 4.24.2.1.

<sup>32</sup> CPJ Statement, *supra* note 18.

<sup>33</sup> ORIGINAL MANUAL, *supra* note 3, para. 4.24.4.

<sup>34</sup> REVISED MANUAL, *supra* note 2, para. 4.24.1.2.

<sup>35</sup> *Id.*, para. 4.24.1.

<sup>36</sup> RSF Welcomes US Department of Defense Revisions to the Law of War Manual, REPORTERS WITHOUT BORDERS (July 21, 2016), at <https://rsf.org/en/news/rsf-welcomes-us-department-defense-revisions-law-war-manual>.

<sup>37</sup> CPJ Statement, *supra* note 18.

## SETTLEMENT OF DISPUTES

*Federal Court of Claims Finds That Settlement Without Compensation of Foreign Nationals' Claims Against Libya Does Not Violate Fifth Amendment*

In July 2016, the United States Court of Federal Claims held that the U.S. government had not violated the Fifth Amendment by blocking the efforts of foreign insurance companies to recover damages for terrorist attacks sponsored by Libya.<sup>1</sup> The case centered on the U.S. government's alleged taking, without just compensation, of plaintiffs' legal claims against Libya. The plaintiffs in the suit were insurance companies and an asset management company; all but one of them were foreign corporations. These plaintiffs had insured the hulls of the aircraft involved in two terrorist attacks sponsored by the Libyan government—the 1985 hijacking of EgyptAir Flight 648 and the 1988 bombing of Pan Am Flight 103. In total, the plaintiffs had paid out approximately \$64 million in insurance claims for the two incidents.<sup>2</sup>

At the time that the insurance companies paid these sums, they were unable to bring suit against Libya, which enjoyed state sovereign immunity as codified in the Foreign Sovereign Immunities Act (FSIA).<sup>3</sup> In 1996, however, Congress amended the FSIA to create an exception for certain suits against states that had been designated sponsors of terrorism.<sup>4</sup> Libya had been so designated in 1979.<sup>5</sup> The insurance companies filed suit against Libya on April 26, 2006, relying on an amended version of the terrorism exception to establish jurisdiction.<sup>6</sup> They sought indemnification of losses sustained in insuring the destroyed aircraft.<sup>7</sup>

In 2008, while the insurers' case was pending, the United States and Libya entered into a claims settlement agreement.<sup>8</sup> Pursuant to that agreement, the “[p]arties agree[d] to authorize the establishment of a humanitarian settlement fund . . . as the basis for settling the claims and terminating and precluding the suits specified in Article 1,” namely, claims that concerned “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such an

<sup>1</sup> *Aviation & Gen. Ins. Co., Ltd. v. United States*, 127 Fed. Cl. 316, 319–20 (2016).

<sup>2</sup> *Id.* at 318.

<sup>3</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1604 (2012).

<sup>4</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, §221, 110 Stat. 1214, 1241–43 (codified as amended at 28 U.S.C. §1605A(a)(1) (2008)). “[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.” 28 U.S.C. §1605A(h)(6). *See also* Monroe Leigh, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AJIL 187 (1997).

<sup>5</sup> *See* Export Controls for Foreign Policy Purposes Letter to the Speaker of the House and the President of the Senate, 2 PUB. PAPERS 2290, 2294, Enclosure 2 (Dec. 29, 1979); Revisions to Reflect Identification and Continuation of Foreign Policy Export Controls, 45 Fed. Reg. 1595, 1596 (Jan. 8, 1980) (codified at 15 C.F.R. §385.4(d) (1980)).

<sup>6</sup> *Aviation & Gen. Ins. Co., Ltd. v. United States*, 121 Fed. Cl. 357, 359 (2015). Soon after, on June 30, 2006, the U.S. government rescinded Libya's status as a state sponsor of terrorism. 71 Fed. Reg. 39,696 (July 13, 2006).

<sup>7</sup> 127 Fed. Cl. at 318.

<sup>8</sup> John R. Crook, *Contemporary Practice of the United States*, 102 AJIL 892, 892–93 (2008).

<sup>9</sup> Libya put \$1.5 billion into an account created to hold funds for distribution by the United States. Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya, Libya-U.S., Aug. 14, 2008, TIAS No. 08-814.

act.”<sup>10</sup> Both parties promised to secure “the termination of any suits pending in its courts, as specified in Article I.”<sup>11</sup>

The federal Libyan Claims Resolution Act implemented this settlement agreement.<sup>12</sup> Pursuant to that legislation, Congress authorized the restoration of Libya’s foreign sovereign immunity for terrorism-related claims once the U.S. Secretary of State certified that “the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure” the payment of certain specified claims and the payment of “fair compensation” for other “claims of nationals of the United States for wrongful death or physical injury.”<sup>13</sup> The Secretary of State made that certification on October 31, 2008.<sup>14</sup>

The same day, President George W. Bush issued an executive order stating that “[a]ll claims within the terms of Article I of the Claims Settlement Agreement . . . are settled.” It further specified that the “Secretary of State shall provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims.”<sup>15</sup> With respect to claims by foreign nationals, the executive order provided:

- (b) Claims of foreign nationals within the terms of Article I are settled according to the terms of the Claims Settlement Agreement.
  - (i) No foreign national may assert or maintain any claim coming within the terms of Article I in any court in the United States.
  - (ii) Any pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.<sup>16</sup>

Based on these provisions and the Libya Claims Resolution Act, the District Court dismissed the insurers’ lawsuit in 2010 for lack of subject matter jurisdiction.<sup>17</sup>

Separately, pursuant to the same legislation and executive order, the Department of State referred the claims of U.S. nationals against Libya to the Foreign Claims Settlement Commission (FCSC).<sup>18</sup> With the exception of New York Marine—the only United States corporation

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

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

<sup>12</sup> Libyan Claims Resolution Act, Pub. L. No. 110–301, 122 Stat. 2999 (2008).

<sup>13</sup> *Id.*

<sup>14</sup> Certification Under Section 5(A)(2) of the Libyan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Libya (Oct. 31, 2008), *available at* <http://www.state.gov/documents/organization/138871.pdf>.

<sup>15</sup> Exec. Order No. 13,477, 70 Fed. Reg. 215 (Nov. 5, 2008).

<sup>16</sup> *Id.*

<sup>17</sup> 121 Fed. Cl. at 360–61.

<sup>18</sup> Under 22 U.S.C.A. §1623, the Foreign Claims Settlement Commission has “jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.” The Secretary of State referred several categories of claims to the Commission. In his January 15, 2009 letter, John Bellinger referred, in pertinent part, “commercial claims” of U.S. nationals to the Foreign Claims Settlement Commission. Letter from John Bellinger, Legal Adviser, U.S. Dep’t of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission of the U.S. (Jan. 15, 2009), *at* [https://www.justice.gov/sites/default/files/pages/attachments/2014/06/18/january\\_15\\_referral.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2014/06/18/january_15_referral.pdf). *Claims Against Libya*, U.S. DEP’T OF JUSTICE, *at* <https://www.justice.gov/fcsc/claims-libya-december-2008-referral-and-january-2009-referral> (last updated June 18, 2014); *see also* John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 164 (2009).

involved in the 2006 action—the nationality requirement prevented any of the insurers in that action from submitting claims to the FCSC. And New York Marine’s claim was itself ultimately dismissed by the FCSC, which found “that EgyptAir itself was the proper party to bring the claim as EgyptAir owned the aircraft hull” and held that it lacked jurisdiction over such a claim because EgyptAir was not a U.S. national.<sup>19</sup> The plaintiffs, then, were left without the ability to pursue their claims or collect on them.

With no apparent avenue for recovery, on August 4, 2014, the insurers filed in the United States Court of Federal Claims alleging a violation of their Fifth Amendment rights for a taking without just compensation. The U.S. Supreme Court had hinted at the possibility of this kind of constitutional challenge in a 1981 case that had approved the settlement of claims against Iran pursuant to the Algiers Accords.<sup>20</sup> In that case, the Supreme Court noted but declined to decide the question whether a “suspension of claims, if authorized, would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation.”<sup>21</sup>

In analyzing the insurers’ arguments, the Court of Federal Claims explained that, for a party to have a claim under the Fifth Amendment’s just compensation clause, it must “establish that it was the owner of property and that the United States took the property for a public purpose.”<sup>22</sup> The court affirmed that the plaintiffs had a property interest in “the insurance contracts they sought to protect with a legal claim against Libya.”<sup>23</sup> And the Court conceded that “the Government extinguished Plaintiffs’ claims without providing an alternative forum in which Plaintiffs could bring their claims.”<sup>24</sup>

The Court concluded, however, that these facts, standing alone, were “not sufficient to establish a taking”:<sup>25</sup>

The Court agrees with the parties that while the facts of this case do not neatly fit those of a traditional regulatory taking, the principal factors in a regulatory takings analysis apply: the character of the governmental action; the extent to which the regulation has interfered with distinct investment-backed expectations; and the economic impact of the regulation on the plaintiff. . . . Penn Central [Transp. Co. v. New York City], 438 U.S. [104,] at 1248 [(1978)] . . . ; see *Abraham-Youri [et al. v. United States]*, 139 F.3d [1462,] at 1466–68 (treating a takings claim based on espousal as a regulatory taking).

Plaintiffs cannot claim an investment-backed expectation free of government involvement nor can they characterize the Government’s action as novel or unexpected. Where plaintiffs could have reasonably expected their property interests to be adversely affected by Government action, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind. In such circumstances, the call for just compensation on grounds of fairness and justice is considerably diminished.

<sup>19</sup> 121 Fed. Cl. at 361; *see also* *N.Y. Marine & Gen. Ins. Co. v. Great Socialist People’s Libyan Arab Jamahiriya*, FCSC, Decision No. LIB-II-165 (2012).

<sup>20</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

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

<sup>22</sup> 127 Fed. Cl. at 319.

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

<sup>24</sup> *Id.* at 320.

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

See, e.g., *Abraham-Youri et al. v. United States*, 36 Fed. Cl. 482, 486 (1996) (collecting cases) *aff'd*, *Abraham-Youri*, 139 F.3d 1462 (Fed. Cir. 1997). This is the case here.<sup>26</sup>

The Court explained that plaintiffs were aware of the risk of government interference because businesses “that engage in international commerce are fully aware that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships among nations.”<sup>27</sup> The Court thus found presidential intervention to be neither unexpected nor novel. Indeed, “Presidents have exercised the power to settle international claims filed in U.S. courts since at least 1799.”<sup>28</sup> Furthermore, the brief lifting of Libya’s sovereign immunity by means of legislation did not alter the calculus of investment-backed expectations, since sovereign immunity has always been the default rule: “Foreign sovereign immunity ‘reflects current political realities and relationships’ and its availability, or lack thereof, ‘generally is not something on which parties can rely in shaping their primary conduct.’”<sup>29</sup>

Finally, the Court dismissed plaintiffs’ challenge to their exclusion from the Settlement Commission’s jurisdiction, emphasizing that the federal government “has no constitutional obligation to act as a collection agent on Plaintiffs’ behalf.”<sup>30</sup>

<sup>26</sup> *Id.* at 319.

<sup>27</sup> *Id.* at 319–20.

<sup>28</sup> *Id.* at 320.

<sup>29</sup> *Id.* (quoting *Republic of Iraq v. Beaty*, 556 U.S. 848, 864–65 (2009)).

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