

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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Given the nature of the charges and the absence of U.S. extradition treaties with Iran and China, cooperation from their national governments to facilitate prosecution is unlikely.³⁷

INTERNATIONAL CRIMINAL LAW

Huawei's Meng Wanzhou Released to China After Entering into Deferred Prosecution Agreement with U.S. Justice Department

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On September 24, 2021, Canadian authorities released Meng Wanzhou, Chief Financial Officer of Huawei Technologies and daughter of its founder, to China after she entered a Deferred Prosecution Agreement (DPA) with the U.S. Justice Department (DOJ) on charges of violating U.S. sanctions on Iran. At the request of the United States, Canadian authorities arrested Meng in December 2018 and subsequently held her under house arrest in Vancouver. Meng fought extradition to the United States,¹ and the case became a major source of friction between China, the United States, and Canada. Shortly after Meng's detention, China arrested two Canadians in China, Michael Kovrig and Michael Spavor, in apparent retribution.² Immediately after Meng's return, China released the Canadians and also allowed two U.S. citizens, siblings Cynthia and Victor Liu, to return to the United States after preventing their departure with an exit ban since 2018.³ The incident has raised concerns about "hostage diplomacy," and questions remain about whether the case's resolution will help to stabilize or even improve tense relations between the United States and China.⁴

In a thirteen-count indictment issued in August 2018 and partially unsealed in January 2019, the United States charged Meng and Huawei with wire fraud and bank fraud,

[opa/pr/eight-individuals-charged-conspiring-act-illegal-agents-people-s-republic-china](https://perma.cc/XM3H-FZMT) [<https://perma.cc/XM3H-FZMT>].

³⁷ See 18 U.S.C. § 3181 (listing U.S. bilateral extradition treaties in the Statutory Notes and showing no such treaties with China or Iran).

¹ David E. Sanger, Dan Bilefsky & Katie Benner, *U.S. Agrees to Release Huawei Executive in Case That Strained Ties with China*, N.Y. TIMES (Sept. 24, 2021), at <https://www.nytimes.com/2021/09/24/us/politics/huawei-meng-wanzhou.html>.

² Chris Buckley & Katie Benner, *To Get Back Arrested Executive, China Uses a Hardball Tactic: Seizing Foreigners*, N.Y. TIMES (Sept. 25, 2021), at <https://www.nytimes.com/2021/09/25/world/asia/meng-wanzhou-china.html>.

³ Michael Forsythe, Chris Buckley & Katie Benner, *American Siblings Barred from Leaving China for 3 Years Return to U.S.*, N.Y. TIMES (Sept. 27, 2021), at <https://www.nytimes.com/2021/09/27/us/politics/china-americans-released.html>.

⁴ See, e.g., Katie Benner & David E. Sanger, *How the Huawei Case Raised Fears of "Hostage Diplomacy" by China*, N.Y. TIMES (Sept. 28, 2021), at <https://www.nytimes.com/2021/09/28/us/politics/huawei-meng-wanzhou.html>; Dan Bilefsky, *Meng's Release Could Eliminate a Source of Friction Between China and the Biden Administration*, N.Y. TIMES (Sept. 24, 2021), at <https://www.nytimes.com/2021/09/24/world/canada/meng-wanzhou-biden-china.html>.

among other crimes, in connection with a Huawei-controlled subsidiary in Iran.⁵ The indictment alleged that Meng lied to U.S. bank officials when asked whether Huawei was unlawfully engaged in business with Iran.⁶ In so doing, Meng and Huawei allegedly caused global financial institutions to process millions of dollars in transactions for Huawei's business activities in Iran in violation of U.S. sanctions.⁷ Pursuant to a U.S. request, Canadian authorities arrested Meng at the Vancouver airport in December 2018 as she traveled from Hong Kong to Mexico.⁸ After Meng's arrest, her attorneys repeatedly asserted her innocence and argued that her detention was a political play by former President Trump, who suggested that he might drop the case against Meng in exchange for a trade deal with China.⁹ Canada agreed to proceed with the U.S. extradition request on March 1, 2019.¹⁰

Nine days after Meng's arrest in Vancouver, China arrested two Canadian citizens living in China, Michael Kovrig and Michael Spavor, who became known as "[t]he two Michaels."¹¹ Their arrest and continued detention significantly worsened relations between China and Canada in general, including on trade issues.¹² While detained, "Meng was allowed to live in her Vancouver mansion," but "the two Canadians were confined to prison under much harsher conditions."¹³ In June 2020, China charged both of them with suspected espionage,¹⁴ and in August 2021, a Chinese court sentenced Michael Spavor to eleven years in prison on the charges.¹⁵ Canadian Prime Minister Justin Trudeau publicly called on China to release the two Michaels, and Canadian officials repeatedly raised the issue with the United States.¹⁶

China also continued to detain two U.S. citizens during this time. During a visit to China in June 2018, siblings Victor and Cynthia Liu were subjected to an exit ban and prevented from leaving China because their father, a former Chinese bank executive, was wanted for his role in a fraud case.¹⁷ According to press reports, "President Donald J. Trump had raised the issue of Mr. and Ms. Liu's release at a summit in Argentina with President Xi Jinping of China, and Mr. Xi had agreed to let them leave But on the day the summit ended,

⁵ Indictment, *United States v. Meng*, Cr. No. 18-457 (S-2) (AMD) (E.D.N.Y. Jan. 24, 2019), at <https://www.justice.gov/usao-edny/press-release/file/1125036/download> [<https://perma.cc/T5DD-HUS2>]; see also Jean Galbraith, *Contemporary Practice of the United States*, 113 *AJIL* 376, 388–89 (2019).

⁶ Galbraith, *supra* note 5, at 389–90.

⁷ Indictment, *supra* note 5, at 6; see also 31 C.F.R. § 560.427 (2021).

⁸ Galbraith, *supra* note 5, at 388.

⁹ See, e.g., *id.* at 392–93; Sanger, Bilefsky & Benner, *supra* note 1.

¹⁰ Moira Warburton, *Key Events in Huawei CFO Meng Wanzhou's Extradition Case*, REUTERS (Sept. 24, 2021), at <https://www.reuters.com/technology/key-events-huawei-cfo-meng-wanzhou-extradition-case-2021-08-11>. Meng then filed a civil suit against Canada's government, as well as the Royal Canadian Mounted Police and Canadian Border Services Agency claiming that they "breach[ed] her civil rights under Canada's Charter of Rights and Freedoms" when she was arrested at the Vancouver airport in 2018. *Huawei's Meng Wanzhou Sues Canada Authorities Over Arrest*, BBC (Mar. 4, 2019), at <https://www.bbc.com/news/world-us-canada-47436497>.

¹¹ Buckley & Benner, *supra* note 2.

¹² See Warburton, *supra* note 10.

¹³ Buckley & Benner, *supra* note 2.

¹⁴ Javier C. Hernández & Dan Bilefsky, *For Canadians Held in China, Two Years of Isolation and Uncertainty*, N.Y. TIMES (Dec. 9, 2020), at <https://www.nytimes.com/2020/12/09/world/asia/china-canada-michael-kovrig-spavor.html>.

¹⁵ Chris Buckley, Dan Bilefsky & Tracy Sherlock, *China Sentences Canadian Businessman to 11 Years in Prison*, N.Y. TIMES (Aug. 10, 2021), at <https://www.nytimes.com/2021/08/10/world/asia/china-canada-spavor-kovrig.html>.

¹⁶ Benner & Sanger, *supra* note 4.

¹⁷ Forsythe, Buckley & Benner, *supra* note 3.

Ms. Meng was taken into custody in Canada, and the agreement was off.”¹⁸ In talks in China in July 2021, Deputy Secretary of State Wendy R. Sherman “raised the cases of American and Canadian citizens,” according to the State Department,¹⁹ and in September 2021, President Biden and President Xi apparently touched on the issue of the Western detainees in a phone call.²⁰

As Meng’s extradition hearings proceeded, she raised a number of defenses and affirmative claims, contending that the case represented an abuse of process and was politically motivated.²¹ She also argued that the charges did not satisfy the dual criminality requirement for extradition.²² Although the 1976 U.S.–Canada Extradition Treaty includes a commitment to extradite individuals charged with, among other things, “[f]raud by a banker, agent, or by a director or officer of any country,”²³ Meng argued that she could not be extradited because Canada does not have sanctions in place on financial services in Iran.²⁴ In May 2020, Associate Chief Justice Heather Holmes of the Supreme Court of British Columbia rejected this argument.²⁵ The extradition hearings concluded on August 10, 2021, and the Canadian judge was scheduled to issue a final ruling in October.²⁶

The U.S. Department of Justice and Meng’s lawyers had been discussing a potential deferred prosecution agreement since December 2020.²⁷ Reportedly the parties disagreed over whether Meng would admit any wrongdoing, and in September, U.S. prosecutors informed her lawyers that they would end settlement talks and prepare for trial in U.S. district court.²⁸ Meng’s lawyers eventually offered a compromise in the form of a “statement of facts” that allowed her to plead “not guilty” while effectively admitting to the allegations in the original indictment.²⁹

On September 24, 2021, Meng appeared via video in federal court in Brooklyn and entered into a deferred prosecution agreement.³⁰ Acting U.S. Attorney for the Eastern

¹⁸ *Id.*

¹⁹ U.S. Dep’t of State Press Release, Deputy Secretary Sherman’s Visit to the People’s Republic of China (July 26, 2021), at <https://www.state.gov/deputy-secretary-shermans-visit-to-the-peoples-republic-of-china> [<https://perma.cc/33RF-XJBS>].

²⁰ Forsythe, Buckley & Benner, *supra* note 3.

²¹ See Ian Young, *Huawei Extradition Battle: The Trump Card, the Wild Card, and Meng Wanzhou’s Narrow Flight Path to Freedom*, S. CHINA MORNING POST (Aug. 4, 2021), at <https://www.scmp.com/news/china/diplomacy/article/3143580/trump-card-wild-card-and-meng-wanzhou-narrow-flight-path>.

²² *Id.*

²³ Galbraith, *supra* note 5, at 391 (quoting Treaty on Extradition Between the United States of America and Canada, U.S.–Can., Art. 2 & Schedule, Dec. 3, 1971, 27 UST 983).

²⁴ Arjun Kharpal, *Huawei CFO Seeks to End Extradition Case, Citing Trump’s “Intimidating and Coercive” Comments*, CNBC (May 8, 2019), at <https://www.cnbc.com/2019/05/09/huawei-cfo-seeks-to-end-extradition-case-citing-trump-comments.html>.

²⁵ United States v. Meng, 2020 BCSC 785 (Can.), at <https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc785/2020bcsc785.html?searchUrlHash=AAAAAQAMV2FuemhvdSBNZW5nAAAAAE&resultIndex=9#document> [<https://perma.cc/FHA2-43YN>].

²⁶ Warburton, *supra* note 10.

²⁷ Karen Freifeld, *U.S. in Talks with Huawei CFO Meng on Resolving Criminal Charges: Source*, REUTERS (Dec. 3, 2020), at <https://www.reuters.com/article/us-usa-huawei-tech-canada-idUSKBN28D3J8>.

²⁸ Benner & Sanger, *supra* note 4.

²⁹ *Id.*

³⁰ Dan Bilefsky, Katie Benner & Emily Palmer, *Meng Wanzhou Agreed to the Deal in a Brooklyn Court Hearing*, N.Y. TIMES (Sept. 24, 2021), at <https://www.nytimes.com/live/2021/09/24/world/meng-wanzhou-huawei-trial/huawei-meng-wanzhou>.

District of New York, Nicole Boeckmann, stated that Meng took “responsibility for her principal role in perpetrating a scheme to defraud a global financial institution” and her “admissions confirm the crux of the government’s allegations in the prosecution of this financial fraud—that Meng and her fellow Huawei employees engaged in a concerted effort to deceive global institutions, the U.S. government and the public about Huawei’s activities in Iran.”³¹ The Justice Department agreed to defer prosecution of the charges in her indictment for four years from the date of her arrest in Canada, that is, until December 1, 2022, in exchange for Meng’s attestation to the statement of facts and her stipulation to its admissibility should the Department proceed against her.³² Meng also must not commit other federal, state, or local crimes.³³ If she remains in full compliance with her obligations on December 1, 2022, DOJ will move to dismiss the underlying indictment against her with prejudice.³⁴

Importantly, the United States can now use Meng’s statement of facts in its ongoing prosecution of Huawei.³⁵ The statement detailed a complex story of Huawei’s Iran dealings from 2007 to 2014. Huawei funneled goods subject to U.S. export control laws through Skycom, a Huawei-controlled subsidiary that functioned as the company’s representative in Iran.³⁶ After press reports exposed Huawei’s relationship with Skycom, the victim financial institution, identified as HSBC,³⁷ which provided U.S. dollar-clearing services to Huawei, made inquiries with Huawei to ensure HSBC was not in violation of U.S. sanctions.³⁸ In response, Huawei arranged an in-person meeting with the bank.³⁹ Meng prepared a PowerPoint presentation describing the Skycom-Huawei connection as a “normal business cooperation” and calling Skycom a “third party Huawei works with” in Iran, when in fact it was fully Huawei-controlled.⁴⁰ Moreover, Meng stated during the meeting that “Huawei ‘operates in Iran in strict compliance with applicable laws, regulations and sanctions’ and that ‘there ha[d] been no violation of export control regulations’ by ‘Huawei or any third party Huawei works with.’”⁴¹ Through these misleading statements, Meng caused the bank to violate sanctions laws by providing banking services prohibited by U.S. law.⁴² Meng’s admission will help the

³¹ U.S. Dep’t of Justice Press Release, Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), at <https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution> [<https://perma.cc/S2J5-7NNC>].

³² Deferred Prosecution Agreement, United States v. Meng, Cr. No. 18-457, 1–3 (S-3) (AMD) (E.D.N.Y. Sept. 22, 2021), at <https://www.justice.gov/opa/press-release/file/1436211/download> [<https://perma.cc/6DTY-AGLE>].

³³ *Id.* at 2.

³⁴ *Id.*

³⁵ *Id.* at 2–3; see also Aruna Viswantha, Dan Strumpf & Jacquie McNish, *Huawei CFO Meng Wanzhou Reaches Deal With Justice Department*, WALL ST. J. (Sept. 25, 2021), at <https://www.wsj.com/articles/justice-department-reaches-deal-with-huawei-executive-11632494001>.

³⁶ Deferred Prosecution Agreement, *supra* note 32, Attach. A at 2.

³⁷ Gordon Corera, *HSBC Documents Revealed in Huawei Extradition Battle*, BBC (June 30, 2021), at <https://www.bbc.com/news/world-us-canada-57673027>.

³⁸ Deferred Prosecution Agreement, *supra* note 32, Attach. A at 2.

³⁹ *Id.*

⁴⁰ *Id.*, Attach. A at 3.

⁴¹ *Id.*

⁴² *Id.*

U.S. case against Huawei, which is charged with violating the same sanctions law.⁴³ Assistant Attorney General Kenneth A. Polite Jr. of the Department's Criminal Division said that DOJ's "prosecution team continues to prepare for trial against Huawei, and [they] look forward to proving [the] case against the company in court."⁴⁴

The timing of Meng's return and corresponding release of the U.S. and Canadian citizens have raised concerns about "hostage diplomacy"—arbitrary detention of a foreign country's citizens to gain leverage in state-to-state relations.⁴⁵ According to a recent piece in the *Washington Post*, the past few years have seen a "dramatic" increase "in foreign governments wrongfully detaining Americans to extract concessions, policy changes or prisoner exchanges from the United States," with "China, Cuba, Iran, North Korea and Venezuela . . . currently the most active hostage-taking states."⁴⁶ The Biden administration has consistently denied that there was any agreement with China to exchange detainees. White House Press Secretary Jen Psaki said that "[t]here is no link" between the release of the two Michaels and the DPA and explained that "we have an independent Justice Department that made independent decisions—law enforcement decisions."⁴⁷ The DOJ similarly asserted that it "reached the decision to offer a deferred prosecution agreement with Ms. Meng independently, based on the facts and the law, and an assessment of litigation risk."⁴⁸ For its part, China portrayed the case against Meng as politically motivated. Chinese Foreign Ministry spokesperson Hua Chunying called it a "a fully proven fact that this is an incident of political persecution against a Chinese citizen, an act designed to hobble Chinese high-tech companies," labeling "[t]he so-called 'fraud' charges . . . purely fabricated" and Meng's arrest "a typical case of arbitrary detention."⁴⁹ When asked at a press conference about the release of the two Michaels, Hua characterized Meng's case as "completely different in essence from the two

⁴³ See U.S. Dep't of Justice Press Release, Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged With Financial Fraud (Jan. 28, 2019), at <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [<https://perma.cc/LX3Y-FNFW>].

⁴⁴ U.S. Dep't of Justice Press Release, Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), at <https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution> [<https://perma.cc/S2J5-7NNC>].

⁴⁵ See, e.g., U.S. Dep't of State, Antony J. Blinken, Video Remarks on the Declaration Against the Use of Arbitrary Detention in State-to-State Relations (Feb. 15, 2021), at <https://www.state.gov/secretary-of-state-antony-j-blinken-video-remarks-on-the-declaration-against-the-use-of-arbitrary-detention-in-state-to-state-relations> [<https://perma.cc/KWU6-44H9>].

⁴⁶ Kate Woodsome, Jason Rezaian & Ray Whitehouse, Op., *More Countries Are Taking Americans Hostage. The U.S. Is Losing Its Ability to Stop It*, WASH. POST (Nov. 8, 2021), at <https://www.washingtonpost.com/opinions/interactive/2021/hostage-taking-americans-foreign-governments>.

⁴⁷ White House Press Release, Press Briefing by Press Secretary Jen Psaki (Sept. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/27/press-briefing-by-press-secretary-jen-psaki-september-27-2021> [<https://perma.cc/4NUJ-2LKF>].

⁴⁸ Forsythe, Buckley & Benner, *supra* note 3 (quoting statement from Justice Department spokesman Anthony Coley).

⁴⁹ Ministry of Foreign Affairs of the People's Republic of China Press Release, Foreign Ministry Spokesperson Hua Chunying's Remarks on Meng Wanzhou's Return to China (Sept. 25, 2021), at <https://www.mfa.gov.cn/ce/ceus/eng/fyrth/t1909814.htm>.

Canadians' cases," and asserted that the Canadians applied for and Chinese courts granted their "release on bail for medical reasons."⁵⁰

The long-term effect of the Meng case on relations between Canada, China, and the United States remains to be seen. In Canada, the ordeal greatly undermined public perceptions of China, with a May 2021 poll showing that only fourteen percent of Canadians had a favorable view of China.⁵¹ For its part, China warned that "Canada should draw lessons and act in ways that serve its own interests."⁵²

U.S.-China relations remain tense, and the Biden administration has left in place Trump-era trade restrictions on Huawei in particular and China in general. Huawei remains on the Commerce Department's entity list, a move that prohibits U.S. exports to the company in a bid to deny it access to components required for its products, and the Biden administration is reportedly considering whether to add to the list a smartphone company that Huawei sold last year.⁵³ Reports indicate that U.S. actions have hit Huawei hard, "forcing [it] to experiment with new business lines, cede overseas territory and foster a supply chain independent of the [United States]."⁵⁴ In advance of an October 4 speech by U.S. Trade Representative Katherine Tai on the Biden administration's "new approach" to the U.S.-China trade relationship, Biden administration officials asserted that "Beijing is increasingly explicit that it is doubling down on its authoritarian, state-centric approach," and explained the need for "a strategy that deals with China as it is, rather than as we might wish it to be."⁵⁵ On November 15, Biden and Xi met for a virtual summit in which President Biden emphasized "the need to protect American workers and industries from [China's] unfair trade and economic practices" and "the need for common-sense guardrails to ensure that competition does not veer into conflict and to keep lines of communication open" between the two countries.⁵⁶

⁵⁰ Ministry of Foreign Affairs of the People's Republic of China Press Release, Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference (Sept. 27, 2021), at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1910208.shtml.

⁵¹ Bilefsky, *supra* note 4; see also Sean Boynton, *Could Release of 2 Michaels, Meng Wanzhou Thaw Canada-China Relations? Experts Are Mixed*, GLOB. NEWS CAN. (Sept. 25, 2021), at <https://globalnews.ca/news/8220412/canada-china-meng-wanzhou-kovrig-spavor>.

⁵² Ministry of Foreign Affairs, *supra* note 50.

⁵³ Ellen Nakashima & Jeanne Whalen, *Key Security Agencies Split Over Whether to Blacklist Former Huawei Smartphone Unit*, WASH. POST (Sept. 19, 2021), at https://www.washingtonpost.com/national-security/huawei-honor-security-export/2021/09/19/6d49d27c-17ef-11ec-b976-f4a43b740aeb_story.html.

⁵⁴ Dan Strumpf, *U.S. Set Out to Hobble China's Huawei, and So It Has*, WALL ST. J. (Oct. 7, 2021), at <https://www.wsj.com/articles/u-s-set-out-to-hobble-chinas-huawei-and-so-it-has-11633617478>.

⁵⁵ White House Press Release, Background Press Call by Senior Administration Officials on the Administration's Trade Approach to China (Oct. 4, 2021), at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/04/background-press-call-by-senior-administration-officials-on-the-administrations-trade-approach-to-china> [<https://perma.cc/9TRM-A3QR>].

⁵⁶ White House Press Release, Readout of President Biden's Virtual Meeting with President Xi Jinping of the People's Republic of China (Nov. 16, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/16/readout-of-president-bidens-virtual-meeting-with-president-xi-jinping-of-the-peoples-republic-of-china> [<https://perma.cc/G29U-E2EF>]; see also Seung Min Kim, Ashley Parker, Ellen Nakashima & Lily Kuo, *In Hours-Long Virtual Meeting, Biden and Xi Manage Strained U.S.-China Ties*, WASH. POST (Nov. 16, 2021), at https://www.washingtonpost.com/politics/biden-to-meet-with-chinese-president-in-virtual-summit/2021/11/14/6f59b36c-45bb-11ec-973c-be864f938c72_story.html.