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Chapter 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.-Bermuda Mutual Legal Assistance Treaty

On April 12, 2012, the Treaty between the Government of the United States of America and the Government of Bermuda relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009, entered into force. TIAS 12-412. See *Digest 2010* at 38-39; *Digest 2011* at 39.

2. Extraditions pursuant to the U.S. extradition treaty with the United Kingdom

On October 5, 2012, judicial authorities in the United Kingdom approved the extraditions of Abu Hamza al-Masri, Abel Abdul Bary, Khalid al-Fawwaz, Babar Ahmad, and Syed Talha Ahsan to the United States to face prosecution in U.S. courts on terrorism charges. Further information on the charges against Hamza, Bary, and Fawwaz is available at www.justice.gov/usao/nys/pressreleases/October12/HamzaetalExtradition.html. Information on the charges against Ahmad and Ahsan is available at www.fbi.gov/newhaven/press-releases/2012/two-extradited-british-nationals-to-appear-in-new-haven-federal-court-to-face-terrorism-related-charges. The judicial determination in the UK followed a decision by the European Court of Human Rights (“ECHR”). The U.S. Embassy in London issued a press release providing background on these extraditions, excerpted below and available at <http://london.usembassy.gov/ukpapress122.html>.

These extraditions mark the end of a lengthy process of litigation through the UK courts and the ECHR. The extradition request for Khalid al-Fawwaz was submitted in 1998. The request for Adel Abdul Bary was submitted in 1999. The extradition requests for Abu Hamza al-Masri and Babar Ahmad were submitted in 2004 and the request for Syed Talha Ahsan was submitted in 2006.

The U.S. Government agrees with the ECHR’s findings that the conditions of confinement in U.S. prisons—including in maximum security facilities—do not violate

European standards. In fact, the Court found that services and activities provided in U.S. prisons surpass what is available in most European prisons.

3. Asset Sharing Agreement with the Dominican Republic

On April 19, 2012, the United States and the Dominican Republic signed an agreement on the “Sharing of Confiscated Proceeds and Instrumentalities of Crimes.” The Agreement references the UN Convention against Transnational Organized Crime, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the International Convention for the Suppression of the Financing of Terrorism. The Agreement establishes a process whereby one party may share assets it has confiscated through cooperation provided by the other party, either at the other party’s request or on its own initiative. The Agreement entered into force upon signature. The full text of the Agreement is available at www.state.gov/documents/organization/197131.pdf. The United States has entered into similar asset sharing agreements with a number of other countries, the most recent prior to the agreement with the Dominican Republic being an agreement with the Republic of Austria, signed in 2010 and available at www.state.gov/documents/organization/161800.pdf.

4. Extradition of Fugitive Alleging Fear of Torture: *Trinidad y Garcia*

On June 8, 2012, the U.S. Court of Appeals for the Ninth Circuit issued its en banc decision in *Trinidad y Garcia v. Thomas*. 683 F.3d 952 (9th Cir. 2012). Trinidad argued that his extradition to the Philippines would violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”). A majority of the Court of Appeals for the Ninth Circuit, sitting en banc, determined that the case should be remanded to the district court for the United States to file a declaration that it had complied with the Torture Convention in determining that Trinidad should be extradited. The en banc court held that once the District Court receives a declaration signed by the Secretary or a properly designated senior official, “the court’s inquiry shall have reached its end and Trinidad y Garcia’s liberty interest shall be fully vindicated.” See *Trinidad*, 683 F.3d at 957. For further background and previous developments in the case (which was formerly captioned *Trinidad y Garcia v. Benov*), see *Digest 2008* at 57–64, *Digest 2009* at 50–51, *Digest 2010* at 45–49, and *Digest 2011* at 39–47. Trinidad filed a petition for a writ of certiorari in the U.S. Supreme Court on October 4, 2012. The United States filed its brief in opposition in November 2012. The U.S. opposition brief, excerpted below (with footnotes and citations to the record in the case omitted), is available in full at www.state.gov/s/l/c8183.htm.*

* Editor’s note: On January 7, 2013, the U.S. Supreme Court denied certiorari.

* * * *

Petitioner contends that the Ninth Circuit's decision violates the Suspension Clause of the Constitution because the court did not provide for judicial review of the substance of the Secretary of State's rejection of a Torture Convention claim. He further argues that the court incorrectly concluded that *Munaf v. Geren*, 553 U.S. 674 (2008), forecloses his substantive due process claim. Those contentions lack merit and do not warrant further review.

Neither the Torture Convention nor any implementing provisions provide for judicial review of the Secretary of State's determination that a fugitive will not more likely than not be tortured if surrendered for extradition. And the longstanding rule of non-inquiry, as well as separation of powers considerations, preclude judicial review of a fugitive's claim that, if extradited to face foreign charges, he will be mistreated at the hands of a foreign government. The court of appeals' preclusion of such a claim thus did not violate the Suspension Clause. Similarly, this Court in *Munaf* rejected a substantive due process claim where the Executive Branch concludes that an individual is not likely to suffer torture upon surrender to a foreign state, noting that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 553 U.S. at 702.

Petitioner argues that review is warranted because the Ninth Circuit's jurisdictional holding conflicts with holdings of the D.C. and Fourth Circuits that have found no jurisdiction to review a Torture Convention claim outside the immigration context. But that narrow disagreement does not warrant review in this case because it does not produce substantively different results in the extradition context and because petitioner received more favorable treatment below than he would have in other circuits. Indeed, petitioner received more judicial review than is warranted. He can identify no court that would give him greater review of his Torture Convention claim than did the court below.

Finally, petitioner's claims that, if left unreviewed, the decision below will lead to an increased likelihood of torture upon extradition is misguided. The United States has a comprehensive and searching process for determining whether a fugitive would face torture if extradited. That process fully draws upon the foreign-affairs resources of the Executive Branch to protect against the prospect of torture. Judicial intervention into that process is neither necessary nor appropriate. Indeed, it is likely to harm important foreign-relations interests of the United States by interposing substantial delays in effectuating bilateral extradition treaties. Rather than protract the already-prolonged litigation in this case, this Court should deny further review.

1. Petitioner contends that this Court's review is required because, in his view, the Suspension Clause of the Constitution requires substantive review of the Secretary of State's determination concerning petitioner's likely treatment after extradition. That claim rests on a fundamentally incorrect understanding of the role of habeas corpus in the extradition context. As a matter of history and practice, the role of a habeas court does not extend to issues concerning the treatment a fugitive will receive in a foreign state. Rather, a habeas court's role is the far more limited one of reviewing the complaint, and the supporting showing, to determine that the request falls within the scope of the treaty and that probable cause supports the complaint. Petitioner had full access to the jurisdiction of the habeas court to contest those issues. Indeed, he had further access to a second round of habeas review to present his substantive and procedural

due process claims. And petitioner obtained habeas review of his claim under the Torture Convention and its implementing statutes and regulations as well. That opportunity more than satisfied the Suspension Clause, and petitioner has no right to review of the substance of the Secretary's determination under the Torture Convention.

The writ of habeas corpus cannot be deemed "suspended" unless the petitioner can show that he would have enjoyed a greater degree of review at some earlier time. Petitioner makes no plausible Suspension Clause argument because at no time has this Court ever held that the treatment a fugitive might receive after extradition is a proper subject of judicial inquiry in habeas proceedings; quite the opposite is true. For example, in *Munaf*, the habeas petitioners contended that a federal court should enjoin their transfer to Iraqi authorities to face trial in Iraqi courts "because their transfer to Iraqi custody is likely to result in torture." 553 U.S. at 700. Relying on principles announced in extradition cases, this Court held that "[s]uch allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." *Ibid*. The Court explained that, even where constitutional rights are concerned, "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Id.* at 700-701.

The *Munaf* Court noted that the Solicitor General had represented that "it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result," 553 U.S. at 702, and that such determinations rely on "the Executive's assessment of the foreign country's legal system and . . . the Executive[s] ability to obtain foreign assurances it considers reliable," *ibid.* (quoting Br. for Federal Parties 47). The Court concluded that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Ibid.* "In contrast," the Court explained, "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, and what to do about it if there is." *Ibid.* The Court rejected the view that the government would be indifferent to that prospect, concluding instead that "the other branches possess significant diplomatic tools and leverage the judiciary lacks." *Id.* at 702-703 (citation omitted).

Munaf built on a longstanding tradition of judicial reluctance to inquire into the treatment a fugitive would face in a foreign legal system if extradited. See, e.g., *Neely v. Henkel*, 180 U.S. 109, 122 (1901). Applying equitable doctrines that "may require a federal court to forgo the exercise of its habeas corpus power," *Munaf*, 553 U.S. at 693 (citation omitted), the Court concluded that, even in the face of allegations of potential mistreatment by a foreign state, "[d]iplomacy," not judicial review, "was the means of addressing the petitioner's concerns," *id.* at 701. Thus, as a matter of traditional practice, and reaffirmed in *Munaf*, no valid claim exists that a habeas court's refusal to second-guess the Secretary of State's Torture-Convention determination violates the Suspension Clause.

Congress did not alter that historic rule by enacting the FARR Act. Congress enacted Section 2242 of the FARR Act to implement the United States' obligations in Article 3 of the Torture Convention. Those treaty obligations are not self-executing and do not themselves provide a basis for judicial review. . . .

2. Petitioner further contends that this Court should review the court of appeals' determination that petitioner's "substantive due process claim is foreclosed by *Munaf*." According to petitioner, "[t]he *Munaf* Court never discussed, much less decided, a substantive due process claim, because the *Munaf* petitioners only asserted procedural due process challenges." That claim is incorrect. ...

* * * *

In any event, petitioner's substantive due process claim—that he has a protected interest in freedom from extradition “to a country where he would face the prospect of torture”—fails as an original matter. Substantive due process “protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citation omitted). The “deeply rooted” principle in history and tradition is that, in extradition cases, the Executive Branch has the exclusive means and competence to assess “whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.” *Munaf*, 553 U.S. at 702; see *Neely*, 180 U.S. at 122. The Secretary of State will not surrender petitioner absent a determination that it is not more likely than not that he would be tortured if extradited. Here, as in *Munaf*, petitioner does not face a “more extreme case” in which the government proposes to extradite him even if it is likely that he will be tortured. 553 U.S. at 702. His substantive due process claim therefore lacks merit.

3. Petitioner contends that this Court should grant certiorari to address two purported circuit splits: one concerning jurisdiction to review Torture Convention claims and the second concerning the scope of review of the Secretary’s surrender decision. Petitioner does not stand to benefit from review of his claim of a jurisdictional split, and no court of appeals has granted a greater degree of review than petitioner received here. Indeed, if anything, petitioner received more judicial review than he is entitled to.

* * * *

4. Finally, petitioner contends that this Court’s review is warranted because, in his view, absent judicial oversight of the Secretary of State’s implementation of the Torture Convention, individuals facing extradition will experience an increased likelihood of torture. He claims that the separation of powers mandates judicial review in order to maintain proper checks and balances. Petitioner’s claims are unfounded. Given that courts have never played a role in reviewing a fugitive’s likely treatment by a foreign state if surrendered on an extradition warrant, petitioner’s suggestion that the decision below “abdicate[s]” the role of the courts (Pet. 12) is misguided. Indeed, judicial review of the treatment that a fugitive is likely to receive in a foreign state—after the Secretary of State has determined that torture is not more likely than not to occur—itself would threaten to disrupt the proper balance between the branches by requiring the judiciary to pronounce foreign-policy judgments that are the province of the political branches. *Munaf*, 553 U.S. at 702.

* * * *

Significantly, the government is, as this Court recognized in *Munaf*, not “oblivious” to concerns about possible torture. 553 U.S. at 702. Under the regulations that implement the FARR

Act, “[i]n each case where allegations relating to torture are made,” the “appropriate policy and legal offices” in the State Department “analyze information relevant to the case in preparing a recommendation to the Secretary as to whether to sign the surrender warrant.” 22 C.F.R. 95.3. A State Department declaration filed in this case elaborated that State Department offices such as the “Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government’s annual Human Rights Reports,” as well as regional offices and bureaus, which have direct knowledge of country conditions, are integral to the State Department’s analysis. The Department also examines materials submitted by the fugitive as well as by others submitted on the fugitive’s behalf. That process took place in this case. Based on the State Department’s analysis, “the Secretary may decide 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).

The State Department declaration in this case unequivocally represents that “[t]he Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition.” On a case-by-case basis, the Secretary may determine that obtaining specific assurances from the requesting country concerning the humanitarian treatment of the fugitive will sufficiently mitigate any concerns about possible torture. In considering the efficacy of assurances, State Department officials, “including the Secretary,” consider the political and legal context in the requesting state and may also make judgments about “the requesting State’s incentives and capacities to fulfill its assurances to the United States.” *Id.* at 13. In appropriate cases, the State Department monitors or arranges for monitoring of the condition of the fugitive after extradition. *Ibid.* To function effectively, these sensitive processes require confidentiality. See *id.* at 16 (“Consistent with the diplomatic sensitivities that surround the Department’s communications with requesting States concerning allegations relating to torture, the Department does not make public its decisions to seek assurances in extradition cases.”).

* * * *

These processes confirm that “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, and what to do about it if there is.” *Munaf*, 553 U.S. at 702.... Further review of the decision below, entrusting to the Executive Branch the responsibility to make these sensitive decisions without judicial oversight in the extradition context, is not warranted.

* * * *

5. Challenge to Extradition Prior to Secretary’s Determination: *Meza*

In December 2012, the United States filed its brief in the U.S. Supreme Court in opposition to a petition for writ of certiorari brought by Carlos Meza, a Honduran national accused of murder in Honduras, who alleged that he would be tortured if he were extradited. Although a magistrate judge had certified Meza was subject to extradition pursuant to the extradition treaty between the United States and Honduras, the Secretary of State had yet to make her determination of extradition pursuant to the Convention Against Torture at the time petitioner sought a writ of habeas corpus in district court. The district court denied the

petition and the U.S. Court of Appeals for the Eleventh Circuit affirmed, directing that the torture-based claims be dismissed as unripe because the Secretary had not decided to surrender petitioner to Honduras. *Meza v. Holder*, 693 F.3d 1350 (11th Cir. 2012). The U.S. brief in opposition to Meza’s petition for certiorari includes a discussion of the Secretary of State’s determination process similar to that excerpted above from the U.S. brief in *Trinidad*. Excerpts below from the U.S. brief (with footnotes and citations to the record omitted) include the ripeness argument in the case. The U.S. brief in its entirety is available at www.state.gov/s/l/c8183.htm.**

* * * *

Petitioner contends that the court of appeals erred in dismissing as unripe his claim that extradition would violate petitioner’s rights under the Torture Convention and the FARR Act. The court of appeals correctly held that, if petitioner’s humanitarian claim is subject to judicial review at all, that claim would not be ripe until the Secretary of State decides to extradite him to Honduras, something which has not yet occurred. The court of appeals’ ripeness ruling does not conflict with the decisions of this Court or any other court of appeals. And to the extent that petitioner contends that the habeas court should have addressed his Torture-Convention claim as an original matter, that claim lacks merit and is unsupported by authority. No further review is warranted.

1. A claim is not ripe for review “if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’ ” *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)). The court of appeals correctly applied that settled principle in determining that petitioner’s claim under the Torture Convention and the FARR Act would not be ripe “until the Secretary decides to surrender him” for extradition. As the court explained, petitioner’s claim rests on the assumption “that the Secretary will surrender him to Honduran officials.” But the magistrate judge’s determination that petitioner is extraditable does not mean that the Secretary will in fact decide to extradite him. The statute governing extradition procedures vests the Secretary with discretion to surrender a fugitive upon the issuance of an extradition certification. 18 U.S.C. 3186 (providing that the Secretary “*may* order the person” surrendered (emphasis added)). The Secretary may exercise that discretion by “declin[ing] to surrender the [fugitive] on any number of * * * grounds, including but not limited to[] humanitarian and foreign policy considerations.” *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir.), stay denied, 520 U.S. 1206 (1997). The State Department regulations enacted pursuant to the FARR Act to implement the United States’ obligations under the Torture Convention are to the same effect. They provide that, after considering the information relevant to an allegation that an individual will face torture if extradited, “the Secretary may decide 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). The existence of “these different possibilities,” as the court of appeals properly recognized, confirms that petitioner’s claim is tied to an event that might not occur at all—the Secretary’s

** Editor’s note: On January 14, 2013, the U.S. Supreme Court denied Meza’s petition.

decision to surrender him for extradition. Accordingly, the claim was not then (and still is not) ripe.

2. a. Petitioner's only argument directly responding to the court of appeals' ripeness holding contends that, in *Valentine v. United States*, 299 U.S. 5 (1936) and *Neely v. Henkel*, 180 U.S. 109 (1901), this Court reviewed a fugitive's claim that extradition would be unlawful, despite the fact that the Secretary of State had not made an extradition decision. ...Petitioner's reliance on *Valentine* and *Neely* is misplaced.

The exact nature of petitioner's argument is unclear. To the extent that petitioner contends that the habeas courts should evaluate the Secretary of State's decision to extradite him notwithstanding his torture allegations, the court of appeals correctly held that the claim is not ripe, as the Secretary has not made an extradition decision. In neither *Valentine* nor *Neely* did the fugitive seek review of the Secretary of State's decision to issue a surrender warrant. In *Valentine* the fugitive challenged the extradition commissioner's jurisdiction under a predecessor to 18 U.S.C. 3184, arguing that the applicable extradition treaty did not allow for the extradition of citizens. *Valentine*, 299 U.S. at 6; see 18 U.S.C. 651 (1934) (authorizing issuance of extradition certification upon showing that evidence is "sufficient to sustain the charge under the provisions of the proper treaty"). That challenge to the extradition commissioner's jurisdiction was ripe, but it also has no bearing on petitioner's challenge to the Secretary's yet-to-be-made decision to surrender him. Similarly, in *Neely*, the fugitive challenged the constitutionality of an earlier predecessor to 18 U.S.C. 3184, arguing that the statute failed to protect "the fundamental guarantees of life, liberty and property." 180 U.S. at 122; see Rev. Stat. § 5270 (1875). That claim, too, was ripe, but also has no bearing on a decision the Secretary has yet to make.

To the extent that petitioner contends that the habeas court should consider his torture claims as an original matter, on collateral review of the extradition magistrate's extradition certification, petitioner's claim is ripe but fails as a matter of law. This Court has limited a habeas court's review of an extradition certification to determining whether the extradition magistrate "had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). Under the longstanding rule of non-inquiry, review of a fugitive's claim that he will be mistreated if extradited is not available on habeas corpus. As the Court has explained, "[h]abeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state." *Munaf v. Geren*, 553 U.S. 674, 700 (2008) (citation omitted); see *Neely*, 180 U.S. at 122.

Nothing in the Torture Convention or the United States' implementation of the treaty changes that rule. The FARR Act makes the Secretary of State, not the courts, the competent authority for consideration of torture claims in extradition matters. See FARR Act § 2242, 112 Stat. 2681-822; 22 C.F.R. 95.2-95.4. Thus, any claim that the habeas court should have considered petitioner's torture claims as an original matter fails on the merits, as the district court concluded. The court of appeals understood petitioner's challenge to be directed towards a Torture Convention decision the Secretary of State has not yet made and correctly found such a claim not to be ripe. Its omission to address explicitly why petitioner has no valid claim for original review does not warrant this Court's intervention. That case-specific claim raises no important issue of law, particularly where, as here, it is clear that petitioner has no right to have the habeas court decide a Torture-Convention claim.

* * * *

Finally, to the extent that petitioner seeks a judicial ruling on the merits of his claim, the court of appeals' ripeness holding left open the possibility that petitioner could seek habeas review of petitioner's torture claim after the Secretary issues any surrender warrant. Petitioner has submitted to the State Department the evidence he believes shows he will be tortured or killed if he is extradited. By regulation, the "appropriate policy and legal offices" in the State Department will analyze petitioner's evidence "in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." 22 C.F.R. 95.3(a). Based on that recommendation, "the Secretary may decide 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). The Secretary could, for instance, decide to surrender petitioner conditioned on any assurances and monitoring she deems appropriate. As this Court has recognized, the State Department is "well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 553 U.S. at 702; see *ibid.* ("The Judiciary is not suited to second-guess such determinations.").

* * * *

6. Universal Jurisdiction

On October 18, 2012, Steven Hill, Counselor for the U.S. Mission to the UN, addressed the UN General Assembly's Sixth Committee (Legal) on the Sixth Committee's ongoing consideration of the topic of universal jurisdiction. Mr. Hill's remarks appear below and are available at <http://usun.state.gov/briefing/statements/199366.htm>.

* * * *

We greatly appreciate the Sixth Committee's continued interest in this important item. We thank the Secretary-General for his reports, which have usefully summarized the submissions made by States on this topic.

Despite the importance of this issue and its long history as part of international law relating to piracy, basic questions remain about how jurisdiction should be exercised in relation to universal crimes and States' views and practices related to the topic. The submissions made by States to date, the work of the Working Group in this Committee, and the Secretary-General's reports on the issue are extremely useful in helping us to identify differences of opinion among States as well as points of consensus on this issue.

The work undertaken by this committee so far has highlighted numerous issues associated with universal jurisdiction, including the definition of what is meant by "universal jurisdiction," the appropriate scope of the principle, its relationship to treaty-based obligations and to the law of immunity, and the need to ensure that decisions to invoke such a principle are undertaken in an appropriate manner, including in cases where there are other States that may exercise jurisdiction. Questions about the practical application of universal jurisdiction also merit

further examination, such as the circumstances under which and how often it is invoked, whether alternative bases of jurisdiction are relied upon at the same time, and what safeguards are available to prevent inappropriate prosecutions.

The United States continues to analyze the contributions of other states and organizations. We welcome this group's continued consideration of this issue and the input of more states about their own practice and views. We look forward to exploring these issues in as practical a manner as possible.

* * * *

7. Agreements on Preventing and Combating Serious Crime

During 2012, the United States signed or initialed bilateral agreements with Luxembourg, New Zealand, Norway, Iceland, France, Andorra, Liechtenstein, Monaco, San Marino, Singapore, Slovenia, Bulgaria, Japan, and Switzerland on preventing and combating serious crime ("PCSC"). 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. The PCSC agreement with Ireland signed in 2011 entered into force in 2012, as did the agreements signed in 2010 with Austria and Finland. For background, see *Digest 2008* at 80–83, *Digest 2009* at 66, and *Digest 2010* at 57-58. The agreement with Finland is available at www.state.gov/documents/organization/203064.pdf. As of the end of 2012, the United States continued to negotiate such data-sharing agreements with other members of the Visa Waiver Program, consistent with a federal statute requiring completion of such agreements with all members of the program.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On July 31, 2012, the Department of State released the 2011 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 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/j/ct/rls/crt/2011. Daniel Benjamin, State Department Coordinator for Counterterrorism, provided a special briefing on the release of the 2011 Country Reports on Terrorism, available at www.state.gov/j/ct/rls/rm/2012/195898.htm.

b. UN General Assembly

On October 8, 2012, Cheryl Saban, U.S. Public Delegate-Designate, addressed the UN General Assembly's Sixth Committee on measures to eliminate international terrorism. In the excerpts below, Ms. Saban reviewed progress at the UN in developing the legal framework to counter terrorism. The remarks are available at <http://usun.state.gov/briefing/statements/198732.htm>.

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... [W]e recognize the great success of the United Nations, thanks in large part to the work of this Committee, in developing 18 universal instruments that establish a thorough legal framework for combating terrorism. The achievements of the past ten years are noteworthy. We have witnessed a dramatic increase in the number of states who have become party to these important counterterrorism conventions. For example, over the past ten years 170 states have become party to the Terrorist Financing Convention. The international community has also come together to conclude six new counterterrorism instruments, including a new convention on nuclear terrorism and updated instruments which cover new and emerging threats to civil aviation, maritime navigation, and the protection of nuclear material.

The United States recognizes that while the accomplishments of the international community in developing a robust legal counterterrorism regime are significant, there remains much work to be done. The 18 universal counterterrorism instruments are only effective if they are widely ratified and implemented. In this regard, we fully support efforts to promote ratification of these instruments, as well as efforts to promote their implementation. We draw particular attention to the six instruments concluded over the past decade—the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention), the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM Amendment), the 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocols), and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and its Protocol. The work of the international community began with the negotiation and conclusion of those instruments. But that work will only be completed when those instruments are widely ratified and fully implemented.

The United States is advancing in its own efforts to ratify these instruments. We have been working closely with the U.S. Congress to pass legislation that would allow the United States to ratify the Nuclear Terrorism Convention, the CPPNM Amendment, and the SUA Protocols. As we undertake efforts to ratify these recent instruments, we urge other states not yet party to do likewise.

And as we move forward with our collective efforts to ratify and implement these instruments, the United States remains willing to work with other states to build upon and enhance the counterterrorism framework. Concerning the Comprehensive Convention on International Terrorism, we recognize that, despite the best efforts of the Ad Hoc Committee Chair and Coordinator, negotiations remain at an impasse on current proposals. We will listen carefully to the statements of other delegates at this session as we continue to grapple with these challenging issues.

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c. U.S. actions against support for terrorists

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

See Chapter 16.A.4.b.

(2) Foreign terrorist organizations

(i) New designations

In 2012 the Department of State announced the Secretary of State's designation of three additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Jemmah Anshorut Tauhid ("JAT") (77 Fed. Reg. 14,854 (March 13, 2012)); Abdallah Azzam Brigades ("AAB") (77 Fed. Reg. 31,909 (May 30, 2012)); and the Haqqani Network ("HQN") (77 Fed. Reg. 58,203 (Sept. 19, 2012)). See Chapter 16.A.4.b. for discussion of the simultaneous designation of these entities pursuant to Executive Order 13224.

The Department amended the designation of al-Qa'ida in the Arabian Peninsula to include the new alias, Ansar al-Shari'a ("AAS"). 77 Fed. Reg. 61,046 (Oct. 5, 2012). Likewise, the Department amended the designation of al-Qaida in Iraq ("AQI") twice in 2012 to add new aliases: Islamic State of Iraq (77 Fed. Reg. 4082 (Jan. 26, 2012)); Al-Nusrah Front, Jabhat al-Nusrah, Jabhet al-Nusra, The Victory Front, Al Nusrah Front for the People of the Levant (77 Fed. Reg. 73,732 (Dec. 11, 2012)).

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/j/ct/rls/other/des/123085.htm for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations and the delisting of MEK

During 2012 the Secretary of State continued to review designations of entities as FTOs consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, 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 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures. The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and the national security of the United States did not warrant revocation: al-Qaida in Iraq (77 Fed. Reg. 4082 (Jan. 26, 2012)); Aum Shinrikyo (77 Fed. Reg. 4614 (Jan. 30, 2012)); the Islamic Jihad Union (77 Fed. Reg. 11,186 (Feb. 24, 2012)); the Islamic Resistance Movement or Hamas. (77 Fed. Reg. 44,307 (July 27, 2012)); Jaish-e-Mohammed (“JEM”) (77 Fed. Reg. 52,783 (Aug. 30, 2012)); al-Qaida in the Arabian Peninsula (77 Fed. Reg. 61,046 (Oct. 6, 2012)); Al-Shabaab (77 Fed. Reg. 74,265 (Dec. 13, 2012));

On September 28, 2012, the Secretary announced the revocation of the designation of one organization as an FTO, the Mujahedin-e Khalq (“MEK”), and its aliases. 77 Fed. Reg. 60,741 (Oct. 4, 2012). In a media note and special briefing on that date, the Department of State provided background on the determination: “The Secretary’s decision today took into account the MEK’s public renunciation of violence, the absence of confirmed acts of terrorism by the MEK for more than a decade, and their cooperation in the peaceful closure of Camp Ashraf, their historic paramilitary base.” The media note is available at www.state.gov/r/pa/prs/ps/2012/09/198443.htm and the briefing is available at www.state.gov/r/pa/prs/ps/2012/09/198470.htm.

The determination was announced in time to comply with an order of the Court of Appeals for the District of Columbia Circuit, issued June 1, 2012, requiring that the Secretary reach a determination on the petition for revocation brought by the People’s Mojahedin Organization of Iran (“PMOI,” an alias for MEK) within four months. *In re People’s Mojahedin Organization of Iran*, 680 F.3d 832 (D.C. Cir. 2012). PMOI had petitioned the court for a writ of mandamus, ordering either the revocation of its designation as an FTO or that the Secretary make a determination on its petition for revocation within 30 days. The United States filed a brief on March 26, 2012 in opposition to PMOI’s petition, explaining why additional time was needed for the determination and why the court should not displace the Secretary in exercising her role in reviewing the determination. The U.S. brief, excerpted below (with footnotes omitted), is available in full at www.state.gov/s/l/c8183.htm. The Secretary’s most recent review of the designation had been ongoing since an earlier decision by the court of appeals in 2010. See *Digest 2010* at 67-79 and *Digest 2009* at 71-72.

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4. Since the remand order from this Court, the State Department has been carrying out the process directed by the Court. It has consulted with the U.S. Intelligence Community, and engaged in the difficult process of determining whether classified material may now be declassified and disclosed publicly; it has given the PMOI new opportunities to respond to the unclassified evidence, and that entity has submitted a substantial amount of material; it has gathered fresh relevant classified information; it has met with representatives of the PMOI, which made a lengthy in-person presentation; it has consulted with the Department of the

Treasury and the Department of Justice; and it has engaged in extensive internal deliberations.

In addition, Secretary Clinton recently testified in Congress before the House Foreign Affairs Committee, and was asked about her consideration of the PMOI revocation petition. See “Assessing U.S. Foreign Policy Priorities Amidst Economic Challenges: The Foreign Relations Budget for Fiscal Year 2013,” Hearing before the House of Representative Committee on Foreign Affairs (Feb. 29, 2012) (webcast of hearing available at http://foreignaffairs.house.gov/hearing_notice.asp?id=1407). The Secretary explained that the State Department was “continu[ing] to work on our review of the [PMOI’s] designation as a foreign terrorist organization in accordance with the D.C. Circuit’s decision and applicable law.”

Secretary Clinton made clear, however, that “first, we are deeply concerned about the security and safety of the residents of Camp Ashraf [where most of the PMOI personnel are still located in Iraq]. And we have supported the work of the United Nations to find a path forward to relocate the residents and that has now begun.” *Ibid.* The Secretary described that several hundred of the Camp Ashraf residents had already transferred to a different facility in Iraq (Camp Hurriya), which is serving as a United Nations-monitored temporary transit facility as part of efforts by the United Nations High Commissioner for Refugees (“UNHCR”) to assist the relocation of residents out of Iraq. *Ibid.* (Since the Secretary’s public testimony, the State Department reports that approximately 800 additional Camp Ashraf residents have voluntarily transferred to the temporary transit facility at Camp Hurriya for UNHCR processing.)

Secretary Clinton made clear that she was principally focusing on trying to “resolve a complex situation, avoid bloodshed and violence, and have the people from Camp Ashraf move to Camp Hurriya and have them processed as soon as the United Nations can process them [for relocation out of Iraq].” *Ibid.* She explained that, “given the ongoing efforts to relocate the residents, [PMOI] cooperation in the successful and peaceful closure of Camp Ashraf, the [PMOI’s] main paramilitary base, will be a key factor in any decision regarding the [PMOI’s] FTO status.” *Ibid.*

REASONS FOR DENYING A WRIT OF MANDAMUS

Issuance of a writ of mandamus to the Secretary of State is plainly inappropriate in the circumstances of this case, which already involves an unusual type of judicial review. See generally *People’s Mojahedin*, 182 F.3d at 19-25 (remarking on the odd and limited nature of judicial review involving FTO designations). The PMOI urges this Court to revoke the entity’s FTO designation because the Secretary of State is assertedly not acting quickly enough on remand from this Court. Such relief would—despite the PMOI’s long history of terrorism—remove an important barrier to the PMOI’s ability to operate freely in the United States, and is clearly unwarranted here. Moreover, an order directing the Secretary to act by a particular date is also inappropriate given the highly complex and delicate overall nature of the matter pending before her.

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...Secretary Clinton is assiduously carrying out the remand from this Court, which requires the State Department to analyze highly classified and complicated information, and make an extremely challenging, expert predictive judgment about whether the PMOI retains the capability and intent to continue to engage in terrorism, as it has done to deadly effect on many occasions in the past.

In addition, the Secretary must make an extremely delicate decision—assuming that she

believes the evidence adequately shows that the PMOI continues to engage in terrorism or terrorist activity—about the impact on the national security of the United States of the actions of the PMOI, including its capabilities and intentions. And she must do this in consultation with the Attorney General and the Secretary of the Treasury, against the backdrop of this nation’s dealings with both Iraq and Iran.

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3. Moreover, as Secretary Clinton explained to Congress, the State Department is focused immediately on the humanitarian imperative of supporting a peaceful resolution to the impasse between the PMOI located at Camp Ashraf and the Iraqi government, which has ordered that camp closed and the residents to depart Iraq. The State Department is working with the Iraqi government at high levels on this issue, and with the United Nations, which is directly supporting the Iraqi government in transferring the inhabitants of Camp Ashraf to Camp Hurriya as part of efforts to safely relocate them out of Iraq. Not surprisingly, the State Department has given priority in this overall matter to this transfer activity, as it involves an effort to protect the physical safety of individuals who are or were resident at the PMOI camp in Iraq (at Camp Ashraf), and may have a significant bearing on the Secretary’s decision regarding the organization’s FTO status.

The Secretary is closely observing this transfer because the PMOI’s actions in connection with it will likely provide further key information about the actual future intentions of the organization. If the process succeeds through cooperation between the PMOI, the Iraqi government, and the United Nations, this success might bear on the credibility of PMOI’s claims that it has indeed abandoned its terrorist tactics. A crucial process is thus currently ongoing that could provide information of the highest relevance to the Secretary’s predictive judgments about the PMOI.

Furthermore, the governing statute authorizes the Secretary to revoke an existing designation even if the statutory criteria continue to be met, if the Secretary believes that revocation is in the national interests of the United States.

Accordingly, the Secretary is acting quite reasonably in wishing to take into account the PMOI’s actions with regard to the transfer from Camp Ashraf in order to determine if an FTO designation revocation is warranted. Action by this Court to revoke the designation anyway or to impose a short deadline on the Secretary would seriously interfere with the State Department’s ongoing efforts to seek a peaceful resolution to the situation at Camp Ashraf.

* * * *

d. Global Counterterrorism Forum

In 2012, the United States continued its support for the Global Counterterrorism Forum (“GCTF”), an informal multilateral counterterrorism (“CT”) platform with 30 founding members (29 countries plus the EU) that regularly convenes key CT policymakers and practitioners from around the world, as well as experts from the United Nations and other multilateral bodies, that was launched in 2011. See *Digest 2011* at 55. The United States and

Turkey have served as initial co-chairs of the GCTF's Coordinating Committee and they led the GCTF Ministerial-Level Plenary on June 7, 2012 in Istanbul, Turkey.

In advance of the June 7 Ministerial Plenary, Turkey and the United States issued a fact sheet, available at www.state.gov/r/pa/prs/ps/2012/06/191865.htm, identifying the key deliverables of the Plenary, including: adoption of the Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector; adoption of the Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders; announcements of capacity-building projects by GCTF members to train domestic criminal justice personnel; updates on establishing the International Center of Excellence for Countering Violent Extremism in the United Arab Emirates; and plans to establish an international training center for strengthening criminal justice and other rule of law institutions. The co-chairs issued an additional fact sheet on June 6, 2012, describing the background of the GCTF, which is available at www.state.gov/r/pa/prs/ps/2012/06/191864.htm.

Secretary Clinton delivered the opening remarks at the GCTF Ministerial Plenary in Istanbul. She highlighted the GCTF's efforts in the areas of combatting extremism and strengthening the rule of law. Secretary Clinton's remarks, excerpted below, are available in full at www.state.gov/secretary/rm/2012/06/191912.htm.

* * * *

I am pleased that today this forum will adopt two sets of sound practices – one for the criminal justice sector, the other on rehabilitation and reintegration of violent extremist offenders in prison. These will advance our work, and I am proud to announce the United States is contributing \$15 million to support training initiatives in these areas, and to launch new partnerships with the UN and others to make sure our assistance gets to those officials on the front lines who need it most.

And I am here today also to underscore that the United States will work with all of you to combat terrorists within the framework of the rule of law. Now some believe that when it comes to counterterrorism, the end always justifies the means; that torture, abuse, the suspension of civil liberties— no measure is too extreme in the name of keeping our citizens safe.

But unfortunately, this view is short-sighted and wrong. When nations violate human rights and undermine the rule of law, even in the pursuit of terrorists, it feeds radicalization, gives propaganda tools to the extremists, and ultimately undermines our efforts. The international community cannot turn our eyes away from the effects of these tactics because they are part of the problem.

I know that the United States has not always had a perfect record, and we can and must do a better job of addressing the mistaken belief that these tactics are ever permissible. That is why President Obama has made our standards very clear. We will always maintain our right to use force against groups such as al-Qaida that have attacked us and still threaten us with imminent attack. And in doing so, we will comply with the applicable law, including the laws of war, and go to extraordinary lengths to ensure precision and avoid the loss of innocent life.

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Turkey and the United States issued a new fact sheet in conjunction with the GCTF Ministerial Plenary held December 14, 2012 in Abu Dhabi. The December 14, 2012 fact sheet, available at www.state.gov/j/ct/rls/other/des/202103.htm, summarizes the deliverables from the June 2012 Ministerial and lists the GCTF's activities to-date. More information about the GCTF is available at www.thegctf.org.

2. Narcotics

For a discussion of the U.S. objection to Bolivia's proposed reservation to the 1961 UN Single Convention on Narcotic Drugs, see Chapter 4.A.3.

a. *Majors List process*

(1) *International Narcotics Control Strategy Report*

On March 7, 2012, the Department of State released the 2012 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 describes the efforts of key countries to attack all aspects of the international drug trade in calendar year 2011. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The report is available at www.state.gov/j/inl/rls/nrcrpt/2012/.

(2) *Major drug transit or illicit drug producing countries*

On September 14, 2012, President Obama issued Presidential Determination 2012-15, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2013." Daily Comp. Pres. Docs., 2012 DCPD No. 00724, pp. 1-3. In this annual determination, the President named Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. No new countries were added to the list in 2012. 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 Bolivia, Burma, and Venezuela is vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2013 by virtue of § 706(3) of

the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

b. *Interdiction assistance*

During 2012 President Obama again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2012 DCPD No. 00633, p. 1, Aug. 10, 2012) and Brazil (Daily Comp. Pres. Docs., 2012 DCPD No. 00802, p. 1, Oct. 11, 2012), 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. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. *Executive Order 13627 protecting against trafficking in persons in federal contracts*

On September 25, 2012, President Obama issued Executive Order 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts. 77 Fed. Reg. 60,029 (Oct. 2, 2012). The order was issued pursuant to the Trafficking Victims Protection Act of 2000, as amended (“TVPA”) (Public Law 106-386, Division A), among other authorities. Section 1 of the order, set forth below, states the policy underlying the order and its general purpose of ensuring that government contractors comply with anti-trafficking laws. Section 2 of the order directs amendments to the Federal Acquisition Regulations (“FAR”) in order to carry out the policy of zero tolerance for trafficking-related activities by federal contractors. Section 3 authorizes the provision of guidance and training to federal contractors in implementing internal procedures to monitor compliance with anti-trafficking laws and regulations.

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More than 20 million men, women, and children throughout the world are victims of severe forms of trafficking in persons (“trafficking” or “trafficking in persons”)—defined in section 103 of the TVPA, 22 U.S.C. 7102(8), to include sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of

a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

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b. Trafficking in Persons report

On June 19, 2012, the Department of State released the 2012 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 covers the period April 2011 through March 2012 and evaluates the anti-trafficking efforts of countries around the world. In her remarks upon the release of the 2012 report, available at www.state.gov/secretary/rm/2012/06/193368.htm, Secretary of State Hillary Rodham Clinton explained:

[T]he United States is not alone in this fight. Many governments have rallied around what we call the three P’s of fighting modern slavery: prevention, prosecution, and protection. And this report, which is being issued today, gives a clear and honest assessment of where all of us are making progress on our commitments and where we are either standing still or even sliding backwards. It takes a hard look at every government in the world, including our own. Because when I became Secretary of State, I said, “When we are going to be issuing reports on human trafficking, on human rights that talk about other countries, we’re also going to be examining what we’re doing,” because I think it’s important that we hold ourselves to the same standard as everyone else.

Now, this year’s report tells us that we are making a lot of progress. Twenty-nine countries were upgraded from a lower tier to a higher one, which means that their governments are taking the right steps. This could mean enacting strong laws, stepping

up their investigations and prosecutions, or simply laying out a roadmap of steps they will take to respond.

Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The report lists 17 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at www.state.gov/j/tip/rls/tiprpt/2012/. Chapter 6.C.2.b. discusses the determinations relating to child soldiers.

c. Presidential determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to “each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance.” The four determination options are set forth in § 110(d)(1)–(4).

On September 14, 2012, President Obama issued a memorandum for the Secretary of State, “Presidential Determination With Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons.” Presidential Determination No. 2012-16, 77 Fed. Reg. 58,921 (Sept. 24, 2012). The President’s memorandum conveys determinations concerning the 17 countries that the 2012 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a. *supra* for discussion of the 2012 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to “Tier 3” Countries conveys the determinations the President made and their effect; the memorandum also includes a separate discussion of each of the named countries. The memorandum of justification is available at www.state.gov/j/tip/rls/other/2012/197803.htm.

4. Illicit Cross-Border Trafficking in Arms, Drugs, Weapons, and Other Items

In its role as president of the Security Council in April 2012, the United States convened a Security Council open debate on “Threats to International Security: Securing Borders Against Illicit Flows.” U.S. Ambassador to the UN Susan Rice introduced the discussion in remarks available at <http://usun.state.gov/briefing/statements/188472.htm>. She explained the desire to better coordinate efforts to strengthen borders, stating:

The Security Council has been involved in the question of illicit trafficking and movement for a long time. But we have tended to look at each item trafficked in isolation of the common feature they share: the vulnerabilities at poorly secured borders that are too easily exploited by nefarious networks.

As president of the Security Council, the United States also issued a presidential statement on the subject of illicit cross-border trafficking on April 25, 2012. U.N. Doc. S/PRST/2012/16. In the presidential statement, the Security Council tasks the Secretary-General with reporting on the UN's work to assist member states in improving border security. The Secretary-General submitted his report to the Security Council on October 19, 2012. U.N. Doc. S/2012/777. The presidential statement is excerpted below and available in full at <http://usun.state.gov/briefing/statements/188463.htm>.

* * * *

The Security Council acknowledges the evolving challenges and threats to international peace and security including armed conflicts, terrorism, proliferation of weapons of mass destruction and small arms and light weapons, transnational organized crime, piracy, drug and human trafficking. The Council has addressed, when appropriate, related to these challenges and threats, illicit cross-border trafficking in arms, drug trafficking, trafficking by non-state actors in nuclear, chemical and biological weapons, their means of delivery and related materials, trafficking in conflict minerals and the movement of terrorists and their funds in violation of UN sanctions regimes imposed by the Security Council in accordance with Chapter VII of the UN Charter and other decisions taken under Chapter VII, in particular resolutions 1373 (2001) and 1540 (2004) as well as its other relevant decisions (hereinafter - illicit cross-border trafficking and movement). The Council is concerned that such illicit cross-border trafficking and movement contributes to these challenges and threats. The Council recognizes that such illicit cross-border trafficking and movement often involves cross-cutting issues, many of which are considered by the General Assembly and other UN organs and bodies.

The Council notes relevant international conventions such as the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, the Convention on Psychotropic Substances of 1971, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the United Nations Convention against Transnational organized crime of 2000 and the Protocols thereto, the United Nations Convention against Corruption of 2003 and the relevant international conventions and protocols related to terrorism. The Security Council recalls the United Nations Program of Action on Small Arms and Light Weapons as well as the International Tracing Instrument and the United Nations Global Plan of Action to Combat Trafficking in Persons.

The Security Council reaffirms the benefits of transborder communication, international exchange and international migration. The Security Council notes, however, that the various challenges and threats to international peace and security posed by illicit cross-border trafficking and movement have increased as the world has become more interconnected. The Security Council notes that, in a globalized society, organized criminal groups and networks, better equipped with new information and communication technologies, are becoming more diversified

and connected in their illicit operations, which in some cases may aggravate threats to international security.

The Security Council reaffirms that securing their borders is the sovereign prerogative of Member States and, in this context, reaffirms its commitment to the Purposes and Principles of the UN Charter, including the principles of sovereign equality and territorial integrity. The Security Council calls on all Member States to improve border management to effectively constrain the spread of transnational threats. The Security Council reaffirms that Member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and shall also give the UN every assistance in any action it takes in accordance with the UN Charter, and shall refrain from giving assistance to any State against which the UN is taking preventive or enforcement action.

The Security Council acknowledges that distinct strategies are required to address threats posed by illicit cross-border trafficking and movement. Nevertheless, the Council observes that illicit cross-border trafficking and movement are often facilitated by organized criminal groups and networks. The Council further notes that such illicit cross-border trafficking and movement, which in some cases exploits similar vulnerabilities experienced by Member States in securing their borders, can be addressed by improving Member States' abilities to secure their borders. The Security Council further acknowledges the importance of adopting a comprehensive and balanced approach, as necessary, to tackle the conditions conducive to facilitating illicit cross-border trafficking and movement, including demand and supply factors, and underlines the importance of international cooperation in this regard.

The Security Council calls on Member States to fully comply with relevant obligations under applicable international law, including human rights and international refugee and humanitarian law, relating to securing their borders against illicit cross-border trafficking and movement, including obligations stemming from relevant resolutions of the Security Council adopted under Chapter VII of the UN Charter. The Security Council calls on all Member States to fully respect and implement all of their relevant international obligations in this regard.

The Security Council encourages Member States and relevant organizations to enhance cooperation and strategies, as appropriate, to combat such illicit cross-border trafficking and movement.

The Security Council encourages Member States, as well as international organizations and relevant regional and subregional organizations, within existing mandates, as appropriate, to enhance efforts to assist Member States to build the capacity to secure their borders against illicit cross-border trafficking and movement, upon request and by mutual agreement, in accordance with international law. The Security Council commends the substantial efforts already underway in this field.

The Security Council observes that several UN entities, including subsidiary organs of the Security Council, already offer such assistance. The Security Council acknowledges the importance of coherent, system-wide UN action, in order to offer coordinated responses to transnational threats, including through the use of best practices and exchange of positive experiences from relevant initiatives elsewhere, such as the Paris Pact Initiative.

The Security Council invites the Secretary-General to submit in six months a report providing a comprehensive survey and assessment of the UN's relevant work to help Member States counter illicit cross-border trafficking and movement, as defined in the second paragraph above.

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5. Money Laundering

a. *JSC CredexBank (Belarus)*

On May 25, 2012, the Department of the Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56 that the Joint Stock Company CredexBank of Belarus (“Credex”) is a financial institution of primary money laundering concern. 77 Fed. Reg. 31,434 (May 25, 2012). Based on this finding, FinCEN also issued a notice of proposed rulemaking under § 311. 77 Fed. Reg. 31,794 (May 30, 2012). The rule proposed would impose “both the first special measure (31 U.S.C. 5318A(b)(1)) and the fifth special measure (31 U.S.C. 5318A(b)(5))” against Credex. The first special measure imposes requirements with respect to recordkeeping and reporting of certain financial transactions. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for Credex. Excerpts below from the notice of finding explain the action (with footnotes omitted).

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B. *JSC (“Joint Stock Company”) CredexBank*

JSC CredexBank (“Credex”) is a depository institution located and licensed in the Republic of Belarus that primarily services corporate entities. Originally established on September 27, 2001, as Nordic Investment Bank Corporation by Ximex Executive Limited (“Ximex”), the bank changed its name to Northern Investment Bank on April 5, 2006, and then to the current name of JSC CredexBank on February 12, 2007. Credex is 96.82% owned by Vicpart Holding SA, based in Fribourg, Switzerland. With 169 employees and a total capitalization of approximately \$19 million, the bank currently ranks as the 22nd largest in total assets among 31 commercial banks in Belarus. Credex has six domestic branches and one representative office in the Czech Republic. While the majority of its correspondent banking relationships are with domestic banks, Credex maintains numerous correspondent relationships with Russian banks, and also single correspondent relationships in Latvia, Germany, and Austria. According to available public information, Credex does not have any direct U.S. correspondent relationships.

C. *Belarus*

The concentration of power in the hands of the Presidency and the lack of a system of checks and balances among the various branches of government are the greatest hindrances to the rule of law and transparency of governance in Belarus. In particular, economic decision-making is highly concentrated within the top levels of government, and financial institutions have little autonomy.

Under Belarusian law, most government transactions and those sanctioned by the President are exempt from reporting requirements. This is particularly worrisome given well documented cases of public corruption in Belarus, which has led the United States Government (“USG”) in recent years to take action to protect the U.S. financial system from abuse by the Belarusian government. In 2006, the President signed Executive Order (“E.O.”) 13405, which blocks the property and interests in property of Belarusian President Alexander Lukashenko and nine other individuals listed in the Annex, as well as authorizing subsequent designations of other individuals and entities determined to be responsible for or to have participated in public corruption, human rights abuses, or political oppression. Pursuant to this E.O., the U.S. Department of the Treasury (“Treasury”) in November 2007 designated the state petrochemical conglomerate, Belneftekhim, for being controlled by President Lukashenko. Separately, Treasury in April 2006 issued an advisory highlighting abuse and theft of public resources by senior Belarusian regime elements, including senior executives in state-owned enterprises. Furthermore, in April 2004, Treasury identified Infobank, Minsk (later renamed PJSC Trustbank) as a primary money laundering concern under section 311 for laundering funds for the former Iraqi regime of Saddam Hussein. At the time of that action, Infobank was widely reported to be a bank specializing in financial transactions related to arms exports, including procuring and financing weapons and military equipment for several nations deemed by the United States to be State Sponsors of Terrorism.

Since January 2011, in response to the repression of democratic activists following fraudulent presidential elections in Belarus, the European Union (“EU”) has imposed a series of increasingly stiff sanctions against Belarus, including a travel ban and assets freeze extending to some 200 Belarusian officials and an assets freeze of three companies closely associated with President Lukashenko. Most recently, on March 23, 2012, the EU reinforced restrictive measures against the Belarusian government by adding 12 individuals and 29 entities to the sanctions list for their role in supporting the regime.

II. Analysis of Factors

Based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that reasonable grounds exist for concluding that Credex is a financial institution of primary money laundering concern. In addition to the bank’s location in a high risk jurisdiction, FinCEN has reason to believe that Credex (1) has engaged in high volumes of transactions that are indicative of money laundering on behalf of shell corporations; and (2) has a history of ownership by shell corporations whose own lack of transparency contributes to considerable uncertainty surrounding Credex’s beneficial ownership. Taken as a whole, the lack of transparency associated with Credex indicates a high degree of money laundering risk and vulnerability to other financial crimes. The factors relevant to this finding are detailed below:

A. The Extent to Which Credex Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

Information made available to the USG shows that since 2006, Credex has engaged in highly questionable patterns of financial transactions that are indicative of money laundering. Such activity includes: high volumes of transactions involving foreign shell corporations incorporated and operating in high risk jurisdictions; disproportionate and evasive transactional behavior; and nested account activity.

The facts surrounding these transactions are consistent with typical “red flags” regarding

shell company activity identified in most banking standards, including wire transfer volumes that are extremely large in proportion to the asset size of the bank; transacting businesses sharing the same address, providing only a registered agent's address, or having other address inconsistencies; and frequent involvement of multiple jurisdictions or beneficiaries located in higher-risk offshore financial centers.

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B. The Extent to Which Credex Is Used for Legitimate Business Purposes in the Jurisdiction

The lack of transparency—regarding the jurisdiction, beneficial ownership of the bank (discussed in Section II (D), below), and transactional activity with shell corporations—makes it difficult to assess the extent to which Credex is engaged in legitimate business. Thus, any legitimate use of Credex is significantly outweighed by the apparent use of Credex to facilitate or promote money laundering and other financial crimes.

C. The Extent to Which Such Action Is Sufficient To Ensure, With Respect to Transactions Involving Credex, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to conclude that Credex is being used to promote or facilitate international money laundering, and is therefore an institution of primary money laundering concern. Currently, there are no protective measures that specifically target Credex. Thus, finding Credex to be a financial institution of primary money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under section 311, is a necessary first step to prevent Credex from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring any criminal conduct occurring at or through Credex to the attention of the international financial community and will further limit the bank's ability to be used for money laundering or for other criminal purposes.

D. Other Relevant Factor: Lack of Transparency

As outlined above, the pervasive lack of transparency surrounding Credex's business activities—including its high volume of suspicious transactions with shell corporations, the substantial uncertainty surrounding the transacting parties and purposes involved in those transactions, the bank's evasive conduct, and its operation in a high risk jurisdiction—makes it virtually impossible to discern the extent to which the bank is engaged in legitimate business, and most importantly, to evaluate its capacity to identify and mitigate risk and illicit finance. This situation is exacerbated by a similar lack of transparency in the bank's ownership, which has passed from one shell corporation to another, creating considerable uncertainty as to the identity of the true beneficial owner(s).

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b. Withdrawal of Finding: Myanmar Mayflower Bank and Asia Wealth Bank

On October 1, 2012, FinCEN withdrew a finding of primary money laundering concern and repealed the rule imposing special measures relating to Myanmar Mayflower Bank and Asia Wealth Bank, two banks based in Burma. 77 Fed. Reg. 59,747 (Oct. 1, 2012). See *Digest 2004* at 136-39 for discussion of the original finding and notice of proposed rulemaking for

Myanmar Mayflower Bank and Asia Wealth Bank. The notice in the Federal Register explained that FinCEN made the determination because the Government of Burma responded to its 2004 finding by revoking the licenses of the two banks and neither of the banks exists any longer.

6. Organized Crime

See Chapter 16.A.7. for discussion of sanctions directed at transnational criminal organizations.

From October 15 to October 19, 2012, the Sixth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto convened in Vienna, Austria. Brian A. Nichols, Principal Deputy Assistant Secretary of State in the Bureau of International Narcotics and Law Enforcement, delivered opening remarks at the conference, available at <http://vienna.usmission.gov/121015untoc.html> and excerpted below. As discussed by Mr. Nichols, the U.S. had advanced the proposal for a review mechanism under the Transnational Organized Crime Convention. The Sixth Session of the Conference of the Parties concluded without adopting such a review mechanism.

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...[A]s we begin our deliberations, I take pride in announcing a new milestone.

The United States has now used the UN Convention against Transnational Organized Crime and its Protocols on more than 100 occasions for the purpose of international cooperation and with 37 countries spanning the globe. We have used the treaties for extradition and mutual legal assistance requests targeting a broad array of crimes, including arms trafficking, major fraud cases and migrant smuggling. We have used the Convention both to seek assistance and to provide it to our partners.

Our use of the Convention has increased by almost 50 percent in the past two years alone. This milestone demonstrates the practical functionality of the Convention and its Protocols, and their value as an important tool for our police, prosecutors and the judiciary. It also highlights the potential for enhancing cooperation in a relatively short period of time.

This week, we are also on the cusp of another potential milestone for State Parties to the Convention—the adoption of a new peer review mechanism. Since we last met two years ago, we have all been engaged in thoughtful negotiations towards the development of a new review mechanism; and specifically one that is cost effective, efficient and not unduly burdensome on participating experts. Ultimately, the review mechanism should bolster practical cooperation under the Convention, including by identifying technical assistance needs to assist states in doing so. Moving forward, we will need to remain vigilant so as not to lose sight of this core objective. We must ensure that the Conference is able to monitor the effectiveness and efficiency of the new review mechanism at each of its future sessions. The process should not undermine the true benefit of the review mechanism—promoting practical cooperation.

At the same time, we must recognize the valuable contributions of civil society in

promoting implementation of the Convention and its Protocols. Non-governmental organizations and other civil society institutions are in many instances the first-line responders to victims of organized crime. Partnerships with civil society are critical to prevention efforts. For example, through partnerships with private business, we can help ensure that goods produced and bought are free from slave labor. Partnerships with the hospitality and travel industries can also promote responsible tourism and prevent commercial sexual exploitation, especially of children. Media can also help raise awareness of the harms of transnational organized crime.

It is imperative that the Conference recognize the multiplicity of civil society contributions, particularly as we finalize the details for the new review mechanism and seek effective results from it.

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7. Corruption

On March 22, 2012, Secretary Clinton spoke at the Annual Integrity Award Dinner sponsored by Transparency International (“TI”) in Washington, D.C. She summarized the Obama administration’s efforts to fight corruption, including by promoting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and the UN Convention against Corruption. Secretary Clinton’s remarks are excerpted below and are available in full at www.state.gov/secretary/rm/2012/03/186703.htm. See Chapter 6.K. for further discussion of the Open Government Partnership, highlighted in Secretary Clinton’s remarks. And see Chapter 11.G .4. regarding further developments in 2012 in required disclosures in the extractive industries.

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... [W]e have made it a priority to fight corruption and promote transparency.... In 1996, the United States played a major role in developing the first legally-binding commitment by governments to fight corruption. And we’ve led on many important fronts since then. But I’d like to just briefly describe what this Administration is doing.

First, we’re expanding and mobilizing a global consensus in support of greater transparency—a global architecture, if you will, of anticorruption institutions and practices. Along with Brazil, we launched the Open Government Partnership. It is a network of support for government leaders and citizens working to bring more transparency and accountability to governments.

... All told, 53 countries and dozens of civil society organizations are committing to these efforts. And I know that many of TI’s country offices, including TI-USA, will be represented at the Open Government Partnership high-level summit in Brasilia that I will co-chair with the Brazilian foreign minister.

We’re building this anticorruption consensus in other ways as well. In what is called the Deauville Partnership, we are working with our Arab partners on anticorruption, open

government, and asset recovery efforts. At the OECD, we were pleased to welcome Colombia and Russia into the Working Group on Bribery last year. It will be an important milestone when both have become full parties to the Anti-Bribery Convention.

...And through our bilateral diplomacy and at the G-20, we are encouraging major economies such as China, India, Indonesia, Saudi Arabia to join the convention as well. We support the follow-through that's necessary to enforce anticorruption norms such as the new review process that promotes implementation of the UN Convention against Corruption.

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Finally, because our credibility depends on practicing what we preach, we are trying to up our own game. We recently announced our intention to implement the Extractive Industries Transparency Initiative in the United States, which will require disclosure of payments made by companies to the government and of payments received by the government from companies. Additionally, the Cardin-Lugar Amendment requires extractive industry companies registered with the SEC to disclose, project by project, how much they pay foreign governments. Now I know this has been a difficult issue, and the SEC is still working on the regulations, but we do think it will have a very profound effect on our ability to try to help manage some of the worst practices that we see in the extractive industry and in the relationships with governments at local and national levels around the world.

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And of course, this Administration, like those before us, has taken a strong stand when it comes to American companies bribing foreign officials. We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don't need to lower our standards. We need to work with other countries to raise theirs. I actually think a race to the bottom would probably disadvantage us. It would not give us the leverage and the credibility that we are seeking.

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8. Piracy

a. Overview

In 2012, as this section discusses in detail below, the United States continued its active efforts to counter piracy off the coast of Somalia through various international initiatives and domestic prosecutions of individuals suspected of piracy and related offenses. On October 26, 2012, Assistant Secretary of State Andrew J. Shapiro addressed the Atlantic Council on the progress made in combating piracy. Assistant Secretary Shapiro's remarks, excerpted below, are available in full at www.state.gov/t/pm/rls/rm/199927.htm. In addition to his October remarks, Assistant Secretary Shapiro also addressed the U.S. Chamber of Commerce on March 13, 2012 on the topic of private sector partnerships against piracy in remarks that are available at www.state.gov/t/pm/rls/rm/185697.htm. Other U.S. government officials also addressed the issue of piracy in remarks available at

www.state.gov/t/pm/rls/rm/186987.htm, www.state.gov/t/pm/rls/rm/191603.htm, and www.state.gov/t/pm/rls/rm/199929.htm.

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...According to figures from the U.S. Navy, we are on track to experience a roughly 75 percent decline in overall pirate attacks this year compared with 2011. Independent, non-governmental sources, such as the International Maritime Bureau, also indicate a dramatic drop in attacks.

We are seeing fewer attempted attacks in no small measure because pirates are increasingly less successful at hijacking ships. In 2011, the number of successful pirate attacks fell by half compared to 2010. This year, in 2012, the number of successful attacks off the Horn of Africa has continued to decline. To date, pirates have captured just ten vessels this year, compared to 34 in 2011 and 68 in 2010. The last successful Somali pirate attack on a large commercial vessel was more than five months ago.

The lack of success at sea, means that Somali pirates are holding fewer and fewer hostages. In January 2011, pirates held 31 ships and 710 hostages. Today, pirates hold five ships and 143 hostages. That is roughly an 80 percent reduction in ships and hostages held by pirates since January 2011. While this is still unacceptably high, the trend is clear. We are making tremendous progress.

Today, I want to talk about the U.S. government response to piracy. I want to talk about how our response provides a model for dealing with shared global challenges and is an example of “smart power” in action.

This is a challenge where deliberate and concerted action by governments, international organizations, and the private sector resulted in a truly multilateral campaign that has suppressed piracy off the coast of Somalia to levels that seemed impossible only 18 months ago.

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...We have pursued an integrated multi-lateral and multi-dimensional approach. This “smart power” approach has involved utilizing every tool in our tool kit. The cooperation and coordination across the U.S. government to address piracy has been remarkable. It has included a wide swath of agencies: the Departments of State, Defense, Treasury, Justice, Transportation, and Homeland Security, as well as the intelligence community.

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In January 2009, the United States helped establish the Contact Group on Piracy off the Coast of Somalia. The Contact Group is based on voluntary membership of states looking to act and was established concurrent with the UN Security Council’s passage of Resolution 1851. It now includes over 70 nations as well as international and maritime industry organizations. The Contact Group is an essential forum. It helps galvanize action and coordinate the counter-piracy efforts of states, as well as regional and international organizations. A number of specialized working groups were established within the Contact Group to address a variety of subjects, including: naval coordination at sea; judicial and legal issues involving captured pirates; and

public diplomacy programs in Somalia to discourage piracy. While we don't always agree on everything, we agree on a lot, and this coordinated international engagement has spawned action.

Additionally, to utilize resources effectively and prevent duplication, a UN-managed Trust Fund to support counter-piracy initiatives was established. Through contributions from states and the private sector, the Trust Fund has funded a range of initiatives designed to counter-piracy and build capacity ashore. This includes the construction of prisons, the training of judicial officials, and the purchase of equipment for law enforcement in Somalia. It has also helped underwrite the cost of piracy trials of countries in the region.

The issue of piracy has also become a regular part of our diplomatic engagement with countries around the world. When I engage in diplomatic talks with countries like Malaysia, India, and Brazil piracy is on the agenda. Countries are eager to discuss piracy and to find ways in which we can work together to address this shared challenge. The issue of piracy therefore can have an ancillary diplomatic benefit to the United States. As it can serve as a non-controversial security issue we can discuss with countries, in which we are seeking to develop our broader security relationships.

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Critical to the decline in piracy has been the deployment of naval forces. Encouraging the international community to take military action has been an essential component of our diplomatic efforts. For our part, on the high seas, the United States established Combined Task Force 151—a multinational naval effort charged with conducting counter-piracy patrols in the region, covering an area of over one million square miles.

But in addition to our efforts, there are a number of coordinated multinational naval patrols off the Horn of Africa. NATO is engaged with Operation OCEAN SHIELD and the European Union has Operation ATALANTA. Other national navies, including several from Asia and the Middle East conduct counter-piracy patrols and escort operations as well. These are independent from the multinational efforts but are coordinated through participation in Shared Awareness and Deconfliction meetings known as SHADE, which helps ensure that everyone is on the same page.

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The widespread adoption of Best Management Practices has clearly had a significant positive effect. These include practical measures, such as: proceeding at full-speed through high risk areas and erecting physical barriers, such as razor wire, to make it more difficult for pirates to come aboard. These measures help harden merchant ships against pirate attack. Recognizing the value of these measures, the U.S. government has required U.S.-flagged vessels sailing in designated high-risk waters to fully implement these measures.

But perhaps the ultimate security measure a commercial ship can adopt is the use of privately contracted armed security teams. These teams are often made up of former members of various armed forces, who embark on merchant ships and guard them during transits through high risk waters. The use of armed security teams has been a potential game changer in the effort to combat piracy. To date, not a single ship with armed security personnel aboard has been successfully pirated.

For our part, the U.S. government led by example, as early on in the crisis we permitted armed personnel aboard U.S.-flagged merchant vessels. We also mandated that U.S. vessels transiting high risk areas conduct a risk assessment with specific consideration given to supplementing onboard security with armed guards.

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Fully unraveling legal and policy conflicts related to armed security will take some time—and we are continuing to push for progress on this issue. Last month the State Department hosted a working level meeting of policy specialists from 23 nations and international organizations. The intent of the meeting was to share information about national or organizational policy and to give us a more complete picture of the overlaps and gaps in policy from country to country. This is an important step in figuring out a way forward that addresses the thorniest differences.

While we are finding ways to deter and suppress pirates and better protect vessels at sea, some still do not take all available security precautions. Approximately 20 percent of all ships off the Horn of Africa are not taking proper security measures. And predictably, these account for the overwhelming number of successfully pirated ships. Hijackings will therefore remain a danger for the foreseeable future.

In a hostage situation our foremost concern is always about the safety of the entire crew. However, every ransom paid only further institutionalizes piracy and increases the likelihood that others will face the threat of hijacking in the future. The United States has a long tradition of opposing the payment of ransoms, and we have worked to discourage or minimize ransom payments. When a hostage taking occurs we strongly encourage those involved to seek assistance from appropriate government authorities.

The American public should also know that this Administration will do everything it can to ensure the safety and security of American citizens threatened by pirates. We have made clear that we will act aggressively to rescue and protect American citizens threatened by piracy. For example, just months into office, President Obama was confronted with the hostage taking of the American captain of the MAERSK Alabama. The President authorized the use of force to rescue the captured captain and after a long standoff, U.S. Navy Seals successfully freed the captain. And in January this year, just hours before the State of the Union address, President Obama ordered U.S. Special Forces to rescue an American and a Danish aid worker being held hostage on the ground in Somalia. This dangerous mission clearly demonstrated our resolve. If you attack or capture an American citizen, we will act vigilantly and aggressively to make sure you face justice.

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Now let me turn to another aspect of our response—our efforts to deter piracy through effective apprehension, prosecution and incarceration of pirates and their supporters and financiers.

Today, over 1,000 pirates are in custody in 20 countries around the world. Most are, or will be, convicted and sentenced to lengthy prison terms.

An important element of our counter-piracy approach has involved a renewed emphasis on enhancing the capacity of states—particularly those in the region—to prosecute and incarcerate suspected pirates. The United States is currently supporting efforts to:

- increase prison capacity in Somalia;
- develop a framework for prisoner transfers so convicted pirates serve their sentence back in their home country of Somalia; and
- establish a specialized piracy chamber in the national courts of one or more regional states.

Prosecution is crucial and several regional nations have been bearing the lion's share of the burden in this area. Kenya, Seychelles, and the Maldives have each accepted for prosecution dozens of pirates captured by naval forces patrolling off the Horn of Africa. They have also agreed to incarcerate convicted prisoners until more durable solutions are found. These countries deserve both commendation from the international community and support for their judicial systems.

Going forward, however, we cannot expect Somalia's neighbors to host trial after trial and continue to absorb large numbers of imprisoned pirates. Many nations have laws that allow them to prosecute piracy as a crime of universal jurisdiction. Whenever possible, nations affected by piracy, even if only tangentially, should exercise that jurisdiction and help ease the burden.

Furthermore, it is imperative that the maritime industry do everything it can to support prosecutors trying to bring cases against pirates. Too often prosecutors decline cases because they do not believe the required witnesses will be available when a case goes to trial. With pirates from one country; prosecution in a second; a shipping company from a third country; and a merchant-mariner witness from a fourth; prosecutors often have little standing to compel testimony and instead must rely on voluntary cooperation. Crew members should be able to participate in the trials of their tormentors secure in the knowledge that their employers support their decision and will hold their job for them. To that end, the State Department and the United Nations Office on Drugs and Crime have worked together to support prosecutions. Together we recently provided funding and technical support for Kenyan judicial officials to hear testimony from crew members by video teleconference from their home countries for hearings held in Mombasa, Kenya.

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As piracy has evolved into an organized transnational criminal enterprise, it is increasingly clear that the arrest and prosecution of rank and file pirates captured at sea is insufficient on its own to meet our longer term counter-piracy goals. Most pirates captured at sea are often low-level operatives. The harsh reality of life in Somalia ensures there are willing replacements for pirates apprehended at sea. Prosecutions are essential but they must also include the masterminds along with the gunmen. After an intensive review of our strategy last year, Secretary Clinton approved a series of recommendations that constituted a new approach. A focus on pirate networks is at the heart of our strategy.

We are using all of the tools at our disposal in order to disrupt pirate networks and their financial flows. We are focused on identifying and apprehending the criminal conspirators who lead, manage, and finance the pirate enterprise. We are making progress in this effort. For instance, this past August, Pirate negotiator Mohammad Saaili Shibin received two consecutive life sentences from a U.S. federal court for his role in the attack that ended in the deaths of four

Americans aboard the S/V Quest. This kind of sentence is exactly what is needed to create strong disincentives to piracy. Moreover, it is an important step against the upper tiers of the pirate hierarchy and demonstrates that individuals beyond the gunmen in skiffs are culpable and prosecutable.

The Contact Group also endorsed the focus on pirate networks and formed a new working group to facilitate multilateral coordination. This effort includes tracking pirate sources of financing and supplies, such as fuel, outboard motors, and weapons. For example, working closely with INTERPOL's National Central Bureau in Washington, we have helped to develop a comprehensive database on Somali piracy that will make information accessible to law enforcement and help further criminal investigations against pirate ringleaders.

We are also supporting the effort to stand up an information fusion center in the region to facilitate the capture and prosecution of the financiers, investors, and ringleaders of Somali piracy. The Regional Anti-Piracy Prosecutions Intelligence Coordination Center known as RAPPICC is located in the Seychelles and in August broke ground on the Center's new facility, which will be located on an old Coast Guard base in the Seychelles. RAPPICC will be part of a larger "Crime Campus" with a 20-person holding facility for use in conducting interviews. We are confident that it will help prosecutors around the world, by equipping them with the evidentiary packages they need to win convictions against not just rank and file pirates, but the middle and top tier actors.

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b. International support for efforts to bring suspected pirates to justice

In international fora, the United States continued to underscore the importance of bringing suspected pirates to justice and took steps to help states enhance their capacities to pursue prosecutions and incarcerate individuals convicted of piracy and piracy-related crimes.

(1) UN Security Council

The Security Council adopted several resolutions on Somalia in 2012, including resolution 2077 renewing for another twelve months the authorizations granted to States and regional organizations cooperating with Somali authorities in the fight against piracy and armed robbery at sea off the coast of Somalia. U.N. Doc. S/RES/2077. The United States actively supported the work of the Security Council to counter piracy. At a Security Council session on piracy in Somalia on February 22, 2012, Jeffrey DeLaurentis, U.S. Alternate Representative to the United Nations for Special Political Affairs, provided the U.S. response to the latest report by the Secretary General on piracy. Ambassador DeLaurentis's statement, excerpted below, is available in full at <http://usun.state.gov/briefing/statements/184563.htm>.

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... [E]ven as piracy continues to present challenges off the coast of Somalia, we are cautiously optimistic about some of the findings of the Secretary General's report—including that the success rate of attacks decreased in 2011. As more nations implement the guidance provided by the International Maritime Organization—the industry-developed Best Management Practices (BMP) for Protection against Somalia-Based Piracy—and employ the use of privately contracted, armed security personnel (PCASP), we are hopeful that the numbers will continue to decrease.

However, we remain extremely concerned by reports that the geographical expanse of pirate operations is intruding into the Southern Red Sea and extending as far as the Eastern Indian Ocean. In addition to the human toll associated with piracy, the economic costs of dealing with the piracy threat are staggering. These grim statistics reinforce the need, as one part of the solution to the piracy problem, to establish specialized anti-piracy courts and increase the capacity to conduct prosecutions.

We note that an ultimate goal in this regard is enhancing Somali responsibility and active involvement in efforts to prosecute and incarcerate suspected pirates. As one aspect of this, we stress the importance of the Transitional Federal Government (TFG) of Somalia enacting anti-piracy legislation by May 18, as called for in the Roadmap to End the Transition, and the Transitional Federal Parliament (TFP) passing appropriate counter-piracy legislation before the end of the transitional period in August.

We applaud the tremendous amount of work already underway by UNODC, UNDP, and others to assist Somalia and regional states in conducting piracy prosecutions and are very encouraged by the projection that, with assistance, states in the region could collectively increase the number of piracy prosecutions per year by 125—involving up to 1,250 suspects—in accordance with international standards. This includes, as appropriate, prosecution of planners, facilitators, and financiers of piracy attacks. We thank, among others, the Government of the Seychelles for its indication of willingness to host a regional prosecution center contingent on the establishment of an effective, post-trial transfer framework, and look forward to the opening this year of its Regional Anti-Piracy Prosecution and Intelligence Coordination Center.

We also acknowledge UNSCR 2020 and its commendation of INTERPOL for the creation of a global piracy database designed to consolidate information about piracy off the coast of Somalia and facilitate the development of actionable analysis for law enforcement. We urge all States to share such information with INTERPOL for use in the database, through appropriate channels.

We recognize that any increase in prosecution capacity in the region necessarily will require an increase in prison capacity. In this regard, we support the continuing efforts of Somali authorities, UNODC, UNDP, and other international partners in supporting the construction and responsible operation of suitable and sufficient prisons in Somalia and elsewhere in the region.

The United States, for its part, will continue to aggressively prosecute suspected pirates in cases with a U.S. nexus. We have in custody a total of 28 Somalis in various stages of prosecution or incarceration in five cases of attacks on American citizens or American interests.

We believe that the Secretary General's report demonstrates that the experts of UNODC, UNDP, the Contact Group on Piracy off the Coast of Somalia, and other players understand clearly the problems and needs with respect to piracy prosecutions in the region, and how best to address those needs. That is why contributions to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia are so vitally important—to permit timely implementation by UNODC, UNDP, and others of as many of the specific steps called for in the Secretary General's report as possible. The United States contributes regularly to this Trust Fund

and is confident that projects that it funds are making a real difference in building capacity related to the rule of law in the region and specifically to countering piracy.

We also recognize the importance to the Seychelles and other regional states' efforts of international assistance in the form of provision of personnel, as called for in the report. We are studying ways in which we can contribute materially to the joint UK-Seychelles proposed Regional Anti-Piracy Prosecution Intelligence and Information Center to be located in Victoria and believe this center will make a material contribution to the international effort to disrupt the piracy enterprise ashore.

Finally, we endorse the report's suggestion that, as a logical next step, an assessment be conducted—with the assistance of States active in naval operations—to help determine the numbers of piracy incidents where suspects are apprehended and released, as well as the reasons underlying these releases. As the report notes, this will assist both in sharpening of counter-piracy strategy and the determination of likely anticipated demand for prosecution capacity in the region for the foreseeable future.

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(2) Contact Group on Piracy off the Coast of Somalia

In 2012, the United States continued to actively participate in the Contact Group on Piracy off the Coast of Somalia ("CGPCS" or "Contact Group"). See *Digest 2009* at 464-67 regarding the creation of the CGPCS and the website of the CGPCS, www.thecgpcs.org, for more information. Three plenary sessions were held in 2012 in March, July, and December. Communiqués released at the conclusion of each session are available at www.thecgpcs.org/plenary.do?action=plenaryMain#. On December 11, 2012, the 13th plenary session of the CGPCS convened in New York. The communiqué from that session, available at www.state.gov/t/pm/rls/othr/misc/202270.htm, is excerpted below.

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The Contact Group on Piracy off the Coast of Somalia (CGPCS) held its Thirteenth Plenary Session at the UN Headquarters in New York on December 11, 2012 under the Chairmanship of India and agreed to the following conclusions:

* * * *

6. The CGPCS ... noted the Memorandum of Understanding of the Inter-Governmental Authority on Development (IGAD) Joint Committee for the Grand Stabilization Plan for South Central Somalia. It called on the international community to move swiftly to support the Somali authorities so that they can finally provide the security and peace dividends that Somalis deserve. It welcomed Somalia's commitment to combat piracy, as stated in the Program endorsed by its Parliament on November 13, 2012 and called on the Somali authorities to elaborate a maritime

security strategy to facilitate close cooperation with the international community to disrupt and counter pirate activity.

7. As emphasized in several UN Security Council resolutions, the CGPCS reiterated the importance of an early declaration of an Exclusive Economic Zone off the coast of Somalia, in accordance with the 1982 UN Convention of the Law of the Sea, which will promote the effective governance of waters off the coast of Somalia.

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11. It also welcomed the efforts of Working Group (WG) 3 to analyze applicable clauses and implications of existing international conventions, agreements and guidelines to protect the rights of piracy victims. It noted the ongoing discussions in WG 3 on making draft guidelines for assisting victims or potential victims of piracy with a contribution of States, industry, the International Maritime Organization (IMO) and the International Labour Organization (ILO), among others.

12. The CGPCS appreciated the Hostage Support Programme being jointly implemented by the UN Political Office for Somalia (UNPOS) and UN Office on Drugs and Crime (UNODC), with funding from the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, for tracking and monitoring those held hostage by Somali pirates, delivering humanitarian support if possible, and repatriating those abandoned on shore in Somalia.

* * * *

17. The CGPCS noted the adoption by the IMO of revised interim guidance to ship owners, ship operators, and ship masters on the use of Privately Contracted Armed Security Personnel (PCASP) on board ships in the high risk area, as well as the revised interim recommendations for flag States, port States and coastal States regarding the use of PCASP on board ships in the high risk area, and the interim guidelines to private maritime security companies providing PCASP on board ships in the high risk area.

18. The CGPCS encouraged flag States and port States to further consider the development of safety and security measures onboard vessels, including regulations for the deployment of PCASP on board ships, through a consultative process, in close collaboration with the IMO's Maritime Safety Committee and the International Organization for Standardization (ISO).

19. The CGPCS noted that an Ad Hoc Meeting on PCASP was held with the participation of 24 countries, the IMO, and NATO in Washington D.C. on September 12, 2012, where different viewpoints on issues such as the legality of jurisdiction in cases of incidents related to use of PCASP, use of force by PCASP, standard protocols for PCASP, and the wide variation in coastal States' laws for transport of arms by PCASP were expressed. The WG 2 Chair subsequently agreed to undertake a full examination of all legal issues relevant to the use of PCASP in order to identify and prioritize—as a matter of urgency—areas of action.

* * * *

Progress on legal issues

29. The CGPCS welcomed the continued efforts of WG 2 to provide legal guidance on all issues related to the fight against piracy, including with a view to ensure the prosecution of suspected pirates in accordance with international standards. Noting that 1179 individuals are currently being prosecuted or have been prosecuted for piracy in 21 countries around the world, it welcomed the progress in the number of prosecutions undertaken against suspected pirates at a national level.

30. The CGPCS encouraged the Somali authorities to pass a complete set of counter-piracy laws without further delay, with a view to ensuring the effective prosecution of suspected pirates and those associated with piracy attacks off the coast of Somalia. It remains strongly committed to supporting them in this endeavor.

31. It welcomed the new publicly accessible United Nations Interregional Crime and Justice Research (UNICRI) Database on Court Decisions and Related Matters on piracy decisions at the global level, and encouraged States to contribute to the database.

32. It supported the continued implementation of the Post Trial Transfer system and the progress in the UNODC Piracy Prisoner Transfer Programme (PPTP) and noted the need for continued support for capacity building in the field.

33. It encouraged WG 2 to develop best practices for ensuring the protection of human rights during the detention and prosecution of suspected pirates, including with regard to juveniles.

34. The CGPCS recognized the need to strengthen the mechanisms of prosecution of pirates apprehended off the coast of Somalia and reiterated the urgent need to investigate and prosecute not only suspects captured at sea, but also anyone, who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate or finance and profit from such attacks. It called upon the UN Security Council to keep under review the possibility of applying targeted sanctions against such individuals or entities if they meet the listing criteria set out in paragraph 8 of Resolution 1844 (2008).

35. The CGPCS noted the concern expressed by the maritime industry that any sanction measures leading to the prevention of ransom payments could adversely affect the welfare, security and release of seafarers who are held hostage.

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Disrupting financial flows and piracy networks

37. The CGPCS welcomed the progress of the joint UNODC-World Bank-INTERPOL study on illicit financial flows linked to piracy off the Coast of Somalia, which was presented to WG 5 on 9 November 2012. It looked forward to receiving the detailed findings of the first leg of the project in early 2013 and urged the donor community to ensure the full funding of the second leg that will be centered on building financial culture and surveillance capacity in the area.

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Future Chairmanship

49. The CGPCS decided that the fourteenth and fifteenth plenary sessions will be held under the Chairmanship of the United States of America in 2013.

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(3) Foreign prosecutions

In March 2012, the Republic of the Seychelles agreed to prosecute 15 suspected Somali pirates apprehended by the U.S. Navy after boarding an Iranian vessel and liberating Iranian nationals held as hostages. See State Department March 6, 2012 Press Statement, available at www.state.gov/r/pa/prs/ps/2012/03/185289.htm. The 15 suspects were subsequently convicted and sentenced in the Seychelles later in the year. In a November 7, 2012 press statement, available at www.state.gov/r/pa/prs/ps/2012/11/200232.htm, the State Department welcomed the conviction and sentencing and expressed appreciation for Seychelles' regional leadership in counter-piracy, including its conviction of 98 pirates thus far.

c. U.S. prosecutions

Domestically, the United States continued to pursue the prosecution of captured individuals suspected in several pirate attacks. As of the end of 2012, the United States had pursued the prosecution of 28 suspected pirates in U.S. courts for their involvement in attacks on seven ships that were either U.S. flagged or related to U.S. interests. Prosecutions resulted in 19 defendants receiving convictions.

Mohammad Saaili Shibin, the man convicted as the person in Somalia responsible for negotiating the ransom of an American yacht, the *S/V Quest*, and the *Marida Marguerite*, a German-owned vessel, was convicted in the U.S. District Court for the Eastern District of Virginia of fifteen counts of piracy and related crimes. He was sentenced on August 13, 2012 to ten concurrent life sentences for piracy, two consecutive life sentences for the use of a rocket propelled grenade and automatic weapons during crimes of violence, ten years consecutive on six counts charging discharge of a firearm during a crime of violence, and two twenty year sentences for the remaining counts of discharge of a firearm during a crime of violence. Neil H. MacBride, U.S. Attorney for the Eastern District of Virginia, noted following sentencing the importance of Shibin's conviction: "The Somalia piracy criminal enterprise could not function without skilled negotiators like Shibin and his multiple life sentences should put all pirates on notice that the Justice Department will hold you accountable in an U.S. courtroom for crimes on the high seas." See Department of Justice press release, available at www.justice.gov/usao/vae/news/2012/08/20120813shibinnr.html.

Also in 2012, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in a case involving defendants convicted of piracy "as defined by the law of nations" as codified at 18 U.S.C. § 1651 who asserted that the district court had improperly defined the crime of

piracy under that statute. *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012). The 2010 opinion of the district court on the issue is discussed in *Digest 2010* at 109-15, which also excerpts the September 3, 2010 declaration of State Department Legal Adviser Harold Hongju Koh conveying the opinion that the definition of piracy under the law of nations is the definition contained in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the UN Convention on the Law of the Sea (“UNCLOS”). The court of appeals for the Fourth Circuit affirmed the convictions for piracy, agreeing with the district court that piracy “as defined by the law of nations” refers to a definition of piracy under customary international law in its current state, and not to a static definition of piracy as it was understood at the time of codification. The court’s opinion is excerpted below with footnotes omitted. *** *Digest 2010* also discusses (at pp. 106-9) the 2010 opinion of another district court construing the definition of piracy to be more static and to include the element of robbery, *United States v. Said*, 757 F.Supp.2d. 554 (E.D.Va. 2010). As explained in a footnote to the opinion in *Dire*, the Fourth Circuit issued its opinion vacating the *Said* opinion in tandem with its decision in *Dire*. 680 F.3d. 374 (4th Cir. 2012).

* * * *

On appeal, the defendants maintain that the district court erred with respect to Count One both by misinstructing the jury on the elements of the piracy offense, and in refusing to award post-trial judgments of acquittal. Each aspect of the defendants’ position obliges us to assess whether the court took a mistaken view of 18 U.S.C. § 1651 and the incorporated law of nations. ...

Simply put, we agree with the conception of the law outlined by the court below. Indeed, we have carefully considered the defendants’ appellate contentions—endorsed by the amicus curiae brief submitted on their behalf...—yet remain convinced of the correctness of the trial court’s analysis.

The crux of the defendants’ position is now, as it was in the district court, that the definition of general piracy was fixed in the early Nineteenth Century, when Congress passed the Act of 1819 first authorizing the exercise of universal jurisdiction by United States courts to adjudicate charges of “piracy as defined by the law of nations.” Most notably, the defendants assert that the “law of nations,” as understood in 1819, is not coterminous with the “customary international law” of today. The defendants rely on Chief Justice Marshall’s observation that “[t]he law of nations is a law founded on the great and immutable principles of equity and natural justice,” *The Venus*, 12 U.S. (8 Cranch) 253, 297, 3 L.Ed. 553 (1814) (Marshall, C.J., dissenting), to support their theory that “[t]he Congress that enacted the [Act of 1819] did not view the universal law of nations as an evolving body of law.” Br. of Appellants 12; *see also* Br. of Amicus Curiae 11 (arguing that, in 1819, “ ‘the law of nations’ was well understood to refer to an immutable set of obligations—not evolving practices of nations or future pronouncements of international organizations that did not yet exist”).

The defendants’ view is thoroughly refuted, however, by a bevy of precedent, including

*** Editor’s note: The defendants sought further review of their case by filing a petition for certiorari in the Supreme Court of the United States. The Supreme Court denied the petition for certiorari on January 22, 2013.

the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, [542 U.S. 692 (2004)]. The *Sosa* Court was called upon to determine whether Alvarez could recover under the Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"), for the U.S. Drug Enforcement Administration's instigation of his abduction from Mexico for criminal trial in the United States. *See* 542 U.S. at 697, 124 S.Ct. 2739. The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Significantly, the ATS predates the criminalization of general piracy, in that it was passed by "[t]he first Congress ... as part of the Judiciary Act of 1789." *See Sosa*, 542 U.S. at 712–13, 124 S.Ct. 2739 (citing Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (authorizing federal district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States")). Yet the *Sosa* Court did not regard the ATS as incorporating some stagnant notion of the law of nations. Rather, the Court concluded that, while the first Congress probably understood the ATS to confer jurisdiction over only the three paradigmatic law-of-nations torts of the time—including piracy—the door was open to ATS jurisdiction over additional "claim[s] based on the present-day law of nations," albeit in narrow circumstances. *See id.* at 724–25, 124 S.Ct. 2739. Those circumstances were lacking in the case of Alvarez, whose ATS claim could not withstand being "gauged against the current state of international law." *See id.* at 733, 124 S.Ct. 2739.

Although, as the defendants point out, the ATS involves civil claims and the general piracy statute entails criminal prosecutions, there is no reason to believe that the "law of nations" evolves in the civil context but stands immobile in the criminal context. Moreover, if the Congress of 1819 had believed either the law of nations generally or its piracy definition specifically to be inflexible, the Act of 1819 could easily have been drafted to specify that piracy consisted of "piracy as defined *on March 3, 1819* [the date of enactment], by the law of nations," or solely of, as the defendants would have it, "robbery upon the sea." The government helpfully identifies numerous criminal statutes "that incorporate a definition of an offense supplied by some other body of law that may change or develop over time," Additionally, the government underscores that Congress has explicitly equated piracy with "robbery" in other legislation, including the Act of 1790 that failed to define piracy as a universal jurisdiction crime.

For their part, the defendants highlight the Assimilated Crimes Act (the "ACA") as a statute that expressly incorporates state law "in force at the time of [the prohibited] act or omission." *See* 18 U.S.C. § 13(a). That reference was added to the ACA, however, only after the Supreme Court ruled that a prior version was "limited to the laws of the several states in force at the time of its enactment," *United States v. Paul*, 31 U.S. (6 Pet.) 141, 142, 8 L.Ed. 348 (1832)—a limitation that the Court has not found in various other statutes incorporating outside laws and that we do not perceive in 18 U.S.C. § 1651's proscription of "piracy as defined by the law of nations."

Additional theories posited by the defendants of a static piracy definition are no more persuasive. For example, the defendants contend that giving "piracy" an evolving definition would violate the principle that there are no federal common law crimes. *See* Br. of Appellants 32 (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812), for the proposition "that federal courts have no power to exercise 'criminal jurisdiction in common-law cases' "). The 18 U.S.C. § 1651 piracy offense cannot be considered a common law crime, however, because Congress properly "ma[de] an act a crime, affix[ed] a punishment to it, and declare[d] the court that shall have jurisdiction of the offence." *See Hudson*, 11 U.S. (7 Cranch)

at 34. Moreover, in its 1820 *Smith* decision, the Supreme Court unhesitatingly approved of the piracy statute's incorporation of the law of nations, looking to various sources to ascertain how piracy was defined under the law of nations. *See Smith*, 18 U.S. (5 Wheat.) at 159–61.

The defendants would have us believe that, since the *Smith* era, the United States' proscription of general piracy has been limited to "robbery upon the sea." But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases. *See Sosa*, 542 U.S. at 761, 124 S.Ct. 2739 (Breyer, J., concurring in part and concurring in the judgment) (explaining that universal jurisdiction requires, inter alia, "substantive uniformity among the laws of [the exercising] nations"). At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In these circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.

We also agree with the district court that the definition of piracy under the law of nations, at the time of the defendants' attack on the USS *Nicholas* and continuing today, had for decades encompassed their violent conduct. That definition, spelled out in the UNCLOS, as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy. For example, in November 2011, the United Nations Security Council adopted Resolution 2020, recalling a series of prior resolutions approved between 2008 and 2011 "concerning the situation in Somalia"; expressing "grave[] concern[] [about] the ongoing threat that piracy and armed robbery at sea against vessels pose"; and emphasizing "the need for a comprehensive response by the international community to repress piracy and armed robbery at sea and tackle its underlying causes." Of the utmost significance, Resolution 2020 reaffirmed "that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea." Because the district court correctly applied the UNCLOS definition of piracy as customary international law, we reject the defendants' challenge to their Count One piracy convictions, as well as their mandatory life sentences.

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C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Overview

In November 2012, Mr. Koh delivered remarks on international criminal justice at the Vera Institute of Justice in New York and at Leiden University, Campus The Hague. The remarks, excerpted below, are also available at www.state.gov/s//releases/remarks/200957.htm.

* * * *

In my time tonight, let me review the five phases of this historic global project, the role of the United States in advancing it, and the challenges that still loom ahead for international criminal justice and the United States.

I. International Criminal Justice 1.0: The Nuremberg Trials

Let me begin with Nuremberg, what could be called the “beta testing” phase for International Criminal Justice 1.0. Nearly 70 years after the Nuremberg Trials, what seems most remarkable now is that they happened at all. Looking back, we sometimes think of trials—particularly the International Military Tribunal at Nuremberg and the subsequent U.S. Nuremberg proceedings—as the logical and inevitable response to the Nazi atrocities. But at the Tehran Conference, Stalin reportedly suggested that World War II conclude with the summary execution of at least 50,000 Germans. At Yalta, Churchill apparently “thought a list of the major war criminals ... should be drawn up [and] they should be shot once their identity is established.” Even Roosevelt’s Secretary of the Treasury, Henry Morgenthau, suggested that war criminals be summarily liquidated.

But in the famous Yalta memo, it was three American Cabinet Secretaries—the U.S. Secretaries of State and War and Attorney General—who all urged President Roosevelt that “the just and effective solution lies in the use of the *judicial method*.” They presciently pointed out the value in creating “an authentic record of Nazi crimes and criminality” that would be “available for all mankind to study in future years.” And these U.S. officials backed up their idea with both action and resources. As some would say, we cared enough to send our very best: Attorney General Francis Biddle and Judge John J. Parker to serve as Judges, our most brilliant Supreme Court Justice Robert Jackson, to serve as Chief Prosecutor, aided by an all-star team of lawyers that included Telford Taylor, Herbert Wechsler, Whitney Harris, future Senator Tom Dodd, and Ben Ferencz.

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This past August, I visited Nuremberg for the first time, and learned much more about the nuts and bolts of those trials. What struck me most is that the historic success of Nuremberg turned not just on the particular people who were there, but on four *institutional attributes* of international criminal justice that those proceedings worked hard to establish: *legitimacy, professionalism, cooperation, and legality*. ...

* * * *

The most enduring legacy of Nuremberg has been a set of seven legal principles—the Nuremberg Principles—that to this day continue to guide the project of international criminal justice:

- *Principles 1&2* – “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment,” regardless of whether the act is prohibited under local law.
- *Principles 3&4* – “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law,” and the individual is not protected from criminal punishment simply because he (or she) was carrying out orders.

- *Principle 5* – Those accused of crimes have a right to a fair trial, and
- *Principles 6&7* – Describing punishable international crimes as including crimes against peace, war crimes, crimes against humanity, and complicity in any of the above.

As you know, these Nuremberg Principles do not stand alone; in four ways, they went on to galvanize an international criminal justice movement: first, by suggesting universal principles that gave the movement one of its authoritative *texts*; second, by declaring that individuals are *subjects, not just objects*, of international law, thereby denying that international law is for States only; third, by *piercing the veil of state sovereignty* behind which war criminals had all too often previously hidden and recognizing that individuals can be held criminally responsible for international crimes, and fourth, by reaffirming that *criminal courts* can be appropriate forums for holding those individuals responsible for international crimes.

In short, Nuremberg and its principles provided what could be called the “intellectual operating software” for the international criminal justice movement. But for several decades after these Principles were developed, they lay largely dormant, lacking the necessary “hardware”—the functioning international institutions with the necessary legitimacy, legality, professionalism, and cooperation to implement those principles in real cases and crises.

B. International Criminal Justice 2.0: The Ad Hoc Tribunals

Only after the Cold War ended, did the two new international ad hoc tribunals—the ICTY and the ICTR—finally usher in the modern age of international criminal justice. When horrifying atrocities occurred in the Balkans and Rwanda, the United States led the push for accountability, resorting to the UN Security Council’s Chapter VII authority to establish those ad hoc tribunals. As my old boss Madeleine Albright told the UN Security Council when the ICTY was established in 1993, “There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory.”

Nothing quite like the ICTY and ICTR had ever been attempted. Even in the United States and other countries invested in creating the tribunals, some quietly saw them as expressions of guilt for failing to prevent the atrocities, or distractions from the more serious work of peacemaking. The ICTY was simultaneously asked to deliver accountability and to help resolve a bloody conflict, all from a brand new architecture. And it began this work when Croatia, Serbia, and much of Bosnia remained openly hostile to the Tribunal. But like the Nuremberg tribunals, first the ICTY, then the ICTR, built their *bona fides* by strengthening the four basic institutional attributes I just mentioned: legitimacy, legality, cooperation, and professionalism.

First, *Legitimacy*. The question of legitimacy continued to dog international criminal justice—here, the claim was not, as in Nuremberg, that the tribunals exemplified “victors’ justice” after a completed armed conflict, but rather were *biased* players favoring one party or another in an ongoing armed conflict. Despite their many accomplishments, the tribunals—which enjoyed primary jurisdiction—heard many criticisms about their legitimacy among the local populations. To this day, according to surveys, many Serbs tend to think that the ICTY is biased against Serbs, while Croats tend to think that the ICTY is biased against Croats.

To overcome such a critique, a true judicial institution must focus in part on the second attribute of international criminal justice, namely, *legality*. The ICTY and ICTR began developing a modern jurisprudence of criminal liability that was based on existing law as applied to a modern ethnic conflict. One of the ICTY’s early accomplishments was the Dusko *Tadic* case,

which involved a relatively low-level offender who—had he been caught only a few years later—would have been referred to Bosnia for domestic prosecution. The *Tadic* decision provided a reasoned basis for the seminal conclusions that (1) the UN Security Council had the *authority* to set up a criminal court under Chapter VII of the UN Charter; (2) the tribunal’s jurisdiction extended to war crimes committed in the course of a *non-international armed conflict*; and (3) Tadic could be convicted for his association with a small group of offenders, articulating the concept of *joint criminal enterprise* (“*JCE*”) that later became a central feature of the ICTY’s work.

As the late Judge Nino Cassese later explained, JCE allowed international courts to pursue in a reasoned and logical way the masterminds of mass atrocities even when they were not present at the scene of the crime. The ICTR applied similar reasoning to pursue not just the low-level offenders who carried out the Rwandan genocide, but officials as high ranking as the prime minister. Moreover, the early jurisprudence-building of the ad hoc tribunals provided the reasoned and logical basis for the important global conversation that has ensued on the issue of sexual violence. The post-WWII tribunals had largely ignored sexual violence, but the ICTY and ICTR situated the issue within the existing law of war crimes, crimes against humanity, and genocide. Although these decisions cannot, as a strictly legal matter “bind” other courts, there is no doubt that the jurisprudence of the ICTY and ICTR has been influential in the broader development of international criminal law.

Third, *cooperation*. To deliver genuine accountability, a tribunal must win a strong measure of cooperation from the international community. In the early days of the ICTY, national cooperation proved sporadic. The Tribunal found itself without custody of many indictees, particularly high-level ones, and many of the local players were openly hostile. But over the years, the cooperation and support of the international community noticeably improved, as the United States, together with many EU countries, tied foreign assistance to States in the Balkans to their apprehension of suspected war criminals and cooperation with the ICTY. The United States also entered into an arrest and surrender agreement with the ICTY. NATO and UN peacekeepers conducted arrests. U.S. cooperation helped not just in securing defendants but in procuring evidence. To take just one example, my office helped provide the ICTY Prosecutor with aerial images showing the construction of mass graves at Srebrenica, and the Trial Chamber in the *Popovic* case specifically relied on these aerial images to determine that the Bosnian Serb Army had engineered the mass killing and burial of Muslim men and boys in July 1995. And my office, together with the U.S. Department of Justice, also gave the ICTR high-profile assistance in apprehending and transferring Pastor Ntakirutimana, a Rwandan who had come to live in Texas after the genocide, to the ICTR for a fair trial, after which, the suspect was convicted and sentenced.

A fourth and final attribute that helped the ad hoc tribunals succeed was the hard-won reputation of their component institutions—judiciary, prosecution, and defense—for *professionalism*. It is inevitable that countries will limit the sharing of sensitive information unless they have the confidence that the information will be appropriately protected by their tribunal counterparts. The ICTY developed effective rules to provide such protections, but the ultimate assurance was provided by a shared sense that the lawyers and institutions involved would in fact operate in the way that countries expect of true legal professionals.

In short, the phase that I call “International Criminal Justice 2.0” was an initial phase of hardware-building for the international criminal justice system. The UN Security Council created two new institutions that proved capable of doing hugely important work in promoting

accountability. At the same time, it was becoming clear that these tribunals—which were expensive and lasted much longer than anyone had anticipated—would not necessarily be the all-purpose model for all international criminal justice going forward.

C. International Criminal Justice 3.0: The Hybrid Tribunals

Indeed, one lesson we came to appreciate in light of the ICTY/ICTR experiment was that justice for international crimes does not necessarily require justice before an *international* tribunal. To the contrary, in many cases, the best outcome—from the perspective of international justice, transitional justice, and institution-building—is for *States* to investigate and, if appropriate, to prosecute international crimes. For that reason, over the past fifteen years, the process of architecture-building in international criminal justice has taken a turn towards a “third way” of creating hybrid national-international tribunals—what could be called “hybridity” and “complementarity,” or simply “International Criminal Justice 3.0.” In three very different countries—Sierra Leone, Cambodia, and Lebanon—different arrangements were reached to promote justice and accountability, each tailored to their particular local contexts.

Take for example the Special Court for Sierra Leone (SCSL), which was formed to bring accountability for horrific abuses—including brutal amputations, trade in “blood diamonds,” and terror of civilians—during that country’s civil war. “Tribunal fatigue” from the ICTY and ICTR had set in; contentious debates about forming the ICC were ongoing; and some were calling for domestic prosecutions only, even while the Sierra Leone government was requesting international help. I went to Sierra Leone as Assistant Secretary for human rights and worked with many other to help develop a novel hybrid tribunal—not imposed by the UN Security Council under Chapter VII and not purely a creature of domestic law, but rather the product of an innovative treaty between Sierra Leone and the UN, which created a tribunal based in Freetown. The Sierra Leone court became the first modern internationalized criminal tribunal to sit in the same country where the atrocities it was prosecuting occurred, although for security reasons the Charles Taylor prosecution—about which I will say more—took place in The Hague.

The hybrid model of the Sierra Leone tribunal illustrated new ways for international criminal justice to develop the four attributes of legitimacy, legality, cooperation, and professionalism that I have already mentioned. Surveys have shown support among Sierra Leoneans for the court, its contribution to peacekeeping, the fairness of its trials, and its role in deterring future violence. ...

The Sierra Leone Court’s key jurisprudential achievements have included its approach to *amnesty* and *liability rules*. Early on, the Court was confronted with a sweeping amnesty provision in the 1999 Lomé Peace Agreement between the Sierra Leone government and rebels. But—in accord with the UN’s understanding—the Court determined that this domestic agreement could not block an *international* tribunal from prosecuting a serious *international* crime. Thus, in Sierra Leone, a domestic amnesty agreement was construed *not* to block international justice. And as scholars have noted, the inauguration of the SCSL coincided with notably diminished levels of violence on the ground, illustrating that accountability can be compatible with transition and peace.

Perhaps the greatest milestone achieved by the SCSL was the first conviction of a former head of state by an international tribunal since the end of WWII: President Charles Taylor of Liberia was convicted for aiding and abetting atrocity crimes carried out by rebels in Sierra Leone, including murder, rape, conscripting child soldiers, sexual slavery, and acts of terrorism. Although the verdict remains subject to appeal, the *Taylor* case reaffirmed the Nuremberg principle that high-ranking government officials should be held to account for their crimes, a

result only possible after years of firmly rooting the criminal justice project within the broader fabric of international relations. Some have treated this as a shallow victory, questioning why Taylor was convicted “*only*” for aiding and abetting. But as the Nuremberg principles made clear, complicity in war crimes or crimes against humanity is no less a crime under international law than the predicate acts, fully worthy of international condemnation and punishment. These accomplishments in the courtroom required difficult work outside of it in the areas of professionalism and cooperation—a particularly important example being the voluntary financial contributions provided by my government and others.

Similarly, in Cambodia, the international community worked long and hard with domestic authorities to pursue accountability for atrocity crimes that took place decades ago. The Khmer Rouge Tribunal—formally, the Extraordinary Chambers in the Courts of Cambodia (ECCC)—was a different type of hybrid, established under domestic law but regulated by a UN-Cambodia agreement. The ECCC has, with U.S. Government support, successfully held Duch—a Khmer Rouge perpetrator accountable, and we are supporting its continuing efforts to try the three living senior leaders of the Khmer Rouge: Nuon Chea, Khieu Samphan, and Ieng Sary.

Finally, the Special Tribunal for Lebanon, established by the UN Security Council in 2007, represents an entirely different attempt at hybridity. Unlike the other tribunals to date, the Lebanon Tribunal was created as a quasi-*international* tribunal to apply domestic law in connection with the assassination of former PM Rafiq Hariri and certain related political assassinations. For unique reasons, the Lebanese Government lacked the ability to prosecute locally but wanted an international-like tribunal with a clear Lebanese imprint—use of Lebanese law and procedure, and a mix of international and Lebanese judges and prosecutors. As you know, Lebanon continues to be a difficult environment for this effort. But as the Tribunal’s work has finally gotten underway, the United States has continued to offer unwavering strong support.

D. International Criminal Justice 4.0: The ICC

This brings us to global criminal justice 4.0—the International Criminal Court or ICC. The struggles setting up the ICTY and ICTR made clear the value of a permanent, standing institution capable of delivering justice. And many forget that the United States was at the forefront in promoting the creation of an international criminal court.

You all know what happened afterwards. In 1998, a Statute for the ICC was developed in Rome, but the United States expressed serious reservations about certain aspects of the Rome Statute as it was eventually adopted. We did not initially sign the Rome Statute, but participated in drafting the elements of crimes, which helped ensure greater precision in the definitions of crimes within the court’s jurisdiction. But before leaving office in 2000, President Clinton did sign the Rome Statute, signaling our good faith hope to keep working to improve the Court, even while noting that he could not recommend that the United States ratify the treaty “until our fundamental concerns are satisfied.” ... [U]nder the Bush Administration, the United States chose to abstain when the UN Security Council referred the Darfur situation to the Court. By the end of the second Bush term, my predecessor as Legal Adviser, John Bellinger, said explicitly that the United States needed to acknowledge that the ICC is a “reality.”

This chronology shows that our relationship with the ICC has had ebbs and flows. But please do not misread our skepticism of certain institutions as hostility to the bedrock norms and values of international criminal justice. In fact, taking a stand for justice and the rule of law is part of our national character. Of course, many in our country still have fundamental concerns about the Rome Statute that have prevented us from becoming a party. This is hardly surprising, given concerns about the potential risks of politicized prosecutions, the United States’ unique

posture of having more troops and other personnel deployed overseas than any other nation, and that we are frequently called upon to help ensure global peace, justice and security. But if you ask Americans a concrete, practical question—should specific perpetrators of genocide, war crimes, or crimes against humanity be held accountable for their crimes in particular cases—the typical American answer to that question would be an unequivocal “yes.”

Moreover, the United States has long recognized that international criminal justice, and accountability for those responsible for atrocities, is in our national security interests as well as in our humanitarian interests. Among other things, supporting global criminal justice serves U.S. national interests by promoting a culture of accountability that can help increase stability and thus decrease the need for far more costly military interventions in the future. We have much to gain from the effective functioning of the rule of law, and the architecture of international criminal justice can play an important part in that effort.

By early 2009, Secretary Clinton had made clear that “whether we work toward joining or not, we will end hostility toward the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.” And the United States has sought to make our approach to the ICC more congruent with our broader approach to international criminal justice. So, while the United States will always protect U.S. personnel, we are engaging with States parties to the Rome Statute on issues of concern and we have applied a pragmatic, case-by-case approach towards ICC issues. Let me review not only what we’ve said, but what we’ve done:

First, from the beginning of this administration we have dropped the hostile rhetoric. With almost 10 years’ experience with the ICC under our belts, we had seen that the Court could play a key role in bringing perpetrators of the worst atrocities to justice and an important forum for advancing US interests.

Second, we have begun to engage with the Assembly of States Parties (ASP) and the Court. Our “smart power” view is that the way to advance U.S. interests is not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements. Absenting ourselves from meetings of States parties and discussions about aggression allowed States parties to develop a definition of aggression without U.S. input, which greatly complicated our efforts when we did eventually engage on that topic in an effort to promote a more legally coherent outcome. We now regularly attend meetings of the ASP as an “observer” and we participated constructively at the Review Conference in Kampala. We are closely monitoring the evolving jurisprudence of the Court. And we have also actively engaged with the Office of the Prosecutor and the Registry to consider specific ways that we can support specific prosecutions already underway in all of the situations currently before the Court, including through cooperation on witness protection issues, and we have responded positively to a number of requests.

Third, we have publicly urged cooperation and expressed support for the Court’s work in *all* of the ongoing situations in which the Court has begun formal investigations or prosecutions, both in our diplomacy and in multilateral settings. To take just a few examples, last year, we supported the UN Security Council’s referral of the situation in Libya to the ICC, our first affirmative vote for a referral, adopted even as atrocities were being perpetrated. This represented an historic milestone in the fight against impunity, and we have continued to support the Court’s engagement there. President Obama has made strong statements about the importance of accountability and cooperation with the ICC’s efforts in Kenya and Cote d’Ivoire. Secretary Clinton has made equally strong statements throughout her travels about the ICC’s

work to ensure justice for the victims of atrocities in these and other situations before the Court. Following the landmark *Lubanga* judgment, both the White House and State Department issued strong statements about the historic nature of the conviction and the message that it sends to those who engage in the brutal practice of conscripting and using children to participate actively in hostilities. The United States has also supported recent UN Security Council presidential statements urging cooperation with the Court and supporting regional efforts to arrest Joseph Kony and top Lord's Resistance Army (LRA) commanders, emphasizing the importance of Bosco Ntaganda's arrest in the DRC, and stressing the importance of accountability for abuses and violations on all sides in Cote d'Ivoire, while encouraging the Ivorian government to continue its cooperation with the ICC. Last summer, we engaged diplomatically to urge the swift resolution of the detention of ICC defense counsel in Libya, including by supporting a UN Security Council press statement on the issue.

Fourth, we continue to find it a serious cause for concern that nine individuals who are the subject of existing ICC arrest warrants have not yet been apprehended. For example, we have urged all States to refrain from providing political or financial support to the Sudanese suspects who remain at large, including by discouraging States from welcoming these individuals. In the UN Security Council, Ambassador Susan Rice and other senior diplomats have repeatedly called for Sudan to cooperate with the ICC and for States to oppose invitations, facilitation, or support for travel by those subject to existing arrest warrants.

Fifth, on a related front, we have noted that States can lend expertise and logistical assistance to apprehend current ICC fugitives.

Just four years ago, this list of examples of U.S. engagement with the ICC would have seemed like a surprise. But it shouldn't be. *Of course* we support international efforts to bring to justice those responsible for genocide, war crimes, and crimes against humanity in Darfur. *Of course* we think that the perpetrators of horrific war crimes in the Democratic Republic of the Congo ought to be punished. Everyone knows that the ICC is not the exact court we wanted, but it is the Court that exists, and we fully understand that the ICC has the potential in many cases to advance common goals in promoting accountability. Thus, the current policy toward the Court has been based less on an abstract debate about the value of the Court and more on a direct focus on the specific: *do the ICC's efforts in this context complement U.S. efforts to ensure that perpetrators of this particular atrocity be held accountable and advance U.S. interests and values?* If the answer to those questions is yes—and it nearly always has been—we've been able to view ICC prosecutions as part of the solution. This is part of our broader "smart power" approach: not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements that advance U.S. interests, including our interest in justice and the rule of law.

Putting all of this together, as I made clear more than two years ago in a speech at New York University,

"What you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun."

When you look beyond rhetoric and the focus on the U.S. relationship with the Court, a crucial question remains: namely, where is this new institution going, and where does this "4.0"

version fit within the broader architecture of international criminal justice? Let me point to three important considerations.

First, the development of the notion of *positive complementarity*: the ICC is a court of last resort that, if it is truly successful, will have fewer, not more, cases. The complementarity principle is easy to describe but hard to implement, and it is still in the earliest stages of development. The ad hoc tribunals were designed to give the new international tribunals primary jurisdiction, and the hybrid courts were built on the premise that purely domestic justice was not possible in those particular cases. But the Rome Statute has codified the important lesson that domestic justice often remains the best form of justice. This idea underscores the importance of institution-building that can serve developing and post-conflict societies well. And when it works, positive complementarity empowers local populations to take ownership of the accountability process and to bear direct witness to the lesson that grave international crimes carry consequences.

Second, as I have noted, the ICC has finally achieved its first conviction, the conviction of Thomas Lubanga for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities. This historic step in securing a measure of justice for the Congolese people also highlights the brutal practice of conscripting and using children to fight in armed conflict, a topic that is justifiably one of international concern. The ICC's Trial Chamber also recently issued an important decision on principles and procedures governing reparations for victims of Lubanga's crimes.

Third, we must remember that the ICC is still very much in its early stages, and that the bulk of its work is yet to come. The tribunals that came before it took many years to build their jurisprudence on atrocity crimes, to navigate difficult waters of international cooperation, and to establish legitimacy. For that reason, I often describe the ICC as a bicycle, which is now moving, but remains wobbly. The ICC faces several challenges. First, to strengthen the bicycle, by building up the Court's resources and institutional capacities. The tribunal needs to function in a fair and transparent manner with able and unbiased prosecutors and judges. Second, to avoid putting too much weight on the bicycle too early. This is a reminder of the imperative of States lending resources to advise and assist national systems in countering atrocity crimes, so that there will be fewer instances in which the ICC is called upon to act. Third, it will be important to improve the cooperation of States and enhance the efficiency and effectiveness of the Court's prosecutions, as well as to avoid unnecessary collisions with States, including by making prudent decisions about the cases it pursues and declines to pursue. The length of proceedings, as well as the existence of fugitives and lack of cooperation in many of the existing cases before the Court, remain serious problems for the ICC. But note that such criticism was also leveled in its early days against the Yugoslav Tribunal (the ICTY), now considered a mature, well-regarded institution that, remarkably, has no remaining fugitive defendants.

Finally there remain particularly live questions with regard to the implementation of the aggression amendments discussed in Kampala. The United States continues to have concerns about the amendments, and we do not support states moving forward with ratification at this time. Our concerns about the possibility of investigations and prosecutions in the absence of Security Council action are well-known. We believe that it was wise for the States Parties to subject the Court's exercise of jurisdiction over the crime of aggression to a decision to be taken sometime after January 1, 2017, which provides some breathing space in which measures that require attention can be considered, and in which progress on other issues—the effort to ensure

accountability for perpetrators of war crimes, crimes against humanity, and genocide—can be consolidated.

In sum, the key to winning greater international and U.S. support going forward will be for the ICC to focus on strengthening itself as a fair and legitimate criminal justice institution that acts with prudence in deciding which cases to pursue. Critical to the future success of the ICC, and the views of the United States and others in the international community of it, will be its attention to the four values I have already highlighted: (1) building institutional legitimacy; (2) promoting a jurisprudence of legality, with detailed reasoning and steeped in precedent; (3) fostering a spirit of international cooperation; and (4) developing an institutional reputation for professionalism and fairness.

E. International Criminal Justice 5.0

Where does all this leave us, nearly seventy years after Nuremberg and twenty years after the creation of the first ad hoc tribunal? Plainly, we have come to an end of the software and hardware-building phase—call it the “architectural stage”—of modern international criminal justice. But the real work is just beginning. What we have achieved in that time is a gradual, but real and important change in culture, one by which accountability has gone from being a subsidiary concern to an issue that now has a seat at the table as we face the great issues of the day.

Twenty years ago, the status quo was no international trials for war criminals; today, the status quo favors accountability, at least in principle. As important, we now have a menu of architectural options for pursuing justice—whether in an international framework, a domestic one, or some novel and flexible hybrid format. In the first instance, we continue to work to bolster the capacity of national governments to ensure justice for victims in the face of grave atrocities. For those cases where it is needed and appropriate, the architecture at the international level, however imperfect, now exists, and it presents the opportunity to focus on the full range of options for tackling concrete matters of accountability.

For the United States, the current challenge is how to build the accountability agenda of the past seventy years into a sustained “Smart Power Approach” to international criminal justice that sees accountability as part of a broader approach to diplomacy, development, rule of law, and atrocities prevention. To that end, a year ago the President announced the formation of an Atrocities Prevention Board, stating that “preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States of America.” Through focused coordination, training, enhancing our civilian surge capacity, and many other efforts, the United States is working to put in place a whole-of-government approach to atrocities prevention. And as part of these efforts, as Secretary Clinton has said, “we want to deter atrocities by making clear that those who commit these crimes will be held accountable.”

Let me discuss two recent cases: Libya and Syria, which illustrate the role that accountability should play in managing ongoing crises. When the United States supported a UN Security Council referral of the situation in Libya to the ICC, our focus was on the concrete question, “Can the ICC be an effective tool in this situation and does it advance U.S. interests and values”? And our pragmatism compelled us to find in the ICC a positive way of moving forward with accountability.

We have continued to stress the importance of cooperation by the Libyans with the Court, and to find ways to assist a post-Qadhafi Libya to address its justice sector reform goals, emphasizing the need for accountability in Libya for violations and abuses on all sides. Our concern has been with the outcome of accountability, not so much the venue for it. And as the

ICC proceedings move forward on Libya's admissibility challenge in the case against Saif al-Islam Qadhafi, this will be an important moment for both Libya and the Court to show how the principle of complementarity will work in practice. In the meantime, we continue to stress the importance of Libya ensuring that the detention of and any domestic proceedings against Saif al-Islam and Abdullah al-Senussi fully comply with Libya's international obligations.

In Syria, we witness a tragic conflict unfold. Still, we have continued to press for accountability without prejudging these choices by calling for an ICC referral by the UN Security Council now. As the transition proceeds, and as the UN's Commission of Inquiry has recognized, the Syrian people should have a leading voice in deciding how to deal with those responsible for atrocities, in a manner consistent with international law. Perhaps the Syrian people will end up wanting to send cases to the ICC; perhaps they will wish to prosecute and punish perpetrators themselves. We are working with our Arab and other international partners to help the Syrian people ensure that those perpetrating horrific violence against them are ultimately held accountable, and we think it critically important to continue documenting violations and abuses and collecting evidence so that the international community can uncover and tell the truth about what is occurring. We and our international partners are continuing to support the recently launched Syria Justice & Accountability Centre to document human rights abuses and to support accountability efforts in Syria through training and other activities.

Seventy years ago, it would not have been clear that any of those who perpetrate these atrocities would ever be subject to individual criminal responsibility for their actions. Twenty years ago, it would not have been clear that the world would be willing to act on the principles recognized in Nuremberg. But today, there is in place not only an architecture of accountability, but an emerging *culture* that elevates preventing atrocities and accountability for perpetrators as principal concerns in policy discussions. That culture, and the anticipation of certain forms of post-transition accountability may now help to facilitate transition—for example, by opening up space for the Asad regime's opponents and encouraging defections by those officials who want to distance themselves from the regime's crime.

So where is all of this heading? Before too long, the work of the ad hoc tribunals will continue and conclude in the work of the Mechanism for the International Criminal Tribunals (MICT). The MICT was established as a small, temporary, stream-lined institution capable of wrapping up the work of the ICTY and ICTR (for example, handling the remaining appeals after the ICTY and ICTR finish their work, and dealing with legacy issues such as managing sentences). You can think of this as an "exit strategy" for International Criminal Justice 2.0, as we focus on the international criminal justice issues of the future.

I am often asked, in ten years, will the United States have become a party to the Rome Statute? With respect, I think this is the wrong question. The real questions for the next ten years should be: "Are the worst international criminals being held accountable? Is a culture in which perpetrators commit serious violations of international law with impunity slowly but surely eroding in favor of a culture of respect for international law and of accountability? And is the United States doing everything it can to help?"

In answering that question, I would argue, the United States should be judged by its actions, not just its words. Those actions, I have argued, reveal an impressive record of U.S. leadership since Nuremberg in the international criminal justice arena: whether at Nuremberg itself, at the Yugoslav and Rwanda Tribunals, the Hybrid Courts, and now with the ICC.

In short, for too long, the global conversation about international criminal justice has focused too much on what you might call "the reverberations of Rome:" on what did and did not

happen at the Rome ICC Conference, and what it supposedly signals about America's perceived ambivalence toward international criminal justice. Let me suggest that going forward, we focus less on the reverberations of Rome and more on what Secretary Albright called the "echo of Nuremberg": the great and continuing efforts we have taken to embed the Principles recognized in Nuremberg into the fabric of international institutions and the culture of international relations, and to support accountability as part of a broader, durable smart power approach to preventing atrocities and managing conflict. As Nuremberg's Principles approach their 70th birthday, it is my sincere belief that, we are on our way to building a new era of international criminal justice—"International Criminal Justice 5.0"—a better version of international criminal justice for the 21st Century that can endure and do good over the next seventy years and beyond.

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2. International Criminal Court

a. Overview

Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, delivered a statement on behalf of the U.S. observer delegation at the general debate of the Eleventh Session of the annual Assembly of States Parties ("ASP") to the International Criminal Court ("ICC") at The Hague on November 15, 2012. Ambassador Rapp's remarks at the general debate are excerpted below and available at

www.state.gov/j/gcj/us_releases/remarks/2012/200880.htm

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... Since we last met in New York in December 2011, Fatou Bensouda has assumed the duty of Prosecutor of the ICC, and Judge Song has enjoyed re-election as President of the Court. We thank them both for their long and dedicated service, and look forward to continuing to work together.

... This is the fourth time I have stood before this body representing the United States. We also participated actively in the Review Conference in Kampala in 2010. We are pleased to have joined consensus on each of the last two General Assembly Resolutions on the ICC and last year's OAS Resolution. My colleagues in New York and The Hague regularly make positive contributions to meetings, working groups, and formal multilateral sessions devoted to various aspects of the work of the Court.

As Ambassador-at-Large of the Office of Global Criminal Justice, I have traveled around the world, working to bolster national capacities while urging cooperation with the ICC's work... [D]uring the past four years, President Obama and Secretary of State Clinton have consistently championed the cause of pursuing accountability for the world's worst crimes and preventing these crimes in the future.

In short, ensuring the prevention and deterrence of atrocities and making good on the promise of justice to the victims of these crimes, is an urgent priority for the highest levels of my government, one we see as both a moral imperative and a matter of national security. We have

worked diligently to promote an end to impunity and have been supporting the work of the ICC in each of its current cases.

When I visit the places where grave crimes have occurred, I meet with the victims and members of civil society who stood up bravely and demanded justice in the aftermath of conflict. Our work is driven by their consistent calls for truth, accountability, and reparation. Victims the world over have seen that even a “big man” like Charles Taylor must account for his actions and face judgment, and they have heard the promise of accountability implicit in the international community’s commitment to his prosecution and to the prosecution of other defendants, at many levels, for their involvement in the commission of international crimes. The United States is dedicated to helping shape and deliver on this promise.

What does it mean for an institution like the ICC to succeed in ensuring justice for victims, and what has my government done to contribute to this project and advance our shared interests and values? There are a few issues that I would particularly like to focus on today that deserve the attention of friends of the Court, parties and non-parties alike. ...

First, it is essential that the fugitives who currently remain at large in the ICC’s cases are apprehended. And when the Court is successful in bringing them to trial, it is imperative that the witnesses who testify and the victims who wish to participate in the proceedings are assured of their safety. These are basic obligations for any court, anywhere in the world, but they pose particularly vexing challenges in the context of the ICC, in light of its structural constraints, its scope of work, the extreme vulnerability of victims, and the circumstances of the places where fugitives are able to elude capture. Without adequate solutions, the Court will eventually cease to be able to conduct its work or meet the expectations of victims and affected communities. I speak about these issues frequently, because they are so crucial and because so much work remains to be done.

... We use an array of tools to advance the causes of apprehension and witness protection.

On apprehension, we send clear messages: we forcefully and consistently speak out about the need to bring to justice individuals like Omar al-Bashir of Sudan, Joseph Kony of Uganda, Bosco Ntaganda and Sylvestre Mudacumura of the DRC, and their co-accused. We sponsor and impose sanctions on such individuals and the groups they head. ...

On witness protection, we seek to focus international resources and attention on these challenges, both at the national and international level. As you may recall, last year, we co-hosted a side event at the ASP on this topic. We have offered assistance and training to states seeking to protect witnesses in their own cases. ...

A *second* issue of great importance: it is crucial that members of the international community continue to reinforce the legal norms and prohibitions that led to the creation of institutions such as the ICC. Here, I am particularly pleased to report on President Obama’s initiative on preventing atrocities. Since I last addressed this body, the United States has established the Atrocities Prevention Board, composed of high-ranking officials from across the government, to put in place a whole-of-government approach to detecting, preventing, deterring, and responding to atrocities. We are working to ensure that our government can effectively address this imperative, and we are socializing this work with our partners and colleagues around the world—in governments, in the NGO sector, and at the UN.

We are exploring ways to expand available tools for preventing and responding to atrocities, from additional financial measures, to early risk detection, to rapid response “surge” capacities in potential trouble spots, to improved information sharing, to expanded legal authorities on the domestic front. The APB has focused on strengthening accountability tools and

efforts, and my office has worked with others to coordinate assistance to states and international institutions with respect to their investigations and prosecutions. It is not always easy, but it is imperative that we keep our sights focused on these broader goals: namely, to prevent and deter would-be perpetrators of such heinous acts, and in that way to assure victims of past crimes that we have learned from what they have suffered.

Third, we must continue to strive to improve our system of international justice. We do not yet have all the answers, and the ICC, even for its ten years' experience, is still very much in its early stages. I and my colleague Harold Koh, Legal Adviser of the Department of State, have often spoken of the need for the ICC to build a solid jurisprudence, navigate challenges that arise in international cooperation, and establish legitimacy in the years to come as a fair and efficient criminal justice institution that makes prudent decisions in the cases it pursues, and those it declines to pursue. Moreover, the international community must continue to search within itself for creative and innovative solutions to the problems that are sure to arise—some of which I have already focused on today.

For our part, in engaging constructively with the Court and supporting its work on a case-by-case basis as consistent with our laws and policy, we have examined our arsenal and pursued an array of tools in an effort to identify what works. Sometimes, diplomacy alone is the most powerful tool. We stand up for justice, such as when we issued strong statements of support from both the White House and the State Department upon Thomas Lubanga's conviction for the war crime of conscripting and using child soldiers; or when President Obama made strong statements about the importance of accountability and cooperation with the ICC's efforts in Kenya and Côte d'Ivoire.

We also work to calibrate decisions about assistance and sanctions to take into account concerns about accountability and atrocity crimes. We were pleased, for example, that following the suspension of Malawi's Millennium Challenge Corporation compact and under President Joyce Banda's strong leadership, Malawi has taken a number of positive steps toward democracy and good governance, and refused to host President Bashir for the July 2012 African Union summit. We welcomed this decision and the example it set. President Banda has demonstrated strong leadership and democratic commitment, and we were gratified to be able to reinstate the MCC compact in June 2012.

Fourth and finally, we all must continue to recognize that the ICC cannot and must not operate alone. States retain primacy, both legal and moral, in ensuring justice for grave crimes. Justice closer to the victims is always preferable, in a system that can account for local laws and custom, in a familiar language, and in an accessible setting. Even where the ICC does operate, tremendous work will remain to be done at the national level. We, as members of the international community, have an obligation to focus our resources and energies here as well.

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Ambassador Rapp also addressed a plenary session on complementarity at the ASP on November 19, 2012. His remarks during the plenary discussion are excerpted below and available at www.state.gov/j/qc/us_releases/remarks/2012/200950.htm.

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It is crucial to be discussing the principle and the practice of complementarity here at the meeting of the Assembly of States Parties of the ICC. Although the ICC plays an important role in the system of international criminal justice, national courts have the primary role to play in ensuring justice for victims of atrocities. Indeed, the principle of complementarity is at the core of the ICC Statute. I would also highlight the importance of states parties and non-states parties alike remaining committed to strengthening domestic judicial capacity. Beyond furthering accountability, a strong national justice system is conducive to peace, stability, the consolidation of democracy, and economic development.

This project is not one that can be undertaken solely through bilateral efforts; rather, we must act together in a concerted and coordinated fashion, pool our resources, and share our best practices, ideas, and expertise. All nations have something valuable to bring to this conversation. Although this initiative should be a priority for the ASP, it must also continue to be taken up by other multilateral fora, the development community, civil society, regional organizations, and others in the service of justice. In particular, as was discussed at the Greentree event last month, enhancing domestic judicial capacity requires integrating rule of law programs with broader development assistance.

To this end, we encourage all States to identify opportunities to work with national authorities to strengthen domestic judicial systems across a range of technical areas, from forensic investigations, to witness protection, to educating prosecutors, judges, and defense attorneys on international criminal law and due process principles. Mixed investigative teams or judicial panels—comprising international and national staff working side by side—can be an effective model for justice systems emerging from conflict. As national prosecutions increase, strengthening mutual legal assistance frameworks and encouraging cooperation between national judicial authorities can also be appropriate.

Let me speak briefly about some of the programs and policies the United States supports, using our efforts in the Democratic Republic of the Congo as an example. We have long worked on complementarity issues in the DRC even as we support the ICC's cases there. We have always recognized that most of the work toward justice in the DRC will have to be at the national level, including with hybrid institutions that support national courts with international expertise, personnel, and assistance. We hope we can join together in building strong justice institutions and that these endeavors will provide lessons applicable elsewhere as we seek to bolster the principle of complementarity and strengthen the community of courts around the world that prosecute perpetrators of the worst crimes.

Our work in the DRC involves four main lines of effort:

First, funding and supporting specific courts and justice programs: The United States has provided approximately \$3.5 million dollars over the last three years to implementing partners in the eastern DRC, to provide legal representation to survivors of sexual and gender-based violence and to build the capacity of justice sector officials to competently and fairly adjudicate civilian and military sexual and gender based violence cases in North Kivu province. The Department of State will continue to support the legal aid clinic, mobile courts, and mobile investigation teams through 2014. ...

Second, using the tools of diplomacy to promote complementarity. Over the past years, in my capacity as Ambassador-at-Large for War Crimes Issues, I have travelled seven times to the DRC to meet with governmental and nongovernmental actors, to facilitate better coordination and support for accountability efforts. In the DRC, I have engaged diplomatically with parliamentarians, the ministry of justice, and leading civil society members to support their

legislative efforts to incorporate international crimes into their domestic code and to create a mixed chamber for the DRC; to support ongoing prosecutions of perpetrators of serious crimes by military prosecutors; and to support joint efforts by the UN and national authorities, such as the UN peacekeeping mission in the DRC's Prosecution Support Cells.

Third, providing technical and legal assistance to national authorities. Such assistance can come in the form of technical advice on national legislation or through supporting forensic investigators, police, and witness protection experts. ...

Fourth, improving fugitive tracking efforts: Enhancing efforts to track war crimes fugitives is essential to fighting impunity. The United States has assisted the UN in compiling rigorous dossiers on key perpetrators and fugitives, which can serve as a focus of concerted attention by the international community. ...

The United States government will do everything possible to help the government of the DRC bring to justice those responsible of such acts.

Our work on complementarity does not just take place elsewhere. As the White House announced on April 23 during the launch of the interagency Atrocity Prevention Board, "we will hold accountable perpetrators of mass atrocities and genocide and support others who do the same." Under the aegis of the APB, the United States is developing proposals that would strengthen our ability to prosecute perpetrators of atrocities and permit the more effective use of immigration laws and immigration fraud penalties to hold accountable perpetrators of mass atrocities.

To conclude, we reiterate our strong commitment to the principle of complementarity, not only in principle, but in practice. We urge all states, funders, and civil society partners to identify concrete steps – such as the ones I have outlined today – to realize the promise of complementarity and strengthen the continuum of justice.

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On October 17, 2012, Ambassador Rice addressed the UN Security Council during a thematic debate on "Peace and Justice, with a Special Focus on the Role of the International Criminal Court." Her remarks on the ICC are excerpted below and available at <http://usun.state.gov/briefing/statements/199261.htm>.

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Mr. President, strengthening the global system of accountability for the worst atrocities remains an important priority for the United States. President Obama has emphasized that preventing mass atrocities and genocide is a core national security interest and core moral responsibility for our nation. We are committed to bringing pressure to bear against perpetrators of atrocities, ensuring accountability for crimes committed, and prioritizing the rule of law and transitional justice in our efforts to respond to conflict.

Accountability and peace begin with governments taking care of their people. But the international community must continue to support rule of law capacity-building initiatives to advance transitional justice, including the creation of hybrid structures where appropriate. From the Democratic Republic of Congo to Cote d'Ivoire to Cambodia, the United States is supporting

efforts to build fair, impartial, and capable national justice systems.

At the same time, more can be done to strengthen accountability mechanisms at the international level. The United States has strongly backed the ad hoc international criminal tribunals and other judicial institutions in Rwanda, the former Yugoslavia, Sierra Leone, and Cambodia. Such tribunals and courts have been critical to ending impunity and helping these countries move forward. As these judicial institutions complete their mandates in the coming years, the International Criminal Court may become an even more important safeguard against impunity.

Although the United States is not a party to the Rome Statute, we recognize that the ICC can be an important tool for accountability. We have actively engaged with the ICC Prosecutor and Registrar to consider how we can support specific prosecutions already underway, and we've responded positively to informal requests for assistance. We will continue working with the ICC to identify practical ways to cooperate—particularly in areas such as information sharing and witness protection—on a case-by-case basis, as consistent with U.S. policy and law.

Last year, the Council made its first unanimous referral to the ICC of the situation in Libya. Resolution 1970 has kept the principle of accountability central to Libya's transition from authoritarianism to democracy. Moving forward, it's critical that Libya cooperate with the ICC and ensure that the detention of, and any domestic proceedings against, alleged perpetrators of atrocities are in full compliance with its international obligations. We are exploring ways to assist Libya in pursuing justice sector reform, and we reaffirm that there must be accountability in Libya for violations and abuses on all sides.

The Security Council also acted in response to the atrocities in Darfur. But justice has still not been served, and the lack of accountability continues to fuel resentment, reprisal, and conflict in Darfur and beyond. Despite constant calls on all parties to the conflict to cooperate fully with the ICC, Sudan has failed to meet its obligations under Resolution 1593, and individuals subject to outstanding arrest warrants remain at large. We continue to urge all states to refrain from providing political or financial support to these individuals, and we applaud the example Malawi set by refusing to host President Bashir. This Council should review additional steps that can be undertaken to complete the ICC's work in Darfur. We should take inspiration from the concerted European Union efforts that resulted in the arrest and detention of the final fugitives from the ICTY.

Mr. President, we should consider ways to improve cooperation and communication between the Security Council and the Court. For example, the Council should monitor the developments in situations it refers to the Court, since the ICC may face dangers in conducting its work. However, we must also recognize that the ICC is an independent organization. This status raises concerns about proposals to cover its expenses with UN-assessed funding.

The interests of peace, security and international criminal justice are best served when the Security Council and the ICC operate within their own realms but work in ways that are mutually reinforcing. We should not accept the false choice between the interests of justice and the interests of peace.

As we work to strengthen accountability, we support the States Parties' decision to delay until 2017 a final decision on the Court's exercise of jurisdiction over the crime of aggression. This delay will allow for consideration of issues about the aggression amendments that require attention and enable the Court to consolidate its progress in the investigation and prosecution of atrocity crimes.

Mr. President, how we act to halt violence against civilian populations and hold

accountable those who perpetrate such crimes is a fundamental test of our time. The United States continues to press for accountability in Syria without prejudging the ultimate venue for it. As the UN Commission of Inquiry has recognized, the Syrian people should have a leading voice in determining how to deal with those responsible for atrocities in a manner consistent with international law. We continue to help Syrians document abuses and collect evidence, to ensure that the perpetrators of horrific violence against the Syrian people are ultimately held accountable.

In conclusion, we must rededicate ourselves to preventing atrocities from happening and ensuring accountability in their aftermath. We have made progress on both fronts, but much work remains. The United States will not rest until those responsible for perpetrating mass atrocities face justice and those who would commit such crimes know they will never enjoy impunity.

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b. Kenya

On January 23, 2012, the ICC confirmed charges against four Kenyans based on their alleged roles in the violence in late 2007 and early 2008 following a disputed presidential election in Kenya. The U.S. Department of State responded to the ICC's action with a January 23, 2012 press statement urging the Kenyan government and people, as well as the individuals involved, to continue to cooperate fully with the ICC. That press statement is available at www.state.gov/r/pa/prs/ps/2012/01/182349.htm. The Government of Kenya is a party to the Rome Statute, and the ICC Prosecutor opened an investigation into the post-election violence in March 2010. See *Digest 2010* at 139.

c. Democratic Republic of Congo ("DRC")

On March 14, 2012, the ICC handed down its first conviction, that of Thomas Lubanga Dyilo, former commander of the Patriotic Forces for the Liberation of the Congo militia and president of the Union of Congolese Patriots, for his responsibility for the war crimes of enlisting and conscripting children and using them to participate actively in hostilities in the DRC in 2002 and 2003. The government of the DRC referred the situation in the DRC to the ICC in 2004. See *Digest 2010* at 138-39 for background. The State Department's press statement regarding the conviction, released on March 16, 2012 and available at www.state.gov/r/pa/prs/ps/2012/03/185964, is excerpted below. The White House also released a statement, available at www.whitehouse.gov/the-press-office/2012/03/14/statement-national-security-council-spokesman-tommy-vietor-international, which emphasized that the decision is an important reminder to those who engage in these brutal practices that they are committing crimes for which they will be held accountable.

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As the Court's first conviction, this ruling is an historic and important step in providing justice and accountability for the Congolese people. The conviction is also significant for highlighting as an issue of paramount international concern the brutal practice of conscripting and using children to take a direct part in hostilities. These children are often sent to the front lines of combat or used as porters, guards, or sex slaves, and their conscription reverberates throughout entire communities. This conviction puts perpetrators and would-be perpetrators of unlawful child soldier recruitment and other atrocities on notice that they cannot expect their crimes to go unpunished.

Congolese institutions have a critical role to play in ending impunity in the DRC. The Congolese government has taken recent positive steps, such as the prosecution and conviction in national courts of several Congolese army officers for the mass rapes that took place in the town of Fizi on January 1, 2011. The United States continues to encourage the Congolese government to arrest other alleged human rights violators and abusers still at large.

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d. Libya

In 2011, the UN Security Council unanimously adopted Resolution 1970, referring the situation in Libya in 2011 to the ICC. U.N. Doc S/RES/1970. For background on the referral to the ICC, see *Digest 2011* at 91-93. Ambassador Rice mentioned the Libya-related cases at the ICC in remarks to the UN Security Council in October 2012, excerpted in section C.2.a. *supra*. She also addressed the subject more specifically at a May 16, 2012 Security Council briefing on Libya and actions taken to implement resolution 1970. Those remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/190099.htm>.

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We are pleased with the Prosecutor's report that his Office has received a high degree of cooperation from a variety of States and other actors in response to requests for assistance from the ICC.

As the Prosecutor described in his report, Libya recently filed an admissibility challenge with the Court on the grounds that it is actively investigating Saif al-Islam Qadhafi for the same and different crimes as the ICC. Libya also detailed the steps it has taken to conduct that investigation and its stated commitment to adhere to international standards in the process.

This is an important moment both for Libya and for the Court. The Rome Statute of the ICC is predicated on a system of complementary justice, and it contains provisions to deal with situations in which a State with jurisdiction wishes to pursue charges itself. In this regard, we are encouraged by the Prosecutor's report of the ongoing cooperation his office has received from Libya. That said, as the Prosecutor notes, ultimately it will be for the judges to decide whether to defer to Libyan proceedings.

As the ICC proceedings move forward, we will continue to encourage the government of Libya to maintain its cooperation with the Court and to adhere to its international obligations, including under Resolution 1970. In addition, we continue to emphasize that it is critical that

Libya take all necessary steps to ensure the detention and any further domestic proceedings against Saif al-Islam fully comply with Libya's international obligations.

Moreover, there is much work to be done domestically in Libya not only to account for the grave crimes committed in the past but also to ensure a functioning justice system for the future.

It is vital that Libya build a fair and credible criminal justice system that guarantees humane treatment and due process and conforms to Libya's international human rights obligations. We agree with the Prosecutor that the Government of Libya faces critical challenges in assuming custody over the thousands of detainees that continue to be held by militias or local authorities and in arranging for the expeditious release or adjudication of their cases. The international community should respond to the needs of the Libyan government as it approaches this significant administrative, logistical, and judicial task.

We are deeply concerned by the patterns of rape documented by the International Commission of Inquiry, as highlighted in the Prosecutor's report. For the sake of the individual victims and in order to achieve a lasting and inclusive peace in Libya, sexual and gender-based violent crimes must not go unpunished.

It will be important to ensure that there is accountability for violations and abuses of applicable laws committed in Libya on all sides, including for alleged attacks committed against civilians for their perceived loyalties to the Qadhafi regime. Impunity for such crimes cannot be reconciled with respect for human rights and the rule of law. Independent and impartial investigations of all alleged crimes will be a critical part of the effort to create an inclusive, democratic state in which all Libyans, of all backgrounds, have a future and an opportunity to participate in the rebuilding of their country.

We are pleased to hear that the Government is working on a comprehensive strategy to address these issues and support the Ministry of Justice's expressed commitment to justice sector reforms. We welcome the government of Libya's statements in its submissions to the ICC that it is receptive to assistance and support from the international community in this important work. We are working with UNSMIL and the international community to assist the Libyan authorities in addressing these justice sector reform goals.

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On November 7, 2012, Rosemary DiCarlo, Deputy Permanent Representative to the United Nations, addressed the Security Council after a briefing by the ICC prosecutor on the situation in Libya. In her remarks, excerpted below and available at <http://usun.state.gov/briefing/statements/200336.htm>, Ambassador DiCarlo urged further cooperation with the ICC in carrying out its mandate.

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...[W]e continue to urge Libya to adhere to its international obligations, including under Resolution 1970, and continue its cooperation with the ICC. The cases involving Saif al-Islam Gaddafi and Abudullah al-Senussi will unfold against the backdrop of Libya's transition to democracy. This is an important moment both for Libya and the ICC, as they work together

within their respective roles towards fostering and ensuring accountability during this historic transition.

We recall our comments last month at the Council debate on peace and justice and the role of the ICC that the Council's referral of situations to the ICC and subsequent developments highlight why we should consider ways to improve cooperation and communication between the Security Council and the Court. For example, the Council should continue to monitor the developments in situations it refers to the Court and the challenges that may be faced by ICC personnel in conducting their work. States should look for appropriate ways to ensure that Court staff are able to undertake their work safely and effectively.

Further, we note that the Prosecutor's statement that many requests for assistance to a variety of parties have yet to be fully executed. Resolution 1970 decided that Libyan authorities shall cooperate fully with and provide necessary assistance to the Court and Prosecutor, and also urged all other states and concerned organizations to cooperate fully. The United States has endeavored to respond positively to informal requests for assistance in the Libya situation, consistent with our law and policy.

We also remain deeply concerned by allegations of rape and sexual violence documented by the UN Commission of Inquiry, and look forward to further reports by the OTP about its efforts in this regard.

...[R]egardless of the outcome of the admissibility proceedings before the ICC, Libya will need to bolster domestic accountability structures and processes to create a robust and fair system of justice at home. After forty years of a dictatorship, no one has a better appreciation for the importance of due process and rule of law in Libya than Libyans themselves. The new government must work to combat impunity for perpetrators of serious crimes, regardless of their affiliation or the nature of their crimes; to ensure a comprehensive program of transitional justice consistent with Libya's international human rights obligations; and to commit to measures aimed at assisting victims.

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e. Darfur

On June 5, 2012, Ambassador DeLaurentis addressed a Security Council meeting on Darfur and the ICC at which Prosecutor Moreno-Ocampo presented his fifteenth report pursuant to UN Security Council Resolution 1593, which referred the situation in Darfur since July 1, 2002, to the ICC. This was Moreno-Ocampo's final report to the UN Security Council before his term as prosecutor ended on June 15 and Fatou Bensouda of The Gambia became ICC Prosecutor. Ambassador DeLaurentis's remarks are excerpted below and are available in full at usun.state.gov/briefing/statements/191816.htm.

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The United States is gravely concerned about the situation in Sudan, and the role that continuing impunity for crimes committed in Darfur has played in forestalling a just and enduring peace for the people of Sudan and the region.

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...[S]ince the adoption of Resolution 1593 and the initiation of these periodic reports, copious evidence has been collected and arrest warrants sought and granted. The most recent development has been the arrest warrant for Minister of Defense Abdel Raheem Hussein. Most importantly, promises have been made to the victims: that the crimes they suffered will not go unpunished, and the justice they seek will not go undelivered.

But as of today, justice has not been served. The ICC's prosecution of the key architects of the atrocities in Darfur is critical. But, as the Prosecutor has stressed, the individuals subject to the ICC's arrest warrants in Darfur continue to remain at large. We have consistently called on the government of Sudan and all parties to the conflict to cooperate fully with the ICC and its prosecutor, yet there is persistent failure to meet obligations under Resolution 1593. Local accountability initiatives, particularly those agreed to in the Doha Document for Peace in Darfur, remain largely unfulfilled. And the violence continues in Darfur and in other areas of Sudan where these patterns repeat themselves and similarly go unaddressed.

Today's report offers us an opportunity to reflect on what steps we can take to strengthen international efforts to hold accountable those who have committed atrocities in Darfur. We agree with the Prosecutor that the lack of progress to date in executing the arrest warrants and bringing those most responsible to justice merits renewed attention by this Council.

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...[W]e continue to urge all states to refrain from providing political or financial support to the Sudanese suspects subject to ICC arrest warrants and to bring diplomatic pressure to bear on States that invite or host these individuals. We stand with the many states who refuse to welcome the ICC indictees to their countries, and we commend those who have spoken out against President Bashir's continued travel, including to next month's AU summit. For our part, the United States has continued to oppose invitations, facilitation or support for travel by those subject to ICC arrest warrants in Darfur and to urge other states to do the same. We would welcome additional efforts by and better coordination with other members of the international community on these issues.

We encourage the Council to consider creative approaches and new tools. As members of the Security Council, we can and should review additional steps that can be undertaken to effectuate the ICC's work in Darfur, execute outstanding arrest warrants, and ensure compliance by states with relevant international obligations.

Continued impunity and the lack of accountability for heinous crimes fuel resentment, reprisal, and conflict in Darfur. We are deeply troubled by the increased violence in three out of the five Darfur states since the Prosecutor's last briefing in December 2011. Once again, we note that the Sudanese government continues its use of aerial bombardments, including of civilian areas in violation of resolutions issued by this Council. And we are deeply concerned about sexual and gender-based violence crimes there.

We are also deeply troubled that impunity continues for those who attack UNAMID peacekeepers. Since the Prosecutor's last report in December, UNAMID has been attacked four times and three peacekeepers have been killed in these attacks. We redouble our calls on the Government of Sudan to investigate these attacks and bring to justice those responsible. We note the progress made in the ongoing two cases against Darfur rebels, as described in the Prosecutor's report.

...[W]e are extremely concerned about the recurring violence in Southern Kordofan and Blue Nile. Unfortunately, we have seen in the Two Areas a concrete illustration that those who evade accountability all too often contribute to further cycles of violence. As the Prosecutor has reminded us, Ahmad Haroun is the subject of an outstanding arrest warrant for alleged crimes committed in Darfur. Yet rather than facing justice, he has been entrusted by the Government of Sudan to serve as governor of Southern Kordofan, where he engages in inflammatory rhetoric reminiscent of that which he deployed in Darfur, pursuing policies that in recent weeks has led to the displacement of nearly 700 people per day, while continuing to block humanitarian access to those remaining. We will continue to push for a credible, independent investigation into violations of international law there and to demand that those responsible are held to account.

We continue to urge the Government of Sudan to make good on its commitments in the July 2011 Doha Document for Peace in Darfur to make local justice and accountability mechanisms a reality, including by empowering its Special Prosecutor for crimes in Darfur, establishing the Special Courts for Darfur, and inviting observers from the African Union and the United Nations to monitor the proceedings of these Courts.

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Ambassador DeLaurentis also delivered remarks at a Security Council briefing on Darfur by Ms. Bensouda, the new ICC Prosecutor, on December 13, 2012. Ambassador DeLaurentis's remarks are excerpted below and available at <http://usun.state.gov/briefing/statements/202135.htm>.

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The United States remains deeply concerned about the mounting violence in Darfur and reports of deliberate targeting of civilian areas, including increased incidents of aerial bombardments, sexual and gender based violence, and other crimes. The late September shelling of Hashaba that killed at least 60 civilians and the razing of the town of Sigili in early November by the Government of Sudan-aligned Popular Defense Forces are stark cases in point. Should the violence spread beyond North Darfur, threats to civilians will only multiply.

Growing attacks on civilians have come hand in hand with more frequent and serious attempts to deny UNAMID freedom of access. In both Hashaba and Sigili, the Government of Sudan denied UNAMID access to the affected areas immediately after the attacks. Since the initial deployment of UNAMID in December 2007, 43 peacekeepers have lost their lives, including six peacekeepers since the Prosecutor's report in June. Attacks on UNAMID peacekeepers can be prosecuted as war crimes. The Government of Sudan's deliberate obstruction of UNAMID and failure to investigate unwarranted attacks on UNAMID fosters a continued culture of impunity and is unacceptable. This Council should condemn in the strongest

possible terms any and all attacks on UNAMID personnel.

Reversing the cycle of violence and impunity requires accountability for the perpetrators. The ICC's prosecution of the architects of the atrocities in Darfur is crucial in this regard. We note the Prosecutor's report about proceedings in the case against Abdallah Banda and Saleh Jerbo as well as her Office's investigation and monitoring of ongoing crimes in Darfur. However, we are dismayed that the Government of Sudan is still not cooperating with the ICC to execute the outstanding arrest warrants in the Darfur cases, despite its obligation under Security Council Resolution 1593 to cooperate fully with the Court. The subjects of these warrants remain at large and continue to cross international borders. We continue to urge all states to refrain from providing political or financial support to these individuals and we'll work to prevent such support. Continued impunity for crimes committed in Darfur foments instability there and sends a dangerous message to the government that there are no consequences for attacking civilians elsewhere. These attacks have increased in the Two Areas in recent months, particularly in the form of indiscriminate aerial bombardments. We strongly condemn these attacks.

We urge the Government of Sudan to uphold its commitments to stand up credible local justice and accountability mechanisms. The Government of Sudan and the Darfur Regional Authority have repeatedly announced the establishment of investigative committees to determine responsibility for civilian deaths, but have not followed through. So far their announcements have been empty talk. The government-appointed Special Prosecutor for Darfur, moreover, has made not one significant arrest or prosecution. The government's refusal to take serious action in this regard is an abrogation of its commitments to the people of Darfur under the justice and reconciliation chapter of the Doha Document for Peace in Darfur.

Mr. President, we welcome the willingness of States to consider creative approaches and new tools to enable the ICC's work in Darfur, execute outstanding arrest warrants, and ensure compliance by states with relevant international obligations. We would welcome future discussions focused on ensuring full implementation of Council resolutions with ICC referrals.

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3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Overview

On June 7, 2012, Ambassador DeLaurentis addressed a UN Security Council session on the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). His remarks, available at <http://usun.state.gov/briefing/statements/192061.htm>, are excerpted below.

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The United States commends the tribunal Presidents, Prosecutors and Registrars for their dedication and extensive preparation in setting up the Residual Mechanism (RM). We welcome the overall downsizing by both the ICTR and ICTY as trials end and remaining functions are gradually transferred to the Residual Mechanism.

We also appreciate efforts by the ICTY, ICTR and RM to share resources and enact cost-saving managerial and administrative measures. ...

This Council must be flexible to ensure that both tribunals are able to administer justice expeditiously yet fairly. When the Council adopted Resolution 1966 in 2010 and set December 31, 2014 as the requested date for completion of all remaining work by the tribunals, we did not have the benefit of knowing when indicted individuals would be arrested. Today, we are pleased that all ICTY fugitives have been apprehended, including the re-apprehension in January 2012 of convicted war criminal Radovan Stankovic. We recognize, however, that trial and appeal schedules will be difficult to accurately predict, and that flexibility in assigning cases is important in this regard.

Turning to the ICTY, we welcome the reported cooperation of Serbia, Croatia, and Bosnia and Herzegovina in providing access to documents, archives and witnesses in response to requests for assistance from the Office of the Prosecutor. We look forward to Serbia concluding and acting upon investigations into who was involved in and responsible for sheltering Ratko Mladic, Radovan Karadzic, and other notorious ICTY fugitives in Serbia over the course of so many years. Such cooperation is essential to completing ongoing trials and appeals. ...

At the same time, the United States deplores the statement made this week denying genocide in Srebrenica. Genocide in Srebrenica is not a subjective determination – it is a defined criminal act which the ICTY has confirmed in final and binding verdicts in multiple cases. It cannot be denied.

Turning to the ICTR, there are, unfortunately, still nine ICTR fugitives at large. We call on all UN member states, particularly those in the Great Lakes region, to help apprehend them.

...

We take note of the recent transfers of cases from the ICTR to Rwanda, and welcome Rwanda's willingness to fairly adjudicate transferred cases. ... We applaud the ICTR's efforts to create a robust monitoring mechanism in cooperation with regional organizations to ensure the fairness of trials at the national level. ... We welcome the news that the ICTR is close to completing all trial work as projected in the November 2011 completion strategy. ...

As the ICTY and ICTR draw to an end and prepare to transition remaining functions to the Residual Mechanism, they represent a strong legacy in the international fight against impunity for those who commit atrocities. The defendants convicted in tribunal proceedings to date have been tried and found guilty of some of the most heinous crimes known to mankind, including genocide, murder, and rape as crimes against humanity. Thanks to the hard work of the tribunals, the world knows about these crimes, and perpetrators are being held accountable for their actions. In addition, there are now archives and public records which will be accessible to generations to come.... In addition to combating impunity, the tribunals' contributions in the areas of local capacity-building and education will help foster long-term peace and reconciliation.

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b. International Criminal Tribunal for the Former Yugoslavia

(1) Developments in the case of Radovan Karadzic

The case against Radovan Karadzic proceeded before the ICTY in 2012. The Tribunal dismissed one count of genocide against Karadzic, finding that there was insufficient evidence to convict Karadzic of genocide in the murders that took place in a large number of municipalities in 1992. However, the court determined that ten other charges brought against Karadzic, including an additional count of genocide, should proceed. In a response to a taken question about the dismissal on June 28, 2012, available at www.state.gov/r/pa/prs/ps/2012/06/194249.htm, the Department of State spokesperson, explained:

The International Criminal Tribunal for the Former Yugoslavia determination that there was not enough evidence to convict Karadzic of genocide in the murders that took place in a large number of municipalities in 1992 was not unexpected, given similar verdicts on these charges in previous cases.

We note that the Court determined that there was sufficient evidence to support all of the other ten charges against Karadzic, including responsibility for acts of extermination and murder carried out in municipalities between March 1992 and November 30, 1995, other crimes against humanity, and genocide related to the events in and around Srebrenica in 1995.

(2) Other developments

See discussion in section C.3.d. *infra* of the Mechanism for International Tribunals.

c. International Criminal Tribunal for Rwanda

On May 8, 2012, the Appeals Chamber of the ICTR affirmed the convictions of Gaspard Kanyarukiga, Aloys Ntabakuze, and Ildephonse Hategekimana. The United States welcomed the decisions in a May 9, 2012 press statement, available at www.state.gov/r/pa/prs/ps/2012/05/189573.htm, and excerpted below.

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... The Appeals Chamber of the ICTR affirmed the convictions of these three individuals for genocide and crimes against humanity, among other crimes. Although some counts against Ntabakuze were set aside by the Appeals Chamber, the decision indicates a careful, transparent, and balanced judicial process.

The three were sentenced to 30 years, 35 years, and life in prison, respectively. Ntabakuze and Hategekimana were both officers in the Rwandan Army (commander and lieutenant). Kanyarukiga, a businessman, was convicted of genocide based on his participation in the planning of the destruction of a church in Kivumu, which resulted in the death of approximately 2,000 civilians.

There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously brought to justice.

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d. Mechanism for International Criminal Tribunals

On December 5, 2012, Ambassador DeLaurentis addressed the Security Council during a debate on ICTY and ICTR and mechanisms for international criminal tribunals. In 2010, the Security Council established a residual mechanism to continue the work of the criminal tribunals for Yugoslavia and Rwanda. See *Digest 2010* at 142-43. Ambassador DeLaurentis's remarks, available at <http://usun.state.gov/briefing/statements/201622.htm> and excerpted below, express the U.S. view of the importance of the effective functioning of the Mechanism for International Criminal Tribunals.

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Mr. President, as President Obama has said, “preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States of America.” A key element of this endeavor is our commitment to seek justice for the perpetrators of heinous crimes, regardless of where or when they were committed. The system of international tribunals, which now includes the Mechanism for International Criminal Tribunals (the “MICT”) as its newest member, is a critical institution in this process.

Since your last reports, much progress has been made. The MICT has passed down its first decision, to transfer a case for trial in Rwanda, and opened its Arusha Branch on schedule on July 1, 2012. The Hague branch of the MICT is slated to open in July, 2013. As we commend the tribunals for their historic contribution to justice and accountability, including the apprehension of all ICTY fugitives, we also recognize the substantial work which remains at both Tribunals in concluding trials, downsizing staff, and transferring remaining functions to the MICT. The Tribunals still face significant challenges in completing their mandate and we recognize the need for flexibility in assigning cases and determining the appeal and trial schedules.

In light of these tasks, we appreciate the ongoing efforts by the Tribunals to improve efficiency, share resources, and economize on costs. Efficiencies instituted by the MICT, including having a single set of principals—President, Prosecutor, and Registrar—for both the Arusha Branch and the branch in The Hague, and having the MICT President preside over the MICT Appeals Chamber will ensure a more efficient use of resources. We also welcome other cost-saving measures, such as allowing judges to carry out their functions remotely where possible, and the common use of certain administrative support services and other “best practices.” We look forward to future measures that economize on costs while maintaining the highest standards of justice.

Turning to the ICTY, we note the recent judgments of the Appeals and Trial Chambers and fully support the Tribunal and respect its rulings. The pace of work at the ICTY remains high, with eighteen individuals on trial and 15 in appeal proceedings at the close of the reporting period. The last of the ICTY trials has begun—that of Goran Hadžić. We commend the ICTY for expediting trials, such that it anticipates concluding all but three trials during 2013. While the Tribunal has implemented several reforms to expedite trials and appeals, it was not able to implement a 2009 Security Council authorization to redeploy four trial judges to the Appeals Chamber, because they are still needed at trial. We look forward to the President's proposals as to how this situation can be remedied. We recognize that staff retention will continue to be a problem as the Tribunal nears the end of its mandate, and we urge the General Assembly to reconsider proposals put forward earlier for a modest financial incentive to save funds through reduced staff turnover. We also support the Tribunal's outreach program, given the continued need for reconciliation in the states of the former Yugoslavia.

As regards the ICTR, we commend the Tribunal on the completion of numerous cases in the previous reporting period, including the completion of work at the trial level in regards to 92 of the 93 accused. The Trial Chamber delivered two judgments, in the Nzabonimana and the Nizeyimana cases, with a third trial judgment expected in December; and the Appeals Chamber delivered four judgments in 2012. We welcome the Tribunal's projection that it will conclude all cases at the trial level by the end of 2012.

We continue to urge all UN member states, particularly those in the Great Lakes region, to cooperate in the apprehension of the nine remaining fugitives from the ICTR. The United States continues to offer monetary rewards for information leading to the arrest or transfer of ICTR fugitives, whether those individuals will be prosecuted by the MICT or in Rwandan courts. Those who harbor fugitives obstruct justice and stand on the wrong side of history.

We also welcome Rwanda's commitment to adjudicating fairly the cases transferred from the ICTR to Rwanda, and we commend the ICTR and the MICT in creating a robust monitoring mechanism for the transferred cases. We will be watching these cases to satisfy ourselves that the conditions for referral continue to be met ahead of the MICT's transfer of six more cases to the courts of Rwanda as and when fugitives are apprehended. The ICTR and the Rwandan authorities have also shown close cooperation in holding skills-sharing workshops and capacity-building seminars which will ensure fair proceedings at the national level. Strengthening national legal and justice institutions is one of the most important and lasting legacies of international tribunals such as the ICTR.

The defendants convicted in tribunal proceedings have been found guilty of the most heinous crimes known to humanity. The legacy of the tribunals, however, does not only consist of bringing individual perpetrators to justice. Thanks to the dedication of the tribunals, these crimes have been etched in the ledger books of history, and the records and archives of these crimes will be accessible to future generations, providing a corrective against distortions of the historical narrative. The tribunals have fostered respect for the rule of law; developed capacity at the national level, and enhanced reconciliation and peace. These are long-term achievements which not only strengthen the societies affected by such heinous crimes, but help ensure that these crimes will not be repeated elsewhere. Our commitment to working with the international community on behalf of this collective moral responsibility is unwavering.

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4. Special Court for Sierra Leone

On April 26, 2012, the Special Court for Sierra Leone convicted Charles Taylor, the former president of Liberia, of war crimes and crimes against humanity. The State Department welcomed the judgment in a press statement available at www.state.gov/r/pa/prs/ps/2012/04/188534.htm. The press statement elaborated on the significance of the judgment:

Today's judgment was an important step toward delivering justice and accountability for victims, restoring peace and stability in the country and the region, and completing the Special Court for Sierra Leone's mandate to prosecute those persons who bear the greatest responsibility for the atrocities committed in Sierra Leone. The Taylor prosecution at the Special Court delivers a strong message to all perpetrators of atrocities, including those in the highest positions of power, that they will be held accountable.

The trial of Charles Taylor is of enormous historical and legal significance as it is the first of a powerful head of state to be brought to judgment before an international tribunal on charges of mass atrocities and serious violations of international humanitarian law. Over 90 witnesses testified during the trial, bringing to light the range of crimes committed during the war in Sierra Leone, and affirming the importance of justice for the victims. The United States has been a strong supporter and the leading donor of the Special Court for Sierra Leone since its inception. The successful completion of the Special Court's work remains a top U.S. Government priority.

Ambassador Susan Rice also issued a statement on April 26, 2012 welcoming the verdict in the Taylor case. Her statement is available at <http://usun.state.gov/briefing/statements/188560.htm>.

5. Khmer Rouge Tribunal ("ECCC")

In 2012, the United States continued to support the work of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), also known as the Khmer Rouge Tribunal. On August 13, 2012, Deputy Secretary of State Thomas R. Nides certified that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the ECCC. 77 Fed. Reg. 51,604 (Aug. 24, 2012). Deputy Secretary Nides provided the certification pursuant to Section 7044(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Division I, Pub. L. 112-74) (SFOAA). See *Digest 2010* at 145 for background on the original certification requirement and *Digest 2011* at 106 discussing the certification in 2011.

The Federal Register notice also included the Memorandum of Justification accompanying the certification, which summarized recent developments at the ECCC. The Memorandum of Justification reported that in February 2012, the Supreme Court Chamber upheld the conviction of Kaing Guek Eav (aka "Duch"), former chief of the Tuol Sleng

torture center, for crimes against humanity and war crimes, and extended his previous sentence of 35 years to life in prison. 77 Fed. Reg. at 51,605. In addition, the notice related that in January 2012, David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, had succeeded J. Clint Williamson (also a former U.S. Ambassador-at-Large for War Crimes Issues) as the UN Special Expert to the Secretary-General of the ECC. *Id.* The Memorandum further stated that the U.S. government anticipates that Mark Harmon, a former U.S. Department of Justice prosecutor and ICTY prosecutor, would be effective as the newly confirmed co-investigative judge for the ECCC. *Id.* at 51,606.

Cross References

Visa waiver program, **Chapter 1.C.3.**

Somalia, **Chapter 1.D.3.**, **Chapter 16.A.5.e.**

Bolivia's reservation to the 19961 Narcotics Convention, **Chapter 4.A.3.**

Jurisdiction over piracy (Kiobel case), **Chapter 5.B.3.**

Children and armed conflict, **Chapter 6.C.2.**

International Law Commission, **Chapter 7.B.D.**

OAS General Assembly resolution on the ICC, **Chapter 7.E.1.a.**

Maritime security and law enforcement, **Chapter 12.A.5.**

Terrorism related sanctions, **Chapter 16.A.4**

Atrocities prevention, **Chapter 17.C.1.**

Use of force issues regarding U.S. counterterrorism efforts, **Chapter 18.A.1.a.**

Detainee transfers, **Chapter 18.A.3.b.**

Detainee criminal prosecutions, **Chapter 18.A.3.d.**