

**DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW**

2016

CarrieLyn D. Guymon
Editor

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Introduction

It is my pleasure to introduce the 2016 edition of the *Digest of United States Practice in International Law*. The State Department publishes the on-line *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume includes key speeches Legal Adviser Brian J. Egan delivered during 2016. Mr. Egan spoke on the future of international agreements at Yale Law School, where Deputy National Security Adviser Avril Haines also spoke on the importance of treaties. He responded to the work of the International Law Commission on protection of persons in the event of disasters; identification of customary international law; and subsequent agreements and subsequent practice in relation to the interpretation of treaties. He also delivered a talk entitled “The Next Fifty Years of the Outer Space Treaty” at a space law symposium; addressed the International Bar Association on the subject of private international law; discussed international law, legal diplomacy, and the counter-ISIS campaign at the annual meeting of the American Society of International Law (“ASIL”); and spoke at Berkeley Law School on international law and stability in cyberspace.

In addition to Mr. Egan’s speeches, other representatives of the U.S. government explained U.S. international legal views on current world events in 2016. Secretary of State John Kerry announced that, in his judgment, ISIS is responsible for genocide in Iraq against groups in areas under its control, including Yezidis, Christians, and Shia Muslims, and for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities. The United States responded to papers China circulated after the decision in the arbitration between the Philippines and China on the South China Sea with a diplomatic note identifying contradictions between China’s claims and the international law of the sea. The United States also sent a diplomatic note to the Republic of the Marshall Islands regarding U.S. sovereignty over Wake Island. And the Obama administration issued its Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations. All of these enunciations of U.S. legal views contributed to efforts to promote understanding of and compliance with international law.

There were numerous developments in 2016 relating to U.S. international agreements and treaties at all stages, from negotiation to entry into force. The President transmitted eleven treaties to the U.S. Senate for its advice and consent to ratification in 2016, including extradition treaties, two intellectual property treaties, several private international law treaties, maritime boundary treaties, and the Arms Trade Treaty. The Senate provided its advice and consent to ratification of seven treaties in 2016, including extradition treaties, mutual legal assistance treaties, the International Treaty on Plant Genetic Resources for Food and Agriculture, and the Convention on the Law Applicable to

Certain Rights in Respect of Securities Held with an Intermediary (the “Hague Securities Convention”). The United States ratified and joined the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in 2016. And on January 16, 2016, the 2015 Joint Comprehensive Plan of Action with Iran (“JCPOA”) reached its “Implementation Day,” when the International Atomic Energy Agency confirmed that Iran had satisfied the required nuclear commitments and the United States and European Union took steps to lift nuclear-related sanctions against Iran. The United States signed new extradition treaties with Kosovo and Serbia; an agreement “On the Protection of Personal Information Relating to the Prevention, Investigation, Detention, and Prosecution of Criminal Offenses” (“DPPA”) with the European Union; an asset sharing agreement with Colombia; several air transport agreements; and agreements pursuant to the 1970 UNESCO Convention on cultural property. The United States successfully led the way to renegotiate the South Pacific Tuna Treaty and amend the Montreal Protocol to phase down the production and consumption of hydrofluorocarbons (“HFCs”). And, the President also submitted to Congress for its review an Agreement for Cooperation with Norway Concerning Peaceful Uses of Nuclear Energy.

In the area of diplomatic relations, the United States engaged with Cuba in claims talks, conclusion of an aviation arrangement, and amendments to the Cuban Assets Control Regulations, among other initiatives. As a reflection of Burma’s democratic transition, the United States terminated the national emergency with respect to Burma, which had provided the basis for economic and financial sanctions. Also in 2016, the President terminated the national emergency with respect to Côte d’Ivoire. And in 2016, the United States swore in its first ambassador to Somalia in a quarter century after recognizing the government of Somalia in 2013. The United States took several steps in response to Russian interference in the 2016 U.S. election and increasing Russian harassment of U.S. diplomats overseas.

In the area of human rights, the United States followed up on its accepted recommendations after its 2015 Universal Periodic Review (“UPR”) before the UN Human Rights Council by organizing six interagency UPR working groups to consult with civil society and discuss and coordinate implementation efforts during 2016. The United States submitted to the Committee on the Rights of the Child its Combined Third and Fourth Periodic Reports on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography. And the United States supported the adoption by the Human Rights Council of a resolution on the human rights of lesbian, gay, bisexual, and transgender (“LGBT”) persons, creating an independent expert on violence and discrimination based on sexual orientation and gender identity. U.S. leadership was critical to reforming the Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”) and to efforts toward enhancing the participation of indigenous peoples in relevant UN bodies.

The U.S. government also participated in litigation and arbitration involving issues related to foreign policy and international law in 2016. The United States government filed briefs in cases before the U.S. Supreme Court, including *Lynch v. Morales-Santana*, regarding when a child born abroad out of wedlock should be granted

U.S. citizenship at birth; *Tuaua v. United States*, addressing the argument that U.S. nationals residing in American Samoa—an “outlying possession” of the United States—should be granted U.S. citizenship; *Thomas v. Lynch*, examining whether children born on U.S. military bases abroad are citizens at birth; *Meshal v. Higgenbotham*, opposing review of the appeals court decision that factors including extraterritoriality, national security, and foreign policy make unavailable a *Bivens* remedy for detention and interrogation in foreign countries in the context of counterterrorism investigations; *Venezuela v. Helmerich & Payne*, *Helmerich & Payne v. Venezuela*, and *Odhiambo v. Kenya*, regarding the appropriate standard for establishing jurisdiction under the Foreign Sovereign Immunities Act and interpretation of the expropriation and commercial activity exceptions to immunity; and *Belize v. Belize Social Development Ltd.*, involving issues related to the enforcement of an arbitral award. The United States also participated in several cases in the aftermath of the 2015 Supreme Court decision in *Kerry v. Din*, confirming the doctrine of consular nonreviewability with the application of the “facially legitimate and bona fide reason” standard articulated in *Din*. The United States and Iran settled an outstanding claim at the Iran-U.S. Claims Tribunal in The Hague regarding the \$400 million Trust Fund for military sales.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. At the United Nations, the United States joined in adopting the New Urban Agenda at the Habitat III conference on housing and, separately, the New York Declaration for Refugees and Migrants. In the Security Council, U.S. priorities and efforts were reflected in Resolution 2322 on information sharing and international judicial cooperation to counter threats caused by terrorist acts; as well as resolutions on North Korea, establishing the strongest sanctions the Security Council has imposed in more than two decades in response to nuclear tests and ballistic missile launches. Regarding the International Criminal Court (“ICC”), the United States welcomed the conviction of Ahmed al-Mahdi for intentional destruction of cultural property in Mali; the opening of the trial of Dominic Ongwen, of the Lord’s Resistance Army; and the conviction of Jean-Pierre Bemba for war crimes and crimes against humanity, including rape, as well as the subsequent additional conviction of Bemba and four associates for offenses against the administration of justice, including witness intimidation. The United States also welcomed the conviction of Radovan Karadzic by the International Criminal Tribunal for the Former Yugoslavia. The United States was a strong supporter of the Extraordinary African Chambers proceedings that led to the conviction of former Chadian President Habré, the newly created Specialist Chambers in Kosovo, and the Special Criminal Court being developed by authorities in the Central African Republic. At the Inter-American Commission on Human Rights (“IACHR”), the United States responded to petitions and participated in hearings in 2016. U.S. voluntary contributions to the IACHR in 2016 kept the IACHR fully operative, but the United States also prevailed on the Commission to adopt new management procedures in the fall of 2016 and reduce its backlog. The United States government accepted an amendment to the International Monetary Fund (“IMF”) Articles of Agreement to reform its Executive Board and changes to the New Arrangements to Borrow (“NAB”), and also provided U.S. consent to the increase in the U.S. quota at the IMF. And the United States actively pressed at the Organization for the Prohibition of Chemical Weapons (“OPCW”) and Security Council for an appropriate response to the use of chemical weapons in Syria.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2016 volume, attorneys whose voluntary contributions to the *Digest* were particularly significant include Henry Azar, Jay Bischoff, Julianna Bentes, Dorothy Patton, Virginia Frasure, Jennifer Gergen, Monica Jacobsen, Michael Jacobsohn, Meredith Johnston, Steve Kerr, Jeffrey Kovar, Oliver Lewis, Lorie Nierenberg, Megan O’Neill, Alexis Ortiz, Judy Osborn, Phillip Riblett, Shana Rogers, Tim Schnabel, Lela Scott, Gabriel Swiney, Niels von Deuten, Amanda Wall, and Vanessa Yorke. Sean Elliott at the Foreign Claims Settlement Commission also provided valuable input. I express very special thanks to Joan Sherer, the Department’s Senior Law Librarian, and to Jerry Drake and Rickita Smith for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

Richard C. Visek
Acting Legal Adviser
Department of State

Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2016 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the timely release of this year's *Digest*.

The 2016 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through April 2017) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2017 where they relate to the discussion of developments in 2016.

Updates on most other 2017 developments, including those both before and after the change in administrations on January 20, 2017, are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, at www.state.gov/s/l/c8183.htm, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <http://www.un.org/en/documents/ods/>. For UN-related information generally, the UN's home page at www.un.org also remains a valuable source. Resolutions of the UN Human Rights Council can be retrieved most readily by using the search function on the Human Rights Council's website, at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>. Legal texts of the

World Trade Organization (“WTO”) may be accessed through the WTO’s website, at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

The U.S. Government Printing Office (“GPO”) provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at <https://www.gpo.gov/fdsys/>, is GPO’s online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President’s transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <http://www.state.gov/s/l/treaty> and the Library of Congress provides extensive treaty and other legislative resources at <https://www.congress.gov>.

The U.S. government’s official web portal is <https://www.usa.gov>, with links to government agencies and other sites; the State Department’s home page is <http://www.state.gov>.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

- U.S. Court of Appeals for the District of Columbia Circuit:
<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;
- U.S. Court of Appeals for the First Circuit:
<http://www.ca1.uscourts.gov/opinions/main.php>;
- U.S. Court of Appeals for the Second Circuit:
<http://www.ca2.uscourts.gov/decisions.html>;
- U.S. Court of Appeals for the Third Circuit:
<http://www.ca3.uscourts.gov/search-opinions>;
- U.S. Court of Appeals for the Fourth Circuit:
<http://pacer.ca4.uscourts.gov/opinions/opinion.htm>;
- U.S. Court of Appeals for the Fifth Circuit:
<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;
- U.S. Court of Appeals for the Sixth Circuit:
<http://www.ca6.uscourts.gov/opinions/opinion.php>;
- U.S. Court of Appeals for the Seventh Circuit:
<http://media.ca7.uscourts.gov/opinion.html>;
- U.S. Court of Appeals for the Eighth Circuit:
<http://www.ca8.uscourts.gov/all-opinions>;
- U.S. Court of Appeals for the Ninth Circuit:

www.ca9.uscourts.gov/opinions/ (opinions) and
www.ca9.uscourts.gov/memoranda/ (memoranda and orders—unpublished
dispositions);

U.S. Court of Appeals for the Tenth Circuit:

<http://www.ca10.uscourts.gov/clerk/opinions/daily>;

U.S. Court of Appeals for the Eleventh Circuit:

<http://www.ca11.uscourts.gov/published-opinions>;

U.S. Court of Appeals for the Federal Circuit:

<http://www.cafc.uscourts.gov/opinions-orders/0/all>.

The official U.S. Supreme Court website is maintained at www.supremecourtus.gov. The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at <https://www.justice.gov/osg>. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

CarrieLyn D. Guymon