Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.–EU Extradition and Mutual Legal Assistance Agreements

On October 28, 2009, the United States and the European Union exchanged instruments of ratification for the Agreement on Extradition between the United States of America and the European Union and the Agreement on Mutual Legal Assistance between the United States of America and the European Union ("U.S.–EU Agreements"), both of which were signed at Washington on June 25, 2003. Attorney General Eric Holder delivered remarks, excerpted below, in which he described the agreements and how they would enhance U.S. law enforcement cooperation with the European Union. The full text of Mr. Holder's speech is available at *www.justice.gov/ag/speeches/2009/ag-speech-091028.html*. For background on the two agreements, see S. Treaty Doc. Nos. 109-13 and 109-14 (2006); *Digest 2006* at 127–38 and 139–47; and *Digest 2008* at 56–57 and 78. As of the end of 2009, the two agreements had not yet entered into force.*

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These treaties represent a great achievement, both for their practical benefits and in what they symbolize. They give us important new tools to combat crime, including terrorism. Let me list some of these tools:

- The extradition agreement will modernize the existing bilateral extradition treaties with each of the Member States, in many cases replacing lists of offenses that are deemed extraditable with a dual criminality standard.
- The mutual legal assistance agreement contains cutting edge provisions for future legal cooperation. These include authority:
    - to identify the existence of bank accounts associated with the subjects in the other's jurisdiction in terrorism and other serious crimes;
    - to conduct joint task forces across national lines directed against terrorism and serious crime cases rather than merely "coordinating" inquiries;

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* Editor's note: The agreements entered into force on February 1, 2010.

- to obtain assistance in administrative matters that may lead to criminal investigations in matters involving terrorism and serious crimes;
- to acquire evidence, including testimony, by means of video conferencing;
- to use data acquired via the agreement for additional serious offenses other than just the one triggering the initial request.

But beyond their important practical value, these treaties symbolize the joint resolve of Europe and the United States to fight terrorism and transnational crime.

. . . We look forward to implementing these important instruments in a spirit of mutual respect and cooperation.

In 2009 the United States and each of the 27 EU member states exchanged diplomatic notes concerning or instruments of ratification for the following bilateral extradition and mutual legal assistance instruments:

- Austria: protocols to the extradition and mutual legal assistance treaties, signed July 20, 2005;
- Belgium: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004;
- Bulgaria: extradition treaty, signed September 19, 2007, entered into force May 21, 2009, and agreement on certain aspects of mutual legal assistance, signed September 19, 2007;
- Cyprus: instruments as to the application of the extradition and mutual legal assistance treaties, signed January 20, 2006;
- Czech Republic: second supplementary treaty on extradition and supplementary treaty on mutual legal assistance, signed May 16, 2006;
- Denmark: instrument as to the application of the extradition treaty and instrument on mutual legal assistance, signed June 23, 2005;
- Estonia: extradition treaty, signed February 8, 2006, entered into force April 7, 2009, and instrument as to the application of the mutual legal assistance treaty, signed February 8, 2006;
- Finland: protocol to the extradition treaty and treaty on certain aspects of mutual legal assistance, signed December 16, 2004;
- France: instruments as to the application of the extradition and mutual legal assistance treaties, signed September 30, 2004;
- Germany: second supplementary treaty to the extradition treaty, signed April 18, 2006; mutual legal assistance treaty, signed October 14, 2003, and supplementary treaty on mutual legal assistance treaty, signed April 18, 2006, entered into force October 18, 2009;
- Greece: protocols to the extradition and mutual legal assistance treaties, signed January 18, 2006;
- Hungary: protocols to the extradition and mutual legal assistance treaties, signed November 15, 2005;

- Ireland: instruments as to the application of the extradition and mutual legal assistance treaties, signed July 14, 2005; mutual legal assistance treaty, signed January 18, 2001, entered into force August 11, 2009;
- Italy: instruments as to the application of the extradition and mutual legal assistance treaties, signed May 3, 2006;
- Latvia: extradition treaty, signed December 7, 2005, entered into force April 15, 2009, and protocol to the mutual legal assistance treaty, signed December 7, 2005;
- Lithuania: protocols on the application of the extradition and mutual legal assistance treaties, signed June 15, 2005;
- Luxembourg: instruments as to the application of the extradition and mutual legal assistance treaties, signed February 1, 2005;
- Malta: extradition treaty, signed May 18, 2006, entered into force July 1, 2009, and treaty on certain aspects of mutual legal assistance, signed May 18, 2006;
- Netherlands: agreements on the application of the extradition and mutual legal assistance treaties, signed September 29, 2004;
- Poland: agreements on the application of the extradition and mutual legal assistance treaties, signed June 9, 2006;
- Portugal: instruments on extradition and mutual legal assistance, signed July 14, 2005;
- Romania: extradition treaty, signed September 10, 2007, entered into force May 8, 2009, and protocol to the mutual legal assistance treaty, signed September 10, 2007;
- Slovak Republic: instruments on extradition and mutual legal assistance, signed February 6, 2006;
- Slovenia: agreement on the application of the extradition treaty and agreement on mutual legal assistance, signed October 17, 2005;
- Spain: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 17, 2004;
- Sweden: mutual legal assistance treaty, signed December 17, 2001, entered into force June 1, 2009; instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004; and
- United Kingdom: instruments as to the application of the extradition and mutual legal assistance treaties, signed December 16, 2004.

These bilateral exchanges were a prerequisite for the exchange of instruments of ratification between the United States and the European Union itself with respect to the U.S.-EU Agreements. Most of the above-listed agreements, upon entry into force, will implement the U.S.-EU Extradition Agreement and the U.S.-EU Mutual Legal Assistance Agreement,

which require the United States and each EU member state to conclude written instruments confirming that the countries will apply the provisions of the two U.S.–EU Agreements in their bilateral extradition and mutual legal assistance relationships. Apart from the extradition treaties with Bulgaria, Estonia, Latvia, Malta, and Romania; the mutual legal assistance treaties with Ireland and Sweden; and the mutual legal assistance and supplementary mutual legal assistance treaties with Germany, the instruments had not entered into force as of the end of 2009.[**] For additional background on the bilateral instruments, see *Digest 2006* at 131, 135–38, 139–40, and 146–47. Section B.4. below discusses the Treasury Department's Financial Crimes Enforcement Network's 2009 proposal to permit certain foreign law enforcement agencies to request information from financial institutions, consistent with the U.S.–EU Mutual Legal Assistance Agreement and the related bilateral agreements.

2. U.S.–Malaysia Mutual Legal Assistance Agreement

On January 21, 2009, the United States and Malaysia exchanged instruments of ratification to bring into force the Agreement on Mutual Legal Assistance between the United States of America and Malaysia, signed at Kuala Lumpur on July 28, 2006. S. Treaty Doc. No. 109–22 (2006). For background, see *Digest 2006* at 147–48 and *Digest 2008* at 79.

3. Extradition of Fugitives Alleging Fear of Torture

a. Trinidad y Garcia v. Benov

During 2009 litigation continued in a challenge to extradition and custody pending extradition before the U.S. District Court for the Central District of California. *Trinidad y Garcia v. Benov*, No. CV 08–07719–MMM (CW) (C.D. Cal.). Hedelito Trinidad y Garcia ("Trinidad") challenged his extradition to the Philippines, claiming, among other things, that it would violate Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). For previous developments in the case, see *Digest 2008* at 57–64. On November 17, 2009, the court granted Trinidad's September 2008 petition for habeas corpus. *Trinidad y Garcia v. Benov*, 2009 U.S. Dist. LEXIS 115843 (C.D. Cal. 2009). The court also ordered Trinidad's release from custody, which was stayed pending resolution of the government's motion for continued detention of Trinidad

[**] Editor's note: The bilateral instruments not in force at the end of 2009 entered into force on February 1, 2010.

pending appeal. In its order, the court rejected the U.S. arguments for dismissing Trinidad's petition:

> . . . that district court review of Torture Convention claims is barred by the "REAL ID Act" [fn. omitted]; that judicial review of the Secretary's final extradition decisions is precluded by the "Rule of Non-Inquiry" as reaffirmed in *Munaf v. Geren*, [553 U.S. 674] (2008); that neither the Torture Convention nor the FARR Act overturned the Rule of Non-Inquiry; that the APA does not support judicial review of the Secretary's decisions; and that the suggestion in *Cornejo-Barreto I* [218 F.3d 1004 (9th Cir. 2000)] that the Secretary's decisions are reviewable amounts to non-binding dicta. . . .

Trinidad, 2009 U.S. Dist. LEXIS 115843, at *14.

In an Anticipatory Application filed with the court on August 4, 2009, the United States had argued, among other things, that the court should order Trinidad's continued detention pending the government's appeal and petition for certiorari, if any. In an accompanying declaration, Clifton M. Johnson, Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, stated the U.S. view that "[t]he release of Trinidad pending appeal, and the resulting likelihood that he would abscond, would have a significant adverse impact on the relationship of the United States with the Government of the Republic of the Philippines, particularly with respect to ongoing law enforcement matters of critical importance to the United States." The full texts of the U.S. Anticipatory Application and accompanying declaration of Clifton M. Johnson are available at *www.state.gov/s/l/c8183.htm*. On November 20, 2009, the court denied the government's motion for continued detention, ordering Trinidad's release from custody subject to a number of conditions, including home detention with electronic monitoring.

The United States filed its notice of appeal on December 10, 2009. As of the end of 2009, the case remained pending before the U.S. Court of Appeals for the Ninth Circuit.[*]

b. Prasoprat v. Benov

On May 27, 2009, the U.S. District Court for the Central District of California issued an order in a U.S. citizen's long-running effort to challenge his extradition to Thailand based on the United Nations Convention Against

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[*] Editor's note: In an unpublished opinion issued August 24, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment. *Trinidad y Garcia v. Benov*, 2010 U.S. App. LEXIS 17840 (9th Cir. 2010).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). *Prasoprat v. Benov*, 622 F. Supp. 2d 980 (C.D. Cal. 2009). The case arose out of the Government of Thailand's 2001 request for the extradition of the petitioner on drug charges. In prior proceedings, the petitioner had unsuccessfully sought a writ of habeas corpus, challenging the judicial finding that he was extraditable. After the petitioner exhausted his appeals, the Secretary of State authorized the petitioner's extradition to Thailand and signed a surrender warrant on April 26, 2006.

The district court's May 2009 order addressed the petitioner's second petition for habeas corpus, filed on April 28, 2006, which challenged the surrender decision of the Secretary of State. The court denied the U.S. motion to dismiss but dismissed the petition on the merits with prejudice. In its order, the court adopted a magistrate judge's conclusions in her March 26, 2009 Report and Recommendation. *Prasoprat*, 622 F. Supp. 2d at 981. The magistrate judge found that the "petitioner has set forth a cognizable claim challenging his extradition to Thailand on the ground he 'fears torture' if returned to Thailand, *Prasoprat*, 421 F.3d at 1016 n.5; *Cornejo-Barreto I*, 218 F.3d at 1014-17." *Prasoprat*, 622 F. Supp. 2d at 987. The magistrate judge found without merit the U.S. arguments that the rule of non-inquiry bars judicial review of the Secretary of State's extradition decisions and that the CAT and the Foreign Affairs Reform and Restructuring Act ("FARR Act"), which implements Article 3 of the CAT, prohibit judicial review of extradition decisions. *Id.* at 984. The magistrate judge also concluded that the United States argued incorrectly that the court should disregard the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Cornejo-Barreto v. Siefert*, 218 F.3d 1004, 1016-17 (9th Cir. 2000) ("*Cornejo-Barreto I*"), because it was non-binding dicta. Contrary to the U.S. position, the magistrate judge concluded that the Secretary of State's extradition decisions "may be subject to judicial review," *Prasoprat*, 622 F. Supp. 2d at 985. The magistrate judge also rejected the U.S. contention that the Supreme Court's 2008 decision in *Munaf v. Geren*, 553 U.S. 674 (2008), overruled *Cornejo-Barreto I*. "*Munaf* was not an extradition case," the magistrate judge noted, "and the Supreme Court in *Munaf* specifically declined to consider the FARR Act's applicability in habeas corpus proceedings." *Prasoprat*, 622 F. Supp. 2d at 986.

Lastly, the magistrate judge did not agree with the United States that the amendments to the Immigration and Nationality Act enacted in the REAL ID Act of 2005, Div. B, Pub. L. No. 109-13, 119 Stat. 302, 310, bar district courts from reviewing challenges to extradition. The magistrate judge stated:

Section 1252(a)(4) provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section

> 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.
>
> 8 U.S.C. § 1252(a)(4). However, Section 1252(a)(4) does not apply to extradition proceedings or habeas corpus proceedings challenging extradition. [fn. omitted] . . .

Id. at 986.

As to the merits of the petition, however, the magistrate judge concluded that the petitioner had not shown that "it is more likely than not he will be tortured if returned to Thailand . . . so that the State Department's decision to extradite him to Thailand was '"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."' *Id.* at 987 (citations omitted).

On June 12, 2009, the petitioner filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit and on November 24, 2009, the petitioner applied for a stay of extradition pending the appellate court's decision. On December 15, 2009, the district court issued an unpublished order denying the application for a stay.[**]

c. Saldana v. United States

On December 30, 2009, the United States filed a motion to dismiss an amended petition for a writ of habeas corpus filed by a Mexican national who claimed he would be tortured if extradited to Mexico to face homicide charges. *Saldana v. United States*, No. 2:09-cv-02786-JPM-cgc (W.D. Tenn. 2009). The petitioner brought claims under the CAT, the FARR Act, the Administrative Procedure Act, and related regulations, seeking judicial review of the Department of State's December 3 decision to issue a surrender warrant authorizing the petitioner's transfer to Mexican custody. The United States argued that "extradition decisions by the Secretary of State, including those that involve torture claims, are nonreviewable" under the rule of non-inquiry, as bolstered by the Supreme Court's 2008

[**] Editor's note: The petitioner's motions for a stay of extradition pending appeal were denied, and he was extradited to Thailand on May 8, 2010.

judgment in *Munaf v. Geren*, 553 U.S. 674 (2008); the FARR Act, which implements U.S. obligations under the Convention Against Torture; and the 2005 REAL ID Act, 8 U.S.C. § 1252(a)(4).

The United States stressed that:

> It is important to state at the outset that the United States does not claim that the Secretary of State has a right to extradite petitioner to face torture. Under the Department's own regulations, the Secretary of State will not extradite a fugitive if she finds it is more likely than not that the fugitive will be tortured in the requesting country. This case is therefore not about whether the United States may extradite someone when it believes he is more likely than not to be tortured; it may not. The question before the Court is whether, despite repeated clear direction from Congress and the Supreme Court, and decades of precedent from courts around the country, the Judiciary may second-guess the extradition determinations made by the Secretary of State that are intertwined with sensitive foreign policy determinations and assessments. The answer to that question is no.

Excerpts below from the U.S. memorandum in support of the U.S. motion to dismiss set forth the government's arguments concerning *Munaf v. Geren* and the REAL ID Act (footnotes omitted). The full texts of the U.S. memorandum and the accompanying declaration of Clifton M. Johnson, Assistant Legal Adviser, Law Enforcement and Intelligence ("L/LEI"), Department of State, are available at *www.state.gov/s/l/c8183.htm*.[***]

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I. The REAL ID Act Precludes Judicial Review of CAT Claims in The Habeas Context

The REAL ID Act, 8 U.S.C. § 1252(a)(4), requires the dismissal of petitioner's habeas petition opposing the Secretary's extradition determination on grounds that petitioner is more likely than not to face torture. The Act unambiguously provides that "the *sole* and *exclusive* means for judicial review of *any* cause or claim under the [CAT]" is the filing in a court of appeals of a petition for review challenging a final order of removal. 8 U.S.C. § 1252(a)(4) (emphasis added); *see* 8 U.S.C. § 1252(a)(1) (providing review of a "final order of removal"). Congress could not have used more explicit and emphatic terms to show its intention to provide only a single, *exclusive* forum for the judicial review of *any* cause or claim under the CAT. Since the sole means for review of a CAT claim is in the court of appeals upon review of a final order of removal, the clear language of the REAL ID Act necessarily precludes review of a CAT claim under habeas law in connection

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[***] Editor's note: On March 25, 2010, the U.S. District Court for the Western District of Tennessee dismissed Saldana's petition. *Saldana v. United States*, 700 F. Supp. 2d 953 (W.D. Tenn. 2010).

with an extradition decision. *See Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (finding that, pursuant to the REAL ID Act, 8 U.S.C. § 1252(a)(4), jurisdiction over torture claims exists *exclusively* in the court of appeals in connection with immigration proceedings); *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005) (stating that the REAL ID Act "abolishes habeas review of CAT claims, providing that a petition for review filed with the appropriate court of appeals is (with an irrelevant exception) 'the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture.' . . . 8 U.S.C. § 1252(a)(4) . . . .").

Furthermore, this limitation on jurisdiction exists "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." In other words, Congress intended to "override[]" any potentially conflicting law. *Dean v. Veterans Admin. Regional Office*, 943 F.3d 667, 670 (6th Cir. 1991), *vacated and remanded on other grounds*, 503 U.S. 902 (1992); *see Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."). The fact that Congress specifically singled out habeas corpus as not being an instance where jurisdiction exists signals its particular intent that there be no jurisdiction over CAT claims in the habeas context, an approach consistent with the FARR Act, which similarly provides no jurisdiction over CAT claims except in the immigration context. Congress also explicitly indicated that the REAL ID Act was intended to supersede statutory *and nonstatutory law*, and that it therefore preempts contrary judicial decisions allowing for jurisdiction over CAT claims outside the specified removal context. Thus, under the plain language of the REAL ID Act, a CAT claim cannot properly be raised under "section 2241 of Title 28, or any other habeas corpus provision," as petitioner has done here.

II. The Principles of *Munaf* Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary's Decision to Extradite Petitioner

As the plain language of the REAL ID Act shows, Congress unequivocally intended to limit jurisdiction over CAT claims to the court of appeals in a particular immigration context. Jurisdiction therefore does not exist over the instant habeas petition, and the Court's inquiry should end there. Notwithstanding the REAL ID Act, however, the principles enunciated in *Munaf*, reinforcing the longstanding principles underlying the Rule of Non-Inquiry, also preclude judicial review of the Secretary's extradition decision. Once a court has determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, 18 U.S.C. § 3184, the process moves into the foreign affairs arena, and authority over its pursuit shifts entirely to the Executive Branch. 18 U.S.C. § 3186. At that stage, the Secretary of State exercises her discretion to decide whether, and under what circumstances, a fugitive should be returned to the requesting country. *Kin-Hong*, 110 F.3d at 110–111; *Ahmed*, 910 F.2d at 1066–67. The statutory commitment of this decision to the Secretary's discretion reflects a recognition that the decision necessarily involves the application of particular expertise that is not available in the Judiciary and sensitive foreign relations considerations that are not amenable to review. *Escobedo*, 623 F.2d at 1105.

As stated in *Munaf*, in contrast to the Judiciary, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally." 128 S. Ct. at 2226. Therefore, a court should proceed with circumspection when "adjudicating issues inevitably entangled in the conduct of our international relations." *Id.* at 2218;

see Hoxha v. Levi, 465 F.3d at 563 ("The non-inquiry principle serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request."); *Blaxland*, 323 F.3d at 1208 ("Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system."); *Kin-Hong*, 110 F.3d at 110 (stating that the bifurcated procedure reflects the fact that "extradition proceedings . . . implicate questions of foreign policy, which are better answered by the executive branch").

Judicial review of the Secretary's decision would place the Court in an unfamiliar and inappropriate position. For example, if the Secretary accepted the assurance of a foreign government that, despite a history of human rights abuses in that country, a fugitive would not be tortured, and on that basis concluded, consistent with the FARR Act and the CAT, that it was *not* more likely than not that the fugitive would be tortured, a court could evaluate that decision only by second-guessing the expert opinion of the Department of State that such an assurance can be trusted. *See* Johnson Dec. ¶ 9. It is difficult to contemplate how judges would reliably make such a prediction, lacking any ability to communicate with the foreign country or to weigh the situation there with resources and expertise comparable to those of the Department of State. *See Munaf*, 128 S. Ct. at 2226; *see* Johnson Dec. ¶¶ 13–14.

Moreover, only the Secretary of State has the diplomatic tools at her disposal for protecting a fugitive or assuring humane treatment upon his return. *See* Johnson Dec. ¶¶ 8–10; *Munaf*, 128 S. Ct. at 2225; *Kin-Hong*, 110 F.3d at 110. With respect to torture claims such as those raised here, the Secretary has three options: "to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. § 95.3(b); Johnson Dec. ¶ 8. The Secretary may decline to surrender the fugitive "on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations." *Kin-Hong*, 110 F.3d at 109; *see also Munaf*, 128 S. Ct. at 2226. In the same vein, the Secretary may attach conditions to the surrender of the fugitive, *id.* at 110, such as demanding that the requesting country provide assurances regarding the individual's treatment. Johnson Dec. ¶ 8; *see Munaf*, 128 S. Ct. at 2226 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); *Jimenez v. United States District Court*, 84 S. Ct. 14, 19, 11 L. Ed. 2d 30 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers); *Kin-Hong*, 110 F.3d at 110 (stating that the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator").

Application of the Rule of Non-Inquiry here makes perfect sense in light of the factors involved in extradition determinations and the inherent limits on the ability of courts to adjudicate issues intimately tied in with foreign relations. *See Munaf*, 128 S. Ct. at 2218. The Secretary of State, not the Court, has the responsibility to ensure that all extraditions are legally carried out. In other words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Kin-Hong*, 110 F.3d at 111; *see Munaf*, 128 S. Ct. at 2225–26. Petitioner's argument assumes the Secretary will seek to extradite someone to face torture, but petitioner cites no example of such an action having ever occurred nor any reason to believe the Secretary would ever want to do so (in violation of the Department's own regulations). On the contrary, the courts have long recognized the presumption that the decisions of government officials are made in good faith. *United States v.*

Chemical Found., 272 U.S. 1, 14–15 (1926); *see also Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007).

Cornejo-Barretto v. Seifert, 218 F.3d 1004 (9th Cir. 2000), cited by petitioner, is not binding on this Court, and to the extent the decision ever was valid authority, it has been superseded. In *Cornejo*, a Ninth Circuit panel dismissed a fugitive's habeas petition as unripe because the Secretary of State had not yet determined whether to surrender the fugitive to Mexico. *Cornejo*, 218 F.3d at 1016. However, the panel majority went on to state that, if the Secretary should later decide in favor of surrender, Cornejo-Barreto would be able to file a new habeas action in district court, challenging the validity of the Secretary's decision in relation to the FARR Act under the APA. *Id.* at 1009 n.5, 1016–17. *Cornejo* has been overtaken by the REAL ID Act and by the analysis in *Munaf* reinforcing the Rule of Non-Inquiry, under which the courts lack jurisdiction to consider humanitarian arguments against extradition, which are well-established as within the exclusive province of the Executive Branch. No Court of Appeals has expressly adopted the panel majority's analysis in *Cornejo*. *See, e.g.*, *Mironescu v. Costner*, 480 F.3d at 674 (noting that in reaching its conclusion that the FARR Act permits review of CAT claims, the Ninth Circuit in *Cornejo* failed to discuss whether the relevant language in § 2242(d) constitutes such a preclusion). The decision carries no weight here.

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4. Role of Geneva Conventions in Extradition: *Noriega v. Pastrana*

On April 8, 2009, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's 2008 decision dismissing a petition for a writ of habeas corpus that Manuel Noriega filed in an attempt to prevent his extradition to France. *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009). Noriega argued that because a U.S. court had afforded him prisoner-of-war status while he was serving a sentence in the United States for drug-related offenses, his extradition would violate his rights as a prisoner of war under the Third Geneva Convention. For additional background on this case, see *Digest 2007* at 108–17 and *Digest 2008* at 69–70. On July 7, 2009, Noriega filed a petition for writ of certiorari in the Supreme Court, and in September 2009 the United States filed a brief in opposition to the petition for certiorari, arguing that "[t]he court of appeals correctly rejected [Noriega's] claim, and its decision does not conflict with any decision of this Court or any other court of appeals." *Noriega v. Pastrana*, Case No. 09-35. The United States argued further that "the decision below is of limited ongoing significance, because petitioner is the only person currently detained by the United States as a prisoner of war."[*] Excerpts below from the U.S. brief

[*] Editor's note: On January 25, 2010, the Supreme Court denied Noriega's petition for a writ of certiorari, and on March 22, 2010, the Court denied Noriega's petition for rehearing. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010); *Noriega v. Pastrana*, 130 S. Ct. 1942 (2010). On April 26, 2010, Noriega was extradited to France.

provide the government's argument that § 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, precluded Noriega from invoking the Third Geneva Convention as a source of rights in his habeas corpus petition and that the Third Geneva Convention does not prohibit the extradition of a prisoner of war (citations to the Petition omitted). The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2009/0responses/2009-0035.resp.html*.

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1. Section 5 of the [Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2631] provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or * * * agent of the United States is a party as a source of rights in any court." MCA § 5(a), 120 Stat. 2631. Petitioner's habeas corpus petition sought to invoke the Third Geneva Convention "as a source of rights" preventing his extradition, and it was therefore precluded by the plain language of Section 5.

Petitioner suggests that Section 5 applies only to certain rights under the convention, such as "the right to counsel, the right to confront [one's] accusers, [and] the right to know the charges against one," but that it does not address the rights he seeks to invoke. That limited reading finds no support in the text of Section 5, and, as the court of appeals noted, it is also inconsistent with the legislative history. That history shows that Congress intended Section 5 to "prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States." H.R. Rep. No. 664, 109th Cong., 2d Sess. Pt. 2, at 17 (2006); see H.R. Rep. No. 731, 109th Cong., 2d Sess. 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); 152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights.").

Petitioner contends that the court of appeals' interpretation of Section 5 of the MCA results in the "complete repudiation of the Geneva Convention." That is incorrect. A treaty is "primarily a compact between independent nations," and its enforcement is generally a matter of international negotiations, not a subject of redress in domestic courts. *Head Money Cases*, 112 U.S. 580, 598 (1884); see *Medellin v. Texas*, 128 S. Ct. 1346, 1357 & n.3 (2008). This Court has not decided whether the Third Geneva Convention conferred judicially enforceable rights on individuals before the MCA was enacted, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 626–628 (2006), and the court of appeals had no occasion to resolve that question in this case. Whatever the domestic effect of the Third Geneva Convention before the enactment of the MCA, the court of appeals correctly recognized that "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty." [S]ee *Medellin*, 128 S. Ct. at 1359 n.5 ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."). And, as the court of appeals made clear, its reading of Section 5 of the MCA does not change the international obligations of the United States under the Geneva Conventions. The only result of the enactment of that provision is that "Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this."

Petitioner asserts that the decision of the court of appeals "encroaches upon the powers of the Executive and Legislative branches." But because "a later-in-time federal statute supersedes inconsistent treaty provisions," *Medellin*, 128 S. Ct. at 1359 n.5, the decision below correctly gives effect to the statute that Congress enacted. He also suggests that Section 5 violates the Supremacy Clause, U.S. Const. Art. VI, to the extent that it conflicts with the Third Geneva Convention, but that argument is foreclosed by the well-established principle, noted above, that a later-enacted statute may supersede a treaty.[*]

2. As the court of appeals recognized, petitioner's claims fail for the independent reason that the Third Geneva Convention does not prohibit the extradition of a prisoner of war to face criminal charges in another country. . . .

Petitioner focuses on Article 118 of the Third Geneva Convention, which provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." 6 U.S.T. at 3406. But Article 118 is limited by Article 119, which states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." 6 U.S.T. at 3408. As the court of appeals noted, Article 119 has allowed the United States to retain custody over petitioner after hostilities in Panama ceased, to try him for the crimes with which he was charged, and to hold him for the duration of his criminal sentence. That provision also permits a party to the convention to honor an extradition treaty by transferring a prisoner of war to another party to the convention to face criminal charges there. See *ibid.* ("Nowhere * * * [in Article 119] is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another.").

The only provision of the Third Geneva Convention to restrict extradition is Article 12, which provides for the transfer of prisoners of war between parties to the convention "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." 6 U.S.T. at 3328. In this case, as both the district court and court of appeals confirmed, the conditions specified in Article 12 have been satisfied by means of diplomatic communications between France and the United States. But nothing in Article 12 "implies that a contracting party cannot abide by a valid extradition treaty and extradite a prisoner of war to another contracting party simply because the person is a prisoner of war."

Petitioner maintains that the absence of the term "extradition" in the Third Geneva Convention, along with a specific reference in Article 129 to the transfer from one party to another of war criminals, means that prisoners of war may not be extradited, and that they may only be transferred to another nation if they are war criminals. But that reading of the convention does not comport with Article 12, which places only the two restrictions noted above on the transfer of a prisoner of war: that the transfer be to another contracting party, and that the transferee country give

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[*] As petitioner acknowledges, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), invalidated a different provision of the MCA but did not address Section 5. In *Boumediene*, the Court concluded that Section 7 of the MCA, 120 Stat. 2635, violated the Suspension Clause, U.S. Const. Art. I, § 9, because it "deprive[d] the federal courts of jurisdiction to entertain the habeas corpus actions" brought by alien enemy combatants, and the Court held that provision unconstitutional to that extent. *Boumediene*, 128 S. Ct. at 2244, 2274. Unlike Section 7, which was a jurisdiction-stripping provision, Section 5 does nothing to prevent a person from seeking habeas relief. It merely removes "one substantive provision of law upon which a party might rely in seeking habeas relief." *Ibid.*

assurances that the convention will be followed. Article 129 discusses only the ongoing duty of each contracting party to search for war criminals and bring them to justice, and it places no further restrictions on the transfer of prisoners of war. 6 U.S.T. at 3418.

More fundamentally, petitioner's argument based on a lack of "specific authority permitting extradition of prisoners of war" misses the mark. The authority to extradite comes not from the Third Geneva Convention itself but from pre-existing extradition treaties, such as the one between the United States and France that is at issue here. The lack of any indication in the Third Geneva Convention that it is intended to invalidate or supersede such treaties shows that a contracting party to the Convention retains its authority to abide by its other international obligations, including its obligations under valid extradition treaties.

Petitioner also asserts that the courts below should not have relied on language in Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, which provides for the transfer of civilians between parties to the Convention and specifically provides that it does not bar extradition. The court of appeals, like the district court, recognized that the Third and Fourth Geneva Conventions are distinct, but nevertheless found it persuasive that the parties to the conventions contemplated that "transfer" included extradition. "To conclude otherwise," the court of appeals reasoned, "would mean that a country would be obligated to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges." It was appropriate for the courts below to support their interpretation of the Third Geneva Convention by reading the Geneva Conventions as a whole and harmonizing provisions with similar underlying principles. . . .

* * * *

5. Universal Jurisdiction

On October 21, 2009, Wellington Webb, Senior Adviser, U.S. Mission to the United Nations, delivered a statement during the General Assembly's Sixth (Legal) Committee's debate on Agenda Item 84: The Scope and Application of the Principle of Universal Jurisdiction. Mr. Webb's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/130866.htm*.

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* * * *

From the outset, we wish to note that the definition of "universal jurisdiction" remains unsettled, and we expect that Member States may have differing views about the meaning of this term. . . .

For purposes of this discussion, the United States understands universal jurisdiction to refer to the assertion of criminal jurisdiction by a State, for certain grave offenses, where the State's only link to the particular crime is the presence in its territory of the alleged offender. Under this principle, jurisdiction would be established regardless of where the offense took place, the nationality of either the victim or the perpetrator, or the effect of the crime on the State exercising jurisdiction.

Some criminal conduct comes within the scope of international conventions, such as the UN Convention Against Torture, that expressly authorize parties to assert criminal jurisdiction under the circumstances covered by the convention.

In the view of the United States, it would be beneficial to exchange information about the practice of Member States with regard to the assertion of universal jurisdiction. Under U.S. law, federal courts are empowered to assert jurisdiction over crimes of serious international concern—such as piracy, torture, genocide, and various crimes covered by the counterterrorism conventions—even in the absence of a significant U.S. nexus to the underlying criminal acts. Typically, U.S. courts are empowered to exercise such jurisdiction only where the alleged perpetrator is physically present in the United States.

We would be interested to learn more about how other Member States define the term "universal jurisdiction," and how they have empowered their own domestic courts to exercise universal jurisdiction—for which crimes and under what circumstances. We believe that gathering such information is necessary prior to any further consideration of this topic.

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6. Visa Waiver Program Agreements on Preventing and Combating Serious Crime

During 2009 the United States signed bilateral agreements with Greece, Italy, Portugal, and Spain on preventing and combating serious crime. The agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. These agreements are similar to agreements the United States signed in 2008 with Germany and the eight countries admitted to the Visa Waiver Program in 2008 (the Czech Republic, the Slovak Republic, Estonia, Malta, Lithuania, Latvia, Hungary, and Korea). *Digest 2008* discusses these agreements at 80–83. Negotiations commenced in 2009 with a number of other countries that are also members of the Visa Waiver Program. Such agreements are required to be concluded with all VWP members in coming years.

7. Foreign Evidence Request Efficiency Act

On October 19, 2009, President Barack H. Obama signed into law the "Foreign Evidence Request Efficiency Act of 2009." Pub. L. No. 111–79, 123 Stat. 2086. The statute amended 18 U.S.C. § 2703 ("Required disclosure of customer communications or records") and §§ 2711 and 3127 (both containing definitions of terms). The statute also added new § 3512, "Foreign requests for assistance in criminal investigations and

prosecutions." The new section makes it clear that upon the application of foreign authorities, including central authorities under international agreements (which would include central authorities identified under either the UN Convention against Transnational Organized Crime or the UN Convention against Corruption), federal judges may issue "such orders as may be necessary to execute [the] request for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution." A federal judge may issue a search warrant under § 3512 "only if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under federal or state law." In response to a foreign authority's request, a federal district court may issue a search warrant, a warrant or order for the contents of stored wire or electronic communications or related records, a pen register or trap and trace device, or an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both. An appropriate official of the Department of Justice must authorize a foreign authority's request. In addition § 3512 provides greater flexibility as to venue, so that in most instances requests for evidence can be executed in a single district (rather than requiring execution in each district in which evidence might be located, as under 28 U.S.C. § 1782, which is discussed in Chapter 15.C.5.a.). Finally, where there are related U.S. and foreign cases, the foreign request for assistance can be executed by the U.S. Attorney's Office or prosecuting section at the U.S. Department of Justice in Washington that is handling the case, thus promoting better coordination with counterparts in other countries.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On April 30, 2009, the Department of State released the 2008 Country Reports on Terrorism. The annual report is submitted to Congress in compliance with 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/s/ct/rls/crt/2008*.

b. UN General Assembly

On October 11, 2009, Mary McLeod, Legal Adviser, U.S. Mission to the United Nations, addressed the Sixth (Legal) Committee of the UN General Assembly during its annual debate on terrorism. Excerpts below from Ms. McLeod's statement provide U.S. views on the 16 international instruments concerning terrorism and the principles that must underlie any resolution to the outstanding issues in the negotiations concerning a Comprehensive Convention on International Terrorism. The full text of the U.S. statement is available at *http://usun.state.gov/briefing/statements/2009/130436.htm*.

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. . . [T]he United States reiterates both our firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation, especially when they indiscriminately target and injure civilians. An unwavering and united effort by the international community is required if we are to succeed in preventing these heinous acts. In this respect, we recognize the United Nations' central role in coordinating the efforts by member states in countering terrorism and bolstering the ability of states to prevent terrorist acts. We express our firm support for these UN efforts.

Through the UN system, 16 international legal instruments have been completed. These instruments provide a thorough legal framework for cooperation among states directed toward prevention of terrorist acts and ensuring the prosecution and punishment of offenders, wherever found.

We note the ongoing efforts to further enhance this legal framework and promote full and effective implementation of the provisions of these instruments. We believe the four latest counter-terrorism instruments adopted in 2005—the Nuclear Terrorism Convention, the Amendment to the Convention on the Protection of Physical Nuclear Material, and the two Suppression of Unlawful Acts Protocols—are valuable additions to our collective efforts to combat terrorism.

We also note the recent meetings of the Legal Committee of the International Civil Aviation Organization to consider updates to the two civil aviation security Conventions—the 1970 Hague Convention and the 1971 Montreal Convention. We believe this international legal framework for countering terrorism must continue to be supported and developed, with states joining, implementing, and—where needed—refining these existing instruments.

The United States continues to support a Comprehensive Convention on International Terrorism that would strengthen this existing legal regime and reinforce the critical principle that no cause or grievance justifies terrorism in any form. We firmly believe that any successful resolution to the outstanding CCIT issues must be predicated on a shared and clear understanding of two fundamental principles:

- First, a comprehensive convention on terrorism cannot provide a carve-out for terrorist groups to claim their criminal acts are excluded from the scope of the CCIT in the name of national liberation, resistance to foreign occupation, or any other justification or motivation.

- Second, as with other recent counter-terrorism instruments, a comprehensive convention should not reach state military action, which is subject to other international legal regimes.

We continue to believe that the Coordinator's 2002 text best reflects these fundamental principles by incorporating text which 162 states have accepted in the Terrorist Bombings Convention. The text found in the Bombings Convention, as well as four other recent counter-terrorism instruments, was itself the subject of careful compromise. We are not persuaded that there are deficiencies with this text that need to be remedied. While we appreciate the efforts of those who have attempted to offer proposals to finalize the CCIT text, to date those proposals have not been supported by those who object to the Coordinator's 2002 text. We stand prepared to carefully consider any new proposal that is consistent with the fundamental principles we have outlined, and encourage other states to do likewise.

* * * *

c. U.S. actions against support for terrorists

(1) U.S. targeted sanctions implementing UN Security Council resolutions

As discussed in Chapter 16.A.2.b., the United States imposed targeted sanctions on five additional entities and 16 individuals during 2009 pursuant to Executive Order 13224. As discussed in Chapter 16.B.2., the Treasury Department's Office of Foreign Assets Control removed two entities and one individual from the Treasury Department's list of Specially Designated Nationals and Blocked Persons, where they had been placed as a result of their earlier designations under E.O. 13224.

(2) Foreign Terrorist Organizations

(i) New designations

In 2009 Secretary of State Hillary Rodham Clinton or Deputy Secretary James B. Steinberg designated three additional organizations as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Revolutionary Struggle ("RS") (74 Fed. Reg. 23,226 (May 18, 2009)), Kata'ib Hizballah ("KH") (74 Fed. Reg. 31,788 (July 2, 2009)), and al-Qa'ida in the Arabian Peninsula ("AQAP") (75 Fed. Reg. 2920 (Jan. 19, 2010)), along with their associated aliases. U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a

designated FTO. 18 U.S.C. § 2339B. *See www.state.gov/s/ct/rls/other/des/123085.htm* for background on the legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2009 the Secretary of State continued to review designations of entities as Foreign Terrorist Organizations ("FTOs"), determining that the designations of 12 organizations as FTOs, including Al-Qaeda, should remain in place and revoking the designation of one organization. As discussed in *Digest 2008* at 101-3, the reviews began in 2008 and were conducted consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act ("INA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. *See Digest 2005* at 113-16 for additional background on the IRTPA amendments.

Notably, on January 7, 2009, the Secretary determined that the FTO designation of the Mujahedin-e Khalq and its associated aliases ("MEK") should remain in place. In 2008 the People's Mojahedin Organization of Iran ("PMOI"), a designated alias of MEK, had submitted a petition requesting revocation of the designation. Section 219(a)(4)(B) of the INA permits an FTO to file a petition for revocation two years after its designation date (or in the case of a redesignated FTO, its most recent redesignation date) or two years after the date of the determination on its most recent petition for revocation. To provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different to warrant revocation. As explained in the Federal Register notice, the Secretary based her decision to deny the MEK's petition on a review of the administrative record, including the MEK's petition and related filings, and a conclusion that the facts that formed the basis for the organization's 2003 redesignation as an FTO had not changed in "in such a manner as to warrant revocation." 74 Fed. Reg. 1273 (Jan. 12, 2009). On September 8, 2009, the PMOI filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit under 8 U.S.C. § 1189(b), challenging the Secretary's final determination. *People's Mojahedin Org. of Iran v. Department of State*, No. 09-1059 (D.C. Cir.). On October 23, 2009, the United States filed its brief in response. The redacted, public copy of that brief is available at *www.state.gov/s/l/c8183.htm*.[*] For discussion of

[*] Editor's note: On July 16, 2010, the U.S. Court of Appeals for the D.C. Circuit issued a Per Curiam opinion, concluding "that the Secretary failed to accord the PMOI the due process protections outlined in our previous decisions" and remanding to the Secretary of State for further proceedings consistent with the opinion. *People's Mojahedin Org. of Iran v. Department of State*, 613 F.3d 220 (D.C. Cir. 2010).

previous litigation concerning MEK's designation as an FTO, see *Cumulative Digest 1991–99* at 483, *Digest 2001* at 109–17, and *Digest 2003* at 176–77.

On April 22, 2009, the Secretary revoked the FTO designation of Revolutionary Nuclei ("RN"). 74 Fed. Reg. 23,226 (May 18, 2009). The revocation was the first of its kind under the new review procedures.

(iii) FTO-related litigation

(A) Petition for review of Secretary's determination to retain FTO designation

See B.1.c.(2)(ii) *supra*.

(B) Litigation challenging U.S. material-support statute

On September 30, 2009, the U.S. Supreme Court granted and consolidated two petitions for certiorari in a case challenging the constitutionality of the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, that make it a criminal offense for any person within the United States or subject to U.S. jurisdiction "knowingly" to provide "material support or resources" to a designated foreign terrorist organization ("FTO"). *Holder v. Humanitarian Law Project*, 130 S. Ct. 534 (2009); *Humanitarian Law Project v. Holder*, 130 S. Ct. 534 (2009). The plaintiffs sought to provide money and other support for activities of the Kurdistan Worker's Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"), both of which are designated FTOs. For previous developments in the case, see *Digest 2004* at 125–26, *Digest 2005* at 124–28, *Digest 2006* at 180–82, and *Digest 2007* at 143–50. *See* Chapter 16.C.1.b. for discussion of litigation challenging the terrorism-related sanctions the United States imposes pursuant to Executive Order 13224 (2001).

The U.S. petition for certiorari argued that the Ninth Circuit had erred in finding parts of the statute unconstitutionally vague and that the decision warranted review especially "because the statute in question . . . is a vital part of the Nation's effort to fight international terrorism." In summarizing the government's views, the petition stated:

> The court of appeals held that three components of the statutory definition of material support—"training," "expert advice or assistance," and "service"—are unconstitutionally vague. That is incorrect. Each of those terms has an established meaning and is readily understandable by persons of ordinary intelligence. Because the statute provides fair notice of what is prohibited, it satisfies the requirements of the Due Process Clause.

> The court of appeals believed that the terms at issue are vague primarily because they could be construed to prohibit speech that is protected by the First Amendment. That conclusion rests on a confusion between the vagueness and overbreadth doctrines. The breadth of a statute, by itself, has nothing to do with whether the statute is vague. In any event, the statute in question regulates conduct, not speech, and does not violate the First Amendment in any of its applications. To the extent that there is any doubt about the statute's applicability to constitutionally protected advocacy, the court of appeals could have construed the statute to avoid any constitutional infirmity, and erred in failing to do so.

Excerpts below from the U.S. petition address the importance of the material-support statute to U.S. efforts to combat international terrorism and elaborate more fully the view that the statute does not violate the First Amendment and thus is not overbroad. (Citations to other submissions in the case and internal cross references are omitted.) The full text of the U.S. petition is available at *www.justice.gov/osg/briefs/2008/2pet/7pet/2008-1498.pet.aa.html*. The U.S. reply in opposition to the plaintiffs' conditional cross-petition for certiorari is available at *www.justice.gov/osg/briefs/2009/2pet/7pet/2008-1498.pet.rep.html*.[*]

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[A.] This Court's review is particularly appropriate in this case because the material-support statute is an important tool in the Nation's fight against international terrorism. Since 2001, the United States has charged approximately 120 defendants with violations of the material-support provision of 18 U.S.C. 2339B, and approximately 60 defendants have been convicted. Several of those prosecutions have involved the provision of "training," "expert advice or assistance, or "service"—the parts of the statute struck down by the court of appeals in this case. . . . And several of the cases have involved the provision of material support to the LTTE, one of the terrorist organizations at issue here. See, *e.g.*, *United States v. Osman*, No. 06-cr-00416-CCB-1 (D. Md.); *United States* v. *Sarachandran*, No. 06-cr-00615-RJD-1 (E.D.N.Y.); *United States v. Thavaraja*, No. 06-cr-00616-

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[*] Editor's note: On June 21, 2010, the Supreme Court issued a decision upholding the constitutionality of 18 U.S.C. § 2339B, affirming in part and reversing in part the Ninth Circuit's judgment and remanding the case. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). As to the plaintiffs' due process claims under the Fifth Amendment, the Court limited its decision to the specific activities at issue in the case and held that the statute was not vague as applied. With respect to the First Amendment claim, the Court likewise sustained the statute with respect to the support at issue as striking an appropriate balance between national security imperatives and free speech. *Digest 2010* will discuss relevant aspects of the Court's decision.

RJD-JO-1 (E.D.N.Y.). Many of those prosecutions potentially prevented substantial harm to the Nation.

When it enacted the material-support statute, Congress expressly found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." AEDPA § 301(a)(1) and (7), 110 Stat. 1247 (18 U.S.C. 2339B note) (emphasis added). "[T]he fungibility of financial resources and other types of material support" means that when individuals "supply funds, goods, or services to [a terrorist] organization" to "defray the cost to the terrorist organization of running * * * ostensibly legitimate activities," their contribution "frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 383, 104th Cong., 1st Sess. 81 (1995); see *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) ("Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities.") . . . . Accordingly, Congress has banned a broad range of material support—regardless of whether the terrorist group claims to engage in otherwise lawful activities, and regardless of whether the support is ostensibly given to assist those supposedly lawful activities.

The decision below seriously undermines the statutory scheme created by Congress to address the problem of international terrorism. Under the injunction affirmed by the court of appeals, respondents are free to provide "training," "expert advice or assistance," and "service"—of whatever kind—to the PKK and the LTTE, organizations that the Secretary of State has found to engage in terrorist activity that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). That result warrants correction by this Court.

* * * *

[B.3.] . . . Contrary to the view of the court of appeals, the statute does not restrict speech that is protected by the First Amendment.

a. Section 2339B is not aimed at speech. Instead, the statute is a regulation of conduct that, as the court below has previously recognized, serves a purpose unrelated to the content of any expression: "stopping aid to terrorist groups." And as a regulation of conduct that only incidentally restricts speech, Section 2339B easily survives review under the longstanding test set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)—*i.e.*, that the regulation be within the government's power; that it promote an important interest; that the interest be unrelated to suppressing free expression; and that the regulation restrict First Amendment rights no more than is necessary. As the court of appeals observed, the statute is within the Federal Government's authority to regulate the dealings of its citizens with foreign entities; it promotes an essential government interest "in preventing the spread of international terrorism"; it is aimed at stopping aid to terrorist groups rather than at suppressing expression; and it is reasonably tailored, especially considering the "wide latitude" given to the government in an area "bound up with foreign policy considerations" and considering Congress's conclusion that designated terrorist groups "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." *Humanitarian Law Project*, 205 F.3d at 1136 (internal quotation marks omitted); accord *United States v. Hammoud*, 381 F.3d 316, 329 (4th Cir. 2004) (en banc) ("Section 2339B satisfies all four prongs of the *O'Brien* test."), vacated on other grounds, 543 U.S. 1097 (2005), reinstated in relevant part, 405 F.3d 1034 (4th Cir. 2005).

The same analysis applies whether the material support takes the form of conduct or words, because the statute does not regulate the content of any expression, but only the act of knowingly giving material support. Nor does it matter, when the support takes the form of words, whether those words are intrinsically blameworthy (*e.g.*, training on how to build a bomb) or seemingly benign (*e.g.*, advice on international law, or on how to program a computer). In either instance, the statute's aim is not directed at the content of speech, but at the act of aiding deadly terrorist organizations. Accordingly, the prohibition does not contravene the First Amendment, as applied to plaintiffs' conduct or otherwise.

b. Because the statute does not violate the First Amendment in any of its applications, it follows *a fortiori* that it is not overbroad. To be overbroad, a statute must prohibit a "substantial" amount of protected expression, judged in absolute terms and in relation to the law's plainly legitimate sweep. [*Virginia v.*] *Hicks*, 539 U.S. [113,] 119–120 [(2003)]; see [*United States v.*] *Williams*, 128 S. Ct. [1830,] 1838 [(2008)]. Even if respondents could show some cases in which the statute would ban protected speech, those instances would not be "substantial" in absolute number, nor would they be "substantial" in relation to the numerous legitimate applications of the statute, such as prohibiting a person from training a terrorist organization on how to build a bomb, use a weapon, fly a plane, or launder money. See *Hicks*, 539 U.S. at 124 . . . .

c. The court of appeals drew a distinction between material support in the form of independent advocacy (which it held could not be prohibited consistent with the First Amendment), and material support provided directly to, or under the control of, a terrorist group (which can permissibly be banned). But the court failed to appreciate that the challenged terms—"training," "expert advice or assistance," and "service"—can easily be construed so as not to prohibit any independent advocacy, and thus so as not to offend the First Amendment even under the court of appeals' theory. . . .

All the terms at issue here imply a relationship to another person or entity. The ordinary meaning of "service," for example, is "an act done * * * at the command of another." *Webster's* 2075. One does not "serve" in the abstract; one serves someone or something. Similarly, "training," "advice," and "assistance" all assume an object—the person to whom or entity to which the training, advice, and assistance are rendered—and some collaboration or other relationship between the giver and the recipient of the type of aid in question. The terms are therefore naturally read, even if not inevitably read, to exclude independent advocacy.

Other parts of Section 2339B also support this interpretation. The key provision of the statute criminalizes only support provided "*to*" a foreign terrorist organization, 18 U.S.C. 2339A(b)(1), 2339B(a)(1) (emphasis added), which suggests that it prohibits only support that is given directly to a terrorist group or provided with some significant level of collaboration. A person who acts independently to advocate for a terrorist group would not commonly be considered to have knowingly provided something "to" that terrorist organization; if independent support were covered, Congress would have prohibited support "of " or "for" a terrorist group. And the scienter requirement ensures that the individual must knowingly provide support to an organization he or she knows is involved with terrorism, again implying a relationship other than independence between the two.

Accordingly, to the extent that Section 2339B's constitutionality turns on ensuring that its prohibitions do not bar independent advocacy, the statute can easily be construed in such a fashion. And a court would be obliged to adopt that construction if necessary to save the statute, not only under general principles of constitutional avoidance, but also under Congress's specific instruction

that the statute not "be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." 18 U.S.C. 2339B(i). . . .

* * * *

In its December 2009 brief on the merits, the United States addressed, among other things, the plaintiffs' claims that the statute's prohibitions on the provision of "personnel" or "expert advice or assistance" "derived from scientific [or] technical . . . knowledge" violate the First Amendment because they discriminate on the basis of content, are overbroad, and violate associational rights. Excerpts below provide U.S. views on why the term "personnel" in the statute is not unconstitutionally vague under the Fifth Amendment and why the statute does not violate the rights of association protected by the First Amendment. (Footnotes, citations to other submissions in the case, and citations to the Joint Appendix are omitted.) The full text of the U.S. brief is available at *www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1498.mer.aa.html*.

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[I.A.3.]a. Petitioners argue that the term "personnel" is unconstitutionally vague. The court of appeals correctly rejected that argument. . . . [C]onviction under that provision requires a defendant to knowingly provide one or more persons to work under or to supervise a terrorist organization. If an individual acts independently of the organization, he cannot be held liable.

A person of ordinary intelligence would easily understand the statute's distinction between concerted and independent action. . . . Just as, for instance, an ordinary person understands the difference between "concerted effort by more than one entity to fix prices or otherwise restrain trade" and "independent activity by a single entity," *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986), so too he will understand the difference between acting under a foreign terrorist organization's "direction or control" and acting on his own. Indeed, the definition of "personnel" is not significantly different from terms used in other federal statutes that impose criminal liability on persons who act under another's direction or control, see, *e.g.*, 18 U.S.C. 175b(d)(2)(G); 18 U.S.C. 951(d), or on those who manage, supervise, or organize an operation or individual, see, *e.g.*, 18 U.S.C. 225(a)(1); 18 U.S.C. 1169(b)(1); 18 U.S.C. 1960(a).

For that reason, courts have held since IRTPA's enactment that the term "personnel" is not unconstitutionally vague as applied to criminal defendants' intended support to foreign terrorist organizations. See *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 182 (E.D.N.Y. 2008) ("[I]t is clear that the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it also provides explicit standards for those applying it."); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1017–1018 (D. Minn. 2008); *United States v. Shah*, 474 F. Supp. 2d 492, 497 (S.D.N.Y. 2007); *United States v. Awan*, 459 F. Supp. 2d 167, 177–181 (E.D.N.Y. 2006); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1063–1068 (N.D. Ill. 2005); cf. *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (pre-IRTPA); *United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002) (same).

b. Petitioners argue that "direction or control" could "mean many things of potential, but uncertain, applicability." But the statute is not vague simply because some cases may present a

close question as to whether a person is acting independently. That question is no more than a factual issue to be resolved by the jury in a particular case. . . .

. . . The vagueness doctrine steps in only when a question is indeterminate, not when the known facts make an intelligible question difficult to answer.

c. In any event, any vagueness at the margins of the term "personnel" would not help petitioners. They say that they seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * * write and distribute publications supportive of the PKK and the cause of Kurdish liberation; * * * advocate for the freedom of political prisoners in Turkey * * * ; and * * * assist PKK members at peace conferences and other meetings." Of course, petitioners could conduct all but the last of those listed activities "entirely independently" of the PKK and LTTE, 18 U.S.C. 2339B(h), in which case their conduct would not be criminal. But petitioners do not wish to do so: they sought to enjoin enforcement of the term "personnel" so that they could coordinate those activities with, and carry them out under the direction and control of, the PKK and LTTE. Because those proposed coordinated activities clearly fall within the statutory definition of "personnel," the court of appeals properly rejected petitioners' as-applied challenge.

* * * *

[II. C.] . . . [T]he court of appeals properly rejected petitioners' argument that the material-support statute targets association protected under the First Amendment: "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Petitioners] are even free to praise the groups for using terrorism as a means of achieving their ends. What [the statute] prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions." *Humanitarian Law Project*, 205 F.3d at 1133; see *Hammoud*, 381 F.3d at 329 ("Hammoud's argument fails because § 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated [foreign terrorist organization].").

Indeed, Congress took special care not to infringe upon associational rights. Recognizing that "[t]he First Amendment protects one's right to associate with groups that are involved in both legal and illegal activities," *1995 House Report* 43, Congress observed that the statutory ban "only affects one's contribution of financial or material resources" because "[t]he First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities," *id.* at 44. Congress made clear, however, that "[t]hose inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of the foreign organizations." *Id.* at 45. Accordingly, "[t]he basic protection of free association afforded individuals under the First Amendment remains in place." *Id.* at 44.

Petitioners cite a number of cases involving attempts to attach civil or criminal sanctions to membership in the Communist Party. Those cases hold that attaching liability to membership in an organization requires proof of specific intent to further that group's unlawful (rather than its lawful) activities. See *United States v. Robel*, 389 U.S. 258, 262, 265–266 (1967); *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 609–610 (1967); *Noto v. United States*, 367 U.S. 290, 299–300 (1961). But that specific intent requirement applies only when "liability [is] imposed by reason of association alone." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Here, Section 2339B does not prevent petitioners from becoming members of the PKK and

LTTE or impose any sanction on them for doing so. The provision sanctions an entirely different activity, which need not and often does not have any relation to membership.

Petitioners rely extensively on *De Jonge v. Oregon*, 299 U.S. 353 (1937), which set aside a state criminal conviction "for merely assisting at a meeting called by the Communist Party at which nothing unlawful was done or advocated." *Id.* at 357. But the only assistance involved in that case was advocacy of the Communist Party and its views. As this Court explained, "peaceable assembly for lawful discussion cannot be made a crime." *Id.* at 365. Section 2339B is fully consistent with this principle: it does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.

Finally, petitioners argue, in reliance on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), and *Elrod v. Burns*, 427 U.S. 347 (1976), that Section 2339B directly regulates expressive association. In *Dale*, this Court found that the Boy Scouts of America was "an expressive association" and that a statute forbidding its exclusion of gays and lesbians would "significantly affect its expression." 530 U.S. at 656. The Court therefore concluded that the statute "directly and immediately affect[ed] associational rights," requiring the application of strict scrutiny. *Id.* at 659 . . . . By contrast, Section 2339B does not regulate the membership of any organization, expressive or otherwise. Nor does Section 2339B compel any organization to convey a message at odds with its fundamental beliefs, as did the statute in *Dale*. See 530 U.S. at 653–654. Section 2339B prohibits only the provision of aid to terrorists, and to the extent it burdens associational rights at all, it does so only incidentally.

* * * *

d. Maritime counterterrorism efforts

Section 70108 of the Maritime Transportation Security Act of 2002 ("MTSA"), Pub. L. No. 107-295, 116 Stat. 2066, requires the Secretary of Homeland Security to assess the effectiveness of foreign ports' antiterrorism measures. Section 70110 of the MTSA authorizes the imposition of conditions of entry on vessels arriving from or carrying cargo or passengers originating from or transshipped through any port that the Secretary of Homeland Security has determined "does not maintain effective antiterrorism measures." In 2009 the Coast Guard determined that Venezuela, the Republic of Congo (with the exception of the Djeno Oil Terminal), and Madagascar were not maintaining effective counterterrorism measures. As a result, the Coast Guard imposed conditions of entry on vessels that have visited the three states' ports during their last five ports of call. 74 Fed. Reg. 3092 (Jan. 16, 2009); 74 Fed. Reg. 45,230 (Sept. 1, 2009); 74 Fed. Reg. 60,283 (Nov. 20, 2009). The Coast Guard's previous determinations with respect to Cambodia, Cameroon, Cuba, Equatorial Guinea, Guinea-Bissau, Indonesia, Iran, Liberia, Mauritania, and Syria remained in effect throughout 2009. *See Digest 2008* at 111-12 for additional background.

e. U.S.–EU agreement on sharing financial transaction information

On November 30, 2009, the United States and the European Union concluded the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme ("TFTP agreement"). The TFTP agreement obligated the European Union to ensure that companies in EU territory, which are identified in an annex to the agreement, provide the U.S. Treasury Department with certain financial transaction messaging data for the purposes of investigating, preventing, detecting, and prosecuting terrorism and financing of terrorism through the U.S. Terrorist Finance Tracking Program ("TFTP"). The agreement also required U.S. agencies to provide privacy safeguards to any transferred data.

By its terms, the TFTP agreement was an interim one, with a one-year duration.[*] It replaced a non-legally binding arrangement on financial transaction information sharing that the Treasury Department signed with the European Union in 2007. For background on the 2007 arrangement, see *Digest 2007* at 160–61 and 72 Fed. Reg. 60,054 (Oct. 23, 2007). The 2009 agreement became necessary after the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), a Belgian company that operates a global messaging system for transmitting financial transaction data, decided to relocate much of the information it had stored in the United States to Europe.

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[*] Editor's note: The interim agreement was applied provisionally beginning on February 1, 2010, in accordance with its terms. On February 11, 2010, however, the European Parliament refused to consent to it. Article 218(6) of the Treaty on the Functioning of the European Union, part of the Treaty of Lisbon, which entered into force on December 1, 2009, requires that the Council may "conclude" (i.e., definitively enter into) an international agreement only after obtaining the consent of the Parliament. The Parliament's refusal to grant consent thus resulted in the European Union's terminating provisional application of the interim agreement with the United States. The Council and Commission nonetheless expressed their interest in negotiating a long-term agreement with the United States concerning the sharing of financial transaction information. A new agreement on the processing and transfer of financial messaging data from the European Union to the United States for purposes of the TFTP was signed at Brussels on June 28, 2010, and entered into force on August 1, 2010.

2. Narcotrafficking

a. Majors List certification process

(1) International Narcotics Control Strategy Report

On March 1, 2009, the Department of State released the 2009 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report described the efforts of key countries to attack all aspects of the international drug trade in Calendar Year 2008. Volume I covered drug and chemical control activities and Volume II covered money laundering and financial crimes. The report is available at *www.state.gov/p/inl/rls/nrcrpt/2009/index.htm*.

(2) Major drug transit or illicit drug producing countries

On September 15, 2009, President Obama issued Presidential Determination 2009-30, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2010." Daily Comp. Pres. Docs., 2009 DCPD No. 00728, pp. 1-4. In this annual determination, the President named Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international obligations in fighting narcotrafficking. Simultaneously, the President determined that "support for programs to aid Venezuela's democratic institutions and continued support for bilateral programs in Bolivia are vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2010 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424. As a result of the President's designations, Burma remained ineligible during fiscal year 2010 for most types of U.S. assistance.

b. Interdiction assistance

During 2009 President Obama again certified, with respect to Colombia (74 Fed. Reg. 42,573 (Aug. 24, 2009)) and Brazil (74 Fed. Reg. 54,429 (Oct. 22, 2009)), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary

because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–2294, following a thorough interagency review. Background on § 1012 is available in *Digest 2008* at 114.

c. Merida Initiative

In 2009 the United States entered into international agreements with Honduras, El Salvador, Guatemala, Belize, Panama, Nicaragua, Costa Rica, and the Dominican Republic to implement the Merida Initiative, a multi-year effort to counter illicit drugs, trafficking in arms and persons, and organized crime. A State Department fact sheet, excerpted below and issued June 23, 2009, provided additional details on the Merida Initiative. The full text is available at *www.state.gov/p/inl/rls/fs/122397.htm*.

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The Merida Initiative is a multi-year program to provide equipment and training to support law enforcement operations and technical assistance for long-term reform and oversight of security agencies. In 2008, Congress approved an initial $400 million for Mexico and $65 million for Central America, the Dominican Republic, and Haiti. In 2009, Congress approved $300 million for Mexico and $110 million for Central America, the Dominican Republic, and Haiti. In 2010, $450 million for Mexico and $100 million for Central America has been requested from Congress.

* * * *

The Merida Initiative will provide funding for:

- Non-intrusive inspection equipment, ion scanners and canine units for Mexico and Central America to interdict trafficked drugs, arms, cash, and persons.
- Technologies to improve and secure communications systems that collect criminal information in Mexico.
- Technical advice and training to strengthen the institutions of justice—vetting for the new police force, case management software to track investigations through the system, new offices of citizen complaints and professional responsibility, and witness protection programs to Mexico.
- Helicopters and surveillance aircraft to support interdiction activities and rapid response of law enforcement agencies to Mexico.

- Equipment, training, and community action programs in Central American countries to implement anti-gang measures and expand the reach of these measures.

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d. Sanctions

Chapter 16.A.6. discusses the narcotics-related sanctions the United States imposed in 2009, and Chapter 16.B.6. discusses modifications the United States made to its narcotics-related sanctions in 2009.

3. Trafficking in Persons

On June 16, 2009, the Department of State released the 2009 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covered the period April 2008 through March 2009, evaluated the anti-trafficking efforts of a greater number of countries (175) than in past years, and focused on the problem of forced labor in greater detail than previous reports. Through the report, the Department designated applicable countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 in relation to their efforts to comply with the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The report listed 17 countries as Tier 3 countries, making them subject to sanctions in the absence of a Presidential waiver. *See* Chapter 16.A.7.b. for discussion of the U.S. sanctions imposed in 2009 pursuant to the TVPA. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115-17. The full report is available at *www.state.gov/g/tip/rls/tiprpt/2009/*, and Secretary Clinton's remarks at the release of the report are available at *www.state.gov/secretary/rm/2009a/06/124872.htm*.

4. Money Laundering

On November 16, 2009, the U.S. Department of the Treasury's Financial Crimes Enforcement Network issued a notice of proposed rulemaking to expand its special information procedures to deter terrorism and money laundering. 74 Fed. Reg. 58,926 (Nov. 16, 2009). Among other things, the proposed amendments would permit certain foreign law enforcement agencies to request information from financial institutions. Excerpts below

from the preamble to the proposed rule explain the statutory framework and the proposed regulatory provisions relating to foreign law enforcement agencies (footnotes omitted).[*]

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On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT ACT") Act of 2001, Public Law 107-56 ("the Act"). Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act, codified at 12 U.S.C. 1829b and 1951–1959 and 31 U.S.C. 5311–5314 and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR part 103. The authority of the Secretary of the Treasury ("the Secretary") to administer the BSA has been delegated to the Director of FinCEN.

Of the Act's many goals, the facilitation of information sharing among governmental entities and financial institutions for the purpose of combating terrorism and money laundering is of paramount importance. Section 314 of the Act furthers this goal by providing for the sharing of information between the government and financial institutions, and among financial institutions themselves. As with many other provisions of the Act, Congress has charged the U.S. Department of the Treasury with developing regulations to implement these information-sharing provisions.

Subsection 314(a) of the Act states in part that:

> [t]he Secretary shall * * * adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.

B. Overview of the Current Regulatory Provisions Regarding the 314(a) Program

On September 26, 2002, FinCEN published a final rule implementing the authority contained in section 314(a) of the Act. That rule ("the 314(a) rule") allows FinCEN to require U.S. financial institutions to search their records to determine whether they have maintained an account or conducted a transaction with a person that a Federal law enforcement agency has certified is suspected based on credible evidence of engaging in terrorist activity or money laundering. Before processing a request from a Federal law enforcement agency, FinCEN also requires the requesting agency to certify that, in the case of money laundering, the matter is significant, and that the requesting agency has been unable to locate the information sought through traditional methods of investigation and analysis before attempting to use this authority ("the 314(a) program").

Since its inception, the 314(a) program has yielded significant investigative benefits to Federal law enforcement users in terrorist financing and major money laundering cases. . . .

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[*] Editor's note: On February 10, 2010, FinCEN published a final rule that adopted the proposed amendments. 75 Fed. Reg. 6560 (Feb. 10, 2010).

C. Objectives of Proposed Changes

a. Allowing Certain Foreign Law Enforcement Agencies To Initiate 314(a) Queries

In order to satisfy the United States' treaty obligation with certain foreign governments, FinCEN is proposing to extend the use of the 314(a) program to include foreign law enforcement agencies. . . . The U.S.–EU MLAT and all twenty-seven [related] bilateral instruments were ratified by the President on September 23, 2008, upon the advice and consent of the U.S. Senate. [Editor's note: *See* A.1. *supra* for discussion of the U.S.–EU Mutual Legal Assistance Agreement and related bilateral instruments.]

Article 4 of the U.S.–EU MLAT (entitled "Identification of Bank Information") obligates a requested Signatory State to search on a centralized basis for bank accounts within its territory that may be important to a criminal investigation in the requesting Signatory State. Article 4 also contemplates that Signatory States may search for information in the possession of a non-bank financial institution. Under Article 4, a Signatory State receiving a request may limit the scope of its obligation to provide assistance to terrorist activity and money laundering offenses, and many did so in their respective bilateral instruments with the United States. In addition, Article 4 makes clear that the United States and the EU are under an obligation to ensure that the application of Article 4 does not impose extraordinary burdens on States that receive search requests. Certain EU States are expected to accommodate search requests from the United States by querying a single centralized database which identifies all bank accounts within that State. In negotiating the terms of Article 4, the United States expressly envisioned that EU member States would be able to access the information sharing process created by the implementation of section 314(a) of the Act. Expanding that process to include certain foreign law enforcement requesters would greatly benefit the United States by granting law enforcement agencies in the United States with reciprocal rights to obtain information about matching accounts in EU member States.

Foreign law enforcement agencies would be able to use the 314(a) program in a way analogous to how Federal criminal law enforcement agencies currently access the program. Thus, a foreign law enforcement agency, prior to initiating a 314(a) query, would have to certify that, in the case of a money laundering investigation, the matter is significant, and that it has been unable to locate the information sought through traditional methods of investigation and analysis before attempting to use the 314(a) program. FinCEN also anticipates that the foreign request will be screened initially by a Federal law enforcement official serving as an attaché to the requesting jurisdiction. The application of these internal procedures will help ensure that the 314(a) program is utilized only in significant situations, thereby minimizing the cost on reporting financial institutions.

* * * *

5. Corruption

On November 7, 2009, Attorney General Eric Holder addressed the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar. In his speech, excerpted below, Attorney General Holder suggested three steps countries should take to combat corruption. Attorney General Holder's remarks are available in full at *www.justice.gov/ag/speeches/2009/ag-speech-091107.html*. *See also*

the U.S. statement to the 18th Commission on Crime Prevention and Criminal Justice, available at *http://vienna.usmission.gov/041609cc.html*.

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* * * *

First, we must renew our efforts for ratification and full implementation of the UN Convention Against Corruption. Seven years after it opened for signature, several of the world's largest economies—including several of our close partners in the G-20—still have not ratified the Convention. Still others that have ratified have not fully implemented the Convention. We again call upon all countries to join and implement the Convention.

And all of us who already are parties to the Convention must put in place an effective, transparent, and inclusive review mechanism. That is the critical question that we face this coming week in the Conference of States Parties. We will have failed our Governments and more importantly our peoples if we do not produce a review mechanism that is itself transparent and inclusive, and that allows our experts to have a candid dialogue about each nation's anti-corruption efforts. I urge the delegations to dedicate themselves to achieving this goal.

Second, we must work together to ensure that corrupt officials do not retain the illicit proceeds of their corruption. . . .

In response to this ongoing challenge, I stand before you to announce a redoubled commitment on behalf of the United States Department of Justice to recover such funds. Indeed, we have scored successes in this regard already. Through enforcement of our asset forfeiture laws, and in close cooperation with our law enforcement partners in other countries, the United States was able to repatriate more than $20 million to the nation of Peru that was looted during the government of Alberto Fujimori and Vladimiro Montesinos—and we have assisted in the repatriation of tens of millions of dollars more. We likewise have forfeited and repatriated more than $100 million to Italy that constituted proceeds of corruption in the judiciary, and have repatriated several million dollars to the Government of Nicaragua traceable to the illicit conduct of the administration of Arnoldo Aleman.

But we—both the United States and all countries here—need to do more. It is only with a truly international and cooperative response that we will be able to achieve success in recovering the proceeds of corruption. Asset recovery requires the dedication and expertise of investigators and prosecutors in both the country victimized by the corrupt acts and in those countries in which corruption proceeds have been secreted. In that regard, with support from the U.S. Department of State, we will continue and expand our Asset Recovery Mentor Program piloted earlier this year, and—as called for in the Leaders' Statement at the G-20 Summit in Pittsburgh, we will work with the World Bank's Stolen Assets Recovery Program, and with the Financial Action Task Force. I challenge all of my colleagues here today similarly to commit to concerted action in support of asset recovery.

Third, countries must end official impunity with regard to corruption. In a number of countries, immunity for actions of public officials, judges, and parliamentarians has been broadly adopted, often for the legitimate reason of affording officials protection from politically motivated prosecutions. In too many places, however, public officials are given blanket immunity from investigation and prosecution for any action, even where the conduct involves public corruption. In such places, immunity becomes impunity. This cannot stand.

Let me be clear: Swift and effective prosecution of corrupt public officials must be at the core of our broader effort to end corruption. . . .

* * * *

. . . We must vigorously enforce our own laws that prohibit bribery of foreign officials, such as, in the United States, the Foreign Corrupt Practices Act. And we must work together to support our partners in anti-corruption enforcement, and expose all efforts to undermine the effectiveness of anti-corruption initiatives. Together, we can make a difference.

* * * *

As Attorney General Holder discussed at the VI Ministerial Global Forum in Doha, asset forfeiture is an important tool the United States uses to combat corruption. On September 2, 2009, for example, the U.S. Department of Justice announced the transfer to Peru of more than $750,000 in forfeited funds that a Peruvian national had embezzled from the Peruvian government. The Department of Justice's press statement, excerpted below, explained that the United States had acted at the request of and in cooperation with Peruvian law enforcement authorities. The full text of the statement is available at *www.justice.gov/opa/pr/2009/September/09-crm-909.html*.

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The forfeited funds were taken from the private account of Marco Antonio Rodriguez Huerta, a former Peruvian Army General, who was also on the board of directors of the Peruvian Military and Police Pension Fund in 1996. According to court documents, by abusing those positions, Rodriguez Huerta was able to divert funds intended for use as retirement benefits for retired military and police officers into fraudulent real estate investments. These diverted funds were then transferred into the private accounts of Rodriguez Huerta and other high officials of the Peruvian government. According to court documents, Rodriguez Huerta and his associates utilized banking institutions in the United States to hide their illicit profits from the Peruvian government. For these crimes and other illegal activities, Rodriguez Huerta was arrested and convicted by Peruvian authorities in 2002, and sentenced to 15 years in prison in Peru.

* * * *

In August 2004, the Peruvian government requested ICE assistance in identifying Rodriguez Huerta's assets in the United States which resulted in ICE agents in Miami initiating an asset forfeiture investigation. In December 2004, the U.S. government filed a civil complaint in the Southern District of Florida, and seized three bank accounts under the control of Rodriguez Huerta. Subsequently, the U.S. District Court for the Southern District of Florida issued a final order of forfeiture of these seized funds in 2005.

In May 2008, the government of Peru submitted a petition for remission of the forfeited funds to the U.S. Department of Justice. As a result of the cooperation between the governments of Peru and the United States, the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS) has approved the repatriation of more than $750,000 to the Peruvian government and the Peruvian pension fund.

* * * *

6. Genocide

On December 22, 2009, President Obama signed into law the Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3480. The act amended the federal crime of genocide, 18 U.S.C. § 1091, to cover any person who attempts or conspires to commit an offense described in § 1091. It also expanded jurisdiction over the crime to include offenses, regardless of where they are committed, that are committed by offenders who are nationals or lawful permanent residents of the United States, stateless persons whose habitual residence is the United States, or who are present in the United States, as well as offenses that occur in whole or in part within the United States. Previously, jurisdiction over the crime was limited to offenses committed within the United States, regardless of the perpetrator's nationality, and to offenses committed extraterritorially by U.S. nationals. The act also criminalized the provision of material support for genocide and recruitment of child soldiers.

7. Piracy

On July 9, 2009, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, made a statement during a Security Council debate concerning Somalia. Ambassador Rice stressed the importance of prosecuting suspected pirates, stating:

> The international response to the piracy problem has been impressive. But we still face significant legal, logistical, and political problems over one key component of an effective deterrence strategy: that is, the prosecution of suspected pirates. My government believes that states victimized or affected by piracy bear the primary responsibility for prosecuting pirates. These states must step up and shoulder their share of the burden of the prosecutions, as France, the Netherlands, and others have done. In the rare cases in which a state truly cannot prosecute, we applaud the willingness of regional states, such as Kenya, to let themselves be considered as alternative venues. But in such cases, we believe the affected states should be responsible for helping defray the trials' costs.

The full text of the statement is available at *http://usun.state.gov/briefing/statements/2009/july/125867.htm*. For additional discussion of U.S. initiatives in 2009 to counter piracy off the coast of Somalia, see Chapter 12.A.4.

On May 19, 2009, the U.S. Attorney for the Southern District of New York indicted Abduwali Abddukhadir Musé for allegedly participating in the hijacking of the *Maersk Alabama* container ship on April 8, 2009, and taking the ship's captain hostage. The indictment charged Musé with piracy, as well as other offenses, including charges under the U.S. implementing legislation for the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention"), 18 U.S.C. § 2280. A press release issued by the U.S. Attorney's Office on May 19, excerpted below, provided additional background (footnotes omitted). The full text of the press release is available at *www.justice.gov/usao/nys/pressreleases/May09/museabduwaliabdukhadirindictmentpr.pdf*.*

. . . MUSE was taken into custody by the United States Navy on April 12, 2009, while at sea in the Indian Ocean. On April 20, 2009, MUSE was transferred from the custody of the United States Navy to the FBI for transport to the Southern District of New York. On April 21, 2009, following a hearing held before United States Magistrate Judge ANDREW J. PECK at the time of MUSE's presentment on the Complaint in this matter, Magistrate Judge PECK found that MUSE was over 18 years old and could be prosecuted as an adult.

The Indictment filed today in Manhattan federal court charges MUSE with the following offenses:

> . . . Piracy under the law of nations . . .
> . . . Seizing a ship by force . . .
> . . . Conspiracy to seize a ship by force . . .
> . . . Possession of a machinegun during and in relation to seizing a ship by force . . .
> . . . Hostage taking . . .
> . . . Conspiracy to commit hostage taking . . .
> . . . Possession of a machinegun during and in relation to hostage taking . . .
> . . . Kidnapping . . .
> . . . Conspiracy to commit kidnapping . . .
> . . . Possession of a machinegun during and in relation to kidnapping . . .

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* Editor's note: On May 18, 2010, Musé pled guilty to felony counts of hijacking maritime vessels, hostage taking, and kidnapping in the U.S. District Court for the Southern District of New York. *See http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo051810c.htm*.

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. International Criminal Court

a. Address to Assembly of States Parties to the Rome Statute

The United States participated for the first time as an observer in the Eighth Session of the Assembly of States Parties to the Rome Statute, held in The Hague, the Netherlands, November 12–26, 2009. On November 19, 2009, Stephen J. Rapp, Ambassador at Large for War Crimes Issues, addressed the Assembly of States Parties on behalf of the U.S. delegation. In his statement, excerpted below, Ambassador Rapp discussed U.S. efforts to support accountability and end impunity and outlined U.S. concerns about the States Parties' consideration of whether to amend the Rome Statute to incorporate a definition of the crime of aggression. Ambassador Rapp's statement is available in full at *www.state.gov/s/wci/us_releases/remarks/133316.htm*.

. . . It is a pleasure to address you on behalf of the US Delegation, which for the first time is attending a meeting of the Assembly of States Parties as an Observer. Although we have not joined previous meetings of the Assembly, we have not been silent in the face of crimes against the basic code of humanity, crimes that call for condemnation in the strongest possible way. Far from it: We have worked shoulder to shoulder with other states to support accountability and end impunity for hauntingly brutal crimes in the former Yugoslavia, Rwanda, and elsewhere. With special urgency today, we are working to end the impunity that has fostered intolerable crimes of sexual violence in the Democratic Republic of Congo and other countries. As a former prosecutor with the International Criminal Tribunal for Rwanda and former Chief Prosecutor for the Special Court for Sierra Leone, I am especially proud of my country's historic role in demanding justice for those who survived soul-shattering violence in their own countries—and for those who did not survive.

In recent years, we have seen extraordinary achievements of international criminal tribunals. Through their work, these tribunals have not only answered horrific crimes with historic justice, but they have done something of equal importance: they helped foster an expectation among victims that justice would be delivered at home, too, and not just in an international court. We have watched this process play out in several countries and have a deep appreciation of the role that institutions of international justice can play in helping restore accountability and the rule of law to states struggling to emerge from lawless violence. Certainly, the US Government places the greatest importance on assisting countries where the rule of law has been shattered to stand up their own system of protection and accountability—to enhance their capacity to ensure justice at home.

At the same time, the United States recognizes that there are certain times when justice will be found only when the international community unites in ensuring it, and we have been steadfast in our encouragement for action when the situation demands it. It was with this principle in mind that the United States has encouraged the investigation of the situation in Darfur. In short, the commitment of the Obama Administration to the rule of law and the principle of accountability is firm, in line with my country's historic tradition of support for international criminal justice that has been a hallmark of United States policy dating back at least to the time of Nuremberg.

Having been absent from previous rounds of these meetings, much of what we will do here is listen and learn. Our presence at this meeting, and the contacts that our delegates will seek with as many of you as possible, reflects our interest in gaining a better understanding of the issues being considered here and the workings of the Court.

That said, I would be remiss not to share with you my country's concerns about an issue pending before this body to which we attach particular importance: the definition of the crime of aggression, which is to be addressed at the Review Conference in Kampala next year. The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.

Although we respect the hard work that has been done in this area by the Assembly of States Parties, we also share the concern that many of you have expressed about the need to address this issue, above all, with extreme care, and the Court itself has an interest in not being drawn into a political thicket that could threaten its perceived impartiality.

In more than eight years as an international prosecutor I have seen how challenging it can be to try persons alleged to bear the greatest responsibility for crimes that shock the universal conscience—those intentionally targeting civilians and other noncombatants. So much remains to be done to achieve justice for the victims of genocide, war crimes, and crimes against humanity. We must not fail them.

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b. Darfur: Issuance of arrest warrant for Sudanese President Bashir

On March 4, 2009, the International Criminal Court ("ICC") issued an arrest warrant for Sudanese President Omar al-Bashir. On the same day, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, issued a statement supporting the ICC's action. Ambassador Rice's statement is set forth below and is also available at *http://usun.state.gov/briefing/statements/2009/march/126539.htm*.

The United States supports the International Criminal Court's (ICC) actions to hold accountable those responsible for the heinous crimes in Darfur. We remain determined in our pursuit of both peace and justice in Sudan. The people of Sudan have suffered too much for too long, and an end to their anguish will not come easily. Those who committed atrocities in Sudan, including genocide, should be brought to justice. U.N. Security Council Resolution 1593, which referred the crimes in Darfur to the ICC, requires the Government of Sudan and all other parties to the conflict to cooperate fully with the ICC and its prosecutor and urges all states and concerned regional organizations to cooperate fully.

The United States expects restraint from all involved—the Government of Sudan, armed rebel groups, and others. No one should use the ICC's decision as a pretext to incite or launch

violence against civilians or international personnel. The safety and security of all civilians, international personnel, and UN and African Union peacekeepers in Sudan must be respected. We will continue to work with all parties for the full implementation of the Comprehensive Peace Agreement to bring an end to the conflict between North and South Sudan. The U.S. urges all parties to engage seriously with the Joint Chief Mediator of the UN and the African Union, Djibril Bassole, as he works to halt the hostilities in Darfur and to forge a political settlement that will bring lasting peace, justice, and security to the people of Darfur.

2. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Statement to Security Council

On December 3, 2009, Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, addressed the Security Council on the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Ambassador DiCarlo's remarks, excerpted below, are available in full at *http://usun.state.gov/briefing/statements/2009/133107.htm*.

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Mr. President, the United States believes it is important to create a residual mechanism to manage the necessary functions of the Tribunals after the completion of their pending trials and appeals. . . .

Mr. President, we must remember why the tribunals were established—to identify and hold accountable those responsible for some of history's worst crimes. We must not lose sight of the historic importance of this task, and we must work to establish residual mechanisms that do not allow the 13 outstanding ICTY and ICTR fugitives to escape justice.

Individuals indicted by the Tribunals who remain at large must be apprehended and brought to justice without further delay. We call on all states to fulfill their legal obligations to cooperate with the Tribunals and to take the necessary steps to ensure that the remaining fugitives are apprehended.

In particular, let me underscore the need to reinforce efforts to bring the ICTR fugitive Felicien Kabuga to face international justice. We are concerned that the Government of Kenya has not responded to the Tribunal's requests for certain government records relating to Kabuga's assets and has not provided details to support the claim that Kabuga has left Kenya. We urge Kenya to act immediately on the Tribunal's recommendations and to take effective steps to deny Kabuga access to his support networks.

The United States acknowledges Rwanda's desire to receive transferred cases from the ICTR. We commend the Prosecutor's support for that effort, as well as the work by the Rwandan government and others to build up capacity in the Rwandan legal system to make such transfers possible. We welcome the transfer last month of eight individuals convicted by the Special Court of Sierra Leone to Mpanga prison in Rwanda—an achievement that highlights Rwanda's growing capacity and commitment to meeting international standards. The ICTR's ability to transfer cases to Rwanda and other states as appropriate is a critical step toward meeting the Tribunal's completion strategy.

Mr. President, the United States commends states' efforts to cooperate with the ICTY, but vital duties remain unmet. The two remaining fugitives Ratko Mladic and Goran Hadzic must be arrested and transferred to the Tribunal to face justice.

Cooperation with the ICTY remains a fundamental obligation for all states in the region. We commend the Government of Serbia for its improved cooperation, and we urge it to continue to do everything in its power to locate, arrest, and transfer Mladic to the Tribunal. The arrests of Mladic and Hadzic are important for the successful completion of ICTY's mandate, for Serbia's full Euro-Atlantic integration, and for the cause of justice and accountability.

Regarding Croatia, we welcome Croatia's efforts to respond to the Trial Chamber's September 2008 order to deliver artillery documentation from Operation Storm or engage in a credible investigation into its fate. We believe that the Government of Croatia's latest, ongoing investigation and establishment of a Task Force are significant steps forward in Croatia's cooperation with the ICTY. At the same time, we encourage the Croatian authorities to explore additional measures, such as using outside expertise and more aggressive investigative techniques that might help recover additional documents.

Mr. President, Bosnia-Herzegovina has made great strides to cooperate with the Tribunal and ICTY has done a commendable job in supporting the development of domestic courts. But last month the High Representative for Bosnia-Herzegovina informed us that domestic war crimes prosecutions and reform of the justice sector have suffered due to the inability of leaders to reach political decisions that advance national goals. We note the critically important work that international judges are doing in that country and support the extension of their mandates beyond December. International judges and prosecutors have worked tirelessly to bring justice to the victims, regardless of ethnicity.

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b. International Criminal Tribunal for the Former Yugoslavia: Prosecution of Radovan Karadzic

(1) Alleged immunity agreement

In July 2008 the Serbian government arrested Radovan Karadzic, former leader of the Bosnian Serbs, and transferred him to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") to face charges of genocide and crimes against humanity. On May 25, 2009, Karadzic filed a motion before the ICTY Trial Chamber, arguing that the ICTY should dismiss his indictment because, as he claimed, in 1996 Ambassador Richard Holbrooke promised him immunity from prosecution in exchange for withdrawing from public life. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, ICTY. The United States has repeatedly made clear that no such agreement was made. A press statement issued by the Department of State's Office of the Spokesman on June 25 explained the position of the United States. The statement, excerpted below, is available in full at *www.state.gov/r/pa/prs/ps/2009/06a/125410.htm*.

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The United States is aware of [Mr. Karadzic's] allegation and repeatedly has made clear that no agreement ever was made to provide Radovan Karadzic immunity from prosecution. Neither Ambassador Holbrooke nor any United States official was in a position to offer Dr. Karadzic such immunity, and no such offer was made. Dr. Karadzic did sign a statement, the text of which was negotiated in Belgrade on July 18, 1996, by Ambassador Holbrooke and a team of United States government officials with senior Serbian officials at a meeting where Dr. Karadzic was not present. In this statement, Dr. Karadzic pledged to leave office and withdraw from public life. There was no "quid pro quo".

As part of an ongoing commitment to assist the work of the ICTY, the United States regularly provides information to both prosecution and defense counsel. As part of this standard practice and in response to requests from Dr. Karadzic's legal advisor, we have provided a number of documents to Dr. Karadzic, a few of which were cited in the motion filed on May 25. [Editor's note: The documents are available at *www.state.gov/p/eur/rls/or/c31889.htm*.] However, we believe that Dr. Karadzic has mischaracterized the evidentiary import of the information he received.

In the interest of transparency and accuracy, we are making available to the public documents that pertain to the allegation of an immunity agreement and, in particular, demonstrate the lack of an underlying basis for that assertion. As these documents show, the United States Government repeatedly made clear at the time of Dr. Karadzic's agreement to withdraw from public life that it still expected Dr. Karadzic to be tried in The Hague. This position is reflected in both official statements to the press and in private diplomatic communications, including in letters from Secretary of State Warren Christopher and Ambassador Holbrooke to Serbian President Slobodan Milosevic.

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On July 8, 2009, the Trial Chamber dismissed Karadzic's May 25 motion, and on October 12, 2009, the Appeals Chamber dismissed Karadzic's appeal of the Trial Chamber's decision. The two decisions are available at *www.icty.org/x/cases/karadzic/tdec/en/090708.pdf* (Trial Chamber) and *www.icty.org/x/cases/karadzic/acdec/en/091012.pdf* (Appeals Chamber).

(2) Requests for the United States to produce information

During 2009 the United States responded to a number of requests for information from Radovan Karadzic in connection with his defense. *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, ICTY. On June 25, 2009, the United States filed a response to a motion that Karadzic filed on June 17, 2009, requesting the Trial Chamber to issue a subpoena to two U.S. government officials. Karadzic sought information from these individuals in connection with his allegation that in 1996 Ambassador Holbrooke had

offered him immunity from prosecution. *See* C.2.b.(1) *supra*. The United States requested that the ICTY deny the motion because it "fail[ed] to meet the requirements for the issuance of a subpoena and constitute[d] an abuse of the United States' good-faith efforts to cooperate with the Tribunal." The U.S. response explained that, before filing the June 17 motion, Karadzic had made multiple requests to the United States for information concerning the alleged immunity agreement, and "the United States ha[d] striven to proceed cooperatively." The United States noted that, "despite serious reservations about the stated purpose of Accused's request—namely, to obtain information about an agreement that was never made," the United States had "gone to extraordinary lengths" to respond to Karadzic's request by conducting government-wide searches for documents, making two high-ranking U.S. officials available for interviews, providing two signed witness statements, and providing other documents responsive to the request. Further excerpts below from the U.S. response provide the government's views on why Karadzic's request failed to meet the requirements for issuance of a subpoena (most footnotes omitted). The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm*.

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III. The Request Fails to Meet the Requirements for Issuance of a Subpoena[11]

12. As noted by the Appeals Chamber, under Rule 54 of the Tribunal's Rules of Evidence and Procedure, a Trial Chamber "may . . . issue a subpoena when it finds that doing so is 'necessary for the purposes of an investigation or for the preparation or conduct of a trial.'"

13. An applicant for a subpoena must demonstrate "a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues." That is, an applicant must establish that the information sought is necessary for the resolution of specific issues in the trial (the "legitimate forensic purpose" requirement) and such information must be unavailable through other means (the "last resort" requirement).

14. The Appeals Chamber has further noted that the discretion of a Trial Chamber to issue a subpoena is not unfettered, and should take into account "not only the interests of the litigants but the overarching interests of justice and other public considerations." As the Appeals Chamber has cautioned, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers

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[11] The Appeals Chamber in *Krstic* held that requests to call government officials fall under Rule 54. *Prosecutor v. Krstic*, Decision on Application for Subpoenas, 1 July 2003, para. 10. The United States respectfully believes the case was wrongly decided, and that Rule 54*bis* is the correct framework. This submission, however, follows the analysis used in *Krstic* and subsequent Tribunal decisions; in doing so, the United States reserves its right to seek reconsideration of this question, as necessary. The United States only notes here the potentially unfair and asymmetric consequences of the approach taken by the *Krstic* Chamber: in the event a State refuses to authorize its officials to testify to information acquired in the course of their official duties, under the *Krstic* reasoning the consequences—which could include imprisonment and/or a fine—are borne not by the State but by the individual.

and may lead to the imposition of a criminal sanction." Trial Chambers should ensure that the compulsive mechanism of a subpoena is "not abused."

a) Legitimate Forensic Purpose

15. Accused has failed to demonstrate *a reasonable basis* for his belief that the prospective witnesses would be *likely to provide material information*. As the United States communicated to Accused's legal associate in writing on June 12, 2009, both [men] have confirmed that they have no knowledge of any immunity agreement, have no notes of the 1996 meeting, and that reports to Washington were delivered orally and via a July 19, 1996 reporting cable. In light of this communication, Accused has no reasonable grounds for believing that the two men are likely to provide material information that may assist him; his assertion that they have such information has no basis in fact or logic and is simply without merit.

16. Accused has also failed to establish that the information sought is *necessary* for the resolution of specific issues in the trial. First, Accused's legal associate has already spoken with three of the seven U.S. officials present at the meeting; the issuance of a subpoena is not justified in situations where the information sought is merely of a cumulative or corroborative nature, as here.

17. Second, the issue of whether factual information concerning the alleged immunity deal may be necessary for the resolution of a specific issue at trial is currently under consideration by the Trial Chamber; at the moment, the only indication the Trial Chamber has offered regarding the potential relevance of an immunity agreement is the statement that if such an agreement existed it *might* be of relevance for mitigation purposes at sentencing, in the event Accused is convicted. Unless it is established that information concerning the alleged agreement is necessary for the resolution of a specific issue at trial, there is no justification for the use of compulsive measures.

b) Last Resort Requirement

18. Accused cannot meet the last resort requirement because the United States has already provided him, in a variety of formats and from a number of sources, the information he seeks about the July 18–19, 1996, meetings. As noted above, he has received a number of documents, and his legal associate has spoken with three of the U.S. officials present at the meeting. Furthermore, in an additional effort to be cooperative, the United States provided Accused in writing with the specific information he claimed to seek from [the two officials]. Thus, the information sought with respect to these two gentlemen was not only obtainable by other means but was actually obtained through the voluntary cooperation of the United States.

19. That Accused has chosen to ignore, disbelieve, or discount the information provided is his decision, but it cannot serve as a basis or justification for a resort to compulsive measures. The United States, despite its serious reservations about the nature of Accused's requests and his distortions in the presentation of that information, has consistently sought to act cooperatively. Under these circumstances, Accused cannot make a good-faith claim that he has been unable to obtain the information he seeks without resort to the coercive powers of the Tribunal.

c) Trial Chamber Discretion and Other Considerations

20. As discussed above, in exercising its discretion on whether to issue a subpoena, a Trial Chamber should take into account "not only the interests of the litigants but the overarching interests of justice and other public considerations." In the present case, beyond Accused's purported needs, there are a couple of issues that deserve consideration.

21. First, as mentioned briefly above, the Trial Chamber currently has pending before it a motion by Accused requesting an evidentiary hearing on the alleged "Holbrooke Agreement" as well as an opposition filed by the Prosecution. Unless and until the Chamber determines that an evidentiary hearing is warranted, it would be particularly inappropriate to issue subpoenas . . . . Issuing subpoenas at this juncture would also constitute a waste of the time and resources of both the Tribunal (which, among other things, is funding Accused's defense) and the United States Government.

22. Second, although the United States firmly believes that Accused deserves a fair hearing, it does not believe that Accused should be given the leeway to abuse the good-faith efforts of a State to cooperate with the Tribunal. Moreover, the Accused—whether through frustration, a desire to seek continued publicity, or for any other reason—should not be able to pursue frivolous and meritless avenues to delay his trial and distract attention from the gravity of the crimes he is alleged to have committed.

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On July 8, 2009, the Trial Chamber denied Karadzic's June 17 motion, finding, among other things, that, at that stage of the proceedings, the subpoenas were not necessary to the defense.

On September 11, 2009, Karadzic's defense counsel filed another motion with the ICTY, requesting that the court, pursuant to Rule 54 *bis*, order the United States to produce information on a number of other topics. On September 29, 2009, the United States filed its response to the motion. As explained in the excerpts set forth below, the United States requested that the ICTY dismiss the motion without prejudice because "the threshold requirement for filing a Rule 54 *bis* motion is absent: as the Appeals Chamber has expressed, such a motion can only be filed *after* a State has declined to cooperate." The full text of the U.S. response is available at *www.state.gov/s/l/c8183.htm.*

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The United States is grateful for the opportunity to assist the Trial Chamber as it reviews this matter. The United States has long been committed to assisting the important work of the International Criminal Tribunal for the former Yugoslavia and to ensuring that the interests of justice are served. This commitment includes cooperating with reasonable and justified requests for information from the Prosecution and Defense. Over the years, the United States has voluntarily provided a significant amount of information to parties before the Tribunal. Indeed, earlier this year, in response to a different request, we provided Mr. Karadzic with a number of documents and made senior U.S. government officials available for interview.

We were thus somewhat surprised when Mr. Karadzic chose to file the present Motion. The Motion, unfortunately, did not provide to the Trial Chamber the full nature or extent of communications between the United States and Mr. Karadzic. The attached correspondence . . . will provide a more complete picture of the state of affairs, but in essence, at the time of the filing of the Motion, Mr. Karadzic's team and the United States were in the midst of cooperative discussions, the

United States had already expended hundreds of hours searching for potentially responsive material, and the United States had identified and expressed a willingness to provide a first tranche of responsive material.

Since the filing of the Motion, we have met with Mr. Karadzic's legal adviser . . . and made some further progress. At that September 25 meeting, [Mr. Karadzic's legal adviser] indicated that his client was unlikely to narrow the request or to provide additional justification, but he did take three positive steps: (1) he agreed to accept, under Tribunal Rule 70, any material provided by the United States in response to the request and to file a motion requesting that the Trial Chamber apply the provisions of Rule 70 to all such materials; (2) he agreed to accept material incrementally and then assess whether the full range of requested materials was necessary; and (3) he agreed to certain measures that would ease some of our national security concerns, including committing to accept documents with some redactions or in alternative formats. [Editor's note: Rule 70 enables a state to share information with a party on a confidential basis, providing for certain protections for that information.] Thus, the dialogue and the cooperative process are ongoing. In fact, despite continued concerns with the nature and excessively broad scope of Mr. Karadzic's request, the United States remains committed to try to resolve these issues cooperatively and voluntarily, without the need for intervention by the Trial Chamber or the imposition of mandatory measures.

Under these circumstances, it is our firm belief that the threshold requirement for filing a Rule 54bis motion is absent: as the Appeals Chamber has expressed, such a motion can only be filed *after* a State has declined to cooperate ("Only after a State declines to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29." *Prosecutor v. Milutinovic et al*, Decision on Request of the United States of America for Review (12 May 2006), at para 32.) That is clearly not the case here.

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We would like to assure the Trial Chamber that we remain prepared to cooperate and are moving forward on this information request as expeditiously as we can. But the task is not a simple one. Mr. Karadzic's request is lengthy, extremely broad, and involves a number of different actors . . . . We also continue to have concerns about the request. . . . Nevertheless, the United States has been carefully reviewing the request and searching its holdings to identify responsive information. . . . As indicated to Mr. Karadzic in our letter of September 10, 2009, our efforts continue. Seeking to speed up this process by imposing early deadlines is unlikely to achieve the desired result of providing a comprehensive response to Mr. Karadzic's request, and would only further complicate an already complex and multi-layered endeavor.

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On October 12, 2009, the Trial Chamber for the ICTY denied Karadzic's request, noting that issuing an order to compel the United States to produce the documents was premature since the United States was cooperating with the defense to provide the documents Karadzic sought. The full text of the decision is available at *www.icty.org/x/cases/karadzic/acdec/en/091012.pdf*.

3. Special Court for Sierra Leone

On July 16, 2009, Justice Renate Winter, President of the Special Court for Sierra Leone, and Stephen Rapp, then Prosecutor of the Special Court, briefed the Security Council on the work of the Special Court. Ambassador Rosemary A. DiCarlo, U.S. Alternative Representative to the United Nations for Special Political Affairs, made a statement expressing U.S. support for the Special Court as it completed its mandate. Ambassador DiCarlo's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2009/july/126128.htm*.

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The briefings today come at a critical juncture as the Court completes the final phase of its mandate. The successful completion of the Court's work and the establishment of a viable Residual Mechanism remain top priorities for the United States.

. . . [T]he United States was instrumental in the establishment of the Special Court for Sierra Leone and has been its largest financial supporter. Since the Court's inception in 2002, the United States has contributed more than $60 million to it. . . .

. . . The Court has been instrumental in contributing to peace and stability in Sierra Leone through the creation of a transparent and independent judicial process. When the Court closes, it will effectively end a chapter in Sierra Leonean history.

The United States fully supports the court's efforts to transfer its institutional knowledge to Sierra Leone authorities. We believe it important to the country's on-going democratic development that all lessons of the past be fully absorbed, and the Special Court has much to offer in this regard. . . .

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. . . The Court has broken new ground in the field of international criminal law, including the recognition of the use of child soldiers as an international crime and sexual slavery as a war crime and crime against humanity. And it has built a powerful legacy by fighting against impunity and working to bring justice to the people of Sierra Leone.

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4. Special Tribunal for Lebanon

The Special Tribunal for Lebanon began operating on March 1, 2009. Robert Wood, Acting Department of State Spokesman, issued a statement on that day, excerpted below, expressing U.S. support for the tribunal. The full text of the statement is available at

www.state.gov/r/pa/prs/ps/2009/03/119896.htm. For background on the tribunal, see *Digest 2007* at 190–93.

Today's opening of the Special Tribunal for Lebanon represents an important step toward justice in the 2005 assassination of former Lebanese Prime Minister Rafiq Hariri. . . .

The Tribunal is a clear signal that Lebanon's sovereignty is non-negotiable. Moreover, we hope it will help deter further violence and end a sad era of impunity. . . .

We applaud the brave and tireless work of the UN International Independent Investigation Commission and Lebanese judicial authorities who have brought the investigation and Tribunal this far. We will continue to assist their efforts, and recently pledged another $6 million, pending Congressional approval, towards the Tribunal's operations in addition to the $14 million already contributed.

Cross References

International Covenant on Civil and Political Rights, **Chapter 6.A.3., B.1.c., B.4.b., and B.5.**
Crimes committed against women in conflict zones, **Chapter 6.B.2.b.**
Narcotics-related trade preferences, **Chapter 11.D.4.a.**
Role of diplomatic assurances in implementing policy against transferring detainees to countries where it is determined they are more likely than not to be tortured, **Chapter 18.A.5.c.(4)**